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

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.**

MOTION RECORD FOR COMEBACK HEARING

(Quebec Class Action Plaintiffs)

March 28, 2019

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

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TAB A

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NOTICE OF MOTION FOR COMEBACK HEARING

(Quebec Class Action Plaintiffs)

The Quebec Class Action Plaintiffs will make a motion to Justice McEwen presiding over the Commercial List on Thursday, April 4 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, if necessary, abridging the time for service and filing of this Notice of Motion and the Motion Record of the Quebec Class Action Plaintiffs, and dispensing with service on any person other than those served;

2. varying the Initial Order of Justice Hainey dated March 8, 2019 (the "**JTIM Initial Order**") by, *inter alia*,:

    (a) ordering that, in the event that JTI-Macdonald Corp. ("**JTIM**") seeks leave to appeal (the "**JTIM Leave Application**") the judgment of the Court of Appeal of

Quebec (the "**Quebec CA**") released on March 1, 2019 (the "**Appeal Judgment**") to the the Supreme Court of Canada ("**SCC**"), these proceedings (the "**CCAA Proceeding**") pursuant to the *Companies' Creditors Arrangement* Act, R.S.C., 1985, c. C-36, as amended (the "**CCAA**") shall be immediately and automatically terminated, or alternatively, the stay of proceedings provided for in the JTIM Initial Order shall be partially lifted to allow the Quebec Class Action Plaintiffs to request from the Quebec CA or the SCC the imposition of any conditions that the Quebec CA or the SCC may deem appropriate in relation to the JTIM Leave Application and the Further Quebec Class Action Proceedings (as defined in the JTIM Initial Order);

(b) prohibiting JTIM, pending further order of the Court, from making any payments to members of the JTI Group (as defined in the JTIM Initial Order), save and except for the payment for physical inventory actually supplied by such parties at the fair market value thereof in connection with the manufacture, purchase and sale of Tobacco Products (as defined in the JTIM Initial Order), but prohibiting most particularly:

i. the payments of principal and interest to JTI-Macdonald TM Corp. ("**TM**") in connection with those certain Revised TM Term Debentures described in the McMaster Affidavit;

ii. the payment of royalties and fees to entities in the JTI Group in connection with the use and licence of trademarks;

iii. the payment for services rendered by any entity in the JTI Group by way of set-off or otherwise;

iv. the transfer of funds to entities in the JTI Group for any consideration and reason whatsoever; and

v. the payment of dividends;

(c) ordering that all net cash generated by JTIM from its operations during the CCAA Proceeding remain with JTIM in Canada;

(d) rescinding the appointment of Deloitte Restructuring Inc. ("**Deloitte**") as the monitor of JTIM;

(e) rescinding the appointment of William E. Aziz as chief restructuring officer of JTIM (the "**CRO**"), or alternatively, directing that any and all fees and expenses payable or due to William E. Aziz and/or Bluetree Advisors Inc. pursuant to the CRO Engagement Letter (as defined in the JTIM Initial Order) or otherwise shall not be part of the costs of the CCAA Proceeding, shall not be covered by the Administration Charge and shall not be paid by JTIM or out of the Property (as defined in the JTIM Initial Order);

(f) modifying paragraph 39 of the JTIM Initial Order to provide that the fees and disbursements of professionals and consultants engaged by the Applicant in connection with the CCAA Proceeding, including counsel for the Applicant, the Monitor and counsel for the Monitor, shall be taxed by the Court at intervals of no more than 90 days, with prior notice to the Service List;

(g) terminating the stay of proceedings provided for in the JTIM Initial Order as it relates to the Quebec Class Actions (as defined in the JTIM Initial Order) with respect to the non-applicant third parties, Imperial Tobacco Canada Limited ("**Imperial**") and Rothmans, Benson & Hedges Inc. ("**RBH**"); and

(h) partially lifting the stay of proceedings provided for in the JTIM Initial Order for the sole purpose of allowing the Quebec Class Action Plaintiffs to file an application for a bankruptcy order against JTIM;

3. an order reserving the rights of the Quebec Class Action Plaintiffs to seek any further variation of the JTIM Initial Order, as amended from time to time, or any other relief; and

4. such further and other relief as this Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

5. JTIM's application for the JTIM Initial Order was precipitated by the release of the Appeal Judgment on March 1, 2019 by a unanimous bench of five justices of the Quebec CA upholding, with very minor exceptions, the decision of a judge of the Superior Court of Quebec rendered on May 27, 2015 (the "Riordan Judgment") which condemned JTIM, Imperial and RBH (collectively, the "Tobacco Companies") to pay damages to the Quebec Class Action Plaintiffs that, with interest and the additional indemnity provided by law, exceeds $13.5 billion in the aggregate (the "Judgment Debt"). JTIM's share (as among the Tobacco Companies) of the Judgment Debt exceeds $1.75 billion.

Leave application to the Supreme Court of Canada

6. Paragraph 20 of the JTIM Initial Order authorizes JTIM to make an application for leave to appeal to the SCC and an appeal on the merits if leave is granted. Should JTIM file the JTIM Leave Application, the present CCAA Proceeding should be immediately terminated. JTIM has the right to present a motion for a stay of execution to the Quebec CA. The Quebec CA would then determine the conditions to be imposed upon JTIM, if any, for its application for leave. If JTIM determined that it was unwilling or unable to satisfy all of the conditions imposed by the Quebec CA, it could then abandon its application for leave and file for CCAA protection. Otherwise, it would await judgment of the SCC on its application for leave and if successful, its appeal. It could file for CCAA protection upon receiving an adverse judgment from the SCC.

7. The filing made by JTIM on March 8 was premature and was made for an improper purpose, i.e. as a collateral attack to prevent the Quebec CA from adjudicating on a potential motion for stay of execution. JTIM had a duty to advise the Court about matters before the Quebec CA and failed to make full and fair disclosure. At the present time, JTIM has sufficient funds from operations to pay, and is paying, all of its other creditors in the ordinary course of business.

8. The CCAA does not, and the Initial Order cannot, replace or interfere with the jurisdiction of the Quebec CA to make determinations as to the conditions associated with a leave application to the SCC. As Justice Schrager J.A. noted when he ordered Imperial and RBH to post security as a condition of their appeal of the Riordan Judgment in what the ITCAN Applicants have defined as the Deposit Posting Order (herein more properly defined as the

"**Security Judgment**"), the Court may not question the Tobacco Companies' right to appeal but neither can it "*stand idly by while [they] pursue an appeal which will benefit them if they win but which will not operate to their detriment if they lose.*" The CCAA Proceeding cannot be used as a vehicle to permit JTIM to jurisdiction and statute shop in order to circumvent the jurisdiction of the Quebec CA pursuant to article 390 of the *Code of Civil Procedure of Quebec* and Section 65.1 of the *Supreme Court Act*.

Certain intercompany payments to the JTI Group should cease

9. At the *ex parte* hearing before Justice Hainey, JTIM was granted various extraordinary relief, including but not limited to, the authority to make principal and interest payments post-filing to its related entity TM, under certain debentures described in the McMaster Affidavit, on the grounds that "there would be potential adverse tax consequences to its senior secured creditor if such payments were suspended for a significant period of time". Similarly, JTIM was authorized to make post-filing royalty payments to TM on the grounds that the failure to make such payments, if it led to the termination of the Trademark Agreement as defined in the McMaster Affidavit, would likely cause the cessation of JTIM's business. JTIM also proposes to continue paying for various intercompany transactions and services to entities in the JTI Group.

10. JTIM did not make full and fair disclosure to Justice Hainey and, more particularly, intentionally failed to bring to his attention relevant factual findings of Justice Riordan and of the Quebec CA that were germane to this particular relief sought in the JTIM Application.

11. In the Riordan Judgment, Justice Riordan characterized "the tangled web" of JTIM's intercompany contracts under which JTIM has been operating, as "*principally a creditor-proofing exercise undertaken after the institution of the [Quebec Class Actions] by a sophisticated parent company, Japan Tobacco Inc.*", aimed at imposing "*artificial*" expenses on the JTI Applicant. On the strength of these contractual schemes, the JTI Group has been draining the profits out of JTIM year after year. Those contracts include the debentures and trademark agreements pursuant to which JTIM proposes to continue to make payments to its related entity during the pendency of the CCAA Proceeding.

12. As appears from the Riordan Judgment, the real purpose of the intercompany transactions was to eliminate JTIM's average annual earnings through the payment of interest and royalties to related parties in transactions characterized by Justice Riordan, as a "sham".

13. Justice Riordan also specifically held that "*JTM's conduct is characterized by malicious and vexatious intent that goes well beyond mere ignorance, recklessness or negligence*". As Justice Schrager J.A. noted in the Security Judgment, continuing the Tobacco Companies' practice of distributing earnings out-of-jurisdiction at this point is "*at best disingenuous and at worst, bad faith*". Also, the Model Initial Order utilized by the Commercial List specifically excludes the payment post-filing of interest on account of amounts owing by an applicant to its creditors, let alone non-arm's length creditors out-of jurisdiction.

14. The suggestion by JTIM that the day-to-day extension of the TM Forbearance Letter described in the McMaster Affidavit could be terminated at the TM Receiver's sole and

absolute discretion is outrageous, as is the threat that the cessation of these substantial payments in favour of TM would cause TM to terminate the Trademark Agreement.

15. When JTIM obtained an Initial Order from Justice Farley on its previous CCAA filing on August 24, 2004, these same payments to TM were not permitted, or even requested by JTIM.

16. As appears from the Riordan Judgment, after it sought protection under the CCAA in 2004, JTIM ceased making such intercompany payments or modified such payments when it saw fit to do so without any consequence.

17. No plan of arrangement (a "**Plan**") can possibly succeed unless a settlement is arrived at between JTIM and the Quebec Class Action Plaintiffs[1]. Furthermore, any global settlement would necessarily involve contributions from JTIM's parent and related entities. In applying the principle enunciated by Justice Schrager J.A. in the Security Judgment, a strategic decision is required by JTIM in caucus with its parent company which has received the benefit of its profitable operations over the years, as to whether they intend to resolve the Judgment Debt due to the Quebec Class Action Plaintiffs.

18. If the other entities of the JTI Group, which benefit from the current stay of proceedings, are not even prepared to forego or postpone the receipt of certain intercompany payments while JTIM attempts to resolve the Tobacco Claims and maximize recovery for creditors

[1] The Quebec Class Action Plaintiffs are the only claimants with a Tobacco Claim who have obtained a liquidated judgment, the Quebec Class Members consist of tens of thousands of individual creditors, and their claims resulting from an award of damages in respect of bodily harm intentionally inflicted cannot be compromised without their agreement.

under the CCAA, it would be appropriate to know now and avoid incurring tens of millions of dollars in restructuring costs uselessly in an exercise that is obviously doomed to failure.

19. For decades, the Quebec Class Members have been victimized by JTIM, whose commercial conduct, together with that of Imperial and RBH, was described by the Quebec Courts as "*particularly reprehensible*", "*egregious*" "*intentionally negligent*", "*beyond irresponsible*" and "*malveillante et vexatoire" (malicious and vexatious)*.

20. In these circumstances, it is appropriate that there should be no intercompany payments except for the purchase of physical inventory at the fair market value thereof actually supplied post-filing and that all net cash generated from the operations of JTIM during the CCAA Proceeding should remain with JTIM in Canada.

Rescinding the appointment of Deloitte as the monitor of JTIM

21. The involvement of various Deloitte entities in respect of the intercompany transactions between JTIM and its related parties, its representations made to the Canadian taxing authorities regarding the creditor-proofing purpose of the intercompany transactions, its professional activities on behalf of the JTI Group (including as auditor for Japan Tobacco International), its professional involvement with the other Tobacco Companies, and its general activities on behalf of the tobacco industry (all as detailed in the Johnston JTIM Affidavit), as well as the failure of Deloitte to fully disclose same in its pre-filing report, creates an appearance of conflict that can only be resolved by the replacement of Deloitte as monitor.

22. In its pre-filing report, Deloitte agreed with the continuation of the payments of interest and royalties by JTIM to its related entities without considering (or commenting on) the findings of the Riordan Judgment and the Appeal Judgment regarding these same transactions. This rubber stamping of transactions characterized as artificial and a sham by the Courts in Quebec which analyzed the evidence, is a further reason to rescind the appointment of Deloitte.

Rescinding the appointment of the CRO

23. By way of justification for appointing a CRO, JTIM asserts that the CRO's expertise is required in order to successfully complete its contemplated restructuring plan, although JTIM is not a distressed company needing restructuring but rather a hugely profitable entity that generates profits in the tens of millions of dollars which it funnels out of jurisdiction.

24. The proposed services of the CRO are primarily focused on negotiating, developing or implementing a plan or settlement with the Quebec Class Action Plaintiffs (and perhaps the other Tobacco Claimants) rather than finding a solution to restructure the company itself. Given the appointment of the Honourable Warren K. Winkler Q.C. as Interim Tobacco Claimant Coordinator in the ITCAN Initial Order, and in view of the fact that the share of JTIM under the Appeal Judgment is 13% as opposed to 67% for Imperial, it would be an unwarranted duplication of roles to also have the CRO appointed. Neither Imperial nor RBH has seen fit to seek the appointment of a restructuring consultant. If the JTI Group considers that it requires the assistance of a negotiator on its behalf, the fees in connection therewith should be borne by JTIM’s parent corporation.

Taxation of accounts of Applicant's professionals and consultants

25. The restructuring and professional costs of JTIM for the first 13-week period were forecast to be $6.5 million. The corresponding costs of Imperial and RBH for the first 13-week period are $15.5 million and $7 million respectively (the initial 30-day period of March 20 to April 21, 2019 was forecast by RBH to be $2.3 million, which approximates $7 Million for the first 13-week period). Consequently, CCAA fees and costs of $29 million are forecast to be spent by the Tobacco Companies during this initial period.

26. By contrast, JTIM has been condemned to pay each Quebec Class Member diagnosed with lung or throat cancer either $80,000 or $100,000 (plus interest and the additional indemnity), and these victims have been waiting 21 years to receive any compensation from the Tobacco Companies whose particularly reprehensible, malicious and vexatious conduct was found to have intentionally caused them bodily harm.

27. The CCAA Proceeding should not be regarded as a typical filing by a commercial debtor in financial distress but rather as an exceptional situation where a bad corporate actor is seeking the Court's assistance to avoid paying a judgment debt to the victims of its malicious misconduct.

28. In view of the unprecedented findings of fault and misconduct on the part of the Tobacco Companies in the judgments of the Quebec courts, which is the reason that the CCAA Proceeding was commenced in the first place, and the huge costs already forecast in the three concurrent CCAA proceedings, it is appropriate that all fees and disbursements of professionals and consultants paid by JTIM be supervised and approved by the Court at regular intervals of no more than 90 days, with prior notice to the Service List.

Stay of Proceedings should be partially lifted

(a) Termination of the stay granted in favour of Imperial and RBH

29. At the *ex parte* hearing, JTIM requested, and was granted, an extraordinary stay of proceedings in respect of the Quebec Class Actions that extended, *inter alia*, to its competitors, Imperial and RBH. However, JTIM knew, and failed to disclose to Justice Hainey, that Imperial and RBH had already made on March 1, 2019 urgent motions for stays of execution of the Appeal Judgment before the Quebec CA (originally returnable before that Court on March 4, 2019) which were scheduled by the Quebec CA, on consent of the parties, to be heard on March 25, 2019.

30. The CCAA stay of proceedings sought by JTIM, with a view to staying proceedings before the Quebec CA involving only Imperial and RBH, was a collateral attack on the judicial process of the Quebec CA for an improper purpose, to assist Imperial and RBH which had not yet filed for CCAA protection.

31. JTIM has subsequently revised its position by resorting to revisionist history. In a letter to the Service List dated March 12, 2019, counsel for JTIM, in referencing the broad scope of the stay of proceedings included in the JTIM Initial Order, stated that the stay was "*never intended to affect matters that do not, in the interim before the Comeback Hearing, affect the JTI Defendants [i.e. the JTI Applicant, R.J. Reynolds Tobacco, Company and R.J. Reynolds Tobacco International, Inc.]*".

32. JTIM has manifestly not met the test for extending the stay of proceedings to third parties, let alone unrelated third parties. Furthermore, the stay of proceedings in favour of Imperial and RBH is unnecessary now that each of them has obtained an Initial Order.

Consequently, the stay of proceedings in paragraphs 19 and 20 of the JTIM Initial Order extending to "*any Person named as a defendant or respondent in any of the Pending Litigation*", and to the "*Other Defendants*" in the Quebec Class Actions, which necessarily includes Imperial and RBH, should be terminated as it relates to Imperial and RBH and the JTIM Initial Order should be varied accordingly.

(b) Application for a bankruptcy order

33. The stay of proceedings should also be lifted to allow the Quebec Class Action Plaintiffs to file an application for a bankruptcy order in respect of JTIM to ensure an orderly transition to bankruptcy in the event that the CCAA Proceeding fails.

34. Rules 37.14(1) and 39.01(6) of the Rules of Civil Procedure (Ontario).

35. Such further grounds as counsel may advise and this Honourable Court may permit.

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

1. The Affidavit of Bruce Johnston in connection with the JTIM Comeback Motion sworn on March 27, 2019 (the "**Johnston JTIM Affidavit**") and the exhibits filed in support thereof; and

2. Such further and other materials as counsel may advise and this Honourable Court may permit.

March 28, 2019

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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**

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

NOTICE OF MOTION FOR COMEBACK HEARING

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TAB B

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERICAL 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.**

AFFIDAVIT OF BRUCE JOHNSTON
(sworn March 27, 2019)

The Johnston JTIM Affidavit

I, Bruce Johnston, of the City of Montreal, in the Province of Quebec, MAKE OATH AND SAY:

1. I am one of the attorneys representing the class representatives (the "**Quebec Class Action Plaintiffs**") in two class action lawsuits instituted in Quebec in 1998 on behalf of approximately 1 million members (the "**Quebec Class Members**") against JTI-MacDonald Corp. ("**JTIM**"), Imperial Tobacco Canada Ltd. ("**Imperial**" or "**ITL**") and Rothmans, Benson & Hedges Inc. ("**RBH**"), (collectively the "**Tobacco Companies**").

2. This affidavit (the "**Johnston JTIM Affidavit**") is being filed for use on the JTIM Comeback Motion, but may also be used in connection with the ITCAN (as defined below) and RBH Comeback Motions. All three Comeback Motions are scheduled to be heard on April 4 and 5, 2019.

3. The Johnston JTIM Affidavit is sworn to support the Quebec Class Action Plaintiffs' Motion for Comeback Hearing in respect of the Initial Order granted by the Honourable Justice Hainey (the "**JTIM Initial Order**") after hearing, on an *ex parte* basis, JTIM's application for an Initial Order (the "**JTIM Application**").

4. I have read the affidavit of Robert McMaster sworn on March 8, 2019 in support of the JTIM Application (the "**McMaster Affidavit**"). I have also read the affidavit of Eric Thauvette sworn on March 12, 2019 (the "**Thauvette Affidavit**") in support of the application made by Imperial and Imperial Tobacco Company Limited (together, "**ITCAN**") for an Initial Order as well as the affidavit of Peter Luongo sworn on March 22, 2019 (the "**Luongo Affidavit**") in support of the application made by RBH for an Initial Order. All three applications were made without notice to the Quebec Class Action Plaintiffs.

I. INTRODUCTION

5. The JTIM Application was triggered by the decision of the Court of Appeal of Quebec (the "**Quebec CA**") released on March 1, 2019 (the "**Appeal Judgment**") upholding, with very minor exceptions, the decision of the Honourable Justice Brian Riordan (the "**Trial Judge**") of the Superior Court of Quebec (the "**Quebec SC**") rendered on May 27, 2015 (the "**Riordan Judgment**") 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.

6. The judgments obtained by the Quebec Class Action Plaintiffs are unprecedented in scope, in their analysis and comprehensive findings of misconduct on the part of the Tobacco Companies over a period of forty-eight years, and in the results achieved. The achievement of the Quebec Class Action Plaintiffs is remarkable in having obtained judgments of this importance and

magnitude, on a class-wide basis, against the tobacco industry. A document prepared by counsel for the Quebec Class Action Plaintiffs reproducing certain paragraphs extracted from the judgments of the Quebec courts on the findings with respect to the egregious misconduct of the Tobacco Companies and their creditor-proofing schemes (translated where necessary into English) is attached hereto as **Exhibit 1**.

7. The trial and appeal judgments were obtained notwithstanding the concerted and relentless efforts of the Tobacco Companies to delay, hinder and impede the ability of the Quebec Class Action Plaintiffs to prosecute the Quebec Class Actions. As described hereafter, the Tobacco Companies waged a 21-year war of attrition defense strategy, coupled with a strategy of rendering themselves judgment proof, in their attempts to prevent the Quebec Class Action Plaintiffs from ever seeing justice done.

8. The difficulties and roadblocks faced by the Quebec Class Action Plaintiffs in combatting the Tobacco Companies' 21-year war of attrition cannot be overstated:

(i) it took over 6 years of continuous effort by counsel for the Quebec Class Action Plaintiffs to bring the cases to a debate on certification (authorization) in November 2004;

(ii) from certification in February 2005, it took over seven years and more than 80 case management conferences to bring the actions to trial;

(iii) the Tobacco Companies repeatedly refused the requests of the Quebec SC to consent to meetings between the experts of both sides;

(iv) the Tobacco Companies refused to show to their experts a list of proposed admissions which the experts for the Quebec Class Action Plaintiffs believed that no serious expert could deny;

(v) the Tobacco Companies denied the authenticity of virtually every document that formed part of their corporate records and were sanctioned by the Quebec SC for acting in bad faith by taking procedures that were unfounded, excessive and unreasonable:[1]

> ***ITL does not have the right to embark on a war of attrition in order to make it as difficult as possible to produce the thousands of documents that the plaintiffs wish to put into evidence***.
>
> [unofficial translation]

(vi) the Tobacco Companies objected to the filing of virtually every document that formed part of the Tobacco Companies' corporate records, including those from their own individual corporate records, without the author being present (although in most cases the authors were deceased) and although the vast majority of documents filed by the Tobacco Companies were not filed by their authors;

(vii) the Tobacco Companies objected to the filing of documents emanating from their parent companies claiming that such documents were irrelevant even though almost all fundamental research was carried out by the parent companies and the policy on smoking and health was dictated by them;

(viii) Imperial refused to comply with a Quebec SC order relating to the provision of documents in connection with the company's document retention policy. It took

[1] *Conseil Québécois sur le tabac et la santé* v. *JTI-MacDonald Corp*., 2012 QCCS 1870 at para. 34.

three years, and repeated trips to the Quebec CA to have the order reiterated, before the order was complied with by Imperial. In determining the award for punitive damages in the case of Imperial, Justice Riordan made specific mention of the company's "*bad faith efforts to block court discovery of research reports by storing them with outside counsel, and eventually having those lawyers destroy the documents*";[2]

(ix) the Tobacco Companies seized the Quebec CA more than 30 times on interlocutory matters. None of the numerous appeals filed by the Tobacco Companies was successful. In May 2014, the Quebec CA confirmed that many of the Tobacco Companies' appeals were useless:[3]

> *The right to make full answer and defense certainly does not mean that a party may, without limit, resort to all the evidence, even the smallest, which it considers necessary, useful, convenient or simply prudent to produce in order to ensure respect for his rights.* ***The right to defend oneself fully does not mean that one can ignore the practical realities of the judicial system and the smooth running of a trial that cannot continue indefinitely (...) not to mention the parties' visits to the Court, visits that regularly - and often quite unnecessarily - punctuated the proceedings***.
>
> [unofficial translation - emphasis added]

(x) the Tobacco Companies unduly delayed their action to call into warranty the Government of Canada. The action, which was ultimately unsuccessful, engendered a massive discovery process;

(xi) the Tobacco Companies ignored previous findings on virtually identical issues decided and confirmed by the Courts (including the Supreme Court of Canada); for

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[2] Riordan Judgment, para. 1077 (ITCAN Application Record ("**ITCAN AR**")**, Vol. 2, Tab 2, Exhibit "J"**).

[3] *Imperial Tobacco Canada Ltd. v. Létourneau*, 2014 QCCA 944 at paras. 75 and 79.

example, with respect to judicial rulings about the addictive nature of tobacco and the health hazards associated with smoking; and

(xii) the trial at first instance exceeded 250 days with more than 70 witnesses testifying, including 27 expert witnesses and more than 40,000 exhibits filed. While the Tobacco Companies announced that their defense at trial would last 300 days, they eventually only required 94 days and, during their defense, over 30 days that were reserved for the hearing were lost because of their failure to present witnesses.

9. JTIM asserts that CCAA protection is needed to allow it to achieve a collective solution to the numerous tobacco-related lawsuits that have been instituted against it.[4] However, apart from the Quebec Class Action Plaintiffs, JTIM (and the other Tobacco Companies) are not subject to financial pressures from any other creditors. While it is true that the Tobacco Companies have contingent creditors with potentially large claims, none of such claims has advanced to a point where a trial will be held in 2019[5] or a judgment is even foreseeable, and the determination of such contingent claims is many years away. It is evident that the Appeal Judgment was the single event that precipitated these CCAA proceedings.

10. In 2015, the Quebec Class Action Plaintiffs were successful in obtaining from the Quebec CA what ITCAN has defined in its initial order (the "**ITCAN Initial Order**") as the Deposit Posting Order (herein more properly defined as the "**Security Judgment**") that required Imperial

[4] McMaster Affidavit, para. 9 (JTIM Application Record ("**JTIM AR**"), Vol. 2, Tab 5); Endorsement of Justice Hainey dated March 8, 2019, paras. 3-6 (JTIM); Similar statement is made in the Thauvette Affidavit, para. 153(a) (**ITCAN AR, Vol. 1, Tab 2**); and Endorsement of Justice McEwen dated March 12, 2019, para. 2 (ITCAN); See also the statements in the Luongo Affidavit, paras. 15 and 16 (RBH Application Record ("**RBH AR**"), Vol. 1, Tab 2); and Endorsement of Justice Pattillo dated March 22, 2019 (RBH).

[5] The trial for a claim in New Brunswick that was scheduled to commence in November 2019 had to be rescheduled as is stated in the Thauvette Affidavit at paragraph 148 in the ITCAN Application Record).

and RBH to furnish security in the aggregate amount of $984 million to guarantee payment in part of the judgment amount. An explanation of the Security Judgment is provided in the following section of this Affidavit.

11. In the Security Judgment, Justice Schrager, J.A. stated that the right of an unsuccessful litigant to an appeal must be balanced with the right of the successful party to be protected from the risk that the appellant may not be able to satisfy the judgment on appeal. He concluded that the need for such protection was particularly justified in the present case as Imperial and RBH had continued to funnel their profits to related entities to render themselves creditor proof:

> *I do not question [Imperial's and RBH's] right to appeal but* ***neither can I stand idly by while [Imperial and RBH] pursue an appeal which will benefit them if they win but which will not operate to their detriment if they lose.*** *Continuing the practice of distributing earnings out-of-jurisdiction at this point is at best disingenuous and at worst, bad faith.*[6]
>
> [emphasis added]

12. The Quebec Class Members are individual victims who have suffered from an addiction to a toxic product, which addiction was intentionally inflicted upon them and has, in tens of thousands of cases, led to life-ending diseases. The Tobacco Companies' conduct in this regard has been determined by the Quebec courts to constitute intentional interference with the right to life, security and the integrity of the Quebec Class Members. This conduct was further described as of the "*most egregious nature*"[7], to be "*particularly reprehensible*"[8], "*intentionally negligent*"[9], "*beyond irresponsible*"[10] and "*malveillante et vexatoire"*[11] *(malicious and vexatious)*:

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[6] Security Judgment, para. 52 (**ITCAN AR, Vol. 2, Tab 2, Exhibit "M"**).

[7] Riordan Judgment, para. 269 (**ITCAN AR, Vol. 2, Tab 2, Exhibit "J"**).

[8] Riordan Judgment, para. 1076 (**ITCAN AR, Vol. 2, Tab 2, Exhibit "J"**).

[9] Riordan Judgment, para. 288 (**RBH AR, Tab 2, Exhibit "E"**).

[10] Riordan Judgment, para. 288 (**RBH AR, Tab 2, Exhibit "E"**).

[11] Appeal Judgment, para. 1149 (**ITCAN AR, Vol. 1, Tab 2, Exhibit "A"**).

> *[239] By choosing not to inform either the public health authorities or the public directly of what they knew,* ***the Companies chose profits over the health of their customers.*** *Whatever else can be said about that choice, it is clear that* ***it represents a fault of the most egregious nature*** *and one that must be considered in the context of punitive damages.*
>
> *[1037]* ***Over the nearly fifty years of the Class Period, and in the seventeen years since, the Companies earned billions of dollars at the expense of the lungs, the throats and the general well-being of their customers****. If the Companies are allowed to walk away unscathed now, what would be the message to other industries that today or tomorrow find themselves in a similar moral conflict?*
>
> *[1038]* ***The Companies' actions and attitudes over the Class Period were, in fact, "particularly reprehensible" and must be denounced and punished in the sternest of fashions.*** *To do so will be to favour prevention and deterrence both on a specific and on a general societal level. We reject the Companies arguments that there is no justification to award punitive damages against them.*
>
> *[477][Quebec CA – unofficial translation](...) Not only did they* ***intentionally conceal*** *from the public and users the pathological and addictive effects of the cigarettes they marketed,* ***but they collectively developed and practiced, at the same time, a misinformation program aimed at undermining any information contrary to their interests****: they maintained false scientific controversies, hijacked debates, lied to the public (and even to public authorities), shrouding the whole in misleading advertising strategies contrary to their own codes of conduct** *(and, as of 1980, to the C.P.A.).*
>
> [emphasis added]

13. Despite filing for CCAA protection, JTIM asserts that it intends to continue with its "*business operations with minimal disruption*", as appears from a JTIM press release dated March 8, 2019, a copy of which is attached hereto as **Exhibit 2**. Operating under CCAA protection cannot, however, be used as a vehicle to facilitate further inter-company transactions that have been characterized by the courts as "*creditor-proofing*" and a "*sham*"[12].

14. JTIM also asserts that it requires CCAA protection in order to allow for an application for leave to appeal the Appeal Judgment and, if successful, to pursue the appeal to the Supreme Court

[12] Riordan Judgment, para. 1101 (**ITCAN AR, Vol. 2, Tab 2, Exhibit "J"**).

of Canada ("**SCC**").[13] The Initial Order authorizes JTIM (as well as Imperial and RBH, which are non-applicant third parties) to pursue an appeal of the Appeal Judgment to the SCC but expressly prohibits the Quebec Class Action Plaintiffs from requesting from the Quebec CA that conditions, such as the provision of a suretyship, be imposed on JTIM on such appeal.

15. The materials provided in support of the JTIM Application (the "**JTIM Application Record**") do not refer to the provisions of law that it would be subject to if it made a motion to stay execution of the Appeal Judgment (as was done by Imperial and RBH on March 1, 2019) before the Quebec CA, the forum where the Appeal Judgment was rendered. The Quebec Class Action Plaintiffs submit that CCAA proceedings cannot be used as vehicle to permit JTIM to statute or jurisdiction shop in order to circumvent the jurisdiction of the Quebec CA to impose "***appropriate conditions***" on a stay application for leave to appeal to the SCC pursuant to article 390 of the *Code of Civil Procedure of Quebec* ("**CCP**") and section 65.1 of the *Supreme Court Act*[14]:

> **Code of Civil Procedure of Quebec**
>
> ***390.*** *A decision of the Court of Appeal is enforceable immediately (…)*

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[13] McMaster Affidavit, para. 8 (**JTIM AR, Vol. 2, Tab 5**); Appeal Judgment, paras. 1161-1162 (**ITCAN AR, Vol. 1, Tab 2, Exhibit "A"**).

[14] Supreme Court Act
Stay of execution — application for leave to appeal
65.1 (1) The Court, the court appealed from or a judge of either of those courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, **on the terms deemed appropriate**.
Additional power for court appealed from
(2) The court appealed from or a judge of that court may exercise the power conferred by subsection (1) before the serving and filing of the notice of application for leave to appeal if satisfied that the party seeking the stay intends to apply for leave to appeal and that delay would result in a miscarriage of justice.
Modification
(3) The Court, the court appealed from or a judge of either of those courts may modify, vary or vacate a stay order made under this section. [emphasis added]

> *However,* ***the Court of Appeal or one of its judges, on an application, may order execution stayed, on appropriate conditions****, if the party shows that it intends to bring an application for leave to appeal to the Supreme Court of Canada.*
>
> [emphasis added]

16. The approach of JTIM in seeking to pursue an appeal which would benefit it if it were successful but would not operate to its detriment if it loses was specifically rejected by Justice Schrager, J.A. who forcefully stated that he could not "*stand idly by*" in such circumstances.

17. If JTIM wishes to pursue an appeal to the SCC, it must abide by whatever conditions are imposed upon it by the Quebec CA and the SCC. If it considers those conditions unacceptable, it can then choose to abandon its appeal and subsequently seek to avail itself of insolvency protection – but it should not be permitted to resort once again to a "*heads I win, tails you lose*" litigation strategy financed with funds that should properly be used to satisfy the liquidated claims of the Quebec Class Members.

18. The JTIM Initial Order, obtained on an *ex parte* basis, is overreaching and highly prejudicial to the Quebec Class Action Plaintiffs as it would:

(i) impede the possibility of a successful "restructuring" due to the uncertainty and lengthy delay that a SCC leave application would engender; especially in view of the contradictory positions that JTIM is adopting by purporting to be insolvent as a result of the Appeal Judgment while, at the same time, contesting the unanimous conclusions of the Appeal Judgment;

(ii) force the Quebec Class Action Plaintiffs to devote significant resources and incur huge expense to oppose the leave application and, if granted, the appeal, while denying

them their legal right to seek from the Quebec CA the imposition on JTIM of appropriate appeal conditions;

(iii) delay unnecessarily the individual claims process for Blais Class Members (defined below) contemplated in the Riordan Judgment which would result in further unreasonable delay in providing them the rightful compensation to which they have been denied for so long; and

(iv) permit JTIM to pursue a faint hope leave application of the unanimous Appeal Judgment (based on factual findings of six Quebec judges) that it has absolutely no intention of ever satisfying if and when it loses; all the while incurring huge restructuring and professional expenses throughout the process.

19. If JTIM seeks leave to appeal to the SCC, the Quebec Class Action Plaintiffs submit that the present CCAA proceedings should be terminated immediately and the "*appropriate conditions*" for a stay of execution should be determined by the Quebec CA.

II. PROCEDURAL HISTORY OF THE QUEBEC CLASS ACTIONS

20. In September and November 1998, the following two class actions were instituted in the Province of Quebec:

(i) the action in the Quebec SC, bearing number 500-06-000076-980 (the "**Blais Action**") instituted by the Conseil Québécois sur le tabac et la santé and Jean-Yves Blais (now deceased), as class representatives, which sought damages from the Tobacco Companies as a result of the fact that they contracted lung cancer, throat cancer, and emphysema (the "**Diseases**") due to the Tobacco Companies' faults. The Blais Action is comprised of approximately 100,000 members; and

(ii) the action in the Quebec SC, bearing number 500-06-000070-983 (the "**Létourneau Action**") instituted by Cécilia Létourneau, as class representative, which sought damages from the Tobacco Companies as a result of the fact that they became addicted to smoking due to the Tobacco Companies' faults. The Létourneau Action is comprised of approximately 900,000 class members.

21. After nearly 17 years of litigation, the Riordan Judgment was rendered on May 27, 2015, with corrections on June 7, 2015. The Riordan Judgment held that the Tobacco Companies had, *inter alia*, conspired together to mislead the public and prevent it from becoming adequately informed of the health risks relating to smoking and held them liable for the harm caused to the Quebec Class Members.[15]

22. The Trial Judge apportioned moral damages between the Tobacco Companies as follows: 67% for Imperial, 20% for RBH and 13% for JTIM.[16] The decision to apportion damages for these percentages was approved in the Appeal Judgment.

23. In his reasons for determining the award for moral damages, Justice Riordan considered the disastrous impact that smoking had on the Quebec Class Members diagnosed with a Disease (such as throat cancer). By way of illustration:

> *[990] In the pages that follow, Dr. Guertin chronicles the various treatments that are usually attempted when there is indication that the cancer might be curable: surgery, chemotherapy and radiation therapy. He describes the possible secondary effects of each one of those treatments,* ***a veritable litany of horrors****, including:*
>
> - *open sores on the mucous membranes,*
> - *swelling in the legs (oedema),*
> - *nasal intubation or tracheotomy for weeks, months or even permanently,*

[15] Riordan Judgment (**ITCAN AR, Vol. 2, Tab 2, Exhibit "J"**).

[16] Riordan Judgment, paras. 1012 and 1013 (**ITCAN AR, Vol. 2, Tab 2, Exhibit "J"**).

- *cutaneous changes, cervical fibrosis, loss of the ability to taste,*
- *chronic dry-mouth leading to elocution problems and difficulty in swallowing,*
- *removal of all teeth,*
- *surgery-induced mutilation of the face and neck, elocution problems and difficulty in swallowing and the inability to eat certain foods,*
- *loss of the vocal chords,*
- *chronic pain and diminution of shoulder strength.*

[991] ***Death ultimately ends the torture, but at what price?*** *At page 8 of his report, Dr. Guertin writes that "the patients who die from a relapse of their original cancer will experience a death that is atrociously painful, unable even to swallow their saliva or to breathe" (the Court's translation).*

[emphasis added]

24. With respect to punitive damages, in the Blais Action, the Quebec SC limited the award to the symbolic amount of $30,000 for each Applicant, representing "*one dollar for each Canadian death the tobacco industry causes in Canada each year*" and, in the Létourneau Action, the aggregate award was $133 million divided between the Tobacco Companies as follows: $72.5 million for Imperial, $46 million for RBH and $12.5 million for JTIM.[17]

25. As appears from the Riordan Judgment, the Trial Judge further ordered the provisional execution notwithstanding appeal of an amount of $1,131,000,000, representing an initial deposit of the moral damages and punitive damages awarded in the Blais Action and the punitive damages ordered in the Létourneau Action.

26. The Tobacco Companies appealed the Riordan Judgment and immediately made a motion to cancel the Provisional Execution Order before the Quebec CA, which was granted (the "**Provisional Execution Appeal Judgment**").[18]

[17] Riordan Judgment, paras. 1084, 1091 and 1104 (**ITCAN AR, Vol. 2, Tab 2, Exhibit "J"**).

[18] Provisional Execution Appeal Judgment (**ITCAN AR, Vol. 2, Tab 2, Exhibit "K"**).

27. The Quebec Class Action Plaintiffs then made a motion requesting that the Tobacco Companies be ordered to furnish security (*cautionnement*) to guarantee in part the payment of the judgment amount as a condition for the appeals before the Quebec CA (the "**Security Motion**"). The Security Judgment was rendered by Justice Mark Schrager, J.A. on October 27, 2015, wherein each of Imperial and RBH was ordered to provide security.[19]

28. Pursuant to the Security Judgment, Imperial has deposited $757,995,000, in seven equal consecutive quarterly instalments of $108,285,000, and RBH has deposited $225,996,000, in six equal consecutive quarterly instalments of $37,666,000 to the Registry of the Quebec CA (the "**CA Registry**"), as agent for the Quebec Minister of Finance.

29. In his reasons for ordering Imperial and RBH to furnish security, Justice Schrager, J.A. stated:

> *[44] Both Appellants have structured their affairs in a manner that drastically, if not completely, reduces their exposure to satisfy any substantial condemnation that might be made against them in this litigation.* ***Of course, the companies are not empty shells because it is in their obvious interest and that of their parent companies that they continue to operate so as to continue to generate profits.*** *The structure and modus operandi was put in place years ago because no doubt Appellants could observe the seriousness of the case and resolve of the Respondents to conclude that a substantial award was possible, even perhaps likely. (…)*
>
> [emphasis added]

30. The French term "*cautionnement*" is found in article 497 CCP, as it appeared at the time the Security Judgment was rendered. The corresponding English text provided for an order to furnish "*security*" ... "*to guarantee in whole or in part … the amount of the condemnation, if the judgment is upheld*". Article 497 CCP was subsequently replaced and its meaning clarified by the

[19] Security Judgment (**ITCAN AR, Vol. 2, Tab 2, Exhibit "M"**).

Quebec legislator when the new Code of Civil Procedure came into force on January 1, 2016. Article 364 CCP, which replaces article 497 CCP, employs the term "*a suretyship to guarantee*" rather than "*security*" as the proper translation for "*cautionnement*" (with no change being made to the French term in Article 364 CCP).

31. The guarantor in question is the *Ministre des finances* (Quebec) ("**Quebec Minister of Finance**"), since the deposit at the Quebec CA was governed by the *Deposit Act* (Quebec)[20], which:

(i) required the clerk of the Quebec CA, as an agent of the Quebec Minister of Finance, to immediately deposit such sum to the credit of the Quebec Minister of Finance;[21]

(ii) granted the Quebec Class Action Plaintiffs the security of the Quebec government for the payment thereof:

> *8. ...Such officers shall, from the mere fact of holding such offices, be* ***agents of the Minister of Finance*** *for the purposes of this Act.*

(iii) provides that any payment made to them under this Act shall be **deemed to be made to the Minister of Finance**, and all persons who are entitled to withdraw such sums or securities so deposited shall have the **security of the Gouvernement du Québec** for the payment to them of such sums or securities…[22]

---

[20] CQLR c D-5 [*Deposit Act*].

[21] *Deposit Act*, *ibid.*, s. 8: "*Every clerk of appeals, clerk of the Superior Court or clerk of the Court of Québec who, in his official capacity, receives, himself or by his deputy, as a judicial or other deposit, any sum of $100 or over,* ***shall immediately deposit such sum to the credit of the Minister of Finance*** *in such bank listed in Schedule I or II to the Bank Act (Statutes of Canada, 1991, chapter 46), or other monetary institution as shall be indicated by the said Minister of Finance, and shall file in the record of the case or of the proceeding, in which he has received the said sum, the deposit receipt of such bank or institution…*". See also s. 19: "*Whenever any person desires to pay any sum of money which is demanded of him by contending claimants, he may deposit such money in the office of the Minister of Finance*".

[22] *Deposit Act*, *supra* note 17, s. 8.

(iv) stipulates that the claim of the Quebec Class Action Plaintiffs shall be made against the Quebec Minister of Finance, not the depositor:

> *20. In the case mentioned in section 19,* ***the Minister of Finance shall pay over the amount deposited, to the claimant, who shall file an authentic copy of a judgment of a court of justice entitling him to the money****, saving the right of the depositor, if the deposit receipt has not been registered and if the money has not been paid into court as a tender, to withdraw his deposit before the same has been demanded by the claimant.*[23]
>
> [emphasis added]

32. On May 18, 2016, the Deposit Act was replaced by the *Act respecting deposits with the Bureau général de dépôts pour le Québec*[24], which provides that sums deposited as a suretyship are paid into the Consolidated Revenue Fund of Quebec, and that the Quebec Minister of Finance is authorized to take out of the Consolidated Revenue Fund the sums required to pay right-holders, such as the Quebec Class Action Plaintiffs:

> *21. The sums of money received by the Office are paid into the Consolidated Revenue Fund.*
>
> *Except where the right-holder is a minister or a budget-funded body, the sums constitute advances and are payable to the right-holder on demand.*
>
> ***The Minister is authorized to take out of the Consolidated Revenue Fund the sums required for the payment to the right-holder****, plus any interest payable, if applicable.*[25]
>
> [emphasis added]

33. The effect of the Appeal Judgment is that the Quebec Class Action Plaintiffs are now entitled to seek payment from the surety, the Quebec Minister of Finance, of the funds that were deposited with the Quebec CA, as agent for the Quebec Minister of Finance.

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[23] *Deposit Act*, *supra* note 17, s. 20.

[24] CQLR c D-5.1 [*New Deposit Act*].

[25] *New Deposit Act*, *ibid.*, s. 21.

34. It is also noteworthy that Imperial made an unsuccessful motion to the Quebec CA to have the conclusions of the Security Judgment rectified with respect to the security to be furnished by Imperial (the "**Refusal to Rectify Judgment**").[26]

35. In his reasons for refusing Imperial's request, Justice Schrager, J.A. stated:

> *[23] (…) It was, as a consequence of these submissions, brought to light that the lender to whom payments were made was Petitioner's parent company, British American Tobacco (or a closely related corporation). In point of fact, as disclosed by the 2014 financial statements and as confirmed by Petitioner's representative in his deposition, Petitioner paid in excess of $300 million in dividends during 2014 to its parent* ***but at year end owed $400 million to a related company for borrowings to finance the settlement of the Flintkote litigation. Respondents' position to the effect that virtually all available cash was being funnelled to related corporations situated out of jurisdiction was reinforced rather than rebutted****. Petitioner submits that its obligation to pay $100 million to a related entity on December 23, 2015 should not be treated differently than would be the case if the loan was due to an institutional lender dealing with Petitioner at arm's length.* ***In all of the circumstances of this matter, it is impossible to conveniently ignore the benefit of earnings received over the years and the position asserted by Petitioner's parent that it would not commit to fund a final judgment****.*
>
> *[24] In ordering that security be furnished, I found it unacceptable that Petitioner would continue to distribute its earnings to related entities located out of this jurisdiction notwithstanding the judgment in first instance, which albeit subject to an appeal, benefits from a presumption of validity as I stated in the judgment with the supporting authority. (…)*
>
> [emphasis added]

36. The Appeal Judgment was issued on March 1, 2019. Notably, five judges of the Quebec CA rendered a unanimous 422 page decision upholding the Riordan Judgment, with minor modifications relating to the class definition and the date to be used for the calculation of interest

[26] Refusal to Rectify Judgment, dated December 9, 2015 (**ITCAN AR, Vol. 2, Tab 2, Exhibit "N"**).

and the additional indemnity on the award of damages.[27] The joint record of evidence filed with the Quebec CA comprised 267,063 pages and more than 40,000 exhibits.

37. The Quebec CA retained the Trial Judge's findings with respect to the Tobacco Companies' faults and liability to the Quebec Class Action Plaintiffs:

> *[1119] In any event, there is ample evidence to support the conclusion that **JTM's conduct is characterized by malicious and vexatious intent that goes well beyond mere ignorance, recklessness or negligence**. Indeed, if the concerted omission of information about the harmful nature of tobacco use for nearly two decades to delay public awareness of a key public health issue is not (...) conduct that should be deterred and denounced in the strongest terms, it is difficult to see what conduct would justify the granting of punitive damages.*
>
> *[1137] Assuming that this statement is true, it raises the question of why a company must use an outside lawyer to destroy a simple copy of a research report as part of the "regular review of records it no longer needs", as it states in its press release. **More generally, this episode, retained by the trial judge, shows the eminently vexatious nature of the appellant ITL's conduct with regard to anticipated litigation.** By retaining this episode to increase the punitive damages award against ITL, the judge did not commit an error.*
>
> *[1149] The judge therefore rightly concluded that **the three appellants engaged in malicious and vexatious commercial conduct and violated the fundamental rights of [the class action] members in a wrongful, unlawful and intentional manner. The evidence strongly supports this conclusion.** (...)*
>
> [unofficial translation - emphasis added]

III. EVENTS IMMEDIATELY SUBSEQUENT TO RELEASE OF THE APPEAL JUDGMENT

38. Immediately upon release of the Appeal Judgment, on March 1, 2019, the Quebec Class Action Plaintiffs filed a motion with the Quebec CA seeking the withdrawal of the amounts that Imperial and RBH had been ordered to post as security (the "**Security Withdrawal Motion**"), returnable on March 7, 2019 before a judge of the Quebec CA. The Notice of Motion was sent to

[27] Appeal Judgment (**ITCAN AR, Vol. 1, Tab 2, Exhibit "A"**).

each of the Tobacco Companies. A copy of the Security Withdrawal Motion is attached hereto as **Exhibit 3**.

39. A press release issued by JTIM on March 1, 2019 stated that JTIM "*fundamentally disagrees*" with the Appeal Judgment and is considering asking for permission to appeal the decision to the SCC. A copy of the JTIM press release dated March 1, 2019 is attached hereto as **Exhibit 4**.

40. Also on March 1, 2019, each of Imperial and RBH filed motions with the Quebec CA seeking, on an urgent basis, an interim stay of execution of the Appeal Judgment pending their filing of a notice of application for leave to appeal to the SCC (collectively, the "**Imperial/RBH Stay Motions**") and requesting that the motions be heard on March 4, 2019. In both cases, the proceedings were sent to JTIM. A copy of the letters dated March 1, 2019 from Imperial and RBH and the Imperial/RBH Stay Motions are attached collectively hereto as **Exhibit 5**.

41. By email sent in late afternoon on March 1, 2019, Ms. Julie Devroede, the coordinator for the Quebec CA, confirmed that the Imperial/RBH Stay Motions had been added to the roll to be heard on March 4, 2019. A copy of the email dated March 1, 2019 from Ms. Devroede is attached hereto as **Exhibit 6**.

42. By email sent on March 2, 2019, counsel for Imperial advised Ms. Devroede that, upon further review of the Appeal Judgment, it was their interpretation of the Appeal Judgment that no steps could be taken by the Quebec Class Action Plaintiffs until the 60-day period following the Appeal Judgment had elapsed and, therefore, there was no urgency that required that they be heard on March 4. Imperial's counsel requested that the Imperial/RBH Stay Motions be adjourned to a

different date. A copy of the email dated March 2, 2019 from Mr. Fallon is attached hereto as **Exhibit 7**.

43. By email dated March 3, 2019, counsel for the Quebec Class Action Plaintiffs advised that they did not agree with Mr. Fallon's interpretation of the Appeal Judgment as stated in Exhibit 7 and that they intended to make representations the following day at the Quebec CA. A copy of the email dated March 3, 2019 from Mr. Kugler is attached hereto as **Exhibit 8**.

44. On March 4, 2019, a hearing took place before the Honourable Justice Patrick Healy, J.A. Each of the Tobacco Companies was represented by counsel at that hearing, including JTIM. Counsel for RBH informed the Court that all counsel had agreed to "*let things calm down*" until the Security Withdrawal Motion and the Imperial/RBH Stay Motions would be heard.

45. Justice Healy, J.A., after consultation with all counsel, informed counsel that the Honourable Justice Stephane Sansfaçon, J.A. would be seized of the motions (including the Security Withdrawal Motion scheduled for March 7, 2019) to be heard on March 25, 2019, and that all amended motions, or any motion that JTIM would want to submit to the Quebec CA, were to be filed no later than March 15, 2019.

46. The minutes of hearing before Justice Healy, J.A. report that the hearing [of the Imperial/RBH Stay Motions] would be postponed "*for the Appellants to fine tune and amend their respective motions*", that with the agreement of all parties all amended motions were to be filed no later than March 15, 2019, and that the Security Withdrawal Motion due for hearing on the coming Thursday be postponed so that all the motions would be heard at the same time on March 25, 2019. A copy of the Minutes of the hearing on March 4, 2019 before Justice Healy, J.A. is attached hereto as **Exhibit 9**.

47. A chain of emails sent on March 4, 2019 confirms that the Minutes would be corrected to also report that, if JTIM was to file a motion for suspension of the execution of the Appeal Judgment, it had to do so by March 15, 2019. A copy of the chain of emails on March 4, 2019 between Messrs. Pratte, Plante, Kugler and the clerk of the Quebec CA, from the clerk of the Quebec CA to counsel for JTIM and the response from counsel for JTIM is attached hereto as **Exhibit 10**.

48. Despite their representations to the Quebec CA on March 4, 2019 regarding their intent to amend the Imperial/RBH Stay Motions so that they could be heard by the Quebec CA on March 25, 2019, I understand that counsel for both Imperial and RBH were present at the *ex parte* hearing before Justice Hainey on March 8, 2019, when JTIM requested, and was granted, a stay of proceedings in respect of the Quebec Class Actions that extended to Imperial and RBH, as appears from paragraph 19 of the JTIM Initial Order.

49. The filing of the JTIM Application and obtaining the JTIM Initial Order (which notably included a stay of proceedings in favour of JTIM, Imperial and RBH) had the effect of circumventing the hearing that had been scheduled, by consent of the parties, for March 25, 2019 before the Quebec CA.

50. On March 25, 2019, Justice Sansfaçon of the Quebec CA rendered the following decision regarding the three motions scheduled for hearing before him on March 25, 2019 (the Imperial/RBH Stay Motions and the Security Withdrawal Motion), as appears from the minutes of hearing on March 25, 2019 attached hereto as **Exhibit 11**: [unofficial translation]

> *[1] Given the orders rendered by Justices McEwen and Pattillo of the Ontario Superior Court of Justice pursuant to the Companies' Creditors Arrangement Act, ordering a stay of all procedures including the motion to*

withdraw the suretyship, the representations of Me Trudel as to the steps taken by the respondents before the Ontario Court to assert their rights and their declared desire to re-present the said motion to withdraw the suretyship at a later date; and

[2] In view of the absence of any contestation as to the postponement of all of the motions on the role to an undetermined date, but after the next hearing dates of the parties before the Ontario Superior Court of Justice (scheduled for next April 4 and 5).

[3] ***FOR THESE REASONS, the undersigned****:*

[4] ***POSTPONES*** *the motions sine die, subject to sending a new notice of presentation as appropriate.*

IV. THE CCAA FILINGS

51. Notwithstanding the fact that the Quebec CA had already scheduled a hearing on the motions seeking a stay of execution of the Appeal Judgment, and that a judicial process was in place in Quebec to obtain that relief, JTIM filed for CCAA protection, without notice, falsely invoking urgency. There was, however, no executory process that the Quebec Class Action Plaintiffs could have commenced prior to the hearing scheduled for March 25, 2019 before the Quebec CA. Accordingly, not only was the filing for CCAA protection not urgent, but it was unnecessary before the Quebec CA heard motions for the stay of execution of the Appeal Judgment.

52. The Quebec Class Action Plaintiffs were not present at the hearing of the JTIM Application before Justice Hainey and they received no prior notice thereof, despite the fact that they had requested that they be advised in advance in the event that any of the Tobacco Companies would file under the CCAA.[28]

[28] Letter from counsel for the Quebec Class Action Plaintiffs dated July 6, 2015 (**JTIM AR, Vol. 4, Tab 5 KK**).

53. Although the JTIM Initial Order being sought included a stay of proceedings in favour of all three Tobacco Companies, on March 12, 2019, JTIM subsequently offered an explanation concerning the scope of the stay of proceedings included in the JTIM Initial Order, being the same day as the ITCAN Initial Order was obtained. On that day, counsel for JTIM surprisingly asserted for the first time that "*The stay of proceedings was never intended to affect matters that do not, in the interim before the comeback hearing, affect the JTI Defendants*". A copy of the letter dated March 12, 2019 from counsel for JTIM is attached hereto as **Exhibit 12**.

54. On March 12, 2019, ITCAN's application for an Initial Order pursuant to the CCAA was granted by the Honourable Justice McEwen after a hearing, on an *ex parte* basis.

55. On March 18, 2019, Justice McEwen heard the arguments in respect of a Motion made by counsel for the Quebec Class Action Plaintiffs seeking the suspension of certain payments from JTIM to its related parties pending the scheduled hearing of the Comeback Motion. On March 19, 2019, Justice McEwen granted the relief sought by the Quebec Class Action Plaintiffs and provided written reasons for his decision.

56. On March 22, 2019, RBH's application for an Initial Order pursuant to the CCAA was granted by the Honourable Justice Pattillo after a hearing, on an *ex parte* basis.

57. The Quebec Class Action Plaintiffs were not present at the hearing on March 12, 2019 before Justice McEwen or the hearing on March 22, 2019 before Justice Pattillo and they received no prior notices of either of those hearings.

V. THE PERSONS (CLASS MEMBERS) REPRESENTED BY THE QUEBEC CLASS ACTION PLAINTIFFS

58. The Quebec Class Members consist of tens of thousands of separate creditors.

59. In the Blais Action, the Trial Judge determined that the lung-cancer subclass has 82,271 members, the throat cancer subclass has 8,231 members and the emphysema subclass has 23,086 members.[29]

60. Unfortunately, due to the delays resulting from the unprecedented war of attrition waged by the Tobacco Companies, a high percentage of the class members in the Blais Action, i.e. the victims diagnosed with lung cancer, throat cancer and emphysema (the "**Blais Class Members**") have already died, and with each passing day, the number of living class members further diminishes.

61. As an example, in 1995, there were 9,893 new diagnoses of Diseases affecting the Blais Class Members and 7,376 deaths from the Diseases. In 2006, there were 11,265 new diagnoses of Diseases and 8,217 deaths from the Diseases. An extract of Dr. Siemiatycki's expertise report on the Diseases, pages 75 and 76 of Exhibit 1426.1, is attached hereto as **Exhibit 13**.

62. The survival rates of class members with cancer are set forth below:

63. The life expectancy of a patient diagnosed with lung cancer, without the appearance of any symptom, is 66 months. This survival rate is reduced to 50 months if the discovery of the lung cancer occurs when the victim has respiratory symptoms, to 46 months with symptoms of hemoptysis, to 39 months with symptoms of cough, to 27 to 28 months with symptoms of dyspnea and throat pain and to only 24 months with symptoms of local/regional dissemination. An extract of the English Translation of Dr. Desjardins' expertise report, page 67 of Exhibit 1382.2, is attached hereto as **Exhibit 14**.

[29] Riordan Judgment, paras. 978, 988 and 998 (**ITCAN AR, Vol. 2, Tab 2, Exhibit "J"**).

(i) victims of various throat cancers, including cancer of the larynx, the oropharynx or the hypopharynx, have only an average 50% chance of surviving for 5 years after their diagnosis. The survival rate is higher at 60% to 80% when diagnosed early at stages I or II, but is only 30% to 40% for those who are diagnosed later on at stages III or IV. An extract of Dr. Guertin's expertise report, page 8 of Exhibit 1387, is attached hereto as **Exhibit 15**.

64. Given that the latest diagnosis for a Disease eligible for compensation in the Blais Action is March 12, 2012, the longer that the Blais Class Members are delayed in obtaining compensation, the less likely that the judgment amounts will actually be received by living victims.

65. While the amounts ordered as damages in the Riordan Judgment (as affirmed in the Appeal Judgment with minor modifications) are hardly sufficient to compensate for the disastrous impact that the Tobacco Companies' egregious faults have had on their health and their lives, these individuals certainly deserve such recovery and should be permitted to enjoy same while they are still alive.

66. No recoveries have been received by the Quebec Class Action Plaintiffs since 1998 when the class action proceedings were initiated.

67. Prior to the commencement of the CCAA proceedings referenced herein, all of the Tobacco Companies failed to engage in any efforts to reach any agreement with the Quebec Class Action Plaintiffs related to their claims, payment of the judgment debt or the provision of security.

68. No plan of arrangement can be successful without the support and approval of the Quebec Class Action Plaintiffs. The Quebec Class Members consist of tens of thousands of creditors

whose claims have been liquidated and, furthermore, the Tobacco Companies were condemned to pay damages in respect of bodily harm fraudulently[30] and intentionally inflicted on the Quebec Class Members. By way of example, some of the relevant findings in this respect set out in the Appeal Judgment are reproduced below [unofficial translation]:

> *[98] In view of the misconduct of the appellants, punitive damages are also justified under the Charter and C.P.A.133. On the one hand, under sections 1, 4 and 49 of the Charter, the latter* ***intentionally*** *violated the right to life, security and integrity of members of the Blais and Létourneau groups.*
>
> *[127] (...) For the evidence on this topic is clear:* ***tobacco, in this case the type that is smoked, is a product with no real benefit other than to give the user the pleasure of satisfying and temporarily soothing the intense need - drug addiction - that its consumption creates, and to relieve the stress of abstinence, even temporarily.*** *The appellants are aware of this, and as Robert Bexon (of ITL) writes in a 1985 note to Wilmat Tennyson (president of ITL):* ***"If our product was not addictive, we would not sell a cigarette next week in spite of these positive psychological attributes" (i.e., according to the author, reducing stress, improving concentration and relieving boredom).*** *That says a lot about the merits of cigarettes.*
>
> ***[128] This knowledge of the powerful addiction caused by tobacco use, the primary commercial attribute of the product, also existed for a long time.*** *Let us gradually go back in time. Thus, in 1984 (and this is only one example among many), the same Robert Bexon wrote to Wayne Knox (then Director of Marketing at ITL) saying:*
>
> > *However, we know quitting is not an easy process. For every 100 smokers who try, only five will make it past the first year. Less than two will make it permanently. (...)*
>
> *[618] There is no doubt that the appellants are themselves well aware of this characteristic of cigarettes, as early as 1950. But that the use of cigarettes is truly addictive and not only a bad habit was not well-known. First, there is a marked difference between a bad habit and an addiction, which is a condition of physical or physiological dependence. Yet, the* ***appellants have long and falsely claimed that****, while cigarette smoking may be a habit,* ***it was not a form of addiction****.*

[30] In paragraphs 489 to 505 of the Riordan Judgment, in the context of punitive damages, the Trial Judge explains that the provisions of the *Consumer Protection Act*, CQLR, c. P-40.1, which came into force on April 30, 1980, provide that a consumer, to whom the irrebuttable presumption of prejudice applies, has already succeeded in proving the manufacturer's fraudulent intention (**ITCAN AR, Vol. 2, Tab 2, Exhibit "J"**). This conclusion was upheld in the Appeal Judgment (**ITCAN AR, Vol. 1, Tab 2, Exhibit "A"**).

> *[1013] More specifically, these findings of fact show that the appellants could not ignore the extremely likely consequences of their denials for those who became addicted to tobacco, including all members of the Létourneau group as defined, and smokers who develop one of the diseases in question. They understood that this marketing strategy would result in individuals becoming addicted, causing them a life-threatening illness, or exposing them to high risks of developing such an illness. In doing so,* ***they certainly unlawfully and intentionally violated the rights to life, safety and integrity of members of both groups.*** *All of the evidence used by the trial judge, including his conclusion on the policy of silence, suffices for this finding.*
>
> [emphasis added]

VI. THE TOBACCO COMPANIES ARE PROFITABLE ENTERPRISES

69. In view of the fact that the parent company of JTIM has been the recipient (directly or indirectly) of the profits of JTIM for at least 20 years and seeks to benefit from the stay of proceedings contained in the JTIM Initial Order, the creditors should not bear the brunt of the exorbitant costs of the CCAA process. According to the 13-week cash flow forecasts provided by the Tobacco Companies, these costs are estimated to be $29 million just for this period ($6.5 million for JTIM, $15.5 million for ITCAN and $7 million for RBH[31]).

70. The Trial Judge determined that each of the Tobacco Companies generates "*immense*" profits and that their earnings over the class period were "*massive*":

> *[1071] For ITL, the five-year average of before-tax earnings between 2009 and 2013 is $483,000,000. For RBH, it is $460,000,000. JTM's "Earnings from operations" for the period average $103,000,000.*
>
> *[1073] Average earnings are relevant in the context of disgorging ill-gained profits. Here, those profits were* ***immense*** *to the point of being inconceivable to the average person. ITL and RBH earned nearly a half billion dollars a year over the past five years, with ITL earning over $600 million in 2008. The $200 million dollar fine it paid that year looks almost like pocket change.*

[31] As the cash flow forecast provided by RBH is for a 30 day period, we used that amount to estimate the figure for a 13-week period.

> *[1074] Over the averaging period alone, the Companies' combined before-tax earnings totaled more than five billion dollars ($5,000,000,000). Recognizing that a dollar today is not worth what it was in 1950 or 1960, or even 1998, we still must assume that the profits earned by them over the 48 years of the Class Period were* ***massive****.*
>
> [emphasis added]

71. Furthermore, since the Riordan Judgment, the Tobacco Companies have benefited from increases in the selling price of cigarettes in Canada. In fact, in 2015 and 2016, both years where there was no increase in federal excise tax, the average wholesale cigarette price in Canada increased by 18% and the tobacco industry wholesale revenue per cigarette increased by 37%. This translates into an additional $1 billion in yearly revenue for the Canadian tobacco industry, the whole as appears from a report produced by Health Canada, attached hereto as **Exhibit 16**.

72. A more recent report indicates that from 2014 to 2018 the estimated manufacturers' revenue on the sale of cigarettes increased by over 58% whereas provincial tobacco tax revenues decreased slightly, the whole as appears from a report by the Physicians for a Smoke-Free Canada issued in January 2019, attached hereto as **Exhibit 17**.

73. In addition, as more fully appears below, the financial information publicly available concerning JTIM's parent company reveals that it is also extremely profitable.

JTIM and its ultimate parent company, Japan Tobacco Inc. ("JTI")

74. In assessing the condemnation, the Trial Judge specifically considered JTIM's earnings over a five-year period and determined that its average annual earnings were $103 million[32].

75. Since that assessment was made, JTIM's "*massive*" earnings have increased.

[32] Riordan Judgment, para. 1071 (**ITCAN AR, Vol. 2, Tab 2, Exhibit "J"**).

76. The JTIM Application Record includes unaudited non-consolidated financial statements for JTIM as at December 31, 2017 (the "**2017 JTIM Financial Statements**")[33] prepared for the purpose of calculating the company's annual tax returns and the unaudited non-consolidated financial statements without Notes for JTIM as at December 31, 2018 (the "**2018 JTIM Financial Statements**")[34]. These statements report that:

(i) earnings from operations in 2018 were $207.1 million, an increase from the $156.8 million reported for 2017;

(ii) Notes 6 and 7 (2017 JTIM Financial Statements) describe related party transactions and balances including the interest and royalty expenses ($91.9 million and an aggregate of $9.9 million, respectively) due by JTIM and the loans including a payment exceeding $1.18 billion that is payable in 2017 by JTIM in respect of convertible debentures; and

(iii) Note 16 (2017 JTIM Financial Statements) describes the contingent liability from litigation instituted against JTIM. With respect to the actions instituted by the Quebec Class Action Plaintiffs, the Note asserts that "***No provision has been recorded for these two actions as the Company vigorously defends itself and believes that there are good grounds to defeat them***". [emphasis added]

77. JTIM asserts that it does not have sufficient funds available to pay the condemnation in favour of the Quebec Class Action Plaintiffs.[35] However, there is no mention of the position of JTIM's parent company (and other related companies) in contributing to the payment of the award

[33] 2017 JTIM Financial Statements (**JTIM AR, Vol. 4, Tab 5 BB**).
[34] 2018 JTIM Financial Statements (**JTIM AR, Vol. 4, Tab 5 CC**).
[35] McMaster Affidavit, para. 75 (**JTIM AR, Vol. 2, Tab 5**).

of damages now owed to the Quebec Class Action Plaintiffs, although JTIM's earnings have been funneled to these related companies for two decades and they have, in fact, provided "*financial assistance*" to JTIM in the past when it suited their purposes.

78. For example, in 2006, an amount of $186 million was provided by a related entity to enable JTIM to obtain Letters of Credit when it was previously under CCAA protection (the 2004 CCAA Proceedings are discussed more fully below), and in 2010, the contribution of $150 million to a settlement of smuggling claims was made with the support of affiliated companies outside of Canada.

79. According to the 2017 and 2018 annual reports for JTI:[36]

(i) JTI's global reported revenue was in excess of ¥2.1 trillion (CAD $23.4 billion) in 2017 and it generated adjusted profit of ¥585 billion (CAD $6.5 billion) in 2017. JTI's global revenue increased in 2018 and was in excess of ¥2.2 trillion (CAD $27.1 billion);

(ii) international (including Canada) tobacco revenues amounted to in excess of ¥1.2 trillion (CAD $13.4 billion) in 2017, generating adjusted operating profit in excess of ¥351 billion (CAD $3.9 billion) in 2017. The revenue for international tobacco increased in 2018 and was in excess of ¥1.3 trillion (CAD $16 billion);

(iii) the international tobacco business generates over 60% of the group's consolidated adjusted operating budget; and

[36] All amounts reported in these two Annual Reports that are referred to in this Affidavit are converted based on the following exchange rates: ¥100 = C$ 1.12 (as at December 31, 2017) and ¥100 = C$ 1.23 (as at December 31, 2018).

(iv) the adjusted profit from operations for international tobacco was approximately ¥385 billion (CAD $4.7 billion) in 2018.

Extracts from JTI's 2017 and 2018 annual reports are attached hereto as **Exhibit 18**[37] **and Exhibit 19**.[38]

80. In the Refusal to Rectify Judgment[39], Justice Schrager, J.A. made reference to Imperial's loan from a related party to finance a settlement of litigation and concluded that "*In all of the circumstances of this matter, **it is impossible to conveniently ignore the benefit of earnings received over the years** and the position asserted by Petitioner's parent that it would not commit to fund a final judgment*" [emphasis added]. Although this finding dealt with Imperial, the principle applies equally in the case of JTIM.

VII. CREDITOR-PROOFING MECHANISMS OF THE TOBACCO COMPANIES CONSIDERED BY THE QUEBEC COURTS

81. While the Tobacco Companies have each alleged their inability to pay their share of the condemnation in connection with the Quebec Class Actions, seven judges from the Quebec Courts have recognized that such purported state of affairs is the direct result of deliberate actions they have taken with the specific intention of rendering themselves judgment-proof:

Riordan Judgment:

> *[1093] It [JTM] argues that the payments due under the Interco Contracts, totalling some $110 million a year in capital, interest and royalties (the "Interco Obligations"), should be accepted at face value. The result would be to reduce JTM's annual earnings to a deficit, since its average before-tax earnings are "only"*

[37] Page 73 of the JTI 2017 Annual Report provides that the average exchange rate yen/USD for 2017 was 112.16.

[38] The JTI 2018 Annual Report does not provide the average exchange rates yen/USD.

[39] Refusal to Rectify Judgment, para. 23 (**ITCAN AR, Vol. 2, Tab 2, Exhibit "N"**).

$103 million. This would also have the advantage of rendering the choice between before and after-tax figures moot, although JTM favours the latter.

[1102] Unless the Interco Contracts are overturned, something that is not the subject of the present files, JTM appears to be nothing more than a break-even operation. So be it, but that is an artificial state of affairs that does not reflect the company's true patrimonial situation. ***Absent these artifices, JTM is earning an average of $103,000,000 a year before taxes*** *and that is the patrimonial situation that we will adopt for the purpose of assessing punitive damages.*

Security Judgment:

*[30] Appellants have submitted a judgment of Mongeon, J.S.C., of 2013, dismissing an application for a safeguard order against JTM because it had transferred its trademarks valued at $1.2 billion to an "offshore" subsidiary in 1999, the year following the institution of proceedings in the Superior Court. The transferee then pledged the trademark to secure an indebtedness. JTM pays substantial royalties to the transferee in consideration of the use by it of the trademark****. Its president agreed that the purpose of the transaction was "creditor proofing"*** *[…] The judgment of Mongeon, J.S.C., however is of no assistance to Appellants as it did not address any point before me for adjudication. It did not support the contention that facts pre-appeal cannot be relied upon.*

[42] The depositions conducted by Respondents' [Imperial and RBH] attorneys of the affiants upon the motions to cancel the provisional execution make it clear ***that the Appellants intend to continue payments (dividends and otherwise) to their out-of-jurisdiction related entities*** *while the appeal is pending. That practice caused them to protest their inability to satisfy the order of provisional execution.* ***It is reasonable to deduce that should their appeals fail completely or merely reduce the condemnation marginally, leaving a substantial condemnation, the Appellants will be unable to pay just as they were unable to pay the provisional execution in a timely fashion. This state of affairs is not due to any cause extraneous to the will of Appellants such as an unsuccessful business. Rather, their businesses are profitable. The situation is the result of the ongoing business practice continued consistently during the litigation of paying out surplus earnings.*** *This was not illegal. However, there is now and has been since May 27, 2015, a judgment, which includes a condemnation with interest and additional indemnity aggregating approximately $15.5 billion at today's value. Interest and additional indemnity run at approximately $1 million per day. This changes the equation radically. Even if the grounds of appeal are not frivolous,* ***in the circumstances Appellants cannot be allowed to continue on a course of conduct where they will not be able to satisfy the judgment.***

Appeal Judgment [unofficial translation]:

[1162] The judge therefore did not commit an error in taking into account JTM's corporate planning. After a review of the judge's reasons and the evidence to

*support them, which is subject to a confidentiality and sealing order, it should be noted that **the judgment undertaken contains no error of fact on this issue**.*

[emphasis added]

JTIM's Inter-company Transactions (as defined in the JTIM Initial Order)

82. JTIM seeks to continue to make inter-company payments during the pendency of the CCAA proceedings. The Quebec Class Action Plaintiffs oppose the authorization provided by the JTIM Initial Order with respect to the payment of principal and interest by JTIM to its related parties in relation to the convertible debentures and royalties in respect of trademark licenses. These include:

(i) payments of principal and interest to JTI-Macdonald TM Corp. ("**TM**") in connection with Revised TM Term Debentures described in the McMaster Affidavit[40]; and

(ii) payment of royalties to TM in connection with Trademark Agreement and the Trademark Amendments relating thereto described in the McMaster Affidavit[41].

83. The Trial Judge was particularly critical of the willful conduct of JTIM in organizing its affairs, in concert with its parent company and other related entities, in what the Court concluded was a "*sham*" and "*a creditor-proofing exercise*" to avoid paying compensation to its customers who were harmed by JTIM's products:

*[1101] In the first, we cannot but conclude that **this whole tangled web of interconnecting contracts is principally a creditor-proofing exercise undertaken after the institution of the present actions by a sophisticated parent company, Japan Tobacco Inc.**, operating in an industry that was deeply embroiled in product liability litigation. Even Mr. Poirier could not deny that. And on paper, the **sham** may well succeed.*

[40] Para. 50 of the McMaster Affidavit states that JTIM makes payments of principal of $950 thousand in May and November each year and monthly payments of interest in the amount of $7.6 million (**JTIM AR, Vol. 2, Tab 5**).

[41] Para. 70 of the McMaster Affidavit states that JTIM makes monthly payments of approximately $1 million (**JTIM AR, Vol. 2, Tab 5**).

> *[1103] Then there is the qualitative side.* ***The Interco Contracts represent a cynical, bad-faith effort by JTM to avoid paying proper compensation to its customers whose health and well-being were ruined, and the word is not too strong, by its wilful conduct*** *This deserves to be sanctioned and we shall do so by setting the condemnation for punitive damages above the base amount.*
>
> [emphasis added]

84. The Quebec CA determined that such finding was well-founded:

> *[1156] The judge attributes JTM a fictional annual profit of $103,000,000 to reflect the various contractual mechanisms it established in the late 1990s. He considers these mechanisms to be a way for JTM to protect itself from its creditors, which can be analyzed to establish the quantum of punitive damages, insofar as it is relevant to the criteria set out at article 1621 C.C.Q.*
>
> *[1161] The judge accepted the testimony of Mr. Poirier, who admitted unequivocally that the transactions in question were intended to protect JTM from its creditors:*
>
> > *[1097] Our analysis of this matter leads us to agree with Mr. Poirier who, when reviewing some of the planning behind the Interco Contracts, was asked if "that sounds like creditor proofing to you". He candidly replied: "Yes".*
> >
> > *[1162] The judge therefore did not commit an error in taking into account JTM's corporate planning. After a review of the judge's reasons and the evidence to support them, which is subject to a confidentiality and sealing order, it should be noted that the judgment undertaken contains no error of fact on this issue.*
> >
> > *[1163] In short, the appellants show no flaws in the judgment undertaken that would justify overturning the sentence for punitive damages or modifying its quantum. Therefore, their arguments in this respect must be rejected.*
>
> [unofficial translation]

85. Since the creditor-proofing exercise effected in 1999 and thereafter, JTIM has distributed at least $1.7 billion of its operating profits to TM (and ultimately its parent) on account of its $1.2 billion debt to TM. The Quebec Class Action Plaintiffs are at a loss to comprehend how this $1.2 billion “debt” created in 1999 for no consideration whatsoever has only been reduced to $1.18 billion over the past 20 years, notwithstanding these massive payments.

86. The McMaster Affidavit provides information about JTIM's CCAA filing in 2004 (the "**2004 CCAA Proceedings**"). In August 2003, the Attorney General of Canada (the "**AGC**") instituted an action against JTIM, JTI and other entities related to them, alleging, *inter alia*, that certain intercompany transactions should be deemed to be fraudulent conveyances. A copy of the Statement of Claim of the AGC against JTIM and related entities dated August 13, 2003 (not filed with the McMaster Affidavit) is attached hereto as **Exhibit 20**.

87. In response to the AGC's action and to enforcement and seizure actions instituted by the Minister of Revenue for the Province of Quebec (the "**MRQ**"), JTIM sought, and was granted, CCAA protection. The 2004 CCAA Proceedings were resolved on April 13, 2010 when a global settlement was reached with the AGC and MRQ.

88. The Statement of Claim of the AGC, Exhibit 20, also refers to the smuggling activities of JTIM and the entities related to it. They were not alone. The smuggling activities of all of the Tobacco Companies, to import cigarettes illegally without paying taxes, was widely reported when they pleaded guilty and were fined more than $1 billion.

89. Schedule J to the Riordan Judgment is reproduced in part below (all supported by confidential evidence that was considered by Justice Riordan and the Quebec CA):

> *(g) The evidence has shown that notwithstanding the constantly changing inter-corporate structure, the transactions and the $200 Million (plus) deficit on JTI-M's 2003 – 2013 Financial Statements, JTI-M has been fully able of paying or not paying huge sums of money to its subsidiary JTI-TM, <u>whenever it suits JTI-M</u>:*

2004	*JTI-M sought protection under CCAA and <u>it</u> requested the presiding judge in Ontario (Justice James Farley) to issue a Stay Order to prevent JTI-M from paying principal, interest, royalties and dividends (in excess of $100 Million per year) to its subsidiary (JTI-TM) and related companies;*

2005	*No interest or royalty payments were made to JTI-TM;*
2006	*JTI-M paid JTI-TM $186 Million in interest and royalties after furnishing the CCAA Monitor with Letters of Credit issued on the strength of a related company;*
2007-2008	*No interest or royalty payments were made to JTI-TM;*
2009, 2010, 2011 & 2012	*JTI-M "amended" the Debenture Agreement with JTI-TM to reduce the rate of interest on the "loan" of $1.2 billion from 7% to 0% (approximately) thereby reducing the interest payment from $100 Million (approximately) to zero (approximately);*
2009	*JTI-M "amended" its Royalty Agreement with JTI-TM to reduce the rate of royalty payments by 50%;*
2010	*JTI-M paid $150 million to the Quebec and Federal Governments as its contribution toward the settlement of the smuggling claims;*
Dec. 2012	*JTI-M once again "amended" its Debenture Agreements with JTI-TM so as to increase the interest rate from 0% - 7% per annum, thereby resulting in an obligation to pay approximately $100 Million in "interest" to JTI-TM starting in 2013;*
2012	*JTI-M "wiped out" a $410 million debt owed by JTI-TM*

[highlighting is that of the Court; footnotes are omitted]

90. The JTIM Application Record does not include the endorsement by Justice Farley rendered in 2006[42] to respond to JTIM's request "*for an indulgence and partial relief from the restriction on payment in part as to debt to related entities as contained in the Initial Order*". Although Justice Farley did grant the relief requested, he only did so with JTIM's commitment to furnish Letters of Credit that would ensure that the company had the means to pay a judgment creditor:

> *[2] However, under the present circumstances* ***I think it fair that the governments be concerned that there is no leakage of funds/assets from the applicant which by their very payment, particularly since it is to related entities, would deplete the***

[42] *JTI-MacDonald Corp., Re*, 2006 CanLII 4505 (ON SC).

> ***ability of the applicant to make good on any payment out of the ordinary course of business*** *(...)*
>
> [emphasis added]

91. As stated by Justice Schrager, J.A., the Tobacco Companies structured their affairs many years ago to reduce their exposure to satisfying any condemnation against them in connection with the Quebec class actions but "*the companies are not empty shells because it is in their obvious interest and that of their parent companies that they continue to operate so as to continue to generate profits*".[43]

92. Similarly, when Imperial returned to the Court to unsuccessfully challenge the quantum of the security that had been ordered to furnish, Justice Schrager, J.A. concluded that "*Respondents' position to the effect that* ***virtually all available cash was being funneled to related corporations situated out of jurisdiction was reinforced*** *rather than rebutted. (...) In all of the circumstances of this matter,* ***it is impossible to conveniently ignore the benefit of earnings received over the years*** *and the position asserted by Petitioner's parent that it would not commit to fund a final judgment"*[44] [emphasis added]. The findings regarding Imperial are equally applicable to the case of JTIM.

93. Finally, the Quebec Class Action Plaintiffs seek an Order to ensure that all net profits generated by JTIM during the pendency of the CCAA proceedings shall remain with JTIM in Canada and not be moved out of the jurisdiction.

---

[43] Security Judgment, para. 44 (**ITCAN AR, Vol. 2, Tab 2, Exhibit "M"**).

[44] Refusal to Rectify Judgment, para. 23 (**ITCAN AR, Vol. 2, Tab 2, Exhibit "N"**).

VIII. ISSUES CONCERNING THE APPOINTMENT OF THE JTIM MONITOR

94. The Quebec Class Action Plaintiffs seek to have Deloitte Restructuring Inc. ("**Deloitte**") replaced as monitor in JTIM's CCAA proceedings (Deloitte and its affiliates are referred to collectively as the "**Deloitte Group**").

95. The Report of the Proposed Monitor dated March 8, 2019 (the "**Deloitte Report**") purports to disclose the Deloitte Group's prior and current relationships in order to determine if there are any potential conflicts of interest. The relationships disclosed in the Deloitte Report include the fact that an affiliate of Deloitte provides audit services to the trustees of JTIM's pension plans and another Deloitte entity is the auditor of JTI (the ultimate parent of JTIM). As well, in 1999, Deloitte Canada (under the name of its predecessor firm) provided the valuation of the assets of RJR Nabisco, Inc. in connection with the purchase by JTI of the tobacco operations of R.J. Reynolds Tobacco Company and provided the valuation used to support the fair market transfer of R.J. Reynolds Corp's beneficial ownership of its trademarks and the associated rights to sell goods bearing the trademarks to TM.

96. In view of the fact that an entity in the Deloitte Group is the auditor of JTI, and JTI is a beneficiary of the stay of proceedings ordered in the JTIM Initial Order and the beneficiary (directly or indirectly) of the profits generated by JTIM and funneled to JTIM related entities, the role of Deloitte as monitor is of concern to the Quebec Class Action Plaintiffs.

97. The Deloitte Report also discloses that it has spent time with JTIM's management to understand, *inter alia*, the "*intercompany arrangements*" and sought advice from counsel about the TM Term Debentures in order to evaluate the reasonableness of interest payments made in connection thereto. However, the Deloitte Report does not indicate that the Riordan Judgment was

reviewed, or any of the other decisions of the Quebec courts that comment on the nature of these transactions, or that any assessment was made as to whether the purpose of these "*intercompany arrangements*" was to creditor-proof. The absence of references to these judgments, or any critical evaluation of the inter-company transactions, is of great concern to the Quebec Class Action Plaintiffs.

98. As well, the Deloitte Report fails to disclose the following information:

(i) the Deloitte Group's knowledge that the inter-company transactions relating to debentures and royalties were set up principally as a creditor-proofing exercise to funnel assets from JTIM to related entities;

(ii) the Deloitte Group's relationships with entities related to Imperial and RBH; and

(iii) the Deloitte Group's long-time activities on behalf of the tobacco industry.

(i) <u>Knowledge of inter-company transactions entered into for the purpose of creditor-proofing</u>

99. In 2004, JTIM filed for CCAA protection because of actions taken against it by the AGC and the MRQ. The Statement of Claim filed by the AGC in August 13, 2003, Exhibit 20, alleges the following in a section entitled "*Fraudulent Conveyance*":

> *[163] By correspondence dated January 30, 2002,* ***RJR-Macdonald's auditors, Deloitte & Touche, expressly admitted to the plaintiff that the 1999 asset transfers (including of the trademarks) from a predecessor entity to the defendant JTI-Macdonald Corp. was carried out "for creditor proofing purposes"*** *[...]*.
>
> [emphasis added]

100. The correspondence dated January 30, 2002 (referred to in the paragraph reproduced above but not filed due to the confidentiality order of Justice Riordan) was an exhibit that was filed in the trial before Justice Riordan and at the Quebec CA and was treated as a confidential document.

The correspondence was designated as Exhibit 1750-R-CONF. Exhibit 1750-R-CONF is identified on the Joint Schedule of Exhibits that was provided to the Quebec CA with the description: "*Deloitte and Touche memo dated January 30, 2002 [CONFIDENTIAL]*" *filed in JTI.S.C. vol. 2, pp. 486-488*". A copy of the Quebec CA Schedule of Exhibits is attached hereto as **Exhibit 21**.

101. Exhibit 1750-R-CONF is also referenced at footnote 528 on Schedule J of the Riordan Judgment. Schedule J provides a summary of the evidence related to the JTIM inter-company transactions considered by the Quebec Courts and their purpose as creditor-proofing mechanisms.

(ii) <u>The Deloitte Group's relationships with entities related to Imperial and RBH</u>

102. The JTIM Initial Order extends the stay of proceedings to Imperial and RBH, although these are non-applicant third parties whose operations are not intertwined with JTIM. Rather, they are JTIM's competitors. The Deloitte Report does not refer to this three-party stay sought by JTIM or indicate that the reasonableness and appropriateness of this Order was considered.

103. Deloitte LLP were the auditors of Imperial at least for the year ended December 31, 2014, as appears from a copy of the cover page and Auditors' Report dated February 16, 2015 for the 2014 consolidated financial statements of Imperial attached hereto as **Exhibit 22**.[45]

104. Publicly available information also discloses that entities in the Deloitte Group acted as the auditors of Imperial's parent, British American Tobacco p.l.c. ("**BAT**"), at least from the 1960s to the 1990s. Deloitte UK currently provides global financial information advisory services to BAT.

[45] The financial statements were located on the internet but, as they state that the financial statements are not disclosed publically, no financial information has been included with the exhibit.

105. The information about the Deloitte Group's relationships with Imperial, and entities related to it, is not disclosed in the Deloitte Report.

106. Similarly, as appears from the Deloitte Group's website, they have engaged in initiatives with the senior executives of Philip Morris, the parent company of RBH. A copy of a "Case Study (2016)" from the website of Deloitte Switzerland is attached hereto as **Exhibit 23**.

(iii) <u>the Deloitte Group's activities on behalf of the tobacco industry</u>

107. Publicly available information exists to support the Quebec Class Action Plaintiffs' understanding that the Deloitte Group has a long-standing relationship with the tobacco industry. A copy of a document extracted from the website "*TobaccoTactics*" is attached hereto as **Exhibit 24**.

108. Of particular note is the description of the role that the Deloitte Group has played in preparing reports that were funded by BAT and other tobacco companies, such as in respect of plain packaging initiatives.

109. In light of the above and, most particularly, the fact that representatives of the Deloitte Group may be material witnesses with respect to the inter-company transactions, the Quebec Class Action Plaintiffs are concerned about the potential conflicts of interest with respect to the role of Deloitte in these CCAA proceedings as well as the ability of Deloitte to act impartially on behalf of the stakeholders.

IX. ISSUES CONCERNING THE APPOINTMENT OF THE JTIM CRO

110. JTIM asserts that the Chief Restructuring Officer's ("**CRO**") expertise is required in order to successfully complete its contemplated restructuring plan.[46] However, as appears from the terms and conditions set out in the engagement letter from BlueTree Advisors ("**BlueTree**") dated April 23, 2018 (the "**Engagement Letter**")[47], the services to be provided by the CRO are primarily focused on negotiating, developing or implementing a plan or settlement with the stakeholders of JTIM, rather than restructuring the operations of the company itself.

111. JTIM asserts that the assistance of the CRO is important in order to minimize, *inter alia*, the distraction of senior executives away from the task of managing the business and maintaining positive cash flow[48]. However, this assertion is contradicted by paragraph 1.1 of the Engagement Letter which clearly states that the CRO's services are "*subject to ongoing supervision and direction from the JTI-M [JTIM Applicant] Board of Directors (the "**Board**")*". As the directors of JTIM are all officers and employees of the company, and not outside directors, their role is likely not just one of oversight such that their role with the CRO will be duplicative.

112. A further purported justification for JTIM to appoint a CRO is to assist JTIM in achieving a collective solution. The utility of the CRO must be considered in light of the fact that ITCAN has also been granted CCAA protection and the issues to be resolved with the stakeholders, including the Quebec Class Action Plaintiffs, will largely be identical for JTIM and Imperial. As appears from the ITCAN Initial Order, Justice Winkler was appointed to assist and to coordinate

[46] JTIM's Factum dated March 8, 2019, para. 66.
[47] Redacted CRO Engagement Letter (**JTIM AR, Vol. 4, Tab 5 II**).
[48] McMaster Affidavit, para. 103 (**JTIM AR, Vol. 2, Tab 5**).

the interests of all persons "*in the proceedings in connection with the Pending Litigation and any Tobacco Claim*" (as these terms are defined in the ITCAN Initial Order).

113. There is no doubt that the expenses of these CCAA proceedings will be significant and it would be unfair to the stakeholders for expenses to be incurred that are duplicative, particularly as the JTIM Initial Order grants a priority charge for professional fees of the CRO. As the Trial Judge apportioned liability of 67% to Imperial and 13% to JTIM, it would be appropriate to wait and assess whether Justice Winkler's role can be extended to the settlement negotiations for JTIM as well as Imperial.

114. The projected costs in this CCAA process are exorbitant. The fees and expenses of the CRO, which include an unknown success fee (which are secured by an administration charge on the property of JTIM in the amount of $3 million), are an unnecessary additional burden that should not be borne by the Quebec Class Action Plaintiffs or any other creditor. If JTIM related entities, including JTI, that are beneficiaries of the stay of proceedings in the JTIM Initial Order believe the role of the CRO is necessary, they should assume the costs related to that role.

115. All of the facts alleged herein are true.

AND I HAVE SIGNED

Bruce Johnston

Solemnly declared before me at Montreal,
Province of Quebec, this 27th day of March, 2019

Commissioner of Oaths for Quebec

COMMISSAIRE À L'ASSERMENTATION
COMMISSIONER FOR OATHS
ELENA BORDI 198417
FOR QUEBEC
POUR LE QUÉBEC

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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SWORN ON MARCH 27, 2019

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TAB C

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
COMMERICAL 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.

IMPERIAL TOBACCO CANADA LIMITED
AND **IMPERIAL TOBACCO COMPANY LIMITED**

ROTHMANS, BENSON & HEDGES INC.

GLOBAL LIST OF EXHIBITS TO AFFIDAVITS FILED BY THE QUEBEC CLASS ACTION PLAINTIFFS FOR THE COMEBACK HEARINGS
(All Exhibits filed in separate Combined Volume of Exhibits)

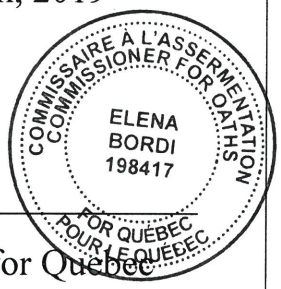
Exhibit	***Description***
Exhibits to the Johnston JTIM Affidavit sworn on March 27, 2019:	
Exhibit 1	Document prepared by counsel for the Quebec Class Action Plaintiffs reproducing extracts from the judgments of the Quebec Courts
Exhibit 2	Press Release by JTIM dated March 8, 2019
Exhibit 3	A copy of the Security Withdrawal Motion dated March 1, 2019
Exhibit 4	Press Release by JTIM dated March 1, 2019

Exhibit	***Description***
Exhibit 5	Letters from ITCAN and RBH dated March 1, 2019 and the ITCAN/RBH Stay Motions
Exhibit 6	Email dated March 1, 2019 from Ms. Julie Devroede, coordinator for the Quebec CA
Exhibit 7	Email from Mr. Fallon dated March 2, 2019
Exhibit 8	Email from Mr. Kugler dated March 3, 2019
Exhibit 9	Minutes of the hearing on March 4, 2019 before Justice Healy, J.A.
Exhibit 10	Chain of emails on March 4, 2019 exchanged between Mr. Kugler, Mr. Plante, Mr. Pratte and the clerk of the Quebec CA
Exhibit 11	Minutes of a hearing held on March 25, 2019 before Justice Stephane Sansfaçon, J.A.
Exhibit 12	Letter from counsel for JTIM dated March 12, 2019
Exhibit 13	Extract of Dr. Siemiatycki's expertise report on the Diseases, pages 75 and 76 of Exhibit 1426.1
Exhibit 14	Extract of the English Translation of Dr. Desjardins' expertise report, page 67 of Exhibit 1382.2
Exhibit 15	Extract of Dr. Guertin's expertise report, page 8 of Exhibit 1387
Exhibit 16	Report produced by Health Canada
Exhibit 17	Report produced by Physicians for a Smoke-Free Canada, January 2019
Exhibit 18	Extracts from JTI's 2017 annual reports
Exhibit 19	Extracts from JTI's 2018 annual reports
Exhibit 20	Statement of Claim of the AGC against JTIM and related entities dated August 13, 2003
Exhibit 21	An extract of the Joint Schedule of Exhibits that was provided to the Quebec CA with the description: "*Exhibit 1750-R-CONF: Deloitte and Touche memo dated January 30, 2002 [CONFIDENTIAL]*"

Exhibit	***Description***
Exhibit 22	Cover page and Auditors' Report dated February 16, 2015 for the 2014 consolidated financial statements of Imperial
Exhibit 23	"*Case Study (2016)*" from the website of Deloitte Switzerland
Exhibit 24	Document extracted from the website "*TobaccoTactics*"
Exhibits to the Johnston ITCAN Affidavit sworn on March 27, 2019:	
Exhibit 1	Document prepared by counsel for the Quebec Class Action Plaintiffs reproducing extracts from the judgments of the Quebec Courts
Exhibit 25	Press Releases by Imperial and British American Tobacco dated March 12, 2019
Exhibit 26	Press Releases by Imperial and British American Tobacco dated March 1, 2019
Exhibit 27	A copy of the publication posted by CTV on July 31, 2008 entitled "*Big tobacco to pay record fines after guilty plea*"
Exhibit 28	A copy of the an article entitled "*The Biggest Big Tobacco Companies*" dated January 18, 2017
Exhibit 29	Extracts from the Transcript of Mr. Eric Thauvette's testimony on June 30, 2015
Exhibit 30	Extracts from BAT's 2018 annual report and a News Release dated February 28, 2019
Exhibits to the Johnston RBH Affidavit sworn on March 27, 2019:	
Exhibit 1	Document prepared by counsel for the Quebec Class Action Plaintiffs reproducing extracts from the judgments of the Quebec Courts
Exhibit 31	Press Releases by RBH and Phillip Morris International Inc. dated March 22, 2019
Exhibit 32	Press Release by RBH dated March 1, 2019
Exhibit 33	Extracts from Phillip Morris International Inc. 2018 Annual Report
Exhibit 34	Press Release by Phillip Morris International Inc. dated March 4, 2019

Exhibit	***Description***
Exhibit 35	Extracts from the Transcript of Mr. William Giff's testimony on June 30, 2015
Exhibits to Silverstein Affidavit sworn on March 27, 2019:	
Exhibit 36	Agreement entered into between the Quebec Class Action Plaintiffs and Northumberland General Insurance Company dated February 16, 2017 **(NOT INCLUDED – UNDER SEAL)**
Exhibit 37	Agreement entered into between the Quebec Class Action Plaintiffs and Kansa General International Insurance Company Ltd. dated July 4, 2017 **(NOT INCLUDED – UNDER SEAL)**

This is **Exhibit « 1 »**, referred to in the **Affidavit of Bruce Johnston**, sworn before me this 27th day of March, 2019



Commissioner of Oaths for Quebec

EXHIBIT 1

PREPARED BY COUNSEL TO THE QUEBEC CLASS ACTION PLAINTIFFS[1]

Extracts from judgments of the Quebec Courts describing the conduct of the Tobacco Companies: Imperial Tobacco Canada Ltd. ("Imperial" or "ITL"), JTI-Macdonald Corp. ("JTIM" or "JTM"), and Rothmans, Benson & Hedges Inc. ("RBH")

A. The Riordan Judgment[2]

Para	Finding
56	Given the close intercorporate and political collaboration between the tobacco industries in the US and Canada by the beginning of the Class Period, the state of knowledge in this regard was essentially the same in both countries, as well as in England, where BAT was headquartered. Nevertheless, except for one short-lived blip on the radar screen by Rothmans in 1958, which the Court examines in a later chapter, no one in the Canadian tobacco industry was saying anything publicly about the health risks of smoking outside of corporate walls. **In fact, at ITL's instigation, it and the other Companies started moving towards a "Policy of Silence" about smoking and health issues as of 1962**.
66	Gibb was the head of ITL's science team and, to his credit, he refused to toe the party line on the "scientific controversy". On the other hand, **his company [**ITL**], to its great discredit, not only failed to embrace the same honesty, but, worse still, pushed in the opposite direction**.
72	**Thus, the Court concludes that at all times during the Class Period ITL knew of the risks and dangers of its products causing one of the Diseases**.
141	In any event, the Companies' objectionable conduct continued after those dates. Moreover, the reasons for this cessation of fault had nothing to do with anything they did. In fact, the opposite is actually the case. **Both by their inaction and by their support of the scientific controversy**, whereby the dangers of smoking were characterized as being inconclusive and requiring further research**, the Companies actually impeded and delayed the public's acquisition of knowledge**.
183	**Dependence** on any substance, to any degree, would be degrading for any reasonable person. It **attacks one's personal freedom and dignity**. **When that substance is a toxic one, moreover, that dependence threatens a person's right to life and personal inviolability**. The Court has no hesitation in concluding that such a dependence is one that can generate legal liability for the Companies.

[1] Emphasis added and unofficial translation in the case of extracts from the Appeal Judgment.
[2] *Létourneau* c. *JTI-MacDonald Corp.*, 2015 QCCS 2382.

Para	Finding
212	One example of that sensitivity was provided by Jean-Louis Mercier, a former president of ITL. He testified that BAT's lawyers frowned on ITL performing scientific research to verify the health risks of smoking because that might be portrayed in lawsuits as an admission that it knew or suspected that such risks were present. Another example comes from BAT's head of research, **Dr. Green, who confided to ITL's head of research in a 1977 memo that " … it may be suggested that it is better in some countries to have no such (position) paper - "it's better not to know" and certainly not to put it in writing"**.
232	Where the manufacturer knows that the information provided is neither complete nor sufficient with respect to the nature and degree of probable danger, the duty has not been met. That is the case here. We earlier held that the Companies were aware throughout the Class Period of the risks and dangers of their products, both as to the Diseases and to dependence. **They thus knew that those risks and dangers far surpassed what either Canada, through educational initiatives, or they themselves, through the pack warnings, were communicating to the public**. **That represents a grievous fault in light of the toxicity of the product**.
239	By choosing not to inform either the public health authorities or the public directly of what they knew, **the Companies chose profits over the health of their customers**. Whatever else can be said about that choice, it is clear that it represents **a fault of the most egregious nature** and one that must be considered in the context of punitive damages.
250	By the time of Mr. Paré's testimony before the Isabelle Committee in 1969, **the Companies had long known of the risks and dangers of smoking and yet they wilfully and knowingly denied those risks and trivialized the evidence** showing the dangers associated with their products.
265	As well, the effect of the gradual reduction of these statements after the Companies decided to abstain from making any public statements about health, as discussed in the following chapter, is mitigated by the reality that, during the Class Period, the Companies never rescinded these statements. In fact, **as late as the end of 1994 ITL was still defending the existence of the same "scientific controversy"** that Mr. Paré had been preaching decades earlier. (…)
268	Thus, one can only wonder whether the people making such comments were remarkably naïve, wilfully blind, dishonest or so used to the industry's mantra that they actually came around to believe it. **Their linguistic and intellectual pirouettes were elegant and malevolent at the same time. They were also brutally negligent**.
269	**ITL and the other Companies, through the CTMC and directly, committed egregious faults as a result of their knowingly false and incomplete public statements about the risks and dangers of smoking**.

Para	Finding
278	The "restrictions" on the Companies' statements to the public are every bit as present today as they were during the Class Period, nevertheless, for at least the last ten years each Company has been warning the public of the dangers of smoking on its website. If the kinds of statements they are making today are legal and proper, their contention that during the fifty previous years the tobacco laws - or their respect for the role of public health authorities - foreclosed them from doing more than printing the Warnings on their packages is feeble to the point of offending reason. **It also leads to the conclusion that during the Class Period the Companies shirked their duty to warn in a most high-handed and intentional fashion**.
288	It follows that, if there is fault for tolerating knowingly inadequate Warnings, there is an arguably more serious fault during the 22 years of the Class Period when there were no Warnings at all. The Companies adduced evidence that in this earlier time it was less customary to warn in consumer matters than it is today. So be it. **Nonetheless, knowingly exposing people to the type of dangers that the Companies knew cigarettes represented without any precaution signals being sent is beyond irresponsible at any time of the Class Period. It is also intentionally negligent**.
337	Yet ITL stuck to the industry's policy of silence and made no attempt to warn what it knew to be an unsophisticated public. **The Plaintiffs argue that this is a gross breach of the duty to inform of safety defects and demonstrates not just ITL's insouciance on that, but also its wilful intent to "disinform" smokers. The Court agrees**.
338	**Here again, ITL's attitude and behaviour portray a calculated willingness to put its customers' well-being, health and lives at risk for the purpose of maximizing profits**. There is no question that this violates the principles established in the Civil Code, both with respect to contractual and to general human relations. It also goes much further than that.
339	**It aggravates the Company's [**ITL**] faults and pushes its actions so far outside the standards of acceptable behaviour that one could not be blamed for branding them as immoral**. (…)
366	Mtre. Ackman, whose memory was either hot or cold depending on the question's potential to harm ITL, made the following statements concerning his engagement of an outside law firm in this context: 396Q-**Can you give us any reason why Imperial would involve outside counsel, or counsel of any kind, to destroy research documents in its possession?** A- **I hired the Ogilvy Renault firm, Simon Potter, to help me in this exercise**. 397Q-Which exercise?

Para	Finding
	A- **The destruction of the documents**. And he did most of the negotiations for us. 398Q-But what negotiations? A- With BAT. 399Q-Negotiations for what? A- You just said, the destruction of documents. 400Q-There was a negotiation of an agreement between... A- I have no idea whether there was a negotiation; I wasn't part of that discussion. It was a long time ago, sir. 401Q-So you hired Simon Potter? A- Yes, sir. 402Q-To destroy the documents? A- I did not hire him... to meet with BAT and settle a matter. 403Q-Settling a matter implies that there is a matter; what was the matter? A- I have no idea other than what I just said. 404Q-Did Simon Potter ever give you reason to believe that he had expertise in research documents, did he have any science background? A- I don't know that, sir.
368	On the first point, **it appears that this clearly was the intention** [to use the destruction of the documents as a means to avoid filing them at trial], since that is exactly what ITL did in a damage action before an Ontario court. Lyndon Barnes, a partner in the law firm of Osler in Toronto who worked on ITL matters for many years, testified before us as follows: A- I would think... probably the first case that we did an affidavit was in a case called *Spasic* in Ontario. 83Q- **So did you produce the documents in that case that were destroyed in this letter?** That were destroyed as identified in this letter

Para	Finding
	of Simon Potter's (sic) of June nineteen fifty-two (1952)... h'm, nineteen ninety-two (1992)? A- **I think it would have been hard to produce documents that had been destroyed**. 84Q- It would have been very hard. A- Yes. 85Q- So that's when you found out that the documents didn't exist? A- Well, no. The original documents did exist, they were at BAT. 86Q- **So did you produce the original BAT documents in that case?** A- **No, they weren't in our control and possession**. 87Q- They weren't in your control or in your possession. A- No. 88Q- **And therefore, they were not produced?** A- **No, they weren't**.
369	**There is thus no doubt that ITL used the destruction as a way to avoid producing the documents**, based on the assertion that they were not in its control or possession. One could query as to whether, under Ontario law, the arrangement with BAT to provide copies by fax meant that the documents were, in fact, in ITL's control, but that is not necessary. **There is enough for us to conclude that ITL's actions in this regard constitute an unacceptable, bad-faith and possibly illegal act designed to frustrate the legal process**.
375	The litigation-based objectives of ITL in ridding itself of these documents lead inexorably to a litigation-based conclusion as to the motive for using outside lawyers to carry out the deed: **ITL was attempting to shield this activity behind professional secrecy**.
377	As a result, the Court is compelled to draw an adverse inference with respect to ITL's motives behind this incident. It was up to ITL to rebut this inference, yet the evidence it adduced had nothing but the opposite effect. We therefore find that it was **ITL's intention to use the lawyers' involvement in order to hide its actions behind a false veil of professional secrecy**.

Para	Finding
378	This constitutes an **unacceptable, bad-faith and possibly illegal act designed to frustrate the legal process**. This finding will play its part in our assessment of punitive damages.
449	Thus, it appears to be incontrovertible that, by adhering to the Policy Statement**, these companies colluded among themselves in order to impede the public from learning of health-related information about smoking, a collusion that continued for many decades thereafter**. They thereby jointly participated in a wrongful act that resulted in an injury, which is a criterion for solidary liability under article 1480 of the Civil Code.
458	It is the overall look and feel of the message, however, that most violates the Companies' obligation to inform consumers of the true nature of their products. **By attempting to lull the public into a sense of non-urgency about the health risks, this type of presentation, for there were many others, is both misleading and dangerous to people's well-being**.
459	Strong evidence existed at the time to support a causal link between cigarettes and disease and it was irresponsible for the Canadian tobacco industry to attempt to disguise that Sword of Damocles. **By working together to this end, the Companies conspired to impede the public from learning of the inherent dangers of smoking and thereby committed a fault, a fault separate and apart from – and more serious than - that of failing to inform**.
475	On the basis of the preceding and, in particular, the clear and uncontested role of the CTMC in advancing the Companies' unanimous positions trivializing or denying the risks and dangers of smoking, **we hold that the Companies indeed did conspire to maintain a common front in order to impede users of their products from learning of the inherent dangers of such use**. A solidary condemnation in compensatory damages is appropriate.
485	On the second question, we found that **the Companies not only knowingly withheld critical information from their customers, but also lulled them into a sense of non-urgency about the dangers**. That unacceptable behaviour does not necessarily mean that they malevolently desired that their customers fall victim to the Diseases or to tobacco dependence. They were undoubtedly just trying to maximize profits. In fact, the Companies, especially ITL, were spending significant sums trying to develop a cigarette that was less harmful to their customers.
486	Pending that Eureka moment, however, they remained silent about the dangers to which they knew they were exposing the public yet voluble about the scientific uncertainty of any such dangers. **In doing so, each of them acted "with full knowledge of the immediate and natural or at least extremely probable consequences that [**its**] conduct will cause". That constitutes intentionality for the purposes of section 49 of the Quebec Charter**.

Para	Finding
506	We noted earlier that section 49 of the Quebec Charter targets the intentionality of the consequences of faulty conduct and not of the conduct itself. We also noted that "intention" in that context refers to "a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct". **To the extent that an analogy can be made between the two statutes, a merchant's intention to mislead a consumer, i.e., to commit a fraud, meets that test**. The irrebuttable presumption thus touches on issues relevant to punitive damages and can assist the consumer in a claim for those.
583	One would have expected JTM to lament the fact that the development of a safer cigarette was not progressing well and that its customers would not have access to its possible benefits. In an environment of collaboration – and concern for one's customers - it would have been normal to search for ways to assist the process, for example, by offering to help, or at least by providing all the information in its possession. **Instead, JTM expressed joy at the chaos within the project and relief that pressure was off shorter butt lengths! More importantly, it chose to keep to itself the broad range of relevant information in its possession**.
584	The gravity of such conduct is magnified by the reality that, at the time, everyone believed that this "safer-cigarette" project would likely have positive consequences for the health and well-being of human beings. **Hence, the longer it took to progress toward that end, the longer smokers would be exposed to greater – and unnecessary - health risks**. These are circumstances that must be considered in the context of assessing punitive damages.
611	Although it is not clear what happened to Mr. O'Neill-Dunne as a result of his campaign of candour, the proof indicates that for the rest of the Class Period Rothmans, and later RBH, never reiterated the position Rothmans so famously took in 1958. **Thereafter, it toed the industry line**, crouching behind the Carcassonnesque [referring to the famous walls defending a medieval fortress] double wall of the Warnings, backed up by the "scientific controversy" of no proven biological link and the need for more research.
612	Nonetheless, based on Rothmans' 1958 announcements and Mr. O'Neill-Dunne's comments, **it is clear that the company [**RBH**] knew of clear risks and dangers associated with the use of its products and that this knowledge was gained well before 1958, in all probability going back to at least the beginning of the Class Period**. That answers this Common Question, but there is more to be learned from this incident.
629	Recognizing that this is true, its near-perfect silence on the issues does not assist RBH in defending against the principal faults we find that it committed. It is revealing, however, to note the manner in which that silence was broken in a 1964 speech by its then-president, Mr. Tennyson, to the Advertising and Sales Association in Montreal. It is difficult, and demoralizing (among other sensations), to read his concluding remarks: As tobacco people, we have a three-fold interest in this matter.

Para	Finding
	1. As human beings, we are, of course, concerned with the health of our fellow man and we would certainly voluntarily refrain from contributing to their detriment. 2. But, as citizens, we have a natural interest in protecting the economic welfare of the many people who are dependent on tobacco, from irresponsible and hasty actions on the part of well-meaning but misguided people. **3. As businessmen, we have a responsibility to our personnel and to our shareholders and I do not think that we may sacrifice their interests on the flimsy evidence which has thus far been presented.** […] The good things in life are simple. A variety of small pleasures make up living, as one learns to recognize and enjoy them. Smoking has been and will continue to be one of these uncomplicated and simple pleasures of life.
630	**Spoken only six years after the company's** [RBH] **"coming-out" under Mr. O'Neill-Dunne, these comments smack of hypocrisy, dishonesty and blind self-interest at the expense of the public.** They are typical of what the Companies were saying throughout most of the Class Period and show why punitive damages are warranted here.
641	The "inventories of tobacco to deplete", it must be remembered, consisted of tobacco that had been cured using direct heat, and thus contained 87% more carcinogenic nitrosamines. The Court recognizes that RBH's use of those inventories took place just after the end of the Class Period, but the incident casts light on the Company's general attitudes and priorities at the time. **It was more important to use up its inventories than to protect the health of its customers**.
642	**This is just one example among many of the Companies' lack of concern over the harm they were causing to their customers and goes directly to intentionality**. It is consistent with the attitudes of the Companies throughout the Class Period and with our conclusions in Chapter II.F of the present judgment.
663	Dr. Desjardins **describes in detail the physical and mental prejudice typically suffered by persons with emphysema and the suffering and loss of quality of life resulting from the various treatments**. He uses what is known as the "GOLD Guidelines" to rank the impact on the quality of life to the relative gravity of the sickness.
665	In Létourneau, the moral damages claimed are for an increased risk of contracting **a fatal disease, reduced life expectancy, social reprobation, loss of self esteem and humiliation**. Here, too, the Plaintiffs relied on an expert to make their proof and filed two reports by Dr. Juan Negrete (Exhibit 1470.1 and 1470.2). The description of the damages is contained in the latter document of some five pages in length and, as above,

Para	Finding
	both that description and the causal link between those damages and tobacco dependence are uncontradicted.
672	For cancer of the larynx, the oropharynx and the hypopharynx, Dr. Guertin states the following at page 24 of his report (Exhibit 1387): For all these reasons, it is clear that the cigarette is the principal etiological agent causing the onset of about 80 to 90 percent of (throat cancers). **Moreover, for a number of reasons, it results in an unfavourable prognostic in a great number of patients**. **Finally, some 50% of patients with a throat cancer will eventually die from it**. **Those who are cured will undergo a significant change in their quality of life before, during and after treatment**.
763	At his recommended critical amount of 4 pack years for lung cancer, his probabilities of causation of 93% in men and 80% in women reflect findings reported in a National Cancer Institute document that states that "**Lung cancer is the leading cause of cancer death among both men and women in the United States, and 90 percent of lung cancer deaths among men and approximately 80 percent of lung cancer deaths among women are due to smoking.**" As well, a 2004 monograph of the International Agency for Research on Cancer states that "the proportion of lung cancer cases attributable to smoking has reached 90%"
809	Consequently, the question posed is answered in the affirmative: **the Blais Members' smoking was caused by a fault of the Companies**.
936	A second reason to rule in this manner is found in article 1526. All parties agree that we are in the domain of extracontractual liability. **Given that we hold that the Companies colluded to "disinform" the Members**, this resulted in injury caused through the fault of two or more persons, as foreseen in that provision.
976	The courts should not allow the spirit and the mission of the class action to be thwarted by an impossible pursuit of perfection. While respecting the general rules of the law, **the courts must find reasonable ways to avoid allowing culpable defendants to frustrate the class action's purpose** by insisting on an overly rigid application of traditional rules. This is particularly so where the fault, the damages and the causal link are proven, as they are here.
981	In his report at pages 75 through 78, **Dr. Desjardins describes the temporary secondary effects of radiation therapy and chemotherapy** in the context of lung cancer as follows: - headaches, nausea, vomiting, fatigue, sores in the mouth, diarrhea, deafness; - inflammation of the esophagus; - skin burns; - stiffness and joint pain;

Para	Finding
	- radical pneumonitis causing fever, coughing and los [sic] of breath; - loss of body hair; - swelling of the lower members; - increased susceptibility to infection.
982	As for lung cancer itself, at page 80 of his report he notes that **a person living with cancer is affected both physically and psychologically, as well as spiritually, with certain patients experiencing significant stress** as a result of being diagnosed with lung cancer. He goes on to cite the following specific affects: - 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; - depression.
984	The evidence of Drs. Desjardins and Guertin convinces us that **few cases of lung and throat cancer fall below very serious**. As well, the amount proposed is not excessive in the context of **life-threatening, and life-ruining, illnesses**. Accordingly, we accept a uniform figure of $100,000 for individual moral damages in the lung cancer and throat cancer subclasses.
990	In the pages that follow, Dr. Guertin chronicles the various treatments that are usually attempted when there is indication that the cancer might be curable: surgery, chemotherapy and radiation therapy. He describes the possible secondary effects of each one of those treatments, **a veritable litany of horrors**, including: - open sores on the mucous membranes, - swelling in the legs (oedema), - nasal intubation or tracheotomy for weeks, months or even permanently, - cutaneous changes, cervical fibrosis, loss of the ability to taste, - chronic dry-mouth leading to elocution problems and difficulty in swallowing, - removal of all teeth, - surgery-induced mutilation of the face and neck, elocution problems and difficulty in swallowing and the inability to eat certain foods, - loss of the vocal chords, - chronic pain and diminution of shoulder strength.
991	**Death ultimately ends the torture, but at what price?** At page 8 of his report, Dr. Guertin writes that "**the patients who die from a relapse of their original cancer will experience a death that is atrociously painful, unable even to swallow their saliva or to breathe**" (the Court's Unofficial Translation).

Para	Finding
999	On the impact of COPD, and thus emphysema, on the quality of life a person afflicted with it, Dr. Desjardins' report (Exhibit 1382) indicates that: -Over 60% of individuals with COPD report significant limitations in their daily activities caused by shortness of breath and fatigue (page 48); -Specific activities affected include sports and leisure, social life, sleep, domestic duties, sexuality and family life (Figure J on page 48; see also page 34); -These limitations, when experienced daily, eventually result in social isolation, loss of self esteem, marital problems, frustration, anxiety, depression and an important reduction in the overall quality of life (pages 48-49); -**A person with emphysema can expect to suffer from a persistent cough, spitting up of blood, loss of breath and swelling in the lower members** (pages 26-28).
1000	Added to the above, of course, is **the likelihood, or rather the near certainty, of a premature death** (pages 18 and 19). **The anticipation of that cannot but contribute to a loss of enjoyment of life**.
1009	Our analysis of the Companies' activities over the Class Period underlines the degree to which **ITL's culpable conduct surpassed that of the other Companies on factors similar to these. It was the industry leader on many fronts, including that of hiding the truth from – and misleading - the public**. There is, for example: • Mr. Wood's 1962 initiatives with respect to the Policy Statement; • the company's refusal to heed the warnings and indictments of Messrs. Green and Gibb, as described in section II.B.1.a of the present judgment; • Mr. Paré's vigorous public defence over many years of the cigarette in the name of both ITL and the CTMC; • **the company's leading role** in publicizing the scientific controversy and the need for more research; • the extensive knowledge and insight ITL gained from its regular Internal Surveys such as the CMA and the Monthly Monitor; and • more specifically with respect to the Internal Surveys, its awareness of the smoking public's ignorance of the risks and dangers of the cigarette, **and its absolute lack of effort to warn its customers accordingly**.

Para	Finding
1010	**We have not forgotten ITL's bad-faith efforts to block court discovery of research reports by storing them with outside counsel, and eventually having those lawyers destroy the documents**. This seems to the Court to be something that would more influence the quantum of punitive damages, but it is not entirely irrelevant to the analysis we are now performing.
1037	**Over the nearly fifty years of the Class Period, and in the seventeen years since, the Companies earned billions of dollars at the expense of the lungs, the throats and the general well-being of their customers**. If the Companies are allowed to walk away unscathed now, what would be the message to other industries that today or tomorrow find themselves in a similar moral conflict?
1038	**The Companies' actions and attitudes over the Class Period were, in fact, "particularly reprehensible" and must be denounced and punished in the sternest of fashions**. To do so will be to favour prevention and deterrence both on a specific and on a general societal level. We reject the Companies arguments that there is no justification to award punitive damages against them.
1069	Concerning the period of averaging, we have ITL's earnings for seven years: 2007 through 2013, so we are able to do either a seven-year or a five-year average. ITL's five-year average of $483,000,000 is some $22 million a year less than the seven year one of $505,000,000. This might sound like a lot, but it is not. **It represents a little over 4% of ITL's half-billion dollars in annual before-tax earnings.**
1071	**For ITL, the five-year average of before-tax earnings between 2009 and 2013 is $483,000,000. For RBH, it is $460,000,000. JTM's "Earnings from operations" for the period average $103,000,000**.
1073	**Average earnings are relevant in the context of disgorging ill-gained profits**. Here, those **profits were immense** to the point of being inconceivable to the average person. ITL and RBH earned nearly a half billion dollars a year over the past five years, with ITL earning over $600 million in 2008. The $200 million dollar fine it paid that year looks almost like pocket change.
1074	Over the averaging period alone, the Companies' combined before-tax earnings totaled more than five billion dollars ($5,000,000,000). Recognizing that a dollar today is not worth what it was in 1950 or 1960, or even 1998, we still must assume that **the profits earned by them over the 48 years of the Class Period were massive.**
1073	In our preceding analysis, we have found that all three Companies were guilty of **reprehensible conduct** that warranted an award of punitive damages against them under both the Quebec Charter and the CPA. We also pointed out a number of elements that distinguish the case of ITL from that of the others.

Para	Finding
1077	In that analysis we referred to the guidelines set out in the section 23 of the TRDA for apportioning liability for compensatory damages among several defendants. There, we considered the following elements: -Mr. Wood's 1962 initiatives with respect to the Policy Statement; -the company's refusal to heed the warnings and indictments of Messrs. Green and Gibb, as described in section II.B.1.a of the present judgment; -Mr. Paré's vigorous public defence over many years of the cigarette in the name of both ITL and the CTMC; -the company's leading role in publicizing the scientific controversy and the need for more research; -the extensive knowledge and insight ITL gained from its regular Internal Surveys such as the CMA and the Monthly Monitor; -more specifically with respect to the Internal Surveys, its awareness of the smoking public's ignorance of the risks and dangers of the cigarette, and its absolute lack of effort to warn its customers accordingly; and -**ITL's bad-faith efforts to block court discovery of research reports by storing them with outside counsel, and eventually having those lawyers destroy the documents.**
1078	As well, there is ITL's "outlier" status throughout the Class Period. In spite of overwhelming scientific acceptance of the causal link between smoking and disease, ITL continued to preach the sermon of the scientific controversy well into the 1990's, as we saw earlier. All these points are relevant to the assessment of punitive damages. **They weigh heavily on the gravity of ITL's faults and require a condemnation higher than the base amount**.
1093	It [JTM] argues that the payments due under the Interco Contracts, totalling some $110 million a year in capital, interest and royalties (the "Interco Obligations"), should be accepted at face value. **The result would be to reduce JTM's annual earnings to a deficit, since its average before-tax earnings are "only" $103 million.** This would also have the advantage of rendering the choice between before and after-tax figures moot, although JTM favours the latter.
1095	For example, **the Japan Tobacco group caused JTM to transfer its trade marks valued at $1.2 billion to a new, previously-empty subsidiary, JTI-TM**, in return for the latter's shares. This "Newco" charges JTM an annual royalty of some $10 million for the use of those trademarks. **It is hard to conceive of a more artificial expense**.

Para	Finding
1096	There is also a loan of $1.2 billion from JTI-TM to JTM for which JTM is charged $92 million a year in interest. **One of the curious aspects of this loan is that JTM appears never to have received any funds as a result of it**, although we must admit that Mr. Poirier's clear answer in this regard at page 115 of the transcript became less clear later in his testimony.
1097	Our analysis of this matter leads us to agree with Mr. Poirier who, when reviewing some of the planning behind the Interco Contracts, was asked **if "that sounds like creditor proofing to you". He candidly replied: "Yes"**.
1098	Shortly thereafter, the following exchange ensued in Mr. Poirier's cross examination: [172]Q." […]The modifications suggested will enhance our ability to protect our most valuable assets." Most valuable assets in this context are the trademarks valued at one point two (1.2) billion dollars? A- Yes. Yes. [173]Q-**And it's to protect your most valuable assets from creditors, creditors like perhaps the plaintiffs in this lawsuit?** A- **Perhaps the plaintiffs**. It's a tobacco company. [174]Q-It's a what? A- **It's a tobacco company**.
1101	In the first, we cannot but conclude that this whole tangled web of interconnecting contracts is **principally a creditor-proofing exercise undertaken after the institution of the present actions by a sophisticated parent company**, Japan Tobacco Inc., operating in an industry that was deeply embroiled in product liability litigation. Even Mr. Poirier could not deny that. And on paper, **the sham may well succeed**.
1102	Unless the Interco Contracts are overturned, something that is not the subject of the present files, JTM appears to be nothing more than a break-even operation. So be it, but **that is an artificial state of affairs that does not reflect the company's true patrimonial situation**. **Absent these artifices, JTM is earning an average of $103,000,000 a year before taxes** and that is the patrimonial situation that we will adopt for the purpose of assessing punitive damages.
1103	Then there is the qualitative side. **The Interco Contracts represent a cynical, bad-faith effort by JTM to avoid paying proper compensation to its customers whose health and well-being were ruined, and the word is not too strong, by its wilful conduct.** This deserves to be sanctioned and we shall do so by setting the condemnation for punitive damages above the base amount.

B. The Appeal Judgment[3]

Para	Finding
94	[UNOFFICIAL TRANSLATION] First, **the appellants knowingly marketed an addictive product**, a fault that could give rise to their civil liability, as well as under the Charter and the C.P.A.
95	[UNOFFICIAL TRANSLATION] The appellants **failed to adequately inform the public of the risks and dangers of their products**, thus constituting a breach of the general obligation not to cause harm to others under article 1457 C.C.Q. In other words, the obligation to inform the public does not cease because, according to the criteria set out in article 1473 C.C.Q., the public knew (or should have known) the risks and dangers of smoking (such knowledge could nevertheless result in the victim's contributory fault). There are several factual elements that show that the appellants have failed to comply with this obligation: **they made public statements that they knew were false and incomplete regarding the risks and dangers of smoking; they were negligent in deliberately exposing consumers to the dangers of their products during the 22 years that no warnings were placed on cigarette packages; the tobacco industry adhered to a policy of silence on these issues; and finally, by choosing not to inform public health authorities or the public directly of what they knew, the appellants gave priority to their profits over the health of the users of their products**.
97	[UNOFFICIAL TRANSLATION] On the other hand, **the appellants conspired** to maintain a common front whose objective was to prevent users of their products from being informed of the dangers inherent in their consumption. **By pursuing this collusion for many decades**, in light of the Declaration of Principle and the activities of the Ad Hoc Committee and then the CCFPT, **the appellants participated in a wrongful collective act that caused prejudice**, thereby engaging their joint and several liability under article 1480 C.C.Q.
98	[UNOFFICIAL TRANSLATION] In view of the misconduct of the appellants, punitive damages are also justified under the Charter and C.P.A.133. On the one hand, under sections 1, 4 and 49 of the Charter, the latter **intentionally violated the right to life, security and integrity of members of the Blais and Létourneau groups**.
102	[UNOFFICIAL TRANSLATION] As for the quantum, in the Blais case, the appellants are jointly and severally ordered to pay $6,858,864,000 in moral damages, namely $15,500,000,000 with interest and additional compensation (...). An analysis of the appellant ITL's activities during the class period, however, shows that **its reprehensible conduct exceeds that of the other appellants**. Indeed, the evidence shows that **the company [ITL] was the industry leader on several fronts, including those aimed at hiding the truth and misleading the public**. Taking into account ITL's bad faith and the appellants' market shares, their liability is divided as follows: 67 % for ITL, 20 % for RBH and 13 % for JTM. (...)

[3] *Imperial Tobacco Canada ltée* c. *Conseil québécois sur le tabac et la santé*, 2019 QCCA 358.

Para	Finding
127	[UNOFFICIAL TRANSLATION] (…) For the evidence on this topic is clear: **tobacco, in this case the type that is smoked, is a product with no real benefit other than to give the user the pleasure of satisfying and temporarily soothing the intense need - drug addiction - that its consumption creates, and to relieve the stress of abstinence, even temporarily.** The appellants are aware of this, and as Robert Bexon (of ITL) writes in a 1985 note to Wilmat Tennyson (president of ITL): **"If our product was not addictive, we would not sell a cigarette next week in spite of these positive psychological attributes" (i.e., according to the author, reducing stress, improving concentration and relieving boredom).** That says a lot about the merits of cigarettes.
128	[UNOFFICIAL TRANSLATION] **This knowledge of the powerful addiction caused by tobacco use, the primary commercial attribute of the product**, **also existed for a long time.** Let us gradually go back in time. Thus, in 1984 (and this is only one example among many), the same Robert Bexon wrote to Wayne Knox (then Director of Marketing at ITL) saying: > However, we know quitting is not an easy process. For every 100 smokers who try, only five will make it past the first year. Less than two will make it permanently. […]
477	[UNOFFICIAL TRANSLATION] Did the appellants fail to comply with this obligation to provide information? This question can only be answered in the affirmative. Not only did they intentionally conceal from the public and users the pathological and addictive effects of the cigarettes they marketed, **but they collectively developed and practiced, at the same time, a misinformation program aimed at undermining any information contrary to their interests**: **they maintained false scientific controversies, hijacked debates, lied to the public (and even to public authorities), shrouding the whole in misleading advertising strategies contrary to their own codes of conduct** (and, as of 1980, to the C.P.A.).
478	[UNOFFICIAL TRANSLATION] The situation, admittedly, is out of the ordinary. [...] In contrast, **the appellants deliberately concealed the information they had about the toxicity of their product for decades, even though they conspired and manipulated, in a concerted manner, to confuse or delay the knowledge that the public and users could acquire about it**. A fortiori, one must conclude that there has been a breach of the appellants' duty to inform.
564	[UNOFFICIAL TRANSLATION] More even, **we can speak of bad faith behavior in, resulting from a deliberate concealment of the effects of cigarettes on the health of users, followed by systematic negation, minimization and trivialization of users based in particular on the cleverly but artificially maintained idea of a scientific controversy and on the alleged weakness of the relationship between cigarettes and diseases or addiction, all wrapped in a misleading advertising strategy**.

Para	Finding
618	[UNOFFICIAL TRANSLATION] There is no doubt that the appellants were themselves well aware of this characteristic of cigarettes, as early as 1950. But that the use of cigarettes as truly addictive and not only a bad habit was not well-known. First, there is a marked difference between a bad habit and an addiction, which is a condition of physical or physiological dependence. **Yet, the appellants have long and falsely claimed that, while cigarette smoking may be a habit, it was not a form of addiction**.
1013	[UNOFFICIAL TRANSLATION] More specifically, these factual findings show that **the appellants could not ignore the extremely likely consequences** of their denials on people who would become addicted to tobacco, including all members of the Létourneau group as defined, and on smokers who would develop one of the diseases in question. **They understood that this marketing strategy would result in individuals becoming addicted, causing them a fatal disease or exposing them to a high risk of developing such a disease**. In so doing, **they have certainly unlawfully and intentionally violated the rights to life, safety and integrity of members of both groups**. All the evidence relied on by the trial judge, including his conclusion on the policy of silence, is sufficient to make this observation.
1078	On the other hand, **the appellants conspired** to maintain a common front whose objective was to prevent users of their products from being informed of the dangers inherent in their consumption. **By pursuing this collusion for many decades**, in light of the Declaration of Principle and the activities of the Ad Hoc Committee and then the CCFPT, **the appellants participated in a wrongful collective act that caused prejudice**, thereby engaging their joint and several liability under article 1480 C.C.Q.
1119	[UNOFFICIAL TRANSLATION] In any event, there is ample evidence to support the conclusion that **JTM's conduct is characterized by malicious and vexatious intent that goes well beyond mere ignorance, recklessness or negligence**. Indeed, if the concerted omission of information about the harmful nature of tobacco use for nearly two decades to delay public awareness of a key public health issue is not […] conduct that should be deterred and denounced in the strongest terms, it is difficult to see what conduct would justify the granting of punitive damages.
1121	[UNOFFICIAL TRANSLATION] However, in the present case, **the seriousness and impact of the infringing conduct and prohibited practices are not commensurate with the cases generally studied by the courts and are in a completely different register**.
1123	[UNOFFICIAL TRANSLATION] **Given the extreme seriousness of the appellants' faults**, their duration, their persistence, the need to prevent the occurrence of similar conduct in the future and to denounce it, the desirability of stripping a legal person of profits acquired in contravention of the law and the appellants' property situation, the amounts granted in this case have a truly rational link with the objectives of exemplarity, dissuasion and denunciation.

Para	Finding
1137	[UNOFFICIAL TRANSLATION] Assuming that this statement is true, **it raises the question of why a company must use an outside lawyer to destroy a simple copy of a research report as part of the "regular review of records it no longer needs"**, as it states in its press release. More generally, **this episode, retained by the trial judge, shows the eminently vexatious nature of the appellant ITL's conduct with regard to anticipated litigation**. By retaining this episode to increase the punitive damages award against ITL, the judge did not commit an error.
1144	[UNOFFICIAL TRANSLATION] RBH was part of CCFPT. Moreover, as for the scientific controversy fueled by RBH, traces of it can still be found as late as 1995 in a fax from John McDonald (RBH) to Robert Parker (CCFPT) dated April 12, 1995 (…)
1145	[UNOFFICIAL TRANSLATION] According to the latter document, even in 1995, a few months after all Quebec residents were - according to the Appellants - deemed to know that smoking was addictive, the official position of the CCFPT was "adequately reflected" in a report written by David Warburton, which was highly critical of the Royal Society of Canada's report on addiction, published in 1989.
1149	[UNOFFICIAL TRANSLATION] The judge therefore **correctly concludes that the three appellants engaged in malicious and vexatious commercial conduct and violated the fundamental rights of [the class action] members in a wrongful, unlawful and intentional manner**. **The evidence strongly supports this conclusion**. With regard more particularly to vexatious commercial conduct, let us recall the countless advertisements and sponsorships of which the judge invoked only a tiny portion and which are referred to in paragraph [854] of these reasons.
1156	[UNOFFICIAL TRANSLATION] The judge attributes JTM a fictional annual profit of $103,000,000 to reflect the various contractual mechanisms it established in the late 1990s. **He considers these mechanisms to be a way for JTM to protect itself from its creditors**, which can be analyzed to establish the quantum of punitive damages, insofar as it is relevant to the criteria set out at article 1621 C.C.Q.
1161	[UNOFFICIAL TRANSLATION] **The judge accepted the testimony of Mr. Poirier, who admitted unequivocally that the transactions in question were intended to protect JTM from its creditors**: > [1097] Our analysis of this matter leads us to agree with Mr. Poirier who, when reviewing some of the planning behind the Interco Contracts, was asked if "that sounds like creditor proofing to you". He candidly replied "Yes".
1162	[UNOFFICIAL TRANSLATION] The judge therefore did not commit an error in taking into account JTIM's corporate planning. **After a review of the judge's reasons and the evidence to support them, which is subject to a confidentiality and sealing order, it should be noted that the judgment on appeal contains no error of fact on this issue**.

Para	Finding
1163	[UNOFFICIAL TRANSLATION] In short, the appellants show no flaws in the judgment below that would justify overturning the award for punitive damages or modifying its quantum. Therefore, their arguments in this respect must be rejected.
1275	[UNOFFICIAL TRANSLATION] Before awarding punitive damages with these objectives in mind, a rational connection must exist between the facts retained by the court and the award of such damages. In this case, such a link exists: **in order to deter similar document destruction behavior that ITL knew to be potentially highly relevant in anticipated litigation, and a lack of frankness in court by raising an objection to the evidence based on half-truth**, the judge was perfectly right to conclude that the situation justified a sentence for punitive damages and that **ITL's reprehensible behavior** could be part of the quantum analysis. The impact of this event on the quantum is discussed in Section IV.5 of these reasons.

C. Security Judgment[4]

30	Appellants have submitted a judgment of Mongeon, J.S.C., of 2013, dismissing an application for a safeguard order against JTM because it had transferred its trademarks valued at $1.2 billion to an "offshore" subsidiary in 1999, the year following the institution of proceedings in the Superior Court. The transferee then pledged the trademark to secure an indebtedness. JTM pays substantial royalties to the transferee in consideration of the use by it of the trademark**. Its president agreed that the purpose of the transaction was "creditor proofing"** […] The judgment of Mongeon, J.S.C., however is of no assistance to Appellants as it did not address any point before me for adjudication. It did not support the contention that facts pre-appeal cannot be relied upon.
32	From 2008 to 2013, RBH's average annual earnings from operations was approximately $450 million. **It paid $300 million annually on average to its parent, Phillip Morris International ("PMI")**. **RBH had benefited from a credit facility with PMI but as indicated, that was cancelled the day following the judgment in first instance**. Historically, RBH's short term credit comes from the PMI cash pool, so given the cancellation, it appears to have little short term availability of cash. In June, RBH's representative confirmed its inability to pay its share of the provisional execution ($200 million) within sixty days, but projected that it could pay the amount by March 2016. At the time of the judgment, its available cash was $70 million.
33	**Despite RBH's assertion that it does not pay out all of its earnings, its financial statements clearly show negative shareholder equity for 2013 and 2014**. Counsel's attempts to qualify its insolvency on a cash basis by stating that it only said it could not pay the provisional execution within 60 days does not change the conclusion that it was insolvent if it was obliged to pay. The B.I.A. measures insolvency by the ability to pay debts when due. **In answer to my questioning how Respondents would obtain satisfaction upon receipt of a favourable judgment on the merits, counsel stated**

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

	that they would have to wait to be paid out of cash flow. By way of illustration, if RBH owed $1 billion (including interest and additional indemnity) upon judgment of the Court on the merits, it would require more than two years, at least, to satisfy that judgment. This is not payment when due.
34	RBH confirms that its real estate and equipment being appropriate for tobacco production only are not readily marketable. Counsel informed me that the sale of tobacco products requires special government permits so that inventory could be difficult if not impossible to seize and sell in execution of a judgment. Also, the trademarks are not owned by RBH. **Thus, it appears that the only real "assets" on the balance sheet against which a creditor might execute judgment are the accounts receivable which is the cash flow and which is substantially and regularly paid out in dividends to PMI**.
35	Irrespective of whether RBH is technically insolvent, it is certainly unable to satisfy the judgment of the Superior Court even if the quantum was reduced. **That fact and the on-going practice of distributing earnings leads the undersigned to conclude that Respondents are in jeopardy of not being able to execute any substantial award that this Court may uphold**.
36	ITL earned $535 million from operations in 2014 and **paid $334 million in dividends to its out of jurisdiction parent, British American Tobacco Corp. ("BAT")**.
37	**Not only has ITL never set aside funds for a condemnation in this matter, it has still not done so even after the judgment of first instance herein because it does not consider the outcome unfavourable according to its representative during the deposition**. I understand that he meant that the outcome would not be unfavourable until all appeals have been exhausted.
38	Similar statements could be made concerning ITL's tangible assets as those of RBH. **The trademarks are also encumbered.**
39	**ITL is indebted to BAT under various financing agreements**. The credit facilities are fully drawn upon. BAT was not willing to fund the provisional execution award and **I am given to understand that BAT makes no commitment to fund a final judgment.**
41	I am also of the opinion that Respondents are in jeopardy of not being able to satisfy any substantial judgment against ITL.
42	The depositions conducted by Respondents' attorneys of the affiants upon the motions to cancel the provisional execution make it clear that **the Appellants intend to continue payments (dividends and otherwise) to their out-of-jurisdiction related entities while the appeal is pending**. **That practice caused them to protest their inability to satisfy the order of provisional execution**. **It is reasonable to deduce that should their appeals fail completely or merely reduce the condemnation marginally, leaving a substantial condemnation, the Appellants will be unable to pay just as**

	they were unable to pay the provisional execution in a timely fashion. **This state of affairs is not due to any cause extraneous to the will of Appellants such as an unsuccessful business**. Rather, their businesses are profitable. **The situation is the result of the ongoing business practice continued consistently during the litigation of paying out surplus earnings**. This was not illegal. However, there is now and has been since May 27, 2015, a judgment, which includes a condemnation with interest and additional indemnity aggregating approximately $15.5 billion at today's value. Interest and additional indemnity run at approximately $1 million per day. **This changes the equation radically. Even if the grounds of appeal are not frivolous, in the circumstances Appellants cannot be allowed to continue on a course of conduct where they will not be able to satisfy the judgment**.
43	A judgment pending appeal benefits from a presumption of validity. Findings of fact of the trial judge are compelling as only a palpable error of fact justifies a reversal by an appellate court. It is not an answer for the Appellants to state that they are not behaving differently now than they were prior to the judgment of the Superior Court. That judgment, in the circumstances, and despite the appeal requires that they do behave differently given the circumstances presented to me. **It is in my opinion far too cynical to adopt the position that we were so foresightful and efficient in ordering our affairs so as not to have the liquidity to satisfy the judgment, that there is no special reason existing to re-balance the situation**. **Counsel for Respondents characterized the situation as "heads I win, tails you lose". Sometimes, the vernacular is pointedly apt.**
44	**Both Appellants [**Imperial and Rothmans**] have structured their affairs in a manner that drastically, if not completely, reduces their exposure to satisfy any substantial condemnation that might be made against them in this litigation**. Of course, the companies are not empty shells because it is in their obvious interest and that of their parent companies that they continue to operate so as to continue to generate profits. **The structure and modus operandi was put in place years ago because no doubt Appellants could observe the seriousness of the case and resolve of the Respondents to conclude that a substantial award was possible, even perhaps likely**. In these circumstances, now that there is a judgment condemning them to pay $8 billion ($15.5 billion at today's value) and **nothing to suggest that the practice (of distributing virtually all earnings) will not continue** and notwithstanding that the transfer and encumbrance of trademarks may have occurred long ago, I am faced with a situation where on balance I conclude that the Respondents are in jeopardy of not obtaining satisfaction of any substantial amount confirmed in appeal. I am mindful that Appellants stated clearly that they could not pay the provisional execution award as ordered. Positive action is necessary to convince me that the reaction to a final judgment would not be the same. These circumstances taken together are a "special reason". I will order that security be furnished.
52	I see the current situation as somewhat different. **The Appellants chose not to reserve funds to satisfy an eventual condemnation** as was their right. However, now that there is a judgment, which I have stated, benefits from a presumption of validity, the situation

	is changed. 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**. **Continuing the practice of distributing earnings out-of-jurisdiction at this point is at best disingenuous and at worst, bad faith**.
56	I have financial statements for 2014 of ITL and RBH, which were filed in the record of this Court with the affidavits in support of the motions to cancel provisional execution. For 2014, RBH's net pre-tax earnings were $495 million. ITL shows a loss due to the pay out of the settlement of the Flinkote litigation. For consistency, I will use the averages determined by the judge for the period 2008 to 2013 as quoted above.

D. Refusal to Rectify Judgment[5]

Para	Finding
8	Petitioner's [ITL] 2014 financial statements were filed in the record of this Court in support of the motions to cancel provisional execution. These statements demonstrate that Petitioner showed a loss (contrary to 2008 - 2013) due to repayments of a loan contracted to fund the settlement of the "Flintkote litigation". Since it was an exception to an otherwise consistently profitable enterprise, the 2014 financial year was not considered by me in the determination of average pre-tax earnings. Moreover, I had no financial statements for any portion of 2015.
12	Petitioner states that the final instalment of $100,000,000 of reimbursement of the Flintkote loan is payable on December 23, 2015, as indicated in its 2014 financial statement. Consequently, Petitioner submits that it should only be required to pay $8,285,000 on account of the security in December 2015. **Petitioner's motion is artfully drafted to suggest that sufficient funds are not available to pay both the Flintkote loan instalment and the security**. **However, there is no assertion of inability to pay per se**. No current financial statements or an affidavit of a financial officer are produced. **Moreover, there is no mention of the position of Petitioner's parent and related companies on the subject of helping to fund the security**. Petitioner relies on the factual record as constituted upon presentation of its motion to cancel provisional execution.

[5] *Imperial Tobacco Canada Ltd.* c. *Conseil québécois sur le tabac et la santé*, 2015 QCCA 2056.

Para	Finding
21	If the conclusions of my judgment ordering security failed to take into account and give effect to an element which was on record and which operated to produce a conclusion other than that contained in the judgment, that would be an error, which could only be corrected on appeal. Thus, if the conclusion to order payment of one of the instalments of security, at the end of December, of $108,285,000 instead of $8,285,000 is an error, not of arithmetic but rather of omission to consider a relevant factual element (i.e. the scheduled Flintkote loan payment) then I am without power to correct it because of the doctrine of functus officio. If the element was considered but not given effect in the conclusions of the judgment, such situation would not lend itself to rectification. **For this reason, Respondents correctly characterized the motion before me as a disguised appeal**.
23	Most significantly, there is no inadvertence or slip in the judgment regarding the Flintkote loan. The payments were raised in argument by Petitioner to illustrate that it had stopped paying dividends at the end of 2014. Previously, it had paid out earnings for all the years in evidence. It was, as a consequence of these submissions, brought to light that the lender to whom payments were made was Petitioner's parent company, British American Tobacco (or a closely related corporation). In point of fact, **as disclosed by the 2014 financial statements and as confirmed by Petitioner's representative in his deposition**, **Petitioner paid in excess of $300 million in dividends during 2014 to its parent but at year end owed $400 million to a related company for borrowings to finance the settlement of the Flintkote litigation**. **Respondents' position to the effect that virtually all available cash was being funnelled to related corporations situated out of jurisdiction was reinforced rather than rebutted**. Petitioner submits that its obligation to pay $100 million to a related entity on December 23, 2015 should not be treated differently than would be the case if the loan was due to an institutional lender dealing with Petitioner at arm's length. **In all of the circumstances of this matter, it is impossible to conveniently ignore the benefit of earnings received over the years and the position asserted by Petitioner's parent that it would not commit to fund a final judgment**.
24	In ordering that security be furnished, **I found it unacceptable that Petitioner would continue to distribute its earnings to related entities located out of this jurisdiction notwithstanding the judgment in first instance,** which albeit subject to an appeal, benefits from a presumption of validity as I stated in the judgment with the supporting authority. For this reason, as well as the various demands known and for that matter, unknown, on Petitioner's cash flow going forward, I stated that: > [52] (…) 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? (…) Continuing the practice of distributing earnings out-of-jurisdiction at this point is at best disingenuous and at worst, bad faith.

Para	Finding
26	As can be seen, it was foreseeable that available cash generated from operations might be, in the "short or medium term", inadequate to meet one or more of the instalment payments of security. Indeed, the affidavit of Petitioner's officer filed in support of the motion to cancel provisional execution claims that the amounts outstanding under Petitioner's line of credit fluctuated between $72 million and $317 million during the period of January to June 2015. It is also conceivable but unknown to the undersigned now, as it was when the judgment was rendered, that 2015 may have been a stellar year for Petitioner and there is ample cash to pay both the security and the Flintkote loan in December 2015. The contrary is not asserted in Petitioner's motion. **In any event, there was no inadvertent omission by the undersigned to take into account the payment of the Flintkote loan to Petitioner's parent or related entity. Petitioner is wrong on that account.**

E. Judgment on the Applicants Refusal to Recognize Authenticity of Evidence[6]

Para	Finding
34	[UNOFFICIAL TRANSLATION] […] **ITL does not have the right to embark on a war of attrition in order to make it as difficult as possible to produce the thousands of documents that the plaintiffs wish to put into evidence**.

F. Judgment on the Examination of Class Action Members[7]

Para	Finding
75	[UNOFFICIAL TRANSLATION] […] The right to make full answer and defense certainly does not mean that a party may, without limit, resort to all the evidence, even the smallest, which it considers necessary, useful, convenient or simply prudent to produce in order to ensure respect for his rights. **The right to defend oneself fully does not mean that one can ignore the practical realities of the judicial system and the smooth running of a trial that cannot continue indefinitely.**
79	[UNOFFICIAL TRANSLATION] […] **not to mention the parties' visits to the Court, visits that regularly - and often quite unnecessarily - punctuated the proceedings.**

[6] *Conseil québécois sur le tabac et la santé* c. *JTI-MacDonald Corp.*, 2012 QCCS 1870.
[7] *Imperial Tobacco Canada Ltd. c. Létourneau*, 2014 QCCA 944.

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**

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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