

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

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

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

Applicants

**QCAPs' RESPONDING MOTION RECORD
(Returnable on October 2, 2019)**

September 25, 2019

Fishman Flanz Meland Paquin LLP
1250 René-Levesque Blvd. West, Suite 4100
Montreal, Quebec H3B 4W8
Tel: 514-932-4100 Fax: 514-932-4170

Avram Fishman
Email: afishman@ffmp.ca

Mark E. Meland
Email: mmeland@ffmp.ca

Chaitons LLP
5000 Yonge St., 10th floor
Toronto, Ontario M2N 7E9
Tel: 416-218-1129 Fax: 416-218-1149

Harvey Chaiton
Email: harvey@chaitons.com

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

TO: JTIM Service List

AND TO: ITCAN Service List

AND TO: RBH Service List

INDEX

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

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

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

Applicants

INDEX

Tab	Document
1	Notice of Motion returnable October 2, 2019
2	Affidavit of Dr. Alain Desjardins sworn June 20, 2019

TAB 1

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.**

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

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

NOTICE OF MOTION FOR STAY EXTENSION HEARING
(Quebec Class Action Plaintiffs)
(Returnable October 2, 2019)

The Quebec Class Action Plaintiffs (the “**QCAPs**”) will present a motion to Justice McEwen presiding over the Commercial List on October 2, 2019 at 10:00 a.m., or as soon thereafter as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

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

THE MOTION IS FOR:

1. An Order providing the following relief:
 - (a) if necessary, abridging the time for service of this Notice of Motion and dispensing with service on any person other than those served;
 - (b) to the extent the Court grants an extension of the Stay Period, limiting the extension to January 15, 2020; and
 - (c) prohibiting Imperial Tobacco Canada Limited from making the payments to British American Tobacco Mexico, S.A. de C.V., referenced in paragraph 17 of the September 23, 2019 Thauvette Affidavit¹, during the Stay Period.
2. Such further and other relief as this Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

3. The Initial Orders rendered in each of the present Court files granted a stay of proceedings until the Comeback Hearing on April 4-5, 2019. Following the Comeback Hearing, the Court extended the Stay Period until June 28, 2019 (the “**First Stay Extension**”).
4. Prior to the expiry of the First Stay Extension, each of the Applicants filed materials requesting a second extension of the Stay Period for a period of five and a half months until December 16, 2019, without any conditions being imposed upon them, without presenting even a

¹ Tab 2 of the Motion Record of the ITCAN Applicants seeking the Third Stay Extension.

“kernel” of a Plan, and without committing to do anything more than “*work towards developing a plan*” within the nine months following the Initial Orders.

5. The QCAPs opposed such a lengthy extension period, and filed a Notice of Motion and Factum on June 21, 2019 (the “**QCAPS’ Second Stay Extension Materials**”), wherein they proposed that any extension of the Stay Period be limited to September 27, 2019, considering that no progress had been made up to that time, and the significant and irreparable harm being suffered by the Quebec Class Members as a result of the Applicants’ delays in satisfying the approximately \$14 billion Judgment Debt owed to them.

6. Following the circulation of the QCAPs’ Second Stay Extension Materials, the Applicants reduced the length of their requested stay extension from December 16, 2019 to October 4, 2019, and consequently, the QCAPs decided to give the process a chance and did not contest the revised Second Stay Extension period.

7. Nevertheless, the QCAPs’ clearly stated at that time that they expected to receive the financial parameters of a Plan before the expiration of the current Stay Period, namely, before October 4, 2019.

8. However, since June 2019, no Plan, nor even the bare economics of a potential settlement, were proposed by any of the Applicants and they are now each requesting a further extension of the Stay Period (the “**Third Stay Extension**”), for an additional period of more than five (5) months, until March 6, 2020².

² The CCAA proceedings first commenced on March 8, 2019 such that the Applicants are seeking an extension of the Stay Period to the approximate one-year anniversary of these proceedings.

9. The QCAPs oppose the length of the Applicants' Third Stay Extension request, and submit that, if granted by the Court, the Third Stay Extension should be limited to January 15, 2019, representing more than three additional months and being a length of time more consistent with prior extensions granted by the Court.

10. In their materials in support of their request for the Third Stay Extension, the Applicants have not made any commitments whatsoever regarding the presentation of any Plan or offer during the next extension period or, for that matter, ever. Rather, they merely indicate that they will continue to "*participate*" in the mediation process during that time. For example, in their respective motion records, JTIM states that during the requested stay extension period, the Applicant will continue "*to engage in discussions to seek a collective resolution*", the ITCAN Applicants state that they intend to "*work diligently (in consultation with the Monitor) to explore a negotiated resolution with the Tobacco Litigation stakeholders*", and RBH states that its "*goal*" is to negotiate a global settlement and that it is "*unlikely*" that it will "*develop and implement a CCAA plan*" by March 6, 2020.

11. The Applicants' burden to justify the requested stay extensions becomes far more onerous with each successive request, and the Applicants have failed to meet this burden and, particularly, have failed to justify why the Court should provide them with an additional five months of blanket protection. Consequently, the requested five-month stay extension does not advance the purpose of the CCAA and, in fact, is counter-productive.

12. To this end, unless a serious and viable offer is made by each of the Applicants, which must include a significant financial contribution on the part of each of their parent companies, by

December 20, 2019, it is the QCAPs' intention, on or prior to January 15, 2020, to contest any further extension of the Stay Period.

13. As described more fully in the Desjardins Affidavit³, further delay has significant and deadly repercussions for the Quebec Class Members:

29. Based on my discussions with several patients during their routine appointments and without any questions on my part, they have spontaneously told me that they are anxious and frustrated that they have not received any monetary compensation after 21 years of proceedings and despite two consecutive victories before the Quebec Superior Court and the Quebec Court of Appeal. They are afraid that they will die before they receive the compensation awarded to them in those judgments.

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

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

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

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

14. In contrast to the devastating effects that further delay causes to the Quebec Class Members, ITCAN now intends to pay BAT Mexico, during the period of the requested Third Stay Extension, approximately £33.2 million (CAD \$54.8 million) to “indemnify BAT Mexico for certain costs resulting from the transition to plain packaging” and to “compensate BAT Mexico

³ Affidavit of Dr. Alain Desjardins sworn on June 20, 2019.

*for the costs of implementing changes requested by ITCAN under the BAT MX Agreement”*⁴. These payments, related to pre-filing obligations outside of the normal course of business and unrelated to the generation of further revenues, should be prohibited during the Stay Period in order to maintain fair and equitable treatment of stakeholders during this period of uncertainty as to whether the Applicants will propose a Plan and, if so, whether it would be sufficiently serious for it to have any prospect of being approved.

15. The huge restructuring costs incurred and to be incurred by the Applicants in these files also militate in favour of a shorter extension period, which would provide the Court with greater oversight over an expensive process that may ultimately reduce potential recoveries by creditors.

16. The QCAPs also rely upon:

- (a) The provisions of the CCAA, including section 11.02, and the inherent and equitable jurisdiction of this Honourable Court, as well as section 19(2)(b).
- (b) Rules 1.04, 1.05, 2.03, 3.02, 16 and 37 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, and section 106 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended; and
- (c) Such further and other grounds as counsel may advise and this Court may permit.

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

⁴ Tab 2 of the Motion Record of the ITCAN Applicants, para 17.

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

September 25, 2019

Fishman Flanz Meland Paquin LLP
1250 René-Levesque Blvd. West
Suite 4100
Montreal, Quebec H3B 4W8

Avram Fishman
Email: afishman@ffmp.ca

Mark E. Meland
Email: mmeland@ffmp.ca

Tel: 514-932-4100
Fax: 514-932-4170

CHAITONS LLP
5000 Yonge St., 10th floor
Toronto, Ontario M2N 7E9

Harvey Chaiton
Tel: 416-218-1129
Fax: 416-218-1149
Email: harvey@chaitons.com

**Lawyers for the Quebec Class Action
Plaintiffs**

TO: THE SERVICE LIST

TAB 2

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

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

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

AFFIDAVIT OF DR. ALAIN DESJARDINS

(sworn June 20, 2019)

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

MAKE OATH AND SAY:

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

Qualifications

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

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

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

Emphysema

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

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

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

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

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

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

Lung cancer

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

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

Conclusions

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

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

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

AND I HAVE SIGNED



Alain Desjardins

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



Commissioner of Oaths for Quebec



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

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

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

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

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

Proceeding commenced at Toronto

**RESPONDING MOTION RECORD
(Re: Stay Extension Motion)
(Returnable October 2, 2019)**

FISHMAN FLANZ MELAND PAQUIN LLP

Barristers and Solicitors
4100-1250 René-Lévesque Blvd. West
Montreal QC H3A 3H3
Tel: 514-932-4100

Avram Fishman
afishman@ffmp.ca
Tel: (514) 932-4100

Mark E. Meland
mmeland@ffmp.ca
Tel : (514) 932-4100

CHAITONS LLP

5000 Yonge Street, 10th Floor
Toronto, ON M2N 7E9

Harvey Chaiton
harvey@chaitons.com
Tel: (416) 218-1129

Attorneys for Conseil Québécois sur le tabac et la santé, Jean-Yves Blais and Cécilia Létourneau
(Quebec Class Action Plaintiffs)