

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

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

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

Applicants

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

June 21, 2019

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Cécilia Létourneau

TO: JTIM Service List

AND TO: ITCAN Service List

AND TO: RBH Service List

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

TAB 1

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

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

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

THE MOTION IS FOR:

1. An Order providing the following relief:

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

THE GROUNDS FOR THE MOTION ARE:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

June 21, 2019

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**Lawyers for the Quebec Class Action
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TO: THE ATTACHED SERVICE LIST

TAB 2

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AFFIDAVIT OF DR. ALAIN DESJARDINS

(sworn June 20, 2019)

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

MAKE OATH AND SAY:

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

Qualifications

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

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

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

Emphysema

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

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

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

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

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

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

Lung cancer

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

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

Conclusions

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

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

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

AND I HAVE SIGNED



Alain Desjardins

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



Commissioner of Oaths for Quebec



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(COMMERCIAL LIST)**

Proceeding commenced at Toronto

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

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