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

BOOK OF AUTHORITIES

(PCC Representative Counsel's Motion for Injunctive Relief)
(Returnable March 26, 2025)

March 21, 2025

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THE COMMON SERVICE LIST

LIST OF AUTHORITIES

CASES

1. *Imperial Tobacco Canada Limited*, 2025 ONSC 1358

2. *Imperial Tobacco Limited*, 2024 ONSC 6890

3. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; 1994 CarswellQue 120 (SCC)

CITATION: Imperial Tobacco Canada Limited, 2025 ONSC 1358
COURT FILE NO.: CV-19-615862-00CL; CV-19-616077-00CL; CV-19-616779-00CL
DATE: 2025-03-06

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **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**

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.

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Natasha MacParland, Chanakya Sethi and Anisha Visvanatha*, for FTI Consulting Canada Inc., in its capacity as court-appointed Monitor of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

R. Shayne Kukulowicz and Monique Sassi, for Ernst & Young Inc., in its capacity as court-appointed Monitor of Rothmans, Benson & Hedges Inc.

Pamela Huff, Linc Rogers, Jake Harris and Katrina Banham, for Deloitte Restructuring Inc., in its capacity as Monitor of JTI-Macdonald Corp.

Deborah Glendinning, Marc Wasserman, Martino Calvaruso, Craig Lockwood and Marleigh Dick, for Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

Michael Feder, K.C., Paul Steep, Heather Meredith, Deborah Templer, Trevor Courtis, Jamey Gage, and Meena Alnajar, for Rothmans, Benson & Hedges Inc.

Robert Thornton, Leanne Williams, Scott McGrath, Mitch Grossell, Rushi Chakrabarti and Rebekah O'Hare, for JTI-Macdonald Corp.

Maria Konyukhova and David Byers, for British American Tobacco p.l.c., B.A.T. Industries, p.l.c. and British American Tobacco (Investments) Limited

Vern DaRe and Robert Cunningham, for the Canadian Cancer Society

Edward Park, for Canada Revenue Agency

Avram Fishman, Mark E. Meland, Tina Silverstein, André Lespérance, Philippe Trudel, Bruce Johnson, Gordon Kugler, and Harvey Chaiton, for Conseil québécois sur le tabac et la santé, Jean-Yves Blais and Cécilia Létourneau (Quebec Class Action Plaintiffs)

Jacqueline Wall, for the Province of Ontario

Linda Plumpton, Jeremy Opolsky, Scott Bomhof, Adam Slavens, and Alec Angle, for JT Canada LLC Inc., and PricewaterhouseCoopers Inc., in its capacity as Receiver of JTI-Macdonald TM Corp.

Clifton Prophet and Nicholas Kluge, for Philip Morris International Inc.

David Ullmann, for La Nordique Compagnie D'Assurance du Canada

Raymond Wagner, K.C., Kate Boyle, and Maddy Carter, Representative Counsel for the Pan-Canadian Claimants

Stacy Petriuk and Laura Comfort, for the Province of Alberta

Jesse Mighton, Jeffrey Leon, Mike Eizenga, Preet Gill, Shawn Kirkman, André I.G. Michael, Peter Lawless, K.C., Edward A. Gores, K.C., Michael Peerless and Jordan Wong, for the Province of British Columbia, Province of Manitoba, Province of New Brunswick, Province of Nova Scotia, Province of Prince Edward Island, Province of Saskatchewan, Government of Northwest Territories, Government of Nunavut and Government of Yukon in their capacities as Plaintiffs in the HCCR Legislation Claims

Glenda Best, K.C. and Ken McClain, for the Province of Newfoundland and Labrador

Brett Harrison and Guneev Bhinder, for the Province of Quebec

Patrick Flaherty, Bryan McLeese, Claire Wortsman, Justin Safayeni and Patrick Carl, for R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International Inc.

Ari Kaplan, Representative Counsel for Former Genstar U.S. Retiree Group Committee

Steven Weisz and Dilina Lallani, for Grand River Enterprises Six Nations Ltd.

James Bunting and Sam Cotton, for Heart and Stroke Foundation

Douglas Lennox and David Klein, for Representative Plaintiff, Kenneth Knight, in the Certified British Columbia Class Action

William Sasso and David Robins, for The Ontario Flue-Cured Tobacco Growers' Marketing Board

Matthew Gottlieb and Andrew Winton, for The Honourable Warren K. Winkler, K.C., Court-Appointed Mediator

HEARD: January 29, 30 and 31, 2025

ADDITIONAL SUBMISSIONS: March 3, 2025

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ENDORSEMENT

A. INTRODUCTION

[1] On March 8, 2019, JTI-Macdonald Corp. ("JTIM") obtained an Initial Order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). Deloitte Restructuring Inc. ("Deloitte") was appointed as the Monitor of JTIM.

[2] On March 12, 2019, Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited (collectively "Imperial") obtained an Initial Order pursuant to the CCAA. FTI Consulting Canada Inc. ("FTI") was appointed the Monitor of Imperial.

[3] On March 22, 2019, Rothmans, Benson & Hedge Inc. ("RBH") obtained an Initial Order pursuant to the CCAA. Ernst & Young Inc. ("E&Y") was appointed as the Monitor of RBH.

[4] A number of elements of these three CCAA filings overlap and the proceedings of JTIM, Imperial and RBH (the "Tobacco Companies") are collectively referred to as the CCAA Proceedings.

[5] On April 5, 2019, the Honourable Warren K. Winkler, K.C., was court appointed as mediator (the "Mediator") of the Tobacco Companies in the CCAA proceedings to oversee and coordinate a multi-party, comprehensive mediation (the "Mediation") among the Tobacco Companies and their key stakeholders and mediate a global settlement of the Tobacco Claims (as defined in the Imperial Plan, the RBH Plan and the JTIM Plan, collectively the "CCAA Plans").

[6] After a period of four and a half years, the Tobacco Companies had failed, both individually and collectively, to produce a plan of arrangement or compromise.

[7] On October 5, 2023, the court directed the Monitors to work with the Mediator to develop a plan of compromise or arrangement for each Tobacco Company.

[8] On October 31, 2024, Meeting Orders were granted in each of the Tobacco Companies' CCAA proceedings pursuant to which a plan of compromise or arrangement in respect of each of the Tobacco Companies dated October 17, 2024 (the "October 17 CCAA Plans") was accepted for filing and creditors meetings for Affected Creditors were scheduled for December 12, 2024 (the "Meetings"). (Defined terms used but undefined in this endorsement are as set out in the Third Amended and Restated CCAA Plan of Compromise and Arrangement in respect of each Tobacco Company dated February 27, 2025 (the "Third A&R CCAA Plans").)

[9] On December 5, 2024, the Monitors served CCAA Plans that amended and restated the October 17 CCAA Plans. The amendments were administrative in nature.

[10] The Meetings of Affected Creditors to vote on the CCAA Plans took place on December 12, 2024. The CCAA Plans were unanimously approved by Affected Creditors voting in person or by proxy at each of the three Meetings and the double majority required by the CCAA was achieved for each CCAA Plan as follows:

(a) at the Imperial Meeting, the Imperial CCAA Plan was unanimously approved by 289,906 votes, representing $963,822,023,265 in total value of Voting Claims;

(b) at the RBH Meeting, the RBH CCAA Plan was unanimously approved by 289,904 votes, representing $963,296,023,265 in total value of Voting Claims; and

(c) at the JTIM Meeting, the JTIM CCAA Plan was unanimously approved by 289,904 votes, representing $963,296,023,265 in total value of Voting Claims.

[11] The Monitors now bring motions in each of the CCAA proceedings:

(d) for Sanction Orders approving and sanctioning the operative CCAA Plans, namely the Third A&R CCAA Plans dated February 27, 2025;

(e) authorizing and directing CCAA Plan Administrators, the Mediator and the Tobacco Companies to implement the CCAA Plans;

(f) approving the CCAA Plan Administration Reserve and the PCC Compensation Plan Reserve;

(g) an order releasing the Released Claims in respect of each Applicant, the Applicant Tobacco Company Group, the Monitors, the CCAA Plan Administrators, the Mediator and the other Released Parties, in accordance with the terms of the CCAA Plans;

(h) extending the Stay Period to the Effective Time;

(i) an order appointing Deloitte, FTI and E&Y as CCAA Plan Administrators; and

(j) ancillary relief.

[12] On March 3, 2025, the Monitors' motions for CCAA Plan Amendment Orders were granted, which reflected an agreement reached by the Tobacco Companies to allocate a $750 million working capital holdback to RBH. In exchange, RBH, JTIM and JTIM-TM agreed to withdraw their opposition to this motion. The court's endorsement, reported at 2025 ONSC 1375 dated March 3, 2025 is attached as Schedule "A".

[13] For the following reasons, the motions are granted, which, among other things, sanctions the CCAA Plans, as amended.

B. OVERVIEW OF CCAA PLANS

[14] The sanctioning of the CCAA Plans is a momentous achievement in Canadian restructuring history.

[15] In order to appreciate the magnitude of this achievement, it is necessary to provide a detailed summary of the CCAA Plans. If there are any inconsistencies between this summary and the specific provisions of the CCAA Plans, the provisions of the CCAA Plans prevail.

[16] The CCAA Plans of Imperial, RBH and JTIM will effect a global settlement of all Tobacco Claims against such Tobacco Companies.

[17] The enormity of this settlement is best understood by considering the sheer number of parties involved and the complexity of the Tobacco Claims within the scope of the global settlement, including:

(a) The forty-two Applicant companies involved including: the Applicants – Imperial, RBH and JTIM; the Tobacco Companies' three international Parents based in the United Kingdom, United States and Japan respectively; and thirty-five Affiliates of the Tobacco Companies;

(b) In actions pursued in every Province, and in claims advanced by two Territories, in which all Provincial Crowns and Territorial governments were involved in seeking recovery of costs incurred in connection with the provision of past and future health care benefits to treat and care for Canadians suffering from Tobacco-related Diseases;

(c) Quebec Class Counsel obtained a $13.7 billion judgment in two Quebec class actions on behalf of smokers who suffered tobacco-related harms, as well as Quebec residents addicted to nicotine in the cigarettes made by the Tobacco Companies;

(d) The tort claims and potential tort claims of all individual smokers in Canada who have suffered tobacco-related harms, except those Quebec residents covered by the Quebec Class Actions judgment, will be settled through the Pan-Canadian Claimants' Compensation Plan ("PCC Compensation Plan") and the Cy-près Fund (described in more detail below). Pan-Canadian Claimants who are not eligible for direct compensation payments under the PCC Compensation Plan will receive indirect benefits from the research, programs and initiatives focused on improving outcomes in Tobacco-related Diseases that will be funded from the Cy-près Fund;

(e) In three uncertified class actions, the Ontario Flue-Cured Tobacco Growers' Marketing Board and certain individual tobacco growers pursued breach of contract claims on behalf of tobacco growers; and

(f) The *Knight* Class Action pursued a certified class action against Imperial alleging misleading marketing of light and mild cigarettes sold in British Columbia.

[18] To obtain the global settlement, the Tobacco Companies will pay all but $750 million of their aggregate cash on hand upfront, and the majority of their future Net After-Tax Income until the Global Settlement Amount of $32.5 billion is paid in full. In return, the Tobacco Companies will receive a release of all Tobacco Claims.

[19] Since the Global Settlement Amount will be paid with a combination of upfront cash and annual payments during the Contribution Period, the CCAA Plans contain terms which are designed to manage the ongoing relationship among the Tobacco Companies and the Claimants to ensure the CCAA Plans are administered properly. The CCAA Plans accomplish this objective by enabling the Provinces, Territories, and any other Claimants who will not be paid their full share of the Global Settlement Amount out of the upfront cash ("Impacted Claimants"), to be provided with insight into the business and operations of the Tobacco Companies through detailed financial disclosure that will be provided over the twenty-or-so-year Contribution Period.

[20] Given the circumstances described above, (i) oversight of the Tobacco Companies by the CCAA Court is required during the administration of the CCAA Plans, (ii) financial and other information from the Tobacco Companies must be provided and explained to the Claimants to whom monies are still owed, and (iii) there must be a reporting function to the CCAA Court regarding the status of the implementation and administration of the CCAA Plans. The CCAA Plans create a role for the Monitors to act as neutral, independent intermediaries – the CCAA Plan Administrators – to perform or facilitate the performance of these functions.

[21] Because the Tobacco Companies will be required to interface with the Provinces and Territories during the administration of the CCAA Plans, it is essential that the Tobacco Companies be able to do so without having to speak separately to individual representatives from each Province and Territory. The CCAA Plans provide the Tobacco Companies with comfort that, during the Contribution Period (which is anticipated to be lengthy), they will not have to deal separately with thirteen individual Provincial and Territorial governments and, instead, will have one representative entity to whom they will direct their attention. In order to communicate with one voice with the Tobacco Companies, the Provinces and Territories shall establish the Provincial and Territorial Liaison Committee ("PTLC") to coordinate and facilitate their communications with the Tobacco Companies, the CCAA Plan Administrators and others regarding the CCAA Plans during the Contribution Period. The Tobacco Companies through the CCAA Plan Administrators will communicate with the Provinces and Territories jointly as a group through the Chair of the PTLC.

[22] The CCAA Plans settle the claims of the Provinces and Territories to recover the expenditures to provide past and future health care benefits to treat and care for Canadians suffering from Tobacco-related Diseases through the payment to the Provinces and Territories of upfront cash, plus annual payments from the Tobacco Companies' future Net After-Tax Income during the Contribution Period.

[23] The CCAA Plans also settle the claims of Canadians to recover damages for certain tobacco-related harms caused by their use of or exposure (whether direct or indirect) to Tobacco

Products or their emissions. There are three components to the settlement of the claims by Individuals in all Canadian jurisdictions:

(a) Payment of $4.119 billion to satisfy the judgment granted by the Quebec Superior Court, and upheld by the Quebec Court of Appeal, awarding damages to Quebec residents diagnosed with Lung Cancer, Throat Cancer or Emphysema/COPD (GOLD Grade III or IV) who meet the other eligibility criteria of the certified class definition. Eligible Quebec residents will receive direct payments of compensation;

(b) Payment of $2.521 billion to fund the PCC Compensation Plan which will provide direct payments of compensation to residents of all of the Provinces and Territories who were diagnosed with Lung Cancer, Throat Cancer or Emphysema/COPD (GOLD Grade III or IV) and meet the other eligibility criteria to qualify for compensation under the PCC Compensation Plan; and

(c) Payment of $1.0 billion to create the Cy-près Fund that will be administered by a public charitable foundation ("Cy-près Foundation") and provide indirect benefits to Individuals residing in all Provinces and Territories who are suffering from tobacco-related harms and do not fulfill the criteria to qualify to receive compensation under the Quebec Administration Plan or the PCC Compensation Plan. The establishment of the Cy-près Foundation is a creative use of a cy-près remedy outside of the context of a class action that is used to fill in the gap where direct compensation is not available to Individuals by providing a remedy in the form of indirect benefits that will flow to:

    (i) Smokers suffering from Lung Cancer, Throat Cancer or Emphysema/COPD (GOLD Grade III or IV) who are outside the claims period or who smoked less than the requisite tobacco dose to qualify for direct compensation under the PCC Compensation Plan;

    (ii) Smokers who have tobacco-related harms other than Lung Cancer, Throat Cancer or Emphysema/COPD (GOLD Grade III or IV); and

    (iii) Persons who smoke or have smoked Tobacco Products who have not yet or may never develop a tobacco-related harm.

[24] The Quebec Administration Plan and the PCC Compensation Plan are innovative in their use of an agent for class counsel to provide assistance to Individual claimants to complete and submit claims forms.

C. BACKGROUND LEADING TO DEVELOPMENT OF CCAA PLANS

[25] JTIM, Imperial and RBH were granted protection from their creditors under the CCAA on March 8, 12 and 22, 2019 respectively. The Tobacco Companies collectively sought to use their CCAA Proceedings to achieve a global settlement of all claims and potential claims against them and their respective parent and affiliated companies in Canada in respect of the development, design, manufacture, production, marketing, advertising, distribution, purchase, sale or disposition of Tobacco Products, the use of or exposure (whether direct or indirect) to Tobacco Products or their emissions, the development of any disease related to the use of Tobacco Products, or any representation or omission in respect of Tobacco Products (together with certain other Claims related to Tobacco Products, collectively, the "Tobacco Claims").

[26] The Tobacco Claims include the Claims of the following Claimants:

(a) **Provinces and Territories** – All Provinces commenced actions against the Tobacco Companies and members of their Tobacco Company Groups pursuant to health care costs recovery ("HCCR") legislation which provide each Provincial Crown with a direct and distinct action against a manufacturer of Tobacco Products to recover the cost of health care benefits caused or contributed to by a tobacco-related wrong. The Northwest Territories and Nunavut proclaimed HCCR Legislation which is not yet in force. Yukon has not enacted HCCR Legislation. The CCAA Plans compromise the claims of Yukon and the other Territories in respect of the present value of the Territories' total expenditures for past and future health care benefits provided for Insured Persons resulting from Tobacco-related Diseases or the risk of Tobacco-related Diseases;

(b) **Quebec Class Action Plaintiffs** – In Quebec, the Quebec Class Action Plaintiffs obtained a $13.7 billion judgment against Imperial, RBH and JTIM in two class actions. The certified class definition in the *Létourneau* Class Action includes Quebec residents who, as of 1998, were addicted to nicotine from September 30, 1994 onward and continued to be daily smokers of the Tobacco Companies' cigarettes as of February 21, 2005 (or their earlier death). The certified class definition in the *Blais* Class Action includes Quebec residents who, prior to November 20, 1998, had smoked a minimum of 87,600 cigarettes and, prior to March 12, 2012, were diagnosed with Lung Cancer, Throat Cancer or Emphysema/COPD (GOLD Grade III or IV);

(c) **Pan-Canadian Claimants** – Represented by the Court-appointed PCC Representative Counsel, the Pan-Canadian Claimants are all Individuals, excluding the *Blais* Class Members and *Létourneau* Class Members, who have asserted or may be entitled to assert a PCC Claim against the Tobacco Companies. A PCC Claim is any Claim of any Pan-Canadian Claimant to recover damages in respect of the development, design, manufacture, production, marketing, advertising, distribution, purchase or sale of Tobacco

Products, including any representations or omissions in respect thereof, the historical or ongoing use of or exposure (whether directly or indirectly) to Tobacco Products or their emissions and the development of any disease or condition as a result thereof, in each case arising from any conduct, act or omission, existing or taking place at or prior to the Effective Time (whether or not continuing thereafter) including, all Claims that have been, could have been or could be advanced in seventeen actions listed in the CCAA Plans that were commenced in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia and Newfoundland and Labrador, by Individuals on their own account or under provincial class proceedings legislation. The settlement of the PCC Claims will be achieved through the payment of direct compensation through the PCC Compensation Plan to eligible PCCs, together with the provision of indirect benefits that will flow to PCCs who are not eligible to receive a direct compensation payment through the research, programs and initiatives focused on improving outcomes in Tobacco-related Diseases that will be funded by the Cy-près Foundation;

(d) ***Knight* Class Action Plaintiffs** – In British Columbia, the *Knight* Class Action Plaintiffs pursued a certified class action against only Imperial on behalf of persons who purchased Imperial's light or mild cigarettes in British Columbia for personal, family or household use between May 9, 1997 and July 31, 2007; and

(e) **Tobacco Producers** – The Ontario Flue-Cured Tobacco Growers' Marketing Board and certain individual tobacco growers pursued three uncertified class actions commenced against each of the Tobacco Companies who sold their tobacco through the Ontario Flue-Cured Tobacco Growers' Marketing Board pursuant to the annual Heads of Agreement made with Imperial, RBH and JTIM from January 1, 1986 to December 31, 1996.

[27] The Mediator and the Monitors intend to serve and file Fourth Amended and Restated CCAA Plans for Imperial, RBH and JTIM which make additional revisions of an administrative nature to (i) clarify the process for the establishment of the Cy-près Foundation and the final approval of the Cy-près Foundation after the Sanction Hearing, and (ii) address the non-solicitation of Pan-Canadian Claimants and Quebec Class Action Plaintiffs. None of these amendments are materially adverse to the financial or economic interests of the Affected Creditors or the Unaffected Creditors.

D. PURPOSE AND EFFECT OF CCAA PLANS

[28] If sanctioned, the CCAA Plans will:

(a) Fully and finally settle, irrevocably compromise and release all Tobacco Claims;

(b) Bring finality to and resolve all Pending Litigation in Canada against the Tobacco Companies, members of their Tobacco Company Groups and the Canadian Tobacco Manufacturers' Council;

(c) Effect the distribution of the Global Settlement Amount of $32.5 billion to the Claimants;

(d) Effect the restructuring of the businesses of Imperial and RBH by transferring their respective Alternative Products Business to a Newco; and

(e) Permit Imperial, RBH and JTIM to exit their CCAA Proceedings and continue to carry on business in Canada.

E. STRUCTURE OF THE CCAA PLANS TO SETTLE ALL TOBACCO CLAIMS IN CANADA

[29] The global settlement of all Tobacco Claims in Canada involves the concurrent resolution of the CCAA Proceedings of Imperial, RBH and JTIM in accordance with the terms of the CCAA Plans. The complexity of the structure of the CCAA Plans to settle the Tobacco Claims and the implementation and administration of the terms of the CCAA Plans over an estimated twenty-year Contribution Period necessitate continuing oversight of the Tobacco Companies throughout the Contribution Period. The CCAA Plans provide compensation to Affected Creditors based on future earnings of the Tobacco Companies over a Contribution Period that is currently estimated to span twenty years.

(i) Jurisdiction of CCAA Court

[30] In the CCAA Plan Administrator Appointment Orders, the CCAA Court will be requested to approve the appointment of the Monitors - FTI, EY and Deloitte - to serve as the CCAA Plan Administrators respectively for the CCAA Plans of Imperial, RBH and JTIM. Once appointed, as required and applicable, they may act in both their capacities as Monitors and CCAA Plan Administrators depending upon the duties that they are fulfilling.

[31] The CCAA Court shall have jurisdiction to address and resolve issues that may arise during the administration of the CCAA Plans including such matters as:

(a) Determining whether a Tobacco Company is no longer Financially Viable due to circumstances beyond the control of the Tobacco Company or its Tobacco Company Group;

(b) Jointly with the Quebec Superior Court, determining matters relating to the ongoing supervision of the Quebec Class Action Administration Plan;

(c) Determining matters relating to the ongoing supervision of the Pan-Canadian Claimants' Compensation Plan;

(d) Supervising the Cy-près Foundation, including approving the establishment of the Cy-près Foundation as a charitable public foundation; approving the appointment of ten directors, including the Chair, to the Foundation Board; and approving proposals from interested individuals and organizations seeking financing and support for research, programs and initiatives which fall within the scope of the mission of the Cy-près Foundation;

(e) Receiving reports from the CCAA Plan Administrators, the Claims Administrator for the PCC Compensation Plan and the Quebec Administration Plan, and the Chair of the Cy-près Foundation;

(f) Determining whether the acceleration clause may be invoked in the event that (i) a Tobacco Company breaches the covenant restricting a Tobacco Company from transferring all of its assets and business to any other entity, except in certain prescribed circumstances, or (ii) a Tobacco Company fails to deposit into the Global Settlement Trust Account or the Supplemental Trust Account, as applicable, any amount at all on account of its respective share of any of the Upfront Contributions, any Annual Contributions or any Reserved Amounts;

(g) Approving any waivers of an Event of Default or Breach, other than a failure to make a Contribution which obligation may not be waived;

(h) In accordance with the Dispute Resolution Procedure, determining any Disputes that may arise between the Tobacco Companies, any or all members of the Tobacco Company Groups, Aggrieved Parties and/or the CCAA Plan Administrators arising out of or relating to the CCAA Plan, including the determination of all proceedings relating to the occurrence of an Event of Default and, in exceptional circumstances, a Dispute pertaining to a Breach in lieu of the Arbitrator doing so;

(i) Determining whether to grant a judgment enforcing an Arbitrator's award that resolved a Dispute arising during the administration of the CCAA Plans; and

(j) Determining whether a Putative Miscellaneous Claimant should be granted leave to commence a proceeding relating to a Miscellaneous Claim and then determining such Putative Miscellaneous Claimant's claim on the merits.

[32] The CCAA Plan Administrators will be central to the administration of the CCAA Plans in their role as the conduit for the orderly flow of information and reports between, as applicable, the CCAA Court, Quebec Superior Court, Tobacco Companies, Claimants, Cy-près Foundation, Claims Administrator and Administrative Coordinator.

[33] The CCAA Plan Administrators' oversight of the administration of the PCC Compensation Plan and the Quebec Administration Plan shall include:

(a) Being consulted regarding and, if warranted, applying to the CCAA Court to seek a revision to the terms of the PCC Compensation Plan and the Quebec Administration Plan;

(b) Upon receipt of a requisition and sufficiently detailed supporting information and data from the Claims Administrator, authorizing the advancement of an instalment of funds held in the PCC Trust Account and QCAP Trust Account to the Claims Administrator's trust account to enable it to make Individual Payments to Eligible PCCs and Compensation Payments to Eligible *Blais* Class Members;

(c) Reporting to the CCAA Court regarding the progress of the administration of the PCC Compensation Plan, and jointly to the CCAA Court and the Quebec Superior Court regarding the progress of the administration of the Quebec Administration Plan; and

(d) Submitting the Claims Administrator's budget for the claims administration of the PCC Compensation Plan to the CCAA Court for approval, and the Claims Administrator's budget for the claims administration of the Quebec Administration Plan for joint approval by the CCAA Court and Quebec Superior Court.

(ii) Overview of Economic Framework of CCAA Plans

[34] In the Tobacco Companies' CCAA Proceedings, the terms of the three CCAA Plans are interrelated and interdependent and have been structured in such a manner as to achieve the global settlement of all Tobacco Claims against Imperial, RBH and JTIM, which essentially comprise the legally compliant tobacco industry in Canada. All three CCAA Plans must be sanctioned by the CCAA Court and commence implementation at the same Effective Time in order to effect the global settlement.

[35] The CCAA Plans contemplate that Annual Contributions will be funded by the Net After-Tax Income generated from the Canadian operations of Imperial, RBH and JTIM. The Tobacco Companies will be maintained as viable going concerns in Canada, which receive ongoing intercompany operational support, in order to maximize their future ability to pay.

[36] The economic framework of the CCAA Plans is structured as follows: the Global Settlement Amount of $32.5 billion will be paid over a period estimated to be in the range of twenty years by (i) an upfront cash payment from each Tobacco Company calculated based upon its cash and cash equivalents generated from all sources by each Tobacco Company as at the month end prior to the Plan Implementation Date, less the aggregate sum of $750 million allocated to RBH to fund working capital, plus the Cash Security Deposits held as suretyship with the Registry of the Quebec Court of Appeal ("Upfront Contributions"); plus (ii) annual payments made by each Tobacco Company from its future earnings calculated using a Metric based upon its Net After-Tax Income ("Annual Contributions"); plus (iii) prescribed percentages of any Tax Refund Cash Payments, Annual Amounts and Carry Amounts (collectively, "Reserved Amounts") which will

provide the Claimants with percentages of any tax attributes resulting from each Tobacco Company's deduction for income tax purposes of an Upfront Contribution, Annual Contribution or Reserved Amount that is available for carryforward or carryback to another taxation year.

(iii) Global Settlement Amount

[37] The Global Settlement Amount under the CCAA Plans is $32.5 billion which will be paid from the Tobacco Companies' cash on hand at CCAA Plan implementation as well as the future Net After-Tax Income that will be generated by the Tobacco Companies' operating businesses in Canada post CCAA Plan implementation. Since the Tobacco Companies do not have sufficient assets to pay the Global Settlement Amount in full on the Plan Implementation Date, the $32.5 billion will be paid by:

1. An Upfront Contribution from each Tobacco Company payable in full on or before the Plan Implementation Date, plus

2. Annual Contributions from each Tobacco Company calculated as percentages of Net After-Tax Income paid on or before the July 30th following each calendar year during the Contribution Period, plus

3. Periodic cash payments of prescribed percentages of any Reserved Amounts deposited into the Supplemental Trust Account by each Tobacco Company.

[38] The Annual Contributions will be based upon a prescribed percentage of each Tobacco Company's Net After-Tax Income calculated in accordance with the Metric. Since the quantum of the Tobacco Companies' future profits after the Plan Implementation Date is not presently determinable, the Contribution Period is not fixed. After the Plan Implementation Date, the Tobacco Companies are required to continue to pay the Annual Contributions and the percentages of the Reserved Amounts to be released from the Supplemental Trust Account to the Global Settlement Trust Account for distribution to the Claimants, until such time as the aggregate amount of the Contributions (inclusive of the Upfront Contributions, Annual Contributions and the Reserved Amounts released to the Global Settlement Trust Account) equals $32.5 billion. Upon payment of the Global Settlement Amount in full, the Tobacco Companies' obligations in respect of their CCAA Plans shall terminate.

(iv) Upfront Contributions

[39] The Upfront Contributions will be equal to the aggregate of:

1. Each Tobacco Company's cash and cash equivalents generated from all sources, excluding Alternative Products for the period commencing at each Tobacco Company's respective Filing Date to the month end prior to the Plan Implementation Date, plus

2. The Cash Security Deposits deposited by Imperial and RBH in the Registry of the Quebec Court of Appeal as security for the payment of the *Blais* Judgment and the *Létourneau* Judgment, less

3. $750 million which shall be allocated to RBH to provide working capital.

[40] Since the commencement of the CCAA Proceedings in March, 2019, the Tobacco Companies have continued to carry on business and have been accumulating cash which will be included in the Upfront Contributions.

[41] Excluded from the CCAA Plans are Alternative Products which include e-cigarettes (vaping products), and nicotine pouches. In the CCAA Plans, an Alternative Product is formally defined to be: (i) any device that produces emissions in the form of an aerosol and is intended to be brought to the mouth for inhalation of the aerosol without burning of (a) a substance; or (b) a mixture of substances; (ii) any substance or mixture of substances, whether or not it contains tobacco or nicotine, that is intended for use with or without those devices to produce emissions in the form of an aerosol without burning; (iii) any non-combustible tobacco (other than smokeless tobacco) or nicotine delivery product; or (iv) any component, part or accessory of or used in connection with any such device or product referred to above.

[42] Imperial and RBH have Alternative Products Businesses in Canada, whereas JTIM does not. Any Alternative Product Claim against a Tobacco Company or any member of its Tobacco Company Group is an Unaffected Claim which is not released pursuant to the CCAA Plans. Cash generated from the Alternative Products Businesses of Imperial and RBH is excluded from the calculations of the Annual Contributions.

[43] Since the formula for calculating the Upfront Contributions includes each Tobacco Company's cash on hand as at the month end prior to the Plan Implementation Date, which will occur on an as yet undetermined date, the following calculation of the $12.456 billion amount of the Upfront Contributions is an estimate as at December 31, 2024 based upon five-year financial forecasts prepared by the Tobacco Companies in the Spring of 2024:

All amounts in CAD, billions

Projected Upfront Contributions as at December 31, 2024:

JTIM:	1.581
IMPERIAL:	4.849
RBH:	5.792
IMPERIAL's Cash Security Deposit:	0.758
RBH's Cash Security Deposit:	0.226
Total:	13.206
Less: Working Capital	(0.750)
Projected Available Upfront Contributions:	**12.456**

(v) Annual Contributions

[44] Each Tobacco Company will make Annual Contributions based upon a prescribed percentage of its Net After-Tax Income that is to be calculated in accordance with the Metric, which is the method by which, on an annual basis, the applicable earnings of the operating business of each Tobacco Company will be determined, excluding the Alternative Products Businesses of Imperial and RBH.

[45] The Metric will **include**:

(a) Interest income; and

(b) The proceeds of any disposition of any assets, including capital assets and intangible assets.

[46] The Metric will **exclude**:

(a) One-time accounting adjustments that are non-operational in nature;

(b) One-time restructuring and global settlement related adjustments that are non-operational in nature (however, the Metric will not exclude cash expenses associated with CCAA Plan implementation including the Costs for the services of the CCAA Plan Administrators, the Claims Administrator in respect of the administration of the PCC Compensation Plan, the Administrative Coordinator and the PCC Representative Counsel);

(c) Interest expense to related parties; and

(d) Any penalties and fines imposed by taxing and/or regulatory authorities.

[47] Each Tobacco Company will calculate the Annual Contributions which it must pay under its CCAA Plan by applying the percentages set out in Table 1 below to its Net After-Tax Income that it will independently determine using its own accounting practices.

Table 1

Years after Plan Implementation Date	Percentage of Net After-Tax Income ("NATI")
Years 1 - 5	85% of NATI
Years 6 - 10	80% of NATI
Years 11 - 15	75% of NATI
Year 16 and following until $32.5 billion has been paid in full	70% of NATI

[48] The Annual Contributions for Year 1 shall be adjusted to eliminate the portion of Year 1 that occurs prior to the Plan Implementation Date. The Annual Contributions for the final calendar year of the Contribution Period shall be pro-rated to ensure that the Global Settlement Amount of $32.5 billion is not exceeded.

[49] A Tobacco Company shall only be permitted to reduce the percentage of its Annual Contributions by the next 5% increment provided that it has made all of the payments of Annual Contributions due and owing for all prior years.

F. ALLOCATION OF GLOBAL SETTLEMENT AMOUNT

(i) Allocation of $32.5 Billion Global Settlement Amount

[50] The following Claimants participated in the mediation, unanimously voted to approve the CCAA Plans at the Meetings on December 12, 2024 and will be entitled to receive shares of the Global Settlement Amount:

1. Provinces and Territories;
2. Quebec Class Action Plaintiffs;
3. Pan-Canadian Claimants;
4. *Knight* Class Action Plaintiffs; and

5. Tobacco Producers.

[51] The Global Settlement Amount will be allocated among the Claimants, the Cy-près Fund, the Miscellaneous Claims Fund and two cash reserves that will be established on the Plan Implementation Date as security for the payment of the Costs (both Costs outstanding as of the Plan Implementation Date and Costs incurred after the Plan Implementation Date) of the services provided by the Monitors, CCAA Plan Administrators, Court-Appointed Mediator, Claims Administrator, Administrative Coordinator and PCC Representative Counsel, as set out in Table 2 below:

Table 2

Amount Allocated from Global Settlement Amount	Amount in CAD, billions
Provinces and Territories Settlement Amount	24.725
QCAP Settlement Amount ($4.250 minus $0.131 allocated to Cy-près Foundation)	4.119
PCC Compensation Plan Amount	2.521
Cy-près Fund (inclusive of $0.131 QCAP Cy-près Contribution)	1.000
Tobacco Producers Settlement Amount	0.015
Knight Class Action Plaintiffs Settlement Amount	0.015
Miscellaneous Claims Amount (may be increased to $0.060 if the Tobacco Companies make an election pursuant to Section 18.2.1)	0.025
CCAA Plan Administration Reserve	0.075
PCC Compensation Plan Reserve	0.005
Global Settlement Amount	**32.500**

(ii) Allocation of Upfront Contributions

[52] Set out in Table 3 below is the projected allocation of the Upfront Contributions which are estimated to be $12.456 billion as of December 31, 2024:

Table 3

Amount Allocated from Upfront Contributions	Amount in CAD, billions
Provinces and Territories	6.202
Quebec Class Action Plaintiffs	3.869
Pan-Canadian Claimants	1.750
Cy-près Foundation	0.500
Tobacco Producers	0.015
Knight Class Action Plaintiffs	0.015
Miscellaneous Claims Fund	0.025
CCAA Plan Administration Reserve	0.075
PCC Compensation Plan Reserve	0.005
Total Estimated Upfront Contributions	**12.456**

(iii) Allocation Among Provinces and Territories

[53] The Provinces and Territories have agreed that the Provinces and Territories Settlement Amount will be apportioned among the Provinces and Territories in accordance with the percentages set out in Table 4 below:

Table 4

Province/Territory	Percentage Share of Provinces and Territories Settlement Amount
British Columbia	14.4710%
Alberta	12.6272%
Saskatchewan	2.8787%
Manitoba	4.5252%
Ontario	28.7761%

Province/Territory	Percentage Share of Provinces and Territories Settlement Amount
Québec	26.8248%
New Brunswick	2.4117%
Nova Scotia	3.1740%
Prince Edward Island	0.6605%
Newfoundland and Labrador	2.1471%
Yukon	0.3973%
Northwest Territories	0.7269%
Nunavut	0.3795%
Total:	100.0000%

G. PARENT AND TOBACCO COMPANY GROUP SUPPORT THROUGH INTERCOMPANY SERVICES

[54] Imperial, RBH and JTIM each carries on business in Canada within a highly integrated, global Tobacco Company Group having an international Parent, based respectively in the U.K., the U.S. and Japan, and many Affiliates and direct or indirect Subsidiaries. Each Tobacco Company is dependent on Intercompany Transactions to buy and sell goods, services, licenses and intellectual property and allocate, collect and pay costs, expenses and other amounts from and to the members of its Tobacco Company Group.

[55] The agreement by the Tobacco Companies' respective Parents and relevant Affiliates to provide shared services and other operational support to the Tobacco Companies during the Contribution Period via the Intercompany Transactions is one part of the consideration for the full and final settlement and release of all Tobacco Claims against the Tobacco Company Groups of Imperial, RBH and JTIM.

[56] During the Contribution Period, each Tobacco Company's Parent and relevant Affiliates shall continue to provide the Tobacco Company and its Subsidiaries with Intercompany Services that are (a) consistent with existing arrangements or past practice, or as otherwise approved by the CCAA Plan Administrators, (b) in compliance with Applicable Law and subject to the Tobacco Company Group's transfer pricing policies across global markets, and (c) subject to normal course market adjustments. Any adjustments to Intercompany Services within the Tobacco Company Group shall not affect the Tobacco Company in a manner that is materially less favourable as

compared to the terms on which similar Intercompany Services are provided to any other members of the Tobacco Company Group.

(i) Payment Assurances for the Benefit of Provinces, Territories and Impacted Claimants

[57] The Tobacco Producers and *Knight* Class Action Plaintiffs will be paid their full shares of the Global Settlement Amount from the Upfront Contributions. The QCAPs, PCCs and Cy-près Foundation will be paid, in substantial part, from the Upfront Contributions with the balance of their full shares projected to be received after the end of Years 1, 2 and 5 respectively of the Contribution Period. The payment period for the Provinces and Territories will extend over the balance of the Contribution Period which, depending on the Tobacco Companies' future financial performance, could extend beyond twenty years.

[58] The CCAA Plans do not include any agreements whereby guarantors would provide guarantees for the Tobacco Companies' performance of their obligations to pay the Global Settlement Amount in full. The payment assurances provided for in the CCAA Plans are comprised of: (i) Contribution Security to be granted by all three Tobacco Companies; (ii) the JTIM Subordination Agreement; and (iii) certain restrictions on the Tobacco Companies' ability to transfer cash outside of Canada during the Contribution Period.

(ii) Contribution Security

[59] As a condition to the implementation of the CCAA Plans, at least ten Business Days prior to the Plan Implementation Date, each Tobacco Company is required to execute a Contribution Security Agreement granting security to a Collateral Agent (to be engaged prior to the Effective Time) for the exclusive benefit of the Claimants over all its present and after acquired assets, undertakings and properties to secure the Tobacco Company's obligation to pay the Annual Contributions and Reserved Amounts. Set out in Table 5 below are the forms of Contribution Security to be granted by each Tobacco Company based upon the nature of their assets and properties:

Table 5

Form of Contribution Security	Imperial	RBH	JTIM
Contribution Security Agreement	√	√	√
Deed of Immoveable Hypothec		√	√
Deed of Moveable Hypothec	√	√	√
Demand Debenture granting mortgage on real property		√	

Form of Contribution Security	Imperial	RBH	JTIM
Subordination Agreement			√

[60] The Contribution Security shall be subordinate to (i) any statutory deemed trusts; and (ii) any security granted by a Tobacco Company to any lender in connection with an operating facility, subject to certain limits.

[61] The Contribution Security shall only be enforceable upon the occurrence of an Event of Default which has not been cured. No exercise of remedies pursuant to the Contribution Security Agreement may occur without the approval of the CCAA Court which shall have exclusive jurisdiction to determine all matters relating to the enforcement of such agreement.

(iii) JTIM Subordination Agreement

[62] JTIM TM, which is a wholly owned subsidiary of JTIM, owns and licenses to JTIM trademarks used in JTIM's business under a trademark license agreement dated October 8, 1999, as amended from time to time. JTIM TM is also JTIM's largest secured creditor pursuant to ten secured convertible debentures.

[63] As a condition to the implementation of the CCAA Plans, at least ten Business Days prior to the Plan Implementation Date, JTIM TM is required to enter into the JTIM Subordination Agreement that subordinates JTIM TM's existing security over JTIM's assets, undertakings and properties to the Collateral Agent and defers the exercise of any rights and recourses by JTIM TM against JTIM and its property, until such time as the Global Settlement Amount has been paid in full. JTIM shall have the right to use the trademarks licensed under the trademark license agreement until the Global Settlement Amount has been paid in full.

[64] During the Contribution Period, before the Global Settlement Amount has been paid in full, JTIM shall be permitted to:

(a) Pay principal and interest (including default interest and fees) on its debentures owing to JTIM TM, and any arrears of royalty and license fees that accrued prior to the Effective Time, solely from JTIM's share of the Net After-Tax Income and any amounts released from the Supplemental Trust Account to JTIM that remain with JTIM, subject to the requirement that JTIM shall retain its cash, cash equivalents and investments in Canada until such time as the Annual Contributions and Reserved Amounts have been paid in respect of each fiscal year; and

(b) Pay from amounts generated from its ongoing operations, the royalties and license fees in respect of trademark license arrangements that are in place on the Plan Implementation Date (except during a Standstill Period that is described in Sections 8 and 9 of the JTIM Subordination Agreement).

(iv) Retention/Transfer of Cash outside of Canada

[65] Prior to filing for protection from their creditors under the CCAA in March, 2019, each Tobacco Company used their Intercompany Transactions as a mechanism to transfer cash generated from their Canadian operations out of Canada to other companies within their Tobacco Company Groups. To provide assurance to the Provinces, Territories and Impacted Claimants, in each year during the Contribution Period, each Tobacco Company will fulfill its obligations to pay its Annual Contribution and any Reserved Amount in full before transferring any cash to other companies within its Tobacco Company Group.

H. GLOBAL RELEASE AND SETTLEMENT OF CLAIMS

[66] Pursuant to the CCAA Plans Imperial, RBH and JTIM and all members of their Tobacco Company Groups will be released from all Tobacco Claims. Since the Tobacco Companies will be obligated to pay out 85%, declining in five-year increments to 70%, of their Net After-Tax Income over the protracted Contribution Period, they need comfort that, in exchange for such payments, the Release will include the domestic Tobacco Companies, their Parents and all of their affiliates to fully and finally settle the Tobacco Claims which have been brought, or may be brought, against them.

[67] The composite list of Claimants who will be bound by the Release includes: all Provinces and Territories; the Quebec Class Action Plaintiffs; the Pan-Canadian Claimants; the Tobacco Producers; and the *Knight* Class Action Plaintiffs. The development of the Pan-Canadian Claimants' Compensation Plan, the Cy-près Foundation and the Miscellaneous Claims Fund was the means for the Tobacco Companies to provide consideration for the release of Claims of the PCCs and any Miscellaneous Claimants, among others. In addition to the global Release, the Claimants will execute contractual releases in favour of each Tobacco Company to provide even greater certainty of the release of all Tobacco Claims and, in particular, any Section 5.1(2) and Section 19(2) Claims of the Claimants.

(i) Scope of Released Claims

[68] At the Effective Time, each of the Released Parties shall be fully, finally, irrevocably and unconditionally released and forever discharged of and from any and all Released Claims that any of the Releasors has ever had, now has, or may hereafter have against the Released Parties or any of them (either individually or with any other Person), whether or not based on conduct continuing after the Effective Time and whether or not presently known to any of the Releasors.

[69] The Released Parties include: the Tobacco Companies; members of their respective Tobacco Company Groups that were named as defendants in actions commenced in Canada; every other current or former Affiliate of any of the Tobacco Companies and their Tobacco Company Groups and each of their respective indemnitees; and the Canadian Tobacco Manufacturers' Council (a trade association of the Canadian tobacco industry that addresses smoking and health issues).

[70] The Releasors include: the Provinces and Territories; Quebec Class Action Plaintiffs; Pan-Canadian Claimants; *Knight* Class Action Plaintiffs; Tobacco Producers; and every other Person having an Affected Claim or a Released Claim,

[71] The expansive and global scope of the Release is achieved through the release of all Tobacco Claims against the Released Parties. A Tobacco Claim is any Claim of any Person against a Tobacco Company, any member of its Tobacco Company Group, or any Director of any such companies, that has been, could have been or could be advanced, by a Person, or on behalf of a certified or proposed class, or by a Government (including the Provinces, Territories and Canada), to recover damages or any other remedy or costs in respect of the development, design, manufacture, production, marketing, advertising, distribution, purchase, sale or disposition of Tobacco Products, the use of or exposure (whether direct or indirect) to Tobacco Products or their emissions, the development of any disease related to the use of Tobacco Products, or any representation or omission in respect of Tobacco Products, including any misrepresentations, breach of duty or fraud in respect thereof by any member of the Tobacco Company Group or its Representatives in Canada or, in the case of the Tobacco Company, anywhere else in the world, in each case arising from any conduct, act or omission existing or taking place at or prior to the Effective Time (whether or not continuing thereafter) and including any Section 5.1(2) Claim or Section 19(2) Claim.

[72] The Tobacco Claims include any:

(a) **Provincial HCCR Claim** which is any Claim that has been, could have been or could be advanced in any of the actions commenced by the Provinces under the HCCR Legislation;

(b) **Territorial HCCR Claim** which is any Claim that has been, could have been or could be advanced in relation to the recovery of the present value of the Territories' total expenditures for past and future health care benefits provided for Insured Persons resulting from Tobacco-related Disease or the risk of Tobacco-related Disease;

(c) **QCAP Claim** which is any Claim that has been, could have been or could be advanced in the *Blais* Class Action and the *Létourneau* Class Action;

(d) **PCC Claim** which is any Claim of any Pan-Canadian Claimant that has been made or may in the future be made against any of the Released Parties, by a Person, or on behalf of a certified or proposed class, to recover damages or any other remedy in respect of the development, design, manufacture, production, marketing, advertising, distribution, purchase or sale of Tobacco Products, including any representations or omissions in respect thereof, the historical or ongoing use of or exposure (whether directly or indirectly) to Tobacco Products or their emissions and the development of any disease or condition as a result thereof, in each case arising from any conduct, act or omission, existing or taking place at or prior to the Effective Time (whether or not continuing

thereafter) including all Claims that have been, could have been or could be advanced in seventeen actions listed in the CCAA Plans that were commenced in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia and Newfoundland and Labrador, by Individuals on their own account or under provincial class proceedings legislation. The PCC Claims will be settled by the provision of direct compensation under the PCC Compensation Plan as well as indirect benefits by virtue of the Cy-près Foundation;

(e) ***Knight* Claim** which is any Claim that has been, could have been or could be advanced in the certified *Knight* Class Action against Imperial alleging deceptive marketing of light and mild cigarettes; and

(f) **Tobacco Producers Claim** which is any Claim that has been, could have been or could be advanced in the three uncertified class actions commenced against each of the Tobacco Companies by the Ontario Flue-Cured Tobacco Growers' Marketing Board, and certain individual Tobacco Producers, who sold their tobacco through the Ontario Flue-Cured Tobacco Growers' Marketing Board pursuant to the annual Heads of Agreement made with Imperial, RBH and JTIM from January 1, 1986 to December 31, 1996.

[73] The Provinces' actions against the Tobacco Companies and members of their Tobacco Company Groups were brought pursuant to the HCCR Legislation enacted in each Province which, *inter alia*, provides that each Provincial Crown has a direct and distinct action against a manufacturer of Tobacco Products to recover the cost of health care benefits caused or contributed to by a tobacco related wrong. The Northwest Territories and Nunavut proclaimed HCCR Legislation which is not yet in force. Yukon has not enacted HCCR Legislation.

[74] The CCAA Plans provide assurance to the Tobacco Companies that the Provinces and Territories will not enact future legislation that will circumvent the global release. The issue to be addressed is that, notwithstanding the release of the Provinces' and Territories' tobacco-related health care costs claims, future governments in the Provinces and Territories might enact legislation similar to the HCCR Legislation to advance future Tobacco Claims. To address this concern, the CCAA Plans provide that the Released Parties and the Provinces and Territories recognize that a legislature's sovereign power to enact, amend and repeal legislation cannot be fettered. However, in the event that any legislation (including any regulations promulgated thereunder) similar or analogous to the HCCR Legislation may be enacted or amended by a Province or Territory at any time after the Effective Time, the Released Parties and the Provinces and Territories are *ad idem* that the enactment of such future legislation shall not render unenforceable or otherwise make ineffective any of the terms of the Claimant Contractual Releases or the CCAA Plans.

[75] In addition to Tobacco Claims, the Released Claims include any Claims:

(a) In respect of the assets, obligations, business or affairs of the Released Parties in Canada or, in the case of Imperial, RBH and JTIM, anywhere else in the

world, relating to Tobacco Products, which are based on or arising from any conduct, act or omission, existing or taking place at or prior to the Effective Time (whether or not continuing thereafter);

(b) In respect of the CCAA Proceedings (and the Chapter 15 Proceedings of Imperial and JTIM (if commenced)) up to the Effective Time, provided that the Released Party is not determined by (i) a final order of the CCAA Court to have committed fraud in the CCAA Proceedings, or (ii) a final order of the US Bankruptcy Court to have committed fraud in the Chapter 15 Proceedings of Imperial or JTIM; and

(c) Existing at or prior to the Effective Time that have been, could have been or could be advanced in the CCAA Proceedings.

[76] The CCAA Plans also provide comprehensive releases by all Persons, including the Released Parties, Releasors, Affected Creditors and Unaffected Creditors, of any claims that could be advanced against: (i) FTI, EY and Deloitte in their capacities as the Monitors and the CCAA Plan Administrators; (ii) FTI in its capacity as Foreign Representative in Imperial's Chapter 15 Proceeding; (iii) the Mediator; (iv) the Administrative Coordinator; and (v) the Chief Restructuring Officer ("CRO") for JTIM.

(ii) Injunctions

[77] The CCAA Plans give effect to comprehensive permanent injunctions that will forever bar the commencement of any proceeding in respect of all Affected Claims and all Released Claims against any of the Released Parties, the Monitors, the CCAA Plan Administrators, the Mediator, the Administrative Coordinator and the CRO and their respective Representatives.

(iii) Claimant Contractual Release

[78] In addition to the comprehensive terms of the Release set out in the CCAA Plans, the Claimants will execute contractual releases in favour of each Tobacco Company ("Claimant Contractual Releases"), for the purpose of providing even greater certainty with respect to the release of the Tobacco Claims and, in particular, any Section 5.1(2) and Section 19(2) Claims of the Claimants.

[79] The Released Claims are expressly defined to include any Section 5.1(2) Claim and any Section 19(2) Claim. At the Meetings of Eligible Voting Creditors held in each CCAA Proceeding on December 12, 2024, the Claimants voted unanimously to approve the CCAA Plans of Imperial, RBH and JTIM.

[80] In order to provide certainty with respect to the release of any Section 5.1(2) and Section 19(2) Claims, the Claimants will execute Claimant Contractual Releases in favour of the Released Parties, the Monitors, the CCAA Plan Administrators, the Mediator and the Administrative Coordinator, and their respective Representatives, that shall take effect as at the Effective Time.

The Claimant Contractual Releases include express releases of any Section 5.1(2) Claim and any Section 19(2) Claim.

[81] Each Tobacco Company shall also execute the Claimant Contractual Releases in order to give effect to their releases of the Monitors, the CCAA Plan Administrators, the Mediator and the Administrative Coordinator, and their respective Representatives.

(iv) Unaffected Claims

[82] The principal purpose of the CCAA Plans is the settlement of the Tobacco Claims. Accordingly, liabilities of the Tobacco Companies other than the Tobacco Claims are largely unaffected. The Unaffected Claims that will not be compromised and released pursuant to the CCAA Plans include:

(a) Any Alternative Product Claim;

(b) Any Cash Management Bank Claim;

(c) Any Employee Priority Claim;

(d) Any Governmental Priority Claim;

(e) Any Claims in respect of CCAA Plan Administration Reserve Costs and the PCC Compensation Plan Reserve Costs;

(f) Any Secured Claim that is not a Tobacco Claim**,** including the Secured Claim by JTIM TM against JTIM but provided that the JTIM TM Secured Claim shall be subordinated as described in Article 5, Section 5.14 in JTIM's CCAA Plan;

(g) Any Claim by any Director under any directors' or officers' indemnity policy or agreement with a Tobacco Company to the extent not otherwise covered by the CCAA Charges;

(h) Any Intercompany Services Claim;

(i) Any Intercompany Claim, subject to the terms of Article 5, Section 5.15 in the CCAA Plans of Imperial and RBH, and Section 5.16 in JTIM's CCAA Plan;

(j) Any Claim by a supplier against a Tobacco Company for the supply of goods or services other than a Tobacco Claim;

(k) Any Claim against a Tobacco Company relating to environmental remediation pursuant to Applicable Law;

(l) Any Claim by any Person under any contract with a Tobacco Company that has not been disclaimed and which Claim is not a Tobacco Claim;

(m) Any Claim by Canada or any Province or Territory against any Released Party relating in any manner to:

i. Except as otherwise contemplated in Imperial's CCAA Plan, any applicable Taxes of any kind whatsoever applicable to any Released Party, and

ii. Such Released Party's compliance with any Applicable Law and statutes and the regulations made thereunder, except for liability for actions or omissions occurring prior to the Effective Time in respect of a Tobacco Claim; and

(n) Any Claim in respect of Imperial's obligation to pay the balance owed under the Comprehensive Agreement dated July 31, 2008 between Imperial, Canada and the Provinces which settled the claims by Canada and the Provinces against Imperial regarding the trade of contraband products in Canada and related tax collection matters.

(v) Consideration Provided by Tobacco Companies and Tobacco Company Groups for Release

[83] The consideration for the Release to be provided to the Tobacco Companies and, as applicable, certain members of their Tobacco Company Groups, includes:

(a) The Tobacco Companies' payment of the Upfront Contributions and promise to pay the Annual Contributions and Reserved Amounts to the Global Settlement Trust Account and Supplemental Trust Account until the aggregate $32.5 billion Global Settlement Amount is paid in full;

(b) The agreement of each Tobacco Company's Parent and relevant Affiliates to provide shared services and other operational support to the Tobacco Companies;

(c) The other promises and commitments made by the Released Parties, or any of them as applicable, in the Definitive Documents;

(d) The QCAP Settlement Amount ($4.250 billion minus $131.0 million allocated to the Cy-près Foundation) is the consideration for the full and final settlement and satisfaction of the *Blais* Judgment;

(e) The QCAP Cy-près Contribution in the amount of $131.0 million is the consideration for the full and final settlement and satisfaction of the *Létourneau* Judgment;

(f) The $2.521 billion funding of the PCC Compensation Plan is the consideration for the full and final settlement and release of all PCC Claims;

(g) The $1.0 billion Cy-près Fund will provide consideration for the full and final settlement and release of all claims and potential claims of PCCs who are not receiving direct compensation payments from the PCC Compensation Plan, and *Létourneau* Class Members who are not receiving direct compensation payments from the Quebec Administration Plan, but will be indirectly benefited by falling within the scope of the Cy-près Foundation;

(h) Consideration for the settlement of the *Knight* Class Action shall be a contribution to the Cy-près Fund and the payment of the *Knight* Class Counsel Fee;

(i) The $15.0 million consideration for the settlement of the Tobacco Producers' Actions shall be paid to the Ontario Flue-Cured Tobacco Growers' Marketing Board for the benefit of the Tobacco Producers; and

(j) The Miscellaneous Claims Fund which is described in the following section.

(vi) Miscellaneous Claims Fund

[84] The Miscellaneous Claims Fund was created in order to provide even greater certainty that the CCAA Plans will provide a comprehensive and effective release of all Tobacco Claims. In order to identify any Person, other than a Claimant or an Individual Claimant, who might have a potential Tobacco Claim that has not been ascertained or asserted, the CCAA Plans include a mechanism for such Putative Miscellaneous Claimant to assert, with leave of the CCAA Court, a Miscellaneous Claim against the Miscellaneous Claims Fund. No Claimant or Individual Claimant may assert a Miscellaneous Claim. The existence of any Miscellaneous Claims is not admitted by the Tobacco Companies and is expressly denied.

[85] The Miscellaneous Claims Fund shall be in the amount of $25.0 million to be paid from the Upfront Contributions. The Tobacco Companies may unanimously elect to increase the Miscellaneous Claims Amount from $25.0 million to $60.0 million provided that: (a) the $35.0 million top-up shall be paid by the Tobacco Companies on top of the $32.5 billion Global Settlement Amount; (b) the Tobacco Companies are in unanimous agreement regarding how they shall apportion payment of the $35.0 million among themselves and the source of the top-up funds; and (c) the sourcing of the additional sum of $35.0 million shall not affect the amount nor the timing of the payments of the Upfront Contributions and the Global Settlement Amount.

[86] A Putative Miscellaneous Claimant is required to seek leave from the CCAA Court to commence a proceeding relating to a Miscellaneous Claim.

[87] All Putative Miscellaneous Claimants shall only have recourse to the Miscellaneous Claims Fund, and any judgments or awards made, or other amounts ordered to be paid in regard to Miscellaneous Claims shall be paid solely from the Miscellaneous Claims Fund.

I. SETTLEMENT OF CLAIMS BY INDIVIDUALS RESIDENT IN CANADA WHO SUFFERED TOBACCO-RELATED HARMS

[88] There are three components to the consideration provided by the CCAA Plans which together constitute a complete package of benefits to settle the claims of Tobacco-Victims who suffer or suffered harm from a Tobacco-related Disease as a result of the use of or exposure to a Tobacco Product sold by Imperial, RBH and JTIM in Canada:

1. **Quebec Class Action Administration Plan** - Pursuant to the *Blais* Judgment, Tobacco-Victims who reside in Quebec, were diagnosed with Lung Cancer, Throat Cancer or Emphysema/COPD (GOLD Grade III or IV) and fulfill the other required eligibility criteria set out in the certified class definition (regarding amount of cigarettes smoked, period of time during which smoking took place, and date of diagnosis), will be able to submit claims for payment of direct compensation through the Quebec Class Action Administration Plan ("Quebec Administration Plan");

2. **Pan-Canadian Claimants' Compensation Plan** - The PCC Compensation Plan is the counterpart to the Quebec Administration Plan that will provide direct compensation payments to Tobacco-Victims residing in the Provinces and Territories, except those Quebec residents covered by the *Blais* Judgment. To achieve parity as much as possible across Canada, the eligibility criteria under the PCC Compensation Plan tracks the eligibility criteria for the Quebec Administration Plan, in that the Tobacco-Victims must have been diagnosed with Lung Cancer, Throat Cancer or Emphysema/COPD (GOLD Grade III or IV) and must have smoked the same amount of cigarettes (Twelve Pack-Years) during the same period of time (January 1, 1950 to November 20, 1998). The date of diagnosis and the date upon which the Tobacco-Victim must have been alive differ between the two plans due to the differences in the timing of the commencement of the Quebec Class Actions and the commencement of the CCAA Proceedings. The amounts of compensation payable to eligible Tobacco-Victims under the PCC Compensation Plan are discounted 40% from the amounts payable to Tobacco-Victims under the Quebec Administration Plan to take into account the applicable law on causation in Quebec versus the common law jurisdictions, the status of the Quebec Class Action Judgments and litigation risk for the PCCs; and

3. **Cy-près Fund administered by Cy-près Foundation** - Any Tobacco-Victim residing in any Province or Territory who does not meet the eligibility criteria to receive a direct compensation payment under either the Quebec Administration Plan or the PCC Compensation Plan will receive indirect benefits through the research, programs and initiatives focused on improving outcomes in Tobacco-related Diseases that will be funded by grants from the Cy-près Fund.

[89] The package of benefits provided by the Quebec Administration Plan, PCC Compensation Plan and Cy-près Fund will redress the tobacco-related harms suffered by all Tobacco-Victims in Canada. The Quebec Administration Plan and PCC Compensation Plan will enable eligible Tobacco-Victims to access benefits using claims processes that are innovative and unique in that:

(a) In assessing whether a claim meets the eligibility criteria under either plan, presumptive causation is inferred for Tobacco-Victims who prove a diagnosis of Lung Cancer, Throat Cancer or Emphysema/COPD (GOLD Grade III or IV);

(b) Both plans will have an agent (Raymond Chabot for the Quebec Administration Plan and Epiq for the PCC Compensation Plan) which will assist Tobacco-Victims to complete and submit their claim forms to the Claims Administrator, so that they will not need to retain a lawyer for this purpose; and

(c) Tobacco-Victims will not be required to find a physician to complete a form regarding their diagnosis, unless proof of diagnosis cannot be obtained through the provision of a medical test report which proves the diagnosis and date of diagnosis.

[90] The important features of each of the Quebec Administration Plan, PCC Compensation Plan and Cy-près Foundation are described in more detail in the sections that follow.

J. SETTLEMENT OF QUEBEC CLASS ACTION JUDGMENTS AND QUEBEC CLASS ACTION ADMINISTRATION PLAN

(i) Settlement and Satisfaction of Blais Judgment and Létourneau Judgment

[91] In 1998, the *Blais* Class Action and the *Létourneau* Class Action were commenced against Imperial, RBH and JTIM in the Quebec Superior Court. Both proceedings were certified as class actions on February 21, 2005.

[92] On May 27, 2015 (as rectified on June 9, 2015), the Honourable Justice Brian Riordan of the Quebec Superior Court granted judgment against Imperial, RBH and JTIM in both class actions.

[93] On October 27, 2015, the Quebec Court of Appeal ordered Imperial to deposit the sum of $758 million and RBH to deposit the sum of $226 million with the Registry of the Quebec Court of Appeal in quarterly instalments as suretyship in respect of payment of the *Blais* Judgment and the *Létourneau* Judgment. These monies totalling $984 million comprise the Cash Security Deposits which are included in the Upfront Contributions.

[94] On March 1, 2019, the Quebec Court of Appeal upheld the trial judgment in every respect other than to vary the dates from which interest and the additional indemnity are to be calculated. The judgment awarded to the QCAPs in the *Blais* Class Action and the *Létourneau* Class Action totals $13,699,504,730 inclusive of interest calculated to March 8, 2019.

[95] On March 8, 12 and 22, 2019 respectively, JTIM, Imperial and RBH filed for protection from their creditors under the CCAA because they did not have sufficient funds to satisfy the *Blais* Judgment and *Létourneau* Judgment. The CCAA Court recognized that the Quebec Court of Appeal judgment was the singular event that gave rise to the CCAA Proceedings.

[96] The QCAP Settlement Amount ($4.250 billion including $131.0 million allocated to the Cy-près Foundation) is the consideration for the full and final settlement and satisfaction of the *Blais* Judgment and the *Létourneau* Judgment.

[97] The purpose of the Quebec Administration Plan is to effect the distribution of the compensation ordered in the *Blais* Judgment, as compromised in accordance with the CCAA Plans, to be paid to eligible persons resident in Quebec who are suffering from at least one of three Tobacco-related Diseases caused by smoking cigarettes sold in Canada by Imperial, RBH and JTIM.

(ii) Blais Eligibility Criteria

[98] The Quebec Administration Plan will provide direct compensation in the form of monetary payments to QCAPs who meet all of the following *Blais* Eligibility Criteria to qualify as *Blais* Class Members pursuant to the *Blais* Judgment:

(a) On the date that a Tobacco-Victim Claimant or Succession Claimant submits their Proof of Claim:

(i) If the Tobacco-Victim Claimant is alive, they must reside in Quebec, or

(ii) If the Tobacco-Victim Claimant is deceased, they must have resided in Quebec on the date of their death;

(b) The Tobacco-Victim Claimant was alive on November 20, 1998;

(c) Between January 1, 1950 and November 20, 1998, the Tobacco-Victim Claimant smoked a minimum of Twelve Pack-Years of cigarettes sold by the Tobacco Companies:

Twelve Pack-Years of cigarettes is the equivalent of 87,600 cigarettes which is calculated as any combination of the number of cigarettes smoked in a day multiplied by the number of days of consumption. For example, Twelve Pack-Years equals:

10 cigarettes smoked per day for 24 years (10 x 365 x 24) = 87,600 cigarettes, or

20 cigarettes smoked per day for 12 years (20 x 365 x 12) = 87,600 cigarettes, or

30 cigarettes smoked per day for 8 years (30 x 365 x 8) = 87,600 cigarettes;

(d) Before March 12, 2012, the Tobacco-Victim Claimant was diagnosed with:

i. Lung Cancer, or

ii. Throat Cancer, or

iii. Emphysema/COPD (GOLD Grade III or IV) (collectively, the "*Blais* Compensable Diseases"); and

(e) On the date of the diagnosis with a *Blais* Compensable Disease the Tobacco-Victim Claimant resided in Quebec.

[99] Pursuant to the *Blais* Judgment, the Heirs of Tobacco-Victims who died *prior to or on* November 20, 1998 are not eligible to receive a Compensation Payment from the Quebec Administration Plan. The Heirs of Tobacco-Victims who died *after* November 20, 1998 may qualify to receive a Compensation Payment through a Succession Claim made under the Quebec Administration Plan.

[100] The Quebec Administration Plan and PCC Compensation Plan both set out harmonization principles that direct the Claims Administrator to ensure that a resident of Quebec is not paid a Compensation Payment under the Quebec Administration Plan pursuant to the *Blais* Judgment as well as an Individual Payment from the PCC Compensation Plan. An individual resident in Quebec is only permitted to make one claim for compensation either as a *Blais* Class Member under the Quebec Administration Plan or as a PCC-Claimant under the PCC Compensation Plan. A Quebec resident is not permitted to make a claim to both claims processes.

(iii) Amount of Compensation Payments to Eligible Blais Class Members

[101] Table 6 below summarizes the compensation available to Eligible *Blais* Class Members under the Quebec Administration Plan:

Table 6

Quebec Class Action Administration Plan		
Column 1 **Compensable Disease**	**Compensation Payment** (or such lesser amount as may be determined by the Claims Administrator to be available for the subclass of claimants; quantum will vary based upon the actual take-up rate and other factors and shall not exceed the maximum amounts specified in this table)	
	Column 2	**Column 3**

	Compensation Payment for Eligible *Blais* Class Members who started to smoke before January 1, 1976	**Compensation Payment for Eligible *Blais* Class Members who started to smoke on or after January 1, 1976 (80% of Column 2)**
Lung Cancer	$100,000	$80,000
Throat Cancer	$100,000	$80,000
Emphysema/COPD (GOLD Grade III or IV)	$30,000	$24,000

(iv) Proof of Eligibility for Compensation Payments

[102] The Quebec Administration Plan was designed with the specific intention that Tobacco-Victim Claimants and Succession Claimants will be able to complete and submit the claims forms without retaining the services of either their own third-party lawyer or any non-lawyer who may offer form completion, form submission or other related services.

K. PAN-CANADIAN CLAIMANTS' COMPENSATION PLAN

(i) Rationale for Inclusion of PCC Compensation Plan in CCAA Plans

[103] When JTIM filed for protection from its creditors under the CCAA on March 8, 2019, litigation had already been commenced in Canada against the Tobacco Companies and the Tobacco Company Groups by or on behalf of individuals in Canada in the following three broad claimant groups: the QCAPs in Quebec; *Knight* Class Action Plaintiffs in British Columbia; and claimants who fall within the uncertified proposed class definitions in seven actions commenced under class proceedings legislation in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Nova Scotia.

[104] As at March 8, 2019, the scope of the claims pleaded in the actions pending against the Tobacco Companies and the Tobacco Company Groups did not cover all claims or potential claims which could be advanced against these entities by individuals resident in Canada. There were individuals resident in all Provinces and Territories who may have had claims or potential claims which were not included in the three broad claimant groups described above and were unascertained and unquantifiable. Significantly, this group of individuals was unrepresented by counsel and may have been unaware of the existence of the CCAA proceedings and that their rights may be affected and their claims may be compromised in the CCAA Plans.

[105] The PCC Compensation Plan and the Cy-près Foundation together are the consideration provided for in the CCAA Plans to settle and fully and finally release all claims and potential claims against Imperial, RBH and JTIM and their respective Tobacco Company Groups in Canada by the Pan-Canadian Claimants who are defined to be all Individuals resident in the Provinces and

Territories, excluding the QCAPs, who have either advanced or may be entitled to advance a Tobacco Claim. The PCC Compensation Plan and the Cy-près Foundation are critically important to the global settlement of the Tobacco Claims because, together, they identify those persons who will be bound by the settlement of the PCC Claims in accordance with the terms of the CCAA Plans.

[106] The development of the PCC Eligibility Criteria was informed by the following:

1. The Breach Period (January 1, 1950 and November 20, 1998) and Critical Tobacco Dose (PCCs smoked a minimum of twelve pack-years of cigarettes) are the same as those approved by the Quebec Courts in the *Blais* Judgment;

2. The PCC Claims Period (March 8, 2015 and March 8, 2019 inclusive of those dates) was informed by an analysis of the limitations law applicable in each Province and Territory, as well as relevant historical background and the desire to achieve parity among the PCCs residing in all the Provinces and Territories by choosing a uniform four-year limitation period for all jurisdictions;

3. The PCC Compensable Diseases are the same as those approved by the Quebec Courts in the *Blais* Class Action with the diagnoses of Emphysema and COPD (GOLD Grade III or IV) being treated as sufficiently equivalent; and

4. Expert epidemiological evidence from Dr. Prabhat Jha was used to (i) define which Tobacco-related Diseases will qualify for compensation under the PCC Compensation Plan, and (ii) quantify the estimated number of PCCs who may qualify to receive compensation under the PCC Compensation Plan.

(ii) PCC Eligibility Criteria

[107] To be eligible to receive compensation under the PCC Compensation Plan, each PCC-Claimant must meet all of the following PCC Eligibility Criteria:

(a) On the date that a PCC-Claimant submits their Claim Package:

   i. If the PCC-Claimant is alive, they must reside in a Province or Territory in Canada, or

   ii. If the PCC-Claimant is deceased, they must have resided in a Province or Territory in Canada on the date of their death;

(b) The PCC-Claimant was alive on March 8, 2019;

(c) Between January 1, 1950 and November 20, 1998, the PCC-Claimant smoked a minimum of Twelve Pack-Years of cigarettes sold by the Tobacco Companies:

Twelve Pack-Years of cigarettes is the equivalent of 87,600 cigarettes which is calculated as any combination of the number of cigarettes smoked in a day multiplied by the number of days of consumption. For example, Twelve Pack-Years equals:

10 cigarettes smoked per day for 24 years (10 x 365 x 24) = 87,600 cigarettes, or

20 cigarettes smoked per day for 12 years (20 x 365 x 12) = 87,600 cigarettes, or

30 cigarettes smoked per day for 8 years (30 x 365 x 8) = 87,600 cigarettes.

(d) Between March 8, 2015 and March 8, 2019 (inclusive of those dates), the PCC-Claimant was diagnosed with:

i. Lung Cancer, or

ii. Throat Cancer, or

iii. Emphysema/COPD (GOLD Grade III or IV) (collectively, the "PCC Compensable Diseases"); and

(e) On the date of the diagnosis with a PCC Compensable Disease the PCC-Claimant resided in a Province or Territory in Canada.

(iii) Amount of Compensation Payments to Eligible Pan-Canadian Claimants

[108] Table 7 below summarizes the compensation available to Eligible Pan-Canadian Claimants under the PCC Compensation Plan:

Table 7

PCC Compensation Plan		
Column 1 **PCC Compensable Disease**	**Individual Payment** (or such lesser amount as may be determined by the Claims Administrator to be available for the subclass of claimants; quantum will vary based upon the actual take-up rate and other factors and shall not exceed the maximum amounts specified in this table)	
	Column 2 **Compensation for PCCs who started to smoke before January 1, 1976** **(60% of damages awarded to Quebec Class Action Plaintiffs)**	**Column 3** **Compensation for PCCs who started smoking on or after January 1, 1976** **(80% of Column 2)**
Lung Cancer	$60,000	$48,000
Throat Cancer	$60,000	$48,000
Emphysema/COPD (GOLD Grade III or IV)	$18,000	$14,400

[109] An Individual who meets all the PCC Eligibility Criteria shall be paid for the single PCC Compensable Disease with which they have been diagnosed that will provide them with the highest amount of compensation from the PCC Compensation Plan. No "double recovery" or overlapping recovery will be permitted if a PCC-Claimant has been diagnosed with more than one PCC Compensable Disease.

L. SUPERVISION, OVERSIGHT AND ADMINISTRATION OF THE QUEBEC ADMINISTRATION PLAN AND THE PCC COMPENSATION PLAN

[110] The CCAA Court shall have an ongoing supervisory role in respect of the administration of the CCAA Plans which include the Quebec Administration Plan and the PCC Compensation Plan.

[111] Matters relating to the ongoing supervision of the Quebec Administration Plan, including any changes to the terms thereof, shall be heard and determined jointly by the CCAA Court and the Quebec Superior Court. In performing this function, the CCAA Court and the Quebec Superior Court may communicate with one another in accordance with a protocol to be worked out and

established by them. Matters relating to the ongoing supervision of the PCC Compensation Plan, including any changes to the terms thereof, shall be heard and determined solely by the CCAA Court.

[112] At the Sanction Hearing, the Court was asked to approve:

(a) The terms of the Quebec Administration Plan and the PCC Compensation Plan;

(b) The appointment of Epiq Class Actions Services Canada, Inc. as the Claims Administrator to administer both the Quebec Administration Plan and the PCC Compensation Plan; and

(c) The appointment of Daniel Shapiro, K.C. to serve as the Administrative Coordinator who will coordinate and serve as a liaison and conduit to facilitate the flow of information between the Claims Administrator and the CCAA Plan Administrators in regard to both the Quebec Administration Plan and the PCC Compensation Plan.

M. CY-PRÈS FOUNDATION

(i) Rationale for Inclusion of Cy-près Foundation in CCAA Plans

[113] The Tobacco Companies will fund $1.0 billion to establish the Cy-près Fund that will be administered by a public charitable foundation. The Cy-près Fund is intended to serve the interests of the PCCs and *Létourneau* Class Members by providing them with indirect benefits as an approximation of remedial compensation for those PCCs not eligible to receive direct compensation from the PCC Compensation Plan and *Létourneau* Class Members who are not eligible to receive compensation under the Quebec Administration Plan.

[114] The Cy-près Fund is an essential component of the global settlement of the Tobacco Claims in Canada. In respect of PCCs who are not eligible to receive direct compensation under the PCC Compensation Plan there is a high probability that their claims would not succeed against the Tobacco Companies for several reasons including: (i) their claims are likely statute-barred or subject to the defence of laches; and (ii) they were diagnosed with Tobacco-related Diseases which fall below the threshold to identify diseases which were presumptively caused by smoking the Tobacco Companies' cigarettes, such that they would be required to prove entitlement to direct compensation by establishing medical causation and legal causation in an individual trial. Such PCCs do not have a legal entitlement in the form of a judgment, membership in a class in a certified class action, or an individual claim that has a high probability of success, or any other practicable means to recover direct compensation for Tobacco-related Diseases caused by smoking the Tobacco Companies' cigarettes.

[115] The establishment of the Cy-près Fund is consistent with the class action legislation and case law developed in Canada to make provision for indirect prospective benefits to a class of persons for whom direct compensation is impracticable, and who would not otherwise receive monetary relief.

[116] The Cy-près Fund will provide consideration for the full and final settlement and release of all claims and potential claims of PCCs who are not receiving direct compensation payments from the PCC Compensation Plan, and *Létourneau* Class Members who are not receiving direct compensation payments from the Quebec Administration Plan but will be indirectly benefited by falling within the scope of the Foundation. This broad group of claimants includes the following persons and any affected family members or estates:

1. Smokers suffering from lung or throat cancer or Emphysema/COPD (Gold Grade III or IV) who are outside the claims period or who smoked less than the requisite twelve pack years or, in the case of Emphysema/COPD, were not classified as Gold Grade III or IV or the equivalent;

2. Smokers who have tobacco-related harms other than Lung Cancer or Throat Cancer and Emphysema/COPD (Gold Grade III or IV) or the equivalent; and

3. Persons who smoke or have smoked Tobacco Products who have not yet or may never develop a tobacco-related harm.

[117] The Cy-près Fund will provide indirect benefits to the PCCs that are rationally connected to Tobacco-related Diseases and the varying circumstances of the diverse group of PCCs and *Létourneau* Class Members covered by the Cy-près Fund.

(ii) Purpose of Cy-près Foundation

[118] The Cy-près Foundation's purpose is to fund research, programs and initiatives focused on improving outcomes in Tobacco-related Diseases. The Cy-près Foundation will indirectly benefit users of Tobacco Products and their affected family members or estates who are not directly compensated through the Quebec Administration Plan or PCC Compensation Plan.

[119] The Cy-près Foundation will fund research, programs and initiatives regarding tobacco-related cancers, Emphysema/COPD and other illnesses and conditions which are reasonably and rationally connected to tobacco-related harms. The research, programs and initiatives that are funded by the Cy-près Foundation will achieve earlier diagnosis, better treatment and improved outcomes for Persons suffering from these diseases.

(iii) Establishment and Administration of Cy-près Foundation

[120] The establishment of the Cy-près Foundation will take place in two phases: the first occurring at the Sanction Hearing, and the second occurring at the hearing for the final approval by the CCAA Court of the Cy-près Foundation, so as to permit the finalization of the administrative aspects of the Cy-près Foundation.

[121] The Foundation Board shall establish a secretariat and direct its activities to facilitate the effective and efficient governance, administration and operation of the Cy-près Foundation which will include the solicitation, receipt, review and evaluation of the merits of proposals submitted by

individuals and organizations seeking distributions from the Cy-près Fund. The Foundation Board shall establish the criteria, reflective of the mission of the Cy-près Foundation, for applicants to qualify to receive distributions from the Cy-près Fund. The Foundation Board shall publish requests for proposals soliciting the submission of proposals from interested individuals and organizations seeking financing and support for research, programs and initiatives which fall within the scope of the mission of the Cy-près Foundation. Following a peer review process, proposals accepted by the Foundation Board will be submitted to the CCAA Plan Administrators for their review. If accepted by the CCAA Plan Administrators, they will submit them to the CCAA Court for approval.

(iv) Oversight of Cy-près Foundation

[122] The CCAA Court is responsible for the ultimate supervision of the Cy-près Foundation. The CCAA Plan Administrators will be the overseers of the Cy-près Foundation and will function as the intermediaries relative to the supervisory role of the CCAA Court. In this capacity, the CCAA Plan Administrators will gather the data and information concerning the Cy-près Foundation that will be of significance to the CCAA Court when it approves various functions of the Cy-près Foundation as it will be required to do from time to time. The CCAA Plan Administrators will report to the CCAA Court regarding the activities of the Cy-près Foundation annually, or more frequently as they deem necessary.

(v) Term of Operation of Cy-près Foundation

[123] The Cy-près Foundation shall not be dissolved, nor shall its work be terminated until such time as specified by the CCAA Court.

N. DISPOSITION OF PENDING PROCEEDINGS

[124] The principal purpose of the CCAA Plans is that they will bring finality to thirty years of litigation in Canada against the Tobacco Companies and members of their Tobacco Company Groups. To achieve this objective, as soon as possible after the Plan Implementation Date:

1. the Parties shall take all steps necessary to dismiss with prejudice and without costs all Pending Litigation against the Tobacco Companies, certain members of their respective Tobacco Company Groups, and the Canadian Tobacco Manufacturers' Council; and

2. the Tobacco Companies and the QCAPs shall take all steps and actions necessary to dismiss with prejudice and without costs any leave applications or appeals from the judgments in the Quebec Class Actions or any related motions pending in the Quebec Superior Court, the Court of Appeal of Quebec and/or the Supreme Court of Canada. After the QCAP Claims Process has ended and the Eligible *Blais* Class Members have been paid their Compensation Payments, the Tobacco Companies and the QCAPs shall consent to motions seeking the Closing Judgment to be brought in the Quebec Superior Court by

the Quebec Class Counsel in the *Blais* Class Action and the *Létourneau* Class Action.

O. POSITION OF THE PARTIES

[125] The parties made submissions over three days – January 29 – 31, 2025. It was apparent that the Tobacco Companies had differing views of the Plan.

[126] There was a consensus among the Tobacco Companies with respect to the total compensation to be paid - $32.5 billion – over an extended period of time.

[127] The Tobacco Companies had failed to reach an agreement as to how the $750 million working capital holdback was to be allocated amongst themselves.

[128] The dispute has now been resolved. Subsequent to the hearing, the Tobacco Companies reached an agreement that the $750 million working capital holdback was to be allocated 100% to RBH.

[129] This agreement is reflected in the Plan Amendment Order which was granted on March 3, 2025.

[130] As a result of the Plan Amendment Order, the CCAA Plans now have the support of all three Tobacco Companies and their respective Monitors. The consideration being paid to Claimants remains unchanged and the payment schedule remains unaltered.

[131] The following parties are supportive of the CCAA Plan, as amended, being sanctioned:

(a) JTIM;

(b) JTIM TM;

(c) Imperial;

(d) RBH;

(e) Deloitte, Monitor of JTIM;

(f) FTI, Monitor of Imperial;

(g) E&Y, Monitor of RBH;

(h) QCAPs;

(i) PCCs;

(j) *Knight*;

(k) Tobacco Producers;

(l) British Columbia;

(m) Alberta;

(n) Saskatchewan;

(o) Manitoba;

(p) Ontario;

(q) Quebec;

(r) New Brunswick;

(s) Nova Scotia;

(t) Prince Edward Island;

(u) Newfoundland and Labrador;

(v) Yukon Territory;

(w) North-West Territories; and

(x) Nunavut Territory.

(i) Heart and Stroke Foundation of Canada and Canadian Cancer Society

[132] Two organizations expressed opposition to the CCAA Plans in their current form. The organizations are the Heart and Stroke Foundation of Canada ("HSF") and the Canadian Cancer Society ("CCS").

[133] HSF and CCS raised concerns with respect to the following:

(a) The structure of the Cy-près Foundation; and

(b) The scope of the Release.

[134] It is of fundamental importance to note that neither HSF nor CCS is an Affected Creditor or Unaffected Creditor of the Tobacco Companies. HSF and CCS are "social stakeholders" in these proceedings.

[135] HSF submits that an essential flaw in the CCAA Plans rests in the mandate of the $1 billion Cy-près Foundation.

[136] HSF complains that, in its current form, the Cy-près Foundation has a narrow mandate to only fund research programs and initiatives focused on improving outcomes in tobacco-related diseases. As such, the CCAA Plans and the Cy-près Foundation do not address the legitimate interests of millions of individuals who will suffer harm from the future use of tobacco products (the "FTH Stakeholders").

[137] HSF further submits that the FTH Stakeholders interests, and those of the Canadian public more broadly, require the inclusion of tobacco prevention and reduction measures, including smoking cessation and public awareness.

[138] HSF points out that the Foundation is currently precluded from funding initiatives and programs related to tobacco use prevention and reduction.

[139] HSF submits that the CCAA Plans should not be sanctioned unless and until the CCAA Plans are amended to include prevention and reduction measures within the mandate of the Cy-près Foundation.

[140] It was acknowledged by HSF that the FTH Stakeholders do not have claims in these CCAA proceedings because, they did not use tobacco products and/or suffer harm before the CCAA proceedings began. However, HSF submits that the potential future claims for the harm places FTH Stakeholders in a position where they will be deeply impacted by the CCAA Plans.

[141] HSF also voiced complaints with the scope of the releases. HSF submits that while the releases are anchored to wrongs committed by the Tobacco Companies that occurred before the effective time, they capture future claims "that could be advanced", whether "directly or indirectly", on a "continuing" basis.

[142] HSF also submits that the October 31, 2024 amendment to the Representation Counsel Order was prejudicial to FTH Stakeholders as it incorporated a forward-looking nature of released claims.

[143] From the standpoint of HSF, the sole issue is whether the CCAA Plans are fair and reasonable.

[144] In its current form, HSF submits that the Plans do not meet the third part of the test to sanction a plan, for three interrelated reasons:

(i) The CCAA Plans do not address or protect the legitimate interests of FTH Stakeholders;

(ii) The CCAA Plans are not in the public interest; and

(iii) There are other alternatives that would remedy these deficiencies.

[145] HSF stresses that the court's decision should be informed by the objectives of the CCAA which are to facilitate the reorganization of a debtor company "for the benefit of the Company, its

creditors, employees and in many instances, a much broader constituency of affected persons: see *CanWest Global Communications Corp., Re*, 2010 ONSC 4209, 70 C.B.R. (5th) 1, at para. 20 (*Canwest Global).*

[146] The solution put forward by HSF is as follows: "Stated simply, there is a clear and preferable commercial alternative to the CCAA Plans: Modified CCAA Plans that include prevention and reduction measures within the mandate of the Cy-près Foundation."

[147] CCS is not opposed to the allocation of funds under the CCAA Plans. However, CCS submits that the CCAA Plans should not be sanctioned in their current form and that they should be modified to:

> (i) Ensure there is not a release to protect tobacco companies from liability for future wrongful conduct;
>
> (ii) Restrict promotion;
>
> (iii) Require public disclosure of internal Tobacco Companies' documents provided in provincial lawsuits;
>
> (iv) Expand the mandate of the Cy-près Foundation; and
>
> (v) Make a series of administrative changes related to the Cy-près Foundation to improve the Foundation's operations and impact.

[148] CCS points out that Tobacco Companies want to increase tobacco sales or at least forestall the decline of tobacco sales. CCS wants to minimize tobacco sales. The ultimate objective is to have a tobacco-free society.

[149] With respect to the releases, CCS is concerned that the effect of Article 11 of the CCAA Plans is to provide a release from liability for tobacco companies for some future wrongful conduct after the effective time.

[150] CCS also wants changes to the CCAA Plans to restrict promotional expenditures.

[151] CCS also wants production of documents received by Ontario and New Brunswick as part of pretrial discovery in their provincial lawsuits.

[152] CCS recognizes the documents provided to Ontario and New Brunswick are subject to confidentiality, but they submit that under the CCAA, the court could order production by court order pursuant to s.11 of the CCAA as the court may "make any order that it considers appropriate in the circumstances."

[153] Alternatively, CCS submits that another approach would be to give the parties six months to work out an acceptable proposal.

[154] CCS has also proposed a redraft of the mandate of the Cy-près Foundation so as to expand the mandate of the Cy-près Foundation to include programs and initiatives to reduce tobacco use which would increase the benefit and impact of the foundation.

(ii) Tobacco Companies, Monitors and Claimants

[155] The Tobacco Companies, Monitors and Claimants all oppose any modifications to the mandate of the Cy-près Foundation or changes to the Releases.

(iii) Discussion

[156] I do not, for a moment, doubt the laudable objectives of HSF and CCS. The facts are clear. The use of tobacco products and smoking in particular are harmful to your health and, in many cases, can cause death or have serious health implications. HSF and CCS advocate for the elimination of tobacco products.

[157] However, in considering the arguments put forth by HSF and CCS, it is necessary to consider the impact these arguments would have on the CCAA Plans as a whole and their impact on the broad range of stakeholders.

[158] In *Target Canada Co. (Re)*, 2016 ONSC 316 at para 81, I noted that the CCAA process is one of building blocks. The same comment applies to these proceedings. The Mediator and the Monitors have achieved an unprecedented consensus among the QCAPs, the PCCs, *Knight*, Tobacco Producers, and the Provincial and Territorial governments. All these parties have legal rights as creditors of the Tobacco Companies.

[159] In addition, the Tobacco Companies are also supportive of the CCAA Plans.

[160] Having regard to such widespread support for the CCAA Plans, it is my view that the recommendations offered by HSF and CCS – as social stakeholders – must be approached with great caution. The court's role in determining what is fair and reasonable for purposes of sanctioning a plan of arrangement does not extend to amending or rewriting the CCAA Plans to incorporate the concerns of social stakeholders, notwithstanding how laudable those concerns may be.

[161] This Court has observed in the comparable context of a class-action settlement as follows:

> The parties have chosen to settle the issues on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement. [emphasis added]

(See: *Baxter v. Canada (Attorney General)*, 2006 CanLII 41673 (ONSC) at para. 9.)

[162] HSF and CCS are social stakeholders in this proceeding. They have put forth their positions forcefully. However, the solutions and suggestions provided by HSF and CCS are, in my view, unworkable. In essence, HSF and CCS wish this court to amend the CCAA Plans. This is not a viable option.

[163] The CCAA Proceedings have been ongoing for nearly six years. For four and a half years, there was limited progress. Commencing in the fall of 2023, when the Monitors and the Mediator took control over the preparation and drafting of the CCAA Plans, there was a turning point. Today, the CCAA Plans are before the court on a motion to sanction.

[164] The decision for the court to make is a binary one. It is to either sanction the CCAA Plans or to reject the CCAA Plans. It is not the role or the function of the court to redraft or amend the CCAA Plans. The views expressed by HSF and CCS are important to consider, However, in my view, these views have been taken into account by the drafters of the CCAA Plans.

[165] The quantum of funds for the Cy-près Foundation is unprecedented. It is funded to the extent of $1 billion. Its objectives have been clearly set out and described above. In my view, the Cy-près Foundation will benefit not only Claimants who are not entitled to monetary compensation but will also benefit society in general. The mandate of the Cy-près Foundation may not meet all of the objectives of CCS and HSF. However, the mandate has been established through many hours of negotiation between the Tobacco Companies, the Monitors, Claimants and the Mediator.

[166] The funding of the Foundation requires a significant contribution from the Tobacco Companies. It also requires significant concessions from Claimants. The Claimants have collectively agreed to an allocation of $1 billion to the Foundation.

[167] The Monitors and by extension, the Mediator, recommend that the court sanction the CCAA Plans, as is. This includes approving the mandate of the Cy-près Foundation in its current form.

[168] The mandate of the Cy-près Foundation may not be perfect from the standpoint of HSF and CCS, but that does not entitle HSF and CCS to substitute their proposed solutions and proposed language from that which is set out in the Cy-près Foundation. Furthermore, it does not warrant a rejection of the CCAA Plans. The position of HSF that the CCAA Plans should be rejected if their suggestions are not incorporated is, quite simply, something this court should not and cannot accept.

[169] The concerns of HSF and CCS have been considered by the Monitors and the Mediator. A $1 billion Cy-près Foundation is being created. The establishment of the Cy-près Foundation satisfies me that the CCAA Plans have taken into account the interests of social stakeholders and the public at large.

[170] The mandate of the Cy-près Foundation is both reasonable and appropriate in the circumstances and it is approved.

[171] The Claimants, who will be receiving meaningful compensation as a result of the sanctioning of the CCAA Plans, have waited long enough. Litigation was commenced in 1998. Judgment was obtained in 2015 and confirmed on appellate review in 2019. The CCAA Proceedings were commenced in 2019 and are before this court today to be sanctioned. Thousands of Claimants have sadly passed away during this period. The QCAPs and the PCCs have waited long enough to receive compensation. The wait, for many, has been intolerable. That wait ends today.

[172] With respect to the scope of the release, HSF and CCS complain that the effect of the release is that it covers future wrongful conduct.

[173] A full and complete response to this submission was set out by Ms. Wall in her responding argument on behalf of the Province of Ontario. I can do no better than to reproduce the salient points made by Ms. Wall, taken from the January 31, 2025 unofficial transcript provided by the real-time reporter, commencing at page 115 where Ms. Wall references the position of HSF:

> "The future tobacco harm stakeholders are millions of…"
>
> "… individuals who will purchase or consume tobacco products or be exposed to their use following the commencement of these proceedings but who have not suffered any harm prior to the [claims] bar date."

[174] Ms. Wall responds as follows at p. 118:

> Now the Heart and Stroke Foundation have made up the term "FTH stakeholders". This is not a concept that was used at all in the mediation, and I'll explain why. It's based on fundamental misunderstandings of, first, the concept of the Pan-Canadian claimants, so I'm going to talk about what the Pan-Canadian claimants are; and secondly, the scope of the release, and I think this is quite important to deal with, the scope of the release.
>
> > "The first step in the development of the PCC compensation plan was to identify the potential causes of action that could be advanced by the PCCs against the tobacco companies and the tobacco company groups. Understanding the causes of action are necessary to determine the scope of the PCCs' claims and potential claims that will need to be released in the global settlement."
> >
> > "The thesis underlying the PCC claims is that the tobacco companies have committed breaches of the common-law, equitable, and/or statutory duties or obligations that they owed to individuals in each province and [territory] who have been exposed to tobacco product manufactured by them and offered for sale in each tobacco jurisdiction".

> "The PCCs potentially could base their claims on one or more causes of action, including, without limitation, first conspiracy".
>
> …
>
> "The cause of action will be commencing in about 1953. The tobacco companies conspired and acted in concert to prevent individuals in each province and territory from acquiring knowledge of the harmful and addictive properties of cigarettes in circumstances where they knew or ought to have known that their claims would cause tobacco-related diseases in such persons".

And I'll go back to the public-knowledge date in a moment:

> "…the tobacco companies knew or ought to have known that their cigarettes, when smoked as intended, were addictive and could cause or contribute to disease, and as manufacturers of cigarettes sold to individuals in each province and territory, they owed a duty of care to warn the public of smoke cigarettes of the risks of addiction and disease from smoking as was known or should have been known to them based on research on smoking and health from 1950 onward.
>
> The tobacco companies failed to provide any warning and effective warnings of the risk of tobacco-related disease which were known to them. They suppressed information known to them and misinformed and misled individuals about the risks of addiction and diseases from smoking."

And finally:

> "Another basis of the – these are causes of action, allegations that could ground claims by PCCs would be misrepresentation. Since 1950, the tobacco companies misrepresented the risks of smoking by denying any link between smoking and addiction, which was contrary to what was known or should have been known to them based on research that was known to them on smoking and health."

So I'll leave it there. So only a person who has a cause of action has a claim that can be released. [*emphasis added*]

I mention to you the public-knowledge date, and this becomes relevant in a few minutes when we revisit Mr. Bunting's hypothetical FTH stakeholder named Sarah.

The public-knowledge date, that term came out of the Quebec class action judgement. The Court made a finding regarding what it called the public-knowledge date, which is the date by which individuals knew or should have known

of the risks of smoking the applicants' cigarettes that could cause the smoking, tobacco-related diseases.

The [Quebec] Court found that the [public-knowledge] date to be March 1st of 1996, so the breach period during which the tobacco companies committed their wrongful conduct which grounds the causes of action, begins in 1950 and ends, very important, ends at the public-knowledge date.

The public-knowledge date in the PCC compensation plan was adjusted from that March 1st of 96 date to November 20, 1998, to create some parity with the PCC-certified - sorry, the QCAP-certified class definition, which used November 1998, which was the date of the certification of the class action – I'm sorry, the issuance of the Statement of Claim.

…

So what does all this information I've set out for you do? And this is all – what I'm taking you through is all in the plan, the document.

So if a person smoked before the public-knowledge date, then they may have a cause of action because they smoked before the public knew or should have known of the risks that smoking the cigarettes of the applicants could cause tobacco-related diseases. Such is a person may have a claim that can be released.

But if a person starts smoking after the public-knowledge date, then they don't have a cause of action. They use the applicants' tobacco products when they knew or should have known of the risk of smoking the cigarettes that caused the tobacco-related diseases. Such a person does not have a claim that can be released.

Now, if you recall Mr. Bunting's hypothetical "Sarah", she was an FTH stakeholder, as he termed her, who first tried smoking in high school in 2025. She then became a heavier smoker addicted to nicotine in university and thereafter developed a tobacco-related disease and went to a lawyer to consult about her claim.

Sarah does not have any cause of action against the tobacco companies because she started smoking, in that hypothetical, 27 years after the public-knowledge date in 1996. She used tobacco products that, due to Canadian regulations and legislation, et cetera, have clear warnings in 2025 on their packages, and now, on the actual cigarettes, warning of the risks of smoking and the risk of tobacco-related disease.

So, since Sarah doesn't have a cause of action, she doesn't have any claim to release.

So what the Heart and Stroke Foundation has missed with this concept they've been putting forward is not every person who smokes and suffers from a tobacco-related

> disease has a cause of action and entitles them to redress. And this is product liability principles, and a person who doesn't have a cause of action does not have a claim that is released in the plans.

[175] In my view, the foregoing submissions of Ms. Wall address the concerns of the HSF, as well as the concerns of CCS with respect to the scope of the Release.

P. THE LAW

[176] The issues on this motion are:

(a) Should the Court sanction the CCAA Plans?

(b) Should the Court grant the releases sought?

(c) Should the Court grant the CCAA Plan Administrator Appointment Orders?

[177] In seeking approval of a plan of compromise or arrangement under the CCAA, the debtor company must establish that:

(a) There has been strict compliance with all statutory requirements;

(b) Nothing has been done or purported to be done that is not authorized by the CCAA and prior orders of the Court in the CCAA proceedings; and

(c) The plan must be fair and reasonable.

See *Canadian Airlines Corp. (Re)*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 178, leave to appeal refused, 2000 ABCA 238, variation refused, 2001 ABCA 9, leave to appeal refused, [2001] S.C.R. xii (note) [*Canadian Airlines*]; *Laurentian University of Sudbury*, 2022 ONSC 5645, at para. 23; and *Lydian International Limited (Re)*, 2020 ONSC 4006, at para. 22) [*Lydian International*].

(i) Strict Compliance with Statutory Requirements

[178] I find that the statutory requirements for the sanction of the CCAA Plans under s. 6 of the CCAA have been satisfied.

[179] The Tobacco Companies, Monitors and Court-Appointed Mediator have complied with the procedural requirements of the CCAA, the Second Amended and Restated Initial Orders, the Claims Procedure Orders, the Meeting Orders, the Sanction Protocol Orders and all other Orders granted by the Court in the CCAA Proceedings. In particular:

(a) At the time that each Initial order was granted, the Court found that the CCAA applied to each of the Tobacco Companies and that each of the Tobacco Companies had liabilities that exceeded the $5 million threshold under the CCAA: see *Imperial Tobacco Canada Limited, et al., Re*, 2019 ONSC 1684, 68

C.B.R. (6th) 322, at para. 7; *JTI-Macdonald Corp., Re*, 2019 ONSC 1625, at para. 11; and the Endorsement of Justice Pattillo dated March 21, 2019, at p. 3;

(b) Notices of the Meetings were distributed in accordance with the Meeting Orders: see Imperial Meeting Order (October 31, 2024), at paras. 16-19; JTIM Meeting Order (October 31, 2024), at paras. 16-19; and RBH Meeting Order (October 31, 2024), at paras. 16-19;

(c) The classification of creditors for voting purposes for each of the Tobacco Companies was approved by this Court: Imperial Meeting Order, at para. 20; JTIM Meeting Order, at para. 20; and RBH Meeting Order, at para. 20);

(d) The Meetings were properly constituted, and voting on the CCAA Plans at the Meetings was properly carried out in accordance with the Meeting Orders: see FTI 25th Report, at paras 20-21; EYI 22nd Report, at paras. 21-25; Deloitte 21st Report, at paras. 17-20);

(e) The CCAA Plans comply with the statutory requirements set out in subsections 6(3), 6(5) and 6(6) of the CCAA and the Meeting Orders: see *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 6(1); FTI 25th Report, at para. 33; EYI 23rd Report, at para. 16; and Deloitte 22nd Report, at para. 56(a)).

[180] In addition, the CCAA Plans comply with the statutory requirements set out in subsections 6(3), 6(5) and 6(6) of the CCAA, which provide that the Court may not sanction a plan of arrangement unless it contains certain specified provisions concerning Crown claims, employee claims and pension claims. Such claims are Unaffected Claims under the CCAA Plans.

[181] Further, in compliance with subsection 6(8) of the CCAA, the CCAA Plans do not contemplate the payment of any amounts to equity holders of the Tobacco Companies.

(ii) No Unauthorized Matters

[182] Second, no unauthorized matters have occurred in these CCAA Proceedings.

[183] In considering whether any unauthorized steps have been taken by the debtor companies, courts can rely on the Monitors' reports and the materials filed by the parties and their stakeholders: *Canadian Airlines, supra*, at para. 64; and *Canwest Global, supra*, at para. 17.

[184] Throughout the course of these CCAA Proceedings, the Tobacco Companies, the Monitors and the Court-Appointed Mediator have acted in good faith and with due diligence and have complied with the requirements of the CCAA and the Orders of this Court: see EYI 23rd Report, at para. 24; FTI 25th Report, at para. 38; *Canadian Airlines, supra*, at para. 64; *Canwest Global*, *supra*, at para. 17). The Tobacco Companies have regularly filed affidavits to keep this Court apprised of all material matters over the course of the CCAA Proceedings. This Court was satisfied that at each stay extension in respect of each of the CCAA Proceedings the Tobacco Companies had acted and were acting in good faith and with due diligence. Further, the Monitors have

provided regular reports, none of which have identified any non-compliance with the CCAA or this Court's Orders.

(iii) The CCAA Plans are Fair and Reasonable

[185] In reviewing the fairness and reasonableness of the CCAA Plans, the Court does not and should not require perfection: see *Sammi Atlas Inc., Re*, 3 C.B.R. (4th) 171, at para. 4. As the Court stated in *Canadian Airlines*, at paras. 178-179:

> In summary, in assessing whether a plan is fair and reasonable, courts have emphasized that perfection is not required.… Rather, various rights and remedies must be sacrificed to varying degrees to result in a reasonable, viable compromise for all concerned. The court is required to view the "big picture" of the plan and assess its impact as a whole.…
>
> Fairness and reasonableness are not abstract notions, but must be measured against the available commercial alternatives. The triggering of the statute, namely insolvency, recognizes a fundamental flaw within the company. In these imperfect circumstances there can never be a perfect plan, but rather only one that is supportable.

[186] The Court's discretion is "an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan": see *Canadian Airlines*, *supra*, at para. 3; *Canwest Global*, *supra*, at para. 19). The Court should be informed by the objectives of the CCAA, namely, to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, employees and, in many instances, a much broader constituency of affected persons: see *Canwest Global*, *supra*, at para. 20.

[187] Factors that establish that a plan is fair and reasonable include: (i) the claims are properly classified; (ii) the plan was approved by the double majority of creditors as required by the CCAA; (iii) there is no viable alternative to the plan; and (iv) the public interest: see *Canwest Global*, *supra*, at para. 21; *Canadian Airlines*, *supra*, at para. 96; *Nelson Financial Group Ltd. (Re)*, 2011 ONSC 2750, 79 C.B.R. (5th) 307, at para. 37; and *Sino-Forest Corporation (Re)*, 2012 ONSC 7050, at para. 61).

[188] Each Monitor has concluded that the CCAA Plans are fair and reasonable, as set out below.

[189] The classification of Affected Creditors in a single class for voting purposes was appropriate in the circumstances and was approved pursuant to the Meeting Orders. None of the Affected Creditors have disputed their classification into a single class.

[190] Creditor Approval is the most important factor and "creates an inference that the plan is fair and reasonable": see *Canadian Airlines*, *supra*, at para. 97. The unanimous approval of the CCAA Plans by Affected Creditors voting in person, or by proxy at the meetings, reflects their belief in exercising their business judgment, that the CCAA Plans are fair, reasonable and economically feasible. The Court should not second-guess or displace the business judgment of

the Affected Creditors who, with the Tobacco Companies, participated in the development of the CCAA Plans in their best interests: see *Olympia & York, supra,* at paras. 36-37; and *Canadian Airlines, supra,* at para. 97.

[191] That there is no "alternative transaction that would provide greater recovery than the recoveries contemplated in the Plans" weighs in favour of a finding that the CCAA Plans are fair and reasonable: see *Canwest Global, supra,* at para. 25. As noted above, the Monitors and the Court-Appointed Mediator have considered possible alternatives to the CCAA Plans and have concluded that there is no viable alternative to the CCAA Plans which have the consent of the Affected Creditors.

[192] The Tobacco Companies face aggregate liability of approximately $1 trillion arising from the Tobacco Claims. As this Court has previously recognized, the "astronomical" dollar value of potential claims "is clearly beyond the ability for any or all of the [Tobacco Companies] to satisfy": 2023 ONSC 5449, at para. 15. If the CCAA Plans are not sanctioned by this Court and implemented, the likely outcome is the liquidation or bankruptcy of the Tobacco Companies: see FTI 25th Report, at para. 40.

[193] In my view, each factor supports a finding that the CCAA Plans are fair and reasonable in the unique circumstances of these CCAA Proceedings and within the context of the CCAA: *Canadian Airlines, supra* at para. 94.

(iv) Nothing in the CCAA Plans is Contrary to the Public Interest

[194] Nothing in the CCAA Plans is Contrary to the Public Interest. In fact, the CCAA Plans:

(a) Provide meaningful recovery to Affected Creditors, including the individual QCAP and PCCR Claimants, as well as the Provinces and Territories;

(b) Require the creation and funding of the Cy-près Foundation, a $1 billion public charitable foundation designed to provide indirect benefits to a diverse group of PCCs, *Létourneau* Class Members and the general public; and

(c) Allow the Tobacco Companies to continue as going concerns, which will benefit their employees, suppliers and other stakeholders.

Q. THE THIRD PARTY RELEASES SHOULD BE GRANTED

[195] This Court has jurisdiction to approve the Third-Party Releases

[196] It is well-established that the Court has jurisdiction, in appropriate circumstances, to sanction plans containing releases in favour of third parties: see *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 61, leave to appeal refused, 2008 CanLII 46997 (S.C.C.) [*Metcalfe*]. In addition to approving releases of directors and officers, courts have also sanctioned plans releasing other third parties that contributed to a plan, including the debtor's affiliates, employee representatives and others: see *Sino-Forest Corporation (Re),*

2012 ONSC 7050, at paras. 70-74, leave to appeal refused, 2013 ONCA 456, leave to appeal refused, 2014 CanLII 11054 (S.C.C.) (releasing the debtor's subsidiaries); *Target Canada Co., Re*, 2016 ONSC 3651, at paras. 40-47 [*Target*] (releasing the debtor's parent company, who was also the plan sponsor); *Laurentian*, *supra*, at paras. 39-45 (releasing a university with which the debtor had a relationship); *Lydian International*, *supra*, at paras. 50-64 (releasing senior lenders).

[197] In determining whether to approve a third-party release, the Court will consider the following factors, none of which alone is determinative:

(a) Whether the parties to be released from claims are necessary and essential to the restructuring of the debtor;

(b) Whether the claims to be released are rationally connected to the purpose of the plan and necessary for it;

(c) Whether the plan could succeed without the releases;

(d) Whether the parties being released are contributing to the plan;

(e) Whether the release benefits the debtors as well as the creditors generally;

(f) Whether the creditors who voted on the plan had knowledge of the nature and effect of the releases; and

(g) Whether the releases are fair and reasonable and not overly broad or offensive to public policy: see *Metcalfe*, *supra*, at para. 113; *Laurentian*, *supra*, at para. 40, citing *Lydian International*, *supra*, at para. 54.

[198] The third-party releases in the CCAA Plans were negotiated as part of the overall framework of the compromises in the CCAA Plans and are necessary to achieve the global settlement of the Tobacco Claims and for the CCAA Plans to be implemented. Each of the released third parties either have contributed or will contribute in a tangible and realistic way to the CCAA Plans and, in some cases, are providing consideration absent which the CCAA Plans could not succeed.

[199] The CCAA Proceedings could not proceed without the officers and directors of the Tobacco Companies, the Monitors and the Court-Appointed Mediator, among others, who have each played an integral role in these complex coordinated CCAA Proceedings and have provided meaningful guidance throughout.

[200] Similarly, the implementation of the CCAA Plans would not be possible without the Parent Companies and relevant affiliates in the Tobacco Company Groups. These entities have variously agreed to provide shared services and other operational support to the Tobacco Companies and the Administrative Coordinators, who will administer the PCC Compensation Plan and the Quebec Administration Plan. The Tobacco Companies have further agreed to enter into the Definitive

Documents in exchange for the releases. These releases are necessary to ensure the orderly, efficient and fair administration and implementation of the CCAA Plans.

[201] The Affected Creditors received the CCAA Plans and related materials before the Meeting, which detailed the nature and effect of the releases. Under the CCAA Plans, the Claimants will each execute Claimant Contractual Releases, confirming their consent to the releases under the CCAA Plans. The Affected Creditors voted overwhelmingly in favour of the CCAA Plans containing those releases. In my view, the third-party releases are not overly broad and contain the necessary and appropriate carve-outs: see EYI 23rd Report, at paras. 31-33; FTI 25th Report, at paras. 29-34.

[202] I have no doubt the issue of the releases consumed many hours for all those participating in the mediation. The Monitors, and by extension, the Mediator, support the granting of the releases in their current form. They take into account the required factors. It is not for the court to redraft or amend the releases. Again the choice for the court is a binary one. It must either accept the language or reject it.

[203] The Monitors consider the third-party releases proposed in the CCAA Plans to be fair, reasonable and rationally connected to the overall purpose of the CCAA Plans.

[204] I accept this recommendation. The third party releases are approved.

R. THE CCAA PLAN ADMINISTRATOR APPOINTMENT ORDERS SHOULD BE GRANTED

(i) The Court has the Jurisdiction to Grant the CCAA Plan Administrator Appointment Orders

[205] Section 11 of the CCAA "confers jurisdiction on the court in the broadest of terms" and enables the court to "make any order that it considers appropriate in the circumstances": *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314, at para. 9. As the Supreme Court has explained, the "vast" power conferred by section 11 "is constrained only by restrictions set out in the CCAA itself and the requirement that the order made be appropriate in the circumstances": *Canada v. Canada North Group Inc.*, 2021 SCC 30, [2021] 2 S.C.R. 571, at para. 21. The appropriateness of a section 11 order is also assessed in relation to its grounding in the well-established remedial objectives of the CCAA, including facilitating the reorganization of a debtor company, providing for timely, efficient and impartial resolution of a debtor's insolvency, and ensuring the fair and equitable treatment of the claims against a debtor.

(ii) The CCAA Plan Administrator Appointment Orders are Appropriate in the Circumstances

[206] The implementation of the CCAA Plans is expected to be lengthy and complex. Each CCAA Plan is dependent on the implementation of the other two CCAA Plans to ensure the global settlement of all Tobacco Claims against each Tobacco Company. The CCAA Plan Administrator

Appointment Orders are therefore designed to facilitate the implementation of the coordinated CCAA Plans, including the continued involvement of the Court-Appointed Mediator.

[207] As neutral third parties, the CCAA Plan Administrators, along with the Court-Appointed Mediator, will give comfort and stability to the Court and the Affected Creditors by overseeing the implementation of the CCAA Plans and reporting as necessary.

[208] I am satisfied that the CCAA Plan Administrator Appointment Orders should be granted to facilitate the restructuring of the Tobacco Companies and advance the goals of the CCAA in these complex and coordinated CCAA proceedings.

DISPOSITION

[209] The motion to sanction the CCAA Plan for each of JTIM, Imperial and RBH, together with the ancillary relief set out at para. [11], is granted.

[210] It remains for the CCAA Plans to be implemented on the Plan Implementation Date. The Stay Period expires today. It is therefore necessary to extend the Stay Period.

[211] I am satisfied that the parties are working in good faith and with due diligence such that an extension of the Stay Period is both necessary and reasonable in the circumstances. The Tobacco Companies have sufficient resources to carry on operations from now to the Plan Implementation Date.

[212] The Stay Period is extended to the Plan Implementation Date.

EXPRESSION OF GRATITUDE

[213] All parties, and the court, are indebted to The Honourable Warren K. Winkler, K.C., and the representatives of the Monitors for their incredible contributions and efforts in forming a consensus among stakeholders that has resulted in the sanctioning of these CCAA Plans.

Chief Justice Geoffrey B. Morawetz

Date: March 6, 2025

SCHEDULE "A"

CITATION: Imperial Tobacco Limited, 2025 ONSC 1375
COURT FILE NOS.: CV-19-615862-00CL, CV-19-616077-00CL and CV-19-616779-00CL
DATE: 2025-03-03

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **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**

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.

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Craig Lockwood, Deborah Glendinning, Marc Wasserman and Martino Calvaruso*, for Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

Natasha MacParland and Chanakya Sethi, for FTI Consulting Canada Inc. in its capacity as court-appointed Monitor of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

Robert Thornton, for JTI-Macdonald Corp.

Linc Rogers, for Deloitte Restructuring Inc. in its capacity as Monitor of JTI-Macdonald Corp.

Jamey Gage and Trevor Courtis, for Rothmans, Benson & Hedges Inc.

R. Shayne Kukulowicz and Monique Sassi, for Ernst & Young Inc., in its capacity as court-appointed Monitor of Rothmans, Benson & Hedges Inc.

Jacqueline Wall, for the Province of Ontario

Sam Cotton, for the Heart and Stroke Foundation

Jesse Mighton, Jeffrey Leon, Mike Eizenga and Preet Gill, for the Province of British Columbia, Province of Manitoba, Province of New Brunswick, Province of Nova Scotia, Province of Prince Edward Island, Province of Saskatchewan, Government of Northwest Territories, Government of Nunavut and Government of Yukon in their capacities as Plaintiffs in the HCCR Legislation Claims

André I.G. Michael, for the Consortium of Provinces and Territories

Brett Harrison and Guneev Bhinder, for the Province of Quebec

HEARD: March 3, 2025

ENDORSEMENT

[1] This endorsement concerns the ongoing *Companies' Creditors Arrangement Act* ("CCAA") proceedings involving JTI-Macdonald Corp. ("JTI"), Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited (collectively, "Imperial" and Rothmans Benson & Hedges Inc. ("RBH"). JTI, Imperial and RBH are collectively referred to as the "Tobacco Companies". This endorsement relates to all three Tobacco Companies.

[2] Each of Deloitte Restructuring Inc. ("Deloitte"), in its capacity as Court-appointed Monitor of JTI, FTI Consulting Canada Inc. ("FTI"), in its capacity as Court-appointed Monitor of Imperial and Ernst & Young Inc. ("EY") in its capacity as Court-appointed Monitor of RBH brought a motion for an order (CCAA Plan Amendment Order No. 1) approving the proposed amendments as reflected in the Third Amended and Restated Plan of Compromise and Arrangement in each of the CCAA proceedings.

[3] CCAA Plans were unanimously approved by voting creditors at three separate, sequential meetings of Affected Creditors of JTI, Imperial and RBH (the "Meetings") on December 12, 2024. The Monitors then brought motions for orders sanctioning the CCAA Plans and ancillary relief, which were heard from January 29 to 31, 2025 (the "Sanction Hearing").

[4] The Court's decision on the Sanction Hearing is under reserve.

[5] At the Sanction Hearing, the Tobacco Companies advised that the issue of allocation under the CCAA Plans remains unresolved as between them.

[6] The Tobacco Companies have now reached an agreement in principle to resolve the allocation issue.

[7] Pursuant to the CCAA Plans, the Tobacco Companies are to make upfront contributions on or before the Plan Implementation date equal to the aggregate of each Tobacco Companies' cash and cash equivalents generated from all sources by each Tobacco Company prior to the Plan Implementation Date, plus cash security deposits, less the sum of $750 million.

[8] The allocation of the $750 million holdback to be retained by the Tobacco Companies to fund working capital (the "Working Capital Holdback") remained unresolved at the time of the Sanction Hearing. The Tobacco Companies have now agreed in principle that on the Plan Implementation Date, RBH will retain the entire Working Capital Holdback. In exchange for RBH, JTI and JTI Macdonald TM Corp. ("JTI-TM") have agreed to withdraw all of their objections to the sanctioning of the CCAA Plans.

[9] Pursuant to section 20.4(a) of the CCAA Plans, the Monitors now move for CCAA Plan Amendment Orders to approve certain amendments to the CCAA Plans to implement this agreement in principle (the "Amendments").

[10] As a result of the agreement in principle, the Tobacco Companies take the position that section 5.2 of the CCAA Plans is to be intentionally deleted.

[11] In addition, the Tobacco Companies require that section 5.4 of the CCAA Plans be amended to: (i) provide that the Working Capital Holdback is to be retained by RBH as the "RBH Retained Amount", (ii) permit RBH to deal with the RBH Retained Amount in its sole discretion, including to transfer or distribute such monies outside of Canada in such manner as RBH may determine; and (iii) clarify that any such transfers or distributions of the RBH Retained Amount will be deemed to be permitted transfers for the sole purpose of Article 11 of the CCAA Plans.

[12] Certain administrative changes to effect the Amendments may also be required.

[13] None of the amendments affect any Affected Creditor or Unaffected Creditor. The amendments only impact the allocation of the Working Capital Holdback among the Tobacco Companies.

[14] No Claimants oppose the motions.

[15] The only opposition to the requested relief is from the Heart and Stroke Foundation (Heart & Stroke").

[16] Heart & Stroke makes its submissions as a social stakeholder. It submits that the CCAA Plan Amendment Orders should not be granted because the proposed amendments to the CCAA Plans do not cure the unfairness and unreasonableness of the CCAA Plans arising from the narrow scope of the *Cy-près* Foundation.

[17] In making its submissions, Heart & Stroke relies on the Responding Factum that was referenced at the Sanction Hearing, oral arguments made at the Sanction Hearing and its written submissions for this motion. Heart & Stroke does not raise any new issues on this motion.

[18] The Province of Ontario submitted that Heart & Stroke's objection to the proposed amendment to the Plan constituted an abuse of process.

[19] Abuse of process is a flexible doctrine which grants the court inherent power to prevent the misuse of its procedure in a way that would bring the administration of justice into disrepute.

It may be used to bar the relitigation of issues previously decided and to promote judicial economy and the integrity of the court's process: *Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 37, 51.

[20] Heart & Stroke previously brought a motion for leave to appoint representative counsel for "Future Tobacco Harms Stakeholders" in this proceeding. In a decision dated June 23, 2023, McEwen J. dismissed that motion, in part on the basis that any claims of the Future Tobacco Harms Stakeholders were no different in nature from the unascertained and unasserted claims of the Pan-Canadian Claimants: 2023 ONSC 2347, at para. 86.

[21] As a result of McEwen J.'s decision, Future Tobacco Harms Stakeholders do not constitute a distinct class of creditors in this CCAA process. Heart & Stroke is neither an Affected Creditor nor an Unaffected Creditor. The court need not consider whether the proposed amendments to the plan are materially prejudicial to their interests.

[22] Heart & Stroke opposes the amendments to the plan on the basis that they do not adequately address the needs of Future Tobacco Harms Stakeholders. If the court were to adopt this argument, the effect would be to treat Future Tobacco Harms Stakeholders as a class of creditors whose approval is required to sanction the plan. In this way, Heart & Stroke's submissions are an improper attempt to undermine McEwen J.'s decision.

[23] Heart and Stroke is a social stakeholder in this proceeding, but its status does not give it standing to raise objections on issues that do not affect it. In *Parsons v. Canadian Red Cross Society* (2001), 140 O.A.C. 348, the Court of Appeal held that, where a party has no legal rights that are impacted by a particular decision, that party has no standing to appeal that decision. By analogy, where a party's rights are not impacted by an amendment to a proposed plan of arrangement, that party has no standing to object to the amendment.

[24] The proposed amendments to the plan fix the allocation of the Working Capital Holdback. None of the amendments sought on this motion affect Heart & Stroke as a social stakeholder. The proposed amendments have no impact on the scope of the *Cy-près* Foundation. The issues raised by Heart & Stroke on this motion were raised in the Sanction Hearing. The court's decision on the motion to sanction the plan is under reserve. Heart & Stroke's objections will be addressed in the court's decision on that motion.

[25] Heart & Stroke advanced arguments that had no bearing on the question of whether the motion to amend the plan should be granted, and which challenged the court's previous decision regarding the status of Future Tobacco Harms Stakeholders. For these reasons, Ontario's abuse of process concern was not without merit.

[26] In my view, Heart & Stroke's submissions were ill-advised and are rejected.

[27] The sole issue on these motions is whether the court should grant the CCAA Plan Amendment Orders.

[28] Section 20.4(a) of the CCAA Plan requires the Monitors to notify Affected Creditors and the Tobacco Companies and obtain court approval of any amendment, restatement, modification or supplement to be made following the Meeting Orders that is not solely: (i) administrative; or (ii) error correcting.

[29] The Monitors submit that the proposed amendments are substantive and not merely curative and therefore that the court approve them. They submit that the amendments do not affect and are not materially adverse to the financial or economic interests of Affected Creditors or Unaffected Creditors. The amendments only impact the allocation of the Working Capital Holdback among the Tobacco Companies. The Affected Creditors and Tobacco Companies received notice of these motions on February 27, 2025. All three Tobacco Companies, along with JTI-TM, support the amendments.

[30] Sections 6 and 7 of the CCAA provide the court with authority to sanction a plan or to alter or modify its terms. When amendments are proposed after the creditors meeting, section 7 of the CCAA gives the court the discretion to sanction an amended plan without convening an additional creditors meeting if the court is satisfied that the creditors or shareholders are not adversely affected by the proposed amendments.

[31] I accept the submissions of the Monitor. I am satisfied that no Affected Creditor or Unaffected Creditor will be affected by the amendments. I am also satisfied that each of the Monitors has adhered to section 20.4(a) of the CCAA Plans by providing notice to the common service list and moving for the court's approval of the amendments.

[32] Each of the Monitors has filed a report recommending that the court approve the amendments and grant the CCAA Plan Amendment Order No. 1.

[33] I am satisfied that the evidence establishes that the requested relief is appropriate in the circumstances. The motions of the Monitors are granted and the orders have been signed.

[34] For greater certainty, the existing Stay of Proceedings remains in effect until such time as the decision on the Sanction Hearing has been released.

"Chief Justice Geoffrey B. Morawetz"

Date: March 3, 2025

CITATION: Imperial Tobacco Limited, 2024 ONSC 6890
COURT FILE NOS.: CV-19-616077-00CL, CV-19-615862-00CL and CV-19-616779-00CL
DATE: 2024-12-10

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **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**

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.

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Mark E. Meland, André Lespérance and Tina Silverstein*, for Conseil québécois sur le tabac et la santé, Jean-Yves Blais and Cécilia Létourneau (Québec Class Action Plaintiffs)

Raymond Wagner, K.C. and Kate Boyle, Representative Counsel for the Pan-Canadian Claimants

Andrea Grass, for Actis Law Group

Linc Rogers, for Deloitte Restructuring Inc., in its capacity as Monitor of JTI-Macdonald Corp.

Robert Cunningham, for the Canadian Cancer Society

Jacqueline Wall, for the Province of Ontario

HEARD: December 9, 2024

ENDORSEMENT

[1] This matter concerns the ongoing insolvency proceedings involving JTI-Macdonald Corp. ("JTI"), Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited (collectively,

"Imperial") and Rothmans Benson & Hedges Inc. ("RBH"). This endorsement relates to all three applicants.

[2] The representative counsel for the Pan-Canadian Claimants seeks interlocutory injunctive relief against Actis Law Group and its principal, Andrea Grass (together, "Actis"). For the reasons that follow, the injunction is granted.

Background

[3] In March 2019, JTI, Imperial and RBH commenced insolvency proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA Proceedings"). The CCAA proceedings were precipitated by a class-action judgment rendered in Québec for over $13.5 billion.

[4] Since that time, JTI, Imperial, RBH (collectively, the "Tobacco Companies"), their respective monitors, the claimants, and The Honourable Warren K. Winkler, K.C., the Court-appointed Mediator, have spent thousands of hours in hundreds of court-ordered mediation sessions.

[5] These negotiations culminated in proposed CCAA plans for each of the Tobacco Companies. Under these proposed plans, the Tobacco Companies would collectively pay more than $32.5 billion to be divided among several parties, including class-action plaintiffs and each of the provinces and territories. In exchange for these payments, the Tobacco Companies would be granted a full and final release and emerge as going concerns.

[6] Meeting Orders and Claims Procedure Orders were issued on October 31, 2024. Pursuant to the Meeting Orders, creditors meetings to vote on the CCAA plans are scheduled for this Thursday, December 12.

[7] On December 9, 2019, Wagners was appointed as class counsel for the Pan-Canadian Claimants (PCC) to represent their interests in connection with these proceedings. The Pan-Canadian Claimants are individuals, excluding the Québec Class-Action plaintiffs in relation to the claims in the Québec Class-Action, who have asserted or may be entitled to assert a claim related to, among other things, the development, design, manufacture, production, marketing, advertising, distribution, purchase or sale of tobacco products.

[8] The Respondent Actis published a website purporting to offer representation in the "Canadian Tobacco Class Action Settlement". This website encouraged individuals to submit their information in order to participate in the class-action. It stated that Actis offers its services on a contingency fee basis. The website was taken down before this hearing, but Actis asserts that there is nothing improper in offering its services in this way.

[9] Wagners, in its capacity as class counsel seeks an interlocutory injunction until the Court renders its decision on any sanction orders in the proceedings. They ask that Actis be required to:

(a) Take down the website advertising services related to the CCAA proceedings;

(b) Cease and desist all solicitation of services or provision of advice to the PCC;

(c) Provide a list of persons who signed up or provided information to Actis in response to its advertising services in connection with the CCAA proceeding;

(d) Destroy records in its possession relating to the CCAA proceeding.

[10] I am satisfied that the test for an interlocutory injunction has been met, pursuant to s. 101 of the *Courts of Justice Act* and Rule 40.01 of the *Rules of Civil Procedure*.

Analysis

[11] Section 101 of the *Courts of Justice Act* provides that an interlocutory injunction or mandatory order may be granted where it appears to a judge of the court to be just or convenient to do so.

[12] The test for an interlocutory injunction is set out by the Supreme Court of Canada in *RJR MacDonald Inc. v. Canada (Attorney-General)*, at 334. The test requires the moving party to demonstrate that:

(a) there is a serious issue to be tried;

(b) irreparable harm will result if the relief is not granted; and

(c) the balance of convenience favours the moving party.

[13] This analysis must be contextualized by the ongoing CCAA proceeding. The CCAA creates a single proceeding model to promote the "equitable and orderly resolution of insolvency disputes". This approach is "intended to mitigate the inefficiency and chaos that would result if each stakeholder in an insolvency initiated a separate claim to enforce its rights": *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, 475 D.L.R. (4th) 1, at paras. 54-55.

[14] To this end, this Court is empowered under s. 11 of the CCAA to "make any order it considers appropriate in the circumstances".

A. Serious Issue to be Tried

[15] The threshold to satisfy this requirement is low. So long as the claim is not frivolous or vexatious, this factor of the test will generally be satisfied: *RJR-MacDonald*, at 335.

[16] I am satisfied that this low threshold is met. Whether an order should be granted under s. 11 of the CCAA presents a serious issue.

[17] The interests of the PCC are represented in this proceeding by the court-appointed class counsel. If the CCAA plan is approved by the creditors and sanctioned by the Court, the PCC will require no additional legal representation. They will be entitled to assert their claims under the PCC Compensation Plan with the support of Wagners and its agents.

[18] By advertising legal services and soliciting retainers, Actis stands to interfere with the equitable and orderly resolution of the CCAA proceedings. It risks confusing the claimants and interfering with their representation by the court-appointed class counsel at a critical point in the proceedings. Claimants may be led to mistakenly believe that they must sign up for Actis's services to obtain their entitlements. They may also fail to sign up to receive information from the court-appointed class counsel on the mistaken belief that they have taken the necessary steps to receive such information.

B. Irreparable Harm

[19] The second element of the *RJR-MacDonald* test is whether the moving parties will suffer irreparable harm if the injunction is not granted. What must be established on this part of the test is whether refusing to grant an injunction will cause harm that cannot be remedied at some later stage: *RJR-MacDonald*, at 341.

[20] I am satisfied that allowing Actis to advertise legal services and solicit retainers in connection with the CCAA proceedings poses a risk of irreparable harm. The CCAA proceedings are in a critical stage, with Creditors Meetings taking place on December 12. The court-appointed class counsel requires the ability to make timely and effective communications with the members of the class it represents. By interposing itself between class counsel and the PCC, Actis can interrupt this communication and risk introducing confusion which may undermine the equitable and orderly conduct of the CCAA proceedings.

[21] Additionally, Actis's participation in this proceeding would interfere with the CCAA Plans as they will be presented to creditors on December 12. It may be appropriate in some claims processes for lawyers to offer their services to help claimants pursue their claims. However, these proceedings and these claims processes are unique.

[22] As counsel to the Province of Ontario noted, the process to file claims has been streamlined and claimants are not responsible for the compensation of PCC Counsel.

[23] Ontario supported the position of PCC Counsel as did The Canadian Cancer Society.

[24] In my view, the offering of Actis, on a category fee basis at this stage of the proceedings, is not desirable in this case.

[25] The claimants in this matter are vulnerable, and some have waited over 26 years to realize their claims. The PCC Compensation Plan is specially crafted to meet these unique circumstances and to reduce any further hardship for the claimants. It is specifically designed to eliminate any need for the services Actis proposes to offer. Wagners has procured an agent to manage its communications with potential claimants and to support them in making their claims. Offering such services for a fee, when the PCC are entitled to receive them at no cost, would undermine the very purpose of important aspects of the CCAA Plans.

[26] In the context of these CCAA proceedings, which are uniquely complex and span over five years, such harms cannot be remedied once inflicted.

C. Balance of Convenience

[27] The third factor, the balance of convenience, considers which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction. I must also consider the public interest at this stage: *RJR-Macdonald,* at 348-49.

[28] I am satisfied the balance of convenience favours granting the injunction. Absent an injunction, there is a serious risk that the PCC' interests and their representation by class counsel will be undermined due to confusion caused by Actis's advertising and soliciting activities. Such confusion in turn risks undermining the orderly and equitable resolution of the insolvency proceedings.

[29] On the other hand, Actis purports to offer services that are within the mandate of class counsel. It proposes to help potential claimants determine their eligibility to make a claim in the proceeding. These are services that class counsel are mandated to provide under the PCC Compensation Plan. In the unique circumstances of these CCAA proceedings and these Compensation Plans, Actis's legitimate interest in offering such services is limited at best.

Notice

[30] Rule 40.02 of the *Rules of Civil Procedure* specifies that an interlocutory injunction granted without notice may not exceed a period of 10 days. However, the Court may dispense with compliance with any rule in the interest of justice: r. 2.03. Moreover, the Supreme Court of Canada has recognized that procedural flexibility is a "hallmark" of insolvency law: *Peace River*, at para. 64.

[31] I am satisfied that notice should be waived in this case. Actis attended the hearing and made submissions on its behalf. The CCAA proceedings are at a critical stage, and it is vital that matters proceed as set out in the Meeting Orders and the Claims Procedure Orders. To that end, it is necessary that Actis be enjoined from advertising legal services or soliciting retainers from claimants until a decision is rendered on any sanction orders in this matter.

Undertaking

[32] Rule 40.03 of the *Rules of Civil Procedure* provides that, on a motion for an interlocutory injunction, "the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party."

[33] The court retains discretion to waive this requirement where appropriate, for instance where the motion is brought by a representative on behalf of a class: *Li et al. v. Barber et. al.*, 2022 ONSC 1176, at para. 38. I am satisfied that it is appropriate to waive the requirement for an undertaking in these circumstances. If compensation is owed to Actis, I am satisfied that it can be adequately addressed when this Court makes a decision regarding any sanction orders.

Disposition

[34] The injunction is granted.

[35] As an Officer of the Court, Ms. Grass – the principal of Actis – will not be required to provide evidence of confirming destruction of all copies of the "Actis List" as defined in the order.

Chief Justice Geoffrey B. Morawetz

Date: December 10, 2024

See para. 43

RJR — MacDonald Inc. *Applicant*

v.

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Mis-en-cause*

and

The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada *Interveners on the application for interlocutory relief*

and between

Imperial Tobacco Ltd. *Applicant*

v.

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Mis-en-cause*

and

The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada *Interveners on the application for interlocutory relief*

RJR — MacDonald Inc. *Requérante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

La Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé, et Médecins pour un Canada sans fumée *Intervenants dans la demande de redressement interlocutoire*

et entre

Imperial Tobacco Ltd. *Requérante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

La Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé, et Médecins pour un Canada sans fumée *Intervenants dans la demande de redressement interlocutoire*

INDEXED AS: RJR — MACDONALD INC. v. CANADA (ATTORNEY GENERAL)

File Nos.: 23460, 23490.

1993: October 4; 1994: March 3.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

APPLICATIONS FOR INTERLOCUTORY RELIEF

Practice — Interlocutory motions to stay implementation of regulations pending final decision on appeals and to delay implementation if appeals dismissed — Leave to appeal granted shortly after applications to stay heard — Whether the applications for relief from compliance with regulations should be granted — Tobacco Products Control Act, S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18 — Tobacco Products Control Regulations, amendment, SOR/93-389 — Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1) — Rules of the Supreme Court of Canada, SOR/83-74, s. 27 — Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1.

The *Tobacco Products Control Act* regulates the advertisement of tobacco products and the health warnings which must be placed upon those products. Both applicants successfully challenged the Act's constitutional validity in the Quebec Superior Court on the grounds that it was *ultra vires* Parliament and that it violates the right to freedom of expression in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal ordered the suspension of enforcement until judgment was rendered on the Act's validity but declined to order a stay of the coming into effect of the Act until 60 days following a judgment validating the Act. The majority ultimately found the legislation constitutional.

The *Tobacco Products Control Regulations, amendment*, would cause the applicants to incur major expense in altering their packaging and these expenses would be irrecoverable should the legislation be found unconstitutional. Before a decision on applicants' leave applications to this Court in the main actions had been made, the applicants brought these motions for stay pursuant to s. 65.1 of the *Supreme Court Act*, or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada*. In effect, the applicants sought to be released from any obligation to comply with the new packaging requirements until the disposi-

RÉPERTORIÉ: RJR — MACDONALD INC. c. CANADA (PROCUREUR GÉNÉRAL)

Nos du greffe: 23460, 23490.

1993: 4 octobre; 1994: 3 mars.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

DEMANDES DE REDRESSEMENT INTERLOCUTOIRE

Pratique — Demandes interlocutoires visant à surseoir à l'application d'un règlement en attendant la décision finale sur des appels et à en retarder la mise en œuvre si les appels sont rejetés — Autorisations d'appel accordées peu après l'audition des demandes de sursis — Les demandes de dispense de l'application du règlement devraient-elles être accordées? — Loi réglementant les produits du tabac, L.C. 1988, ch. 20, art. 3, 4 à 8, 9, 11 à 16, 17f), 18 — Règlement sur les produits du tabac—Modification, DORS/93-389 — Charte canadienne des droits et libertés, art. 1, 2b), 24(1) — Règles de la Cour suprême du Canada, DORS/83-74, art. 27 — Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 65.1.

La *Loi réglementant les produits du tabac* vise à réglementer la publicité des produits du tabac et les mises en garde qui doivent être apposées sur ces produits. Les deux requérantes ont eu gain de cause devant la Cour supérieure du Québec lorsqu'elles ont contesté la constitutionnalité de la Loi au motif qu'elle était *ultra vires* du Parlement et contrevenait à l'al. 2*b*) de la *Charte canadienne des droits et libertés*. La Cour d'appel a ordonné la suspension du contrôle d'application jusqu'à ce que jugement soit rendu sur la validité de la Loi, mais elle a refusé de suspendre l'application de la Loi pendant une période de 60 jours suivant un jugement déclarant la Loi valide. La Cour d'appel à la majorité a ultérieurement déclaré la loi constitutionnelle.

Le *Règlement sur les produits du tabac — Modification* obligerait les requérantes à engager des dépenses considérables pour modifier leurs emballages, et ces dépenses ne seraient pas recouvrables si la législation était déclarée inconstitutionnelle. Avant la décision relative aux autorisations de pourvoi dans les actions principales, les requérantes ont demandé un sursis d'exécution en vertu de l'art. 65.1 de la *Loi sur la Cour suprême* ou, dans l'éventualité où les autorisations d'appel seraient accordées, en vertu de l'art. 27 des *Règles de la Cour suprême du Canada*. En réalité, les requérantes demandent d'être libérées de toute obligation de se conformer

tion of the main actions. They also requested that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of *Tobacco Products Control Act*.

This Court heard applicants' motions on October 4 and granted leave to appeal the main action on October 14. At issue here was whether the applications for relief from compliance with the *Tobacco Products Control Regulations, amendment* should be granted. A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants.

Held: The applications should be dismissed.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the *Supreme Court of Canada Act* and r. 27 of the *Rules of the Supreme Court of Canada.*

The words "other relief" in r. 27 of the *Supreme Court Rules* are broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered. It can apply even though leave to appeal may not yet be granted. In interpreting the language of the rule, regard should be had to its purpose: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal.

Section 65.1 of the *Supreme Court Act* was adopted not to limit the Court's powers under r. 27 but to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. It should be interpreted as conferring the same broad powers as are included in r. 27. The Court, pursuant to both s. 65.1 and r. 27, can not only grant a stay of execution and of proceedings in the traditional sense but also make any order that preserves matters between the parties in a state that will, as far as possible, prevent prejudice pending resolution by the Court of the controversy, so as to enable the Court to

aux nouvelles exigences en matière d'emballage jusqu'aux décisions sur les actions principales. Elles ont aussi demandé que le sursis soit accordé pour une période de 12 mois à compter d'un refus des autorisations d'appel ou d'un arrêt de notre Cour confirmant la validité de la *Loi réglementant les produits du tabac.*

Notre Cour a entendu les demandes des requérantes le 4 octobre et a accordé, le 14 octobre, les autorisations d'appel relativement aux actions principales. La question est de savoir si les demandes visant à obtenir une dispense de l'application du *Règlement sur les produits du tabac — Modification* devraient être accordées. Une question préliminaire a été soulevée relativement à la compétence de notre Cour d'accorder le redressement demandé par les requérantes.

Arrêt: Les demandes sont rejetées.

Les pouvoirs de la Cour suprême du Canada d'accorder un redressement dans des procédures de ce genre sont prévus à l'art. 65.1 de la *Loi sur la Cour suprême du Canada* et à l'art. 27 des *Règles de la Cour suprême du Canada.*

L'expression «autre redressement» à l'art. 27 des *Règles de la Cour suprême du Canada* est suffisamment générale pour permettre à notre Cour de retarder l'application d'un règlement qui n'existait pas au moment où la cour d'appel a rendu son jugement. La règle peut s'appliquer même si l'autorisation d'appel n'a pas encore été accordée. Dans l'interprétation du libellé de la règle, il faut en examiner l'objet: faciliter les «recours» devant la Cour et «prendre les mesures nécessaires à l'application de la présente loi». Pour réaliser son objet, la règle ne peut être limitée aux cas où l'autorisation d'appel a déjà été accordée ni recevoir une interprétation restrictive de façon à s'appliquer seulement à une ordonnance qui suspend ou arrête l'exécution des procédures de la Cour par une tierce partie ou encore qui bloque l'exécution du jugement objet de l'appel.

L'adoption de l'art. 65.1 de la *Loi sur la Cour suprême* ne visait pas à restreindre les pouvoirs de notre Cour en vertu de l'art. 27, mais à permettre à un seul juge d'exercer la compétence d'accorder un sursis dans les cas où, avant la modification, c'était la Cour qui pouvait accorder un sursis. Il faut l'interpréter comme conférant les mêmes pouvoirs généraux que ceux de l'art. 27. La Cour est habilitée, tant en vertu de l'art. 65.1 que de l'art. 27, non seulement à accorder un sursis d'exécution et une suspension d'instance dans le sens traditionnel, mais aussi à rendre toute ordonnance visant à maintenir les parties dans une situation qui, dans la mesure

render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. The Court therefore must have jurisdiction to enjoin conduct on the part of a party acting in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court.

Jurisdiction to grant the relief requested by the applicants exists even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* which established that the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established. If jurisdiction under s. 65.1 of the Act and r. 27 were wanting, jurisdiction would be found in s. 24(1) of the *Canadian Charter of Rights and Freedoms*. A *Charter* remedy should not be defeated because of a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

The three-part *American Cyanamid* test (adopted in Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*) should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation into the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the

du possible, ne sera pas cause de préjudice en attendant le règlement du différend par la Cour, de façon que cette dernière puisse rendre une décision qui ne sera pas dénuée de sens et d'efficacité. Notre Cour doit être en mesure d'intervenir non seulement à l'égard des termes mêmes du jugement, mais aussi à l'égard de ses effets. Notre Cour doit donc posséder la compétence d'interdire à une partie d'accomplir tout acte fondé sur le jugement, qui, s'il était accompli, tendrait à annuler ou à diminuer l'effet de la décision de notre Cour.

Notre Cour possède la compétence d'accorder le redressement demandé par les requérantes, même si les requérantes demandent une «suspension» du règlement plutôt qu'une «exemption» de son application. Une conclusion différente sur ce point irait à l'encontre de l'arrêt *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, selon lequel la distinction entre les cas de «suspension» et d'«exemption» ne se fait qu'après que la compétence a été par ailleurs établie. Si la compétence de notre Cour ne pouvait reposer sur l'art. 65.1 de la Loi et l'art. 27 des Règles, le fondement de cette compétence pourrait être le par. 24(1) de la *Charte canadienne des droits et des libertés*. Une lacune dans les pouvoirs accessoires de notre Cour en matière de procédure permettant de préserver les droits des parties en attendant le règlement final d'un différend touchant des droits constitutionnels ne devrait pas faire obstacle à une réparation fondée sur la *Charte*.

Le critère en trois étapes de l'arrêt *American Cyanamid* (adopté au Canada dans *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*) devrait s'appliquer aux demandes d'injonction interlocutoire et de suspension d'instance, tant en droit privé que dans des cas relevant de la *Charte*.

À la première étape, le requérant d'un redressement interlocutoire dans un cas relevant de la *Charte* doit établir l'existence d'une question sérieuse à juger. Le juge de la requête doit déterminer s'il est satisfait au critère, en se fondant sur le bon sens et un examen extrêmement restreint du fond de l'affaire. Le fait qu'une cour d'appel a accordé une autorisation d'appel relativement à l'action principale constitue une considération pertinente et importante, de même que tout jugement rendu sur le fond, mais ni l'un ni l'autre n'est concluant sur ce point. Le tribunal saisi de la requête ne devrait aller au-delà d'un examen préliminaire du fond de l'affaire que lorsque le résultat de la requête interlocutoire équivaudra en fait à un règlement final de l'action, ou que la question de constitutionnalité d'une loi se présente comme une pure question de droit. Les cas de ce genre sont extrêmement rares. Sauf lorsque la demande est futile ou

statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

At the second stage the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will normally determine the result in applications involving *Charter* rights. A consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation has in fact this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

As a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

Here, the application of these principles to the facts required that the applications for stay be dismissed.

The observation of the Quebec Court of Appeal that the case raised serious constitutional issues and this Court's decision to grant leave to appeal clearly indicated that these cases raise serious questions of law.

vexatoire ou que la question de la constitutionnalité d'une loi se présente comme une pure question de droit, le juge de la requête doit en général procéder à l'examen des deuxième et troisième étapes du critère de l'arrêt *Metropolitan Stores*.

À la deuxième étape, le requérant doit établir qu'il subira un préjudice irréparable en cas de refus du redressement. Le terme «irréparable» a trait à la nature du préjudice et non à son étendue. Dans les cas relevant de la *Charte*, même une perte financière quantifiable, invoquée à l'appui d'une demande, peut être considérée comme un préjudice irréparable s'il n'est pas évident qu'il pourrait y avoir recouvrement au moment de la décision sur le fond.

La troisième étape du critère, l'appréciation de la prépondérance des inconvénients, permettra habituellement de trancher les demandes concernant des droits garantis par la *Charte*. Il faut tenir compte de l'intérêt public dans l'appréciation des inconvénients susceptibles d'être subis par les deux parties. Les considérations d'intérêt public auront moins de poids dans les cas d'exemption que dans les cas de suspension. Si la nature et l'objet affirmé de la loi sont de promouvoir l'intérêt public, le tribunal des requêtes ne devrait pas se demander si la loi a réellement cet effet. Il faut supposer que tel est le cas. Pour arriver à contrer le supposé avantage de l'application continue de la loi que commande l'intérêt public, le requérant qui invoque l'intérêt public doit établir que la suspension de l'application de la loi serait elle-même à l'avantage du public.

En règle générale, les mêmes principes s'appliquent lorsqu'un organisme gouvernemental présente une demande de redressement interlocutoire. Cependant, c'est à la deuxième étape que sera examinée la question de l'intérêt public, en tant qu'aspect du préjudice irréparable causé aux intérêts du gouvernement. Cette question sera de nouveau examinée à la troisième étape lorsque le préjudice du requérant est examiné par rapport à celui de l'intimé, y compris le préjudice que ce dernier aura établi du point de vue de l'intérêt public.

En l'espèce, l'application de ces principes aux faits aboutit au rejet des demandes de sursis.

L'observation de la Cour d'appel du Québec que l'affaire soulève des questions constitutionnelles sérieuses, ainsi que les autorisations d'appel accordées par notre Cour, indiquent clairement que l'affaire soulève des questions de droit sérieuses.

Although compliance with the regulations would require a significant expenditure and, in the event of their being found unconstitutional, reversion to the original packaging would require another significant outlay, monetary loss of this nature will not usually amount to irreparable harm in private law cases. However, where the government is the unsuccessful party in a constitutional claim, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies. Although the required expenditure would impose economic hardship on the companies, the economic loss or inconvenience can be avoided by passing it on to purchasers of tobacco products. Further, the applications, since they were brought by two of the three companies controlling the Canadian tobacco industry, were in actual fact for a suspension of the legislation, rather than for an exemption from its operation. The public interest normally carries greater weight in favour of compliance with existing legislation. The weight given is in part a function of the nature of the legislation and in part a function of the purposes of the legislation under attack. The government passed these regulations with the intention of protecting public health and furthering the public good. When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. The applicants, rather, must offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation. The only possible public interest in the continued application of the current packaging requirements, however, was that the price of cigarettes for smokers would not increase. Any such increase would not be excessive and cannot carry much weight when balanced against the undeniable importance of the public interest in health

Bien que l'application du règlement obligerait les requérantes à faire des dépenses importantes et, si ce règlement était déclaré inconstitutionnel, à engager d'autres dépenses considérables pour revenir à leurs méthodes actuelles d'emballage, une perte monétaire de cette nature n'équivaudra habituellement pas à un préjudice irréparable dans des affaires de droit privé. Toutefois, lorsque le gouvernement est la partie qui échoue dans une affaire de nature constitutionnelle, un demandeur aura beaucoup plus de difficulté à établir la responsabilité constitutionnelle et à obtenir une réparation monétaire. Les dépenses nécessitées par le nouveau règlement causeront donc un préjudice irréparable aux requérantes si les demandes sont rejetées, mais les actions principales accueillies en appel.

Pour déterminer lequel de l'octroi ou du refus du redressement interlocutoire occasionnerait le plus d'inconvénients, il faut notamment procéder à l'examen de la nature du redressement demandé et du préjudice invoqué par les parties, de la nature de la loi contestée et de l'intérêt public. Les dépenses nécessaires imposeraient un fardeau économique aux sociétés, mais la perte ou les inconvénients économiques peuvent être reportés sur les acheteurs des produits du tabac. Par ailleurs, puisqu'elles sont présentées par deux des trois sociétés qui contrôlent l'industrie canadienne du tabac, les demandes constituent en réalité un cas de suspension plutôt qu'un cas d'exemption de l'application de la législation. L'intérêt public pèse habituellement plus en faveur du respect de la législation existante. Le poids accordé aux préoccupations d'intérêt public dépend en partie de la nature de la loi et en partie de l'objet de la loi contestée. Le gouvernement a adopté le règlement dans l'intention de protéger la santé publique et donc de promouvoir le bien public. Si le gouvernement déclare qu'il adopte une loi pour protéger et favoriser la santé publique et s'il est établi que les limites qu'il veut imposer à l'industrie sont de même nature que celles qui, dans le passé, ont eu des avantages concrets pour le public, il n'appartient pas à un tribunal saisi d'une requête interlocutoire d'évaluer les véritables avantages qui découleront des exigences particulières de la loi. Les requérantes doivent plutôt faire contrepoids à ces considérations d'intérêt public en établissant que la suspension de l'application de la loi serait davantage dans l'intérêt public. Pour ce qui est du maintien de l'application des exigences actuelles en matière d'emballage, seule la non-majoration du prix des cigarettes pour les fumeurs pourrait être dans l'intérêt du public. Une telle majoration ne serait vraisemblablement pas excessive et ne peut avoir beaucoup de poids face à l'importance incontestable de l'intérêt public dans la protection de la santé

and in the prevention of the widespread and serious medical problems directly attributable to smoking.

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et la prévention de problèmes médicaux répandus et graves directement attribuables à la cigarette.

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APPLICATIONS for interlocutory relief ancillary to constitutional challenge of enabling legislation following judgment of the Quebec Court of Appeal, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, allowing an appeal from a judgment of Chabot J., [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, granting the application. Applications dismissed.

Colin K. Irving, for the applicant RJR — MacDonald Inc.

Simon V. Potter, for the applicant Imperial Tobacco Inc.

Claude Joyal and *Yves Lebœuf*, for the respondent.

W. Ian C. Binnie, *Q.C.*, and *Colin Baxter*, for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

The judgment of the Court on the applications for interlocutory relief was delivered by

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Cassels, Jamie. «An Inconvenient Balance: The Injunction as a Charter Remedy». In Jeffrey Berryman, ed. *Remedies: Issues and Perspectives*. Scarborough, Ont.: Carswell, 1991, 271.
Sharpe, Robert J. *Injunctions and Specific Performance*, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (feuilles mobiles).

DEMANDES de redressement interlocutoire faisant partie d'une contestation de la constitutionnalité d'une loi habilitante à la suite d'un arrêt de la Cour d'appel du Québec, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, qui a accueilli un appel de la décision du juge Chabot, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, qui avait fait droit à la demande. Demandes rejetées.

Colin K. Irving, pour la requérante RJR — MacDonald Inc.

Simon V. Potter, pour la requérante Imperial Tobacco Inc.

Claude Joyal et *Yves Lebœuf*, pour l'intimé.

W. Ian C. Binnie, *c.r.*, et *Colin Baxter*, pour la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et Médecins pour un Canada sans fumée.

Version française du jugement de la Cour sur des demandes de redressement interlocutoire rendu par

SOPINKA AND CORY JJ. —

I. Factual Background

These applications for relief from compliance with certain *Tobacco Products Control Regulations, amendment*, SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

The *Tobacco Products Control Act*, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

The first part of the *Tobacco Products Control Act*, particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(*f*) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(*b*) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

Each of the applicants challenged the constitutional validity of the *Tobacco Products Control Act* on the grounds that it is *ultra vires* the Parliament of Canada and invalid as it violates s. 2(*b*) of the

LES JUGES SOPINKA ET CORY —

I. Le contexte factuel

Les présentes demandes interlocutoires visant à obtenir une dispense de l'application de certaines dispositions du *Règlement sur les produits du tabac — Modification*, DORS/93-389 font partie d'une contestation plus large de la loi réglementante que notre Cour entendra sous peu.

La *Loi réglementant les produits du tabac*, L.R.C. (1985), ch. 14 (4e suppl.), L.C. 1988, ch. 20, est entrée en vigueur le 1er janvier 1989. Cette loi vise à réglementer la publicité des produits du tabac et les mises en garde qui doivent être apposées sur les produits du tabac.

La première partie de la *Loi réglementant les produits du tabac*, plus particulièrement ses art. 4 à 8, interdisent la publicité en faveur des produits du tabac et toute autre activité destinée à en encourager la vente. L'article 9 réglemente l'étiquetage des produits du tabac et prévoit que tout emballage d'un produit du tabac doit comporter des messages relatifs à la santé, conformément au règlement d'application de la Loi.

Les articles 11 à 16 de la Loi portent sur le contrôle d'application et prévoient la désignation d'inspecteurs des produits du tabac auxquels sont conférés des pouvoirs de perquisition et de saisie. L'article 17 autorise le gouverneur en conseil à prendre des règlements en vertu de la Loi. L'alinéa 17*f*) autorise le gouverneur en conseil à adopter des règlements fixant «la teneur, la présentation, l'emplacement, les dimensions et la mise en évidence» des messages obligatoires relatifs à la santé. L'alinéa 18(1)*b*) de la Loi indique que des contraventions peuvent donner lieu à des poursuites pour acte criminel, et que leur auteur encourt sur déclaration de culpabilité une amende maximale de 100 000 $ et un emprisonnement maximal d'un an, ou l'une de ces peines.

Chacune des requérantes a contesté la constitutionnalité de la *Loi réglementant les produits du tabac* au motif qu'elle est *ultra vires* du Parlement du Canada et non valide en ce qu'elle contrevient à

Canadian Charter of Rights and Freedoms. The two cases were heard together and decided on common evidence.

On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, finding that the Act was *ultra vires* the Parliament of Canada and that it contravened the *Charter*. The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

Up to that point, the applicants had complied with all provisions in the *Tobacco Products Control Act*. However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not *ultra vires* the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(*b*) of the *Charter* but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the *Charter*. Brossard J.A. agreed

l'al. 2*b*) de la *Charte canadienne des droits et libertés*. Les deux affaires ont été entendues ensemble et tranchées sur preuve commune.

Le 26 juillet 1991, le juge Chabot de la Cour supérieure du Québec a fait droit aux requêtes des requérantes, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, et conclu que la Loi était *ultra vires* du Parlement du Canada et qu'elle contrevenait à la *Charte*. L'intimé a interjeté appel devant la Cour d'appel du Québec. Avant que la Cour d'appel ne rende son jugement, les requérantes ont demandé à cette cour un redressement interlocutoire de la nature d'une ordonnance déclarant qu'elles n'auraient pas à se conformer à certaines dispositions de la Loi pendant une période de 60 jours suivant le jugement de la Cour d'appel.

Jusqu'à ce moment, les requérantes avaient respecté toutes les dispositions de la *Loi réglementant les produits du tabac*. Cependant, en vertu de la Loi, l'interdiction absolue de publicité à tous les points de vente ne devait entrer en vigueur que le 31 décembre 1992. Les requérantes estimaient qu'elles auraient besoin de 60 jours environ pour démonter tous les supports publicitaires dans les magasins. Fortes du jugement de la Cour supérieure qui avait déclaré la Loi inconstitutionnelle, les requérantes soutenaient qu'elles ne devraient pas être tenues de démonter leurs étalages tant que la Cour d'appel n'aurait pas déclaré la loi valide. En réponse à la requête, la Cour d'appel a statué que les peines pour contravention à l'interdiction de publicité aux points de vente ne pouvaient être appliquées contre les requérantes avant qu'elle se soit prononcée sur le fond. Toutefois, la cour a refusé de suspendre l'application des dispositions pendant une période de 60 jours suivant un jugement déclarant la Loi valide.

Le 15 janvier 1993, la Cour d'appel du Québec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, a accueilli l'appel de l'intimé; le juge Brossard était dissident en partie. La cour a statué, à l'unanimité, que la Loi n'était pas *ultra vires* du gouvernement du Canada. La Cour d'appel a reconnu que la Loi contrevenait à l'al. 2*b*) de la *Charte*, mais a statué que cette contravention se justifiait en vertu de l'article premier de la *Charte*, le juge Brossard

with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the *Charter*. The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

étant dissident sur ce dernier point. Le juge Brossard a souscrit à l'opinion de la majorité relativement à la nécessité de mises en garde non attribuées sur les emballages (c'est-à-dire que les mises en garde ne devaient pas être attribuées au gouvernement fédéral), mais a conclu que l'interdiction de publicité ne pouvait se justifier en vertu de l'article premier de la *Charte*. Les requérantes ont déposé des demandes d'autorisation d'appel relativement à la décision de la Cour d'appel du Québec.

On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: *Tobacco Products Control Regulations, amendment,* SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

Le 11 août 1993, le gouverneur en conseil a publié des modifications du règlement datées du 21 juillet 1993 et prises en application de la Loi: *Règlement sur les produits du tabac—Modification*, DORS/93-389. Ces modifications imposent l'obligation d'apposer des mises en garde plus visibles et plus grandes sur tous les emballages des produits du tabac et de ne plus les attribuer à Santé et Bien-être Canada. Une période d'un an est allouée pour modifier les emballages.

According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotograve cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about $30,000,000.

Selon les affidavits déposés à l'appui de la requête, le respect du nouveau règlement exigerait de l'industrie du tabac de reconcevoir totalement les emballages et d'acheter des milliers de cylindres de rotogravure et de matrices de gaufrage. L'industrie aurait besoin de près d'un an pour procéder à ces changements, moyennant un coût d'environ 30 000 000 $.

Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the *Supreme Court Act*, R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada*, SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a

Avant la décision relative aux autorisations de pourvoi dans les actions principales, les requérantes ont demandé un sursis d'exécution en vertu de l'art. 65.1 de la *Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26 (aj. L.C. 1990, ch. 8, art. 40) ou, dans l'éventualité où les autorisations d'appel seraient accordées, en vertu de l'art. 27 des *Règles de la Cour suprême du Canada*, DORS/83-74. Les requérantes demandent un sursis à l'exécution du [TRADUCTION] «jugement de la Cour d'appel du Québec rendu le 15 janvier 1993», mais «seulement dans la mesure où ce jugement valide les art. 3, 4, 5, 6, 7 et 10 du [nouveau règlement]». En réalité, les requérantes demandent d'être libérées de toute obligation de se conformer aux nouvelles exigences en matière d'emballage jusqu'aux décisions sur les actions principales. Elles demandent

decision of this Court confirming the validity of *Tobacco Products Control Act*.

The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

(*a*) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(*b*) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and

(*c*) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

65.1 The Court or a judge may, on the request of a party who has 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 such terms as to the Court or the judge seem just.

également que le sursis soit accordé pour une période de 12 mois à compter du refus des autorisations d'appel ou d'un arrêt de notre Cour confirmant la validité de la *Loi réglementant les produits du tabac*.

Les requérantes soutiennent qu'elles doivent obtenir le sursis demandé pour ne pas avoir à engager des dépenses considérables et non recouvrables par suite de l'application du nouveau règlement, et ce, même si notre Cour pouvait en fin de compte déclarer inconstitutionnelle la loi habilitante.

Notre Cour a entendu les demandes des requérantes le 4 octobre. Le 14 octobre, elle accordait les autorisations d'appel relativement aux actions principales.

II. Les textes législatifs pertinents

Loi réglementant les produits du tabac, L.R.C. (1985), ch. 14 (4e suppl.), L.C. 1988, ch. 20, art. 3:

3. La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave, urgent et d'envergure nationale et, plus particulièrement:

a) de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant de façon indiscutable un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;

b) de préserver notamment les jeunes, autant que faire se peut dans une société libre et démocratique, des incitations à la consommation du tabac et du tabagisme qui peut en résulter;

c) de mieux sensibiliser les Canadiennes et les Canadiens aux méfaits du tabac par la diffusion efficace de l'information utile aux consommateurs de celui-ci.

Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 65.1 (aj. L.C. 1990, ch. 8, art. 40):

65.1 La Cour ou un juge peut, à la demande d'une partie qui a déposé l'avis de la demande d'autorisation d'appel, ordonner, aux conditions que l'une ou l'autre estime indiquées, le sursis d'exécution du jugement objet de la demande.

Rules of the Supreme Court of Canada, SOR/83-74, s. 27:

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

Chabot J. concluded that the dominant characteristic of the *Tobacco Products Control Act* was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the *Tobacco Products Control Act* as a law regulating advertising of a particular product, a matter within provincial legislative competence.

Chabot J. found that, with respect to s. 2(*b*) of the *Charter*, the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that *Charter* guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that adver-

Règles de la Cour suprême du Canada, DORS/83-74, art. 27:

27. La partie contre laquelle la Cour ou un autre tribunal a rendu un jugement ou une ordonnance peut demander à la Cour un sursis à l'exécution de ce jugement ou de cette ordonnance ou un autre redressement, et la Cour peut accéder à cette demande aux conditions qu'elle juge appropriées.

III. Les tribunaux d'instance inférieure

Pour situer les demandes de sursis d'exécution dans leur contexte, il faut examiner brièvement les décisions des tribunaux d'instance inférieure.

La Cour supérieure, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

Le juge Chabot a conclu que la caractéristique dominante de la *Loi réglementant les produits du tabac* était le contrôle de la publicité du tabac et que la protection de la santé publique n'était qu'un objectif indirect de la Loi. Le juge Chabot a qualifié la *Loi réglementant les produits du tabac* comme étant une loi visant à réglementer la publicité d'un produit particulier, ce qui est une question relevant de la compétence législative provinciale.

En ce qui concerne l'al. 2*b*) de la *Charte*, le juge Chabot a conclu que l'activité interdite par la Loi est une activité protégée et que les avis exigés par le règlement vont à l'encontre de l'al. 2*b*) de la *Charte*. Il a conclu aussi que la preuve établissait, d'une part, que l'objectif de réduction de la consommation des produits du tabac était suffisamment important pour justifier l'adoption d'une loi restreignant la liberté d'expression et, d'autre part, que les objectifs législatifs identifiés par le Parlement aux fins de la réduction de l'utilisation du tabac, répondaient à un problème urgent et réel dans une société libre et démocratique.

Cependant, selon le juge Chabot, la Loi ne constituait pas une atteinte minimale à la liberté d'expression, en ce qu'elle ne visait pas seulement à protéger les jeunes contre les incitations à la consommation du tabac, ou ne se limitait pas à la publicité dite de style de vie. Le juge Chabot a

tising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

Court of Appeal (on the application for a stay)

In deciding whether or not to exercise its broad power under art. 523 of the *Code of Civil Procedure of Québec* to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

> But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a valid act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or delay the implementation or enforcement of valid legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

The Court made a partial grant of the relief sought as follows:

> Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under Sec. 5 after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it

conclu que la preuve présentée par l'intimé selon laquelle l'interdiction totale de la publicité diminuait la consommation n'était pas fiable et n'avait aucune valeur probante parce qu'elle n'établissait pas que l'interdiction de la publicité entraînerait une diminution du tabagisme. En conséquence, l'intimé n'avait pas démontré que l'interdiction de la publicité portait le moins possible atteinte à la liberté d'expression. Le juge Chabot a conclu aussi que la preuve d'un lien rationnel entre la prohibition de la publicité au Canada et l'objectif de réduction du tabagisme était insuffisante, voire inexistante. Il a conclu que la Loi constituait en fait une forme de censure et d'ingérence sociale incompatible avec l'essence même d'une société libre et démocratique, qui ne pouvait être justifiée.

La Cour d'appel (relativement au sursis d'exécution du jugement)

En décidant si elle devait exercer son vaste pouvoir en vertu de l'art. 523 du *Code de procédure civile du Québec* de «rendre toutes ordonnances propres à sauvegarder les droits des parties», la Cour d'appel a fait l'observation suivante relativement à la nature du redressement demandé:

> [TRADUCTION] Toutefois, ce qui est en cause en l'espèce (si la Loi est déclarée valide du point de vue constitutionnel) est, d'une part, la suspension de l'effet juridique d'une partie de la Loi et de l'obligation de s'y conformer pendant une période de 60 jours et, d'autre part, la suspension du pouvoir des autorités publiques responsables d'en assurer l'application. C'est une question sérieuse que de suspendre ou de retarder l'effet ou l'exécution d'une loi valide adoptée par la législature, notamment une loi portant sur la protection de la santé ou de la sécurité du public. Les tribunaux ne devraient pas limiter ou retarder à la légère l'application ou l'exécution d'une loi valide si la législature a procédé à sa mise en vigueur. Le faire aurait pour effet d'empiéter dans les sphères législative et exécutive. [Souligné dans l'original.]

La cour a fait droit en partie au redressement demandé:

> [TRADUCTION] Puisque les lettres du ministère de la Santé et du Bien-être et la contestation des appelantes laissent entendre qu'il existe une possibilité que les requérantes soient poursuivies en vertu de l'art. 5 de la Loi après le 31 décembre 1992, peu importe que le juge-

seems reasonable to order the suspension of enforcement under Sec. 5 of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.

We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.

. . .

Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (*A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110, 127, 135). [Emphasis in original.]

Court of Appeal (on the validity of the legislation), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. LeBel J.A. (for the majority)

LeBel J.A. characterized the *Tobacco Products Control Act* as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

LeBel J.A. applied the criteria set out in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(*b*) of the *Charter* but found that it was justified under s. 1 of the *Charter*. LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the *Oakes* test have been attenuated by later decisions of the

ment sur le fond ait alors été rendu ou non, il est approprié d'ordonner la suspension de l'application de l'art. 5 jusqu'à ce que le jugement sur le fond soit rendu. Il existe après tout une question sérieuse à juger relativement à la validité de la Loi, et il serait injustement onéreux d'exiger des requérantes qu'elles engagent des dépenses considérables pour démonter les supports publicitaires aux points de vente jusqu'à ce que nous ayons tranché la question.

Cependant, il n'est aucunement justifié, à notre avis, d'ordonner une suspension de l'entrée en vigueur de la Loi pendant une période de 60 jours suivant notre jugement dans ces appels.

. . .

En fait, compte tenu de l'intérêt public de cette Loi, qui vise à protéger la santé publique, dans l'éventualité où la Loi serait déclarée valide, il y a d'excellentes raisons de ne pas suspendre son effet et sa mise en application (*Manitoba (Procureur Général) c. Metropolitan Stores (MTS) Ltd.*, [1987] 1 R.C.S. 110, aux pp. 127 et 135). [Souligné dans l'original.]

La Cour d'appel (relativement à la validité de la loi), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. Le juge LeBel (au nom de la majorité)

Le juge LeBel a qualifié la *Loi réglementant les produits du tabac* de loi relative à la santé publique. Il a affirmé que la loi était valide en tant que loi adoptée pour la paix, l'ordre et le bon gouvernement.

Le juge LeBel a appliqué le critère formulé dans l'arrêt *R. c. Crown Zellerbach Canada Ltd.*, [1988] 1 R.C.S. 401, et il a conclu que la Loi satisfaisait au critère de la «théorie de l'intérêt national» et qu'elle pouvait reposer sur un lien purement théorique non prouvé entre la publicité du tabac et sa consommation globale.

Souscrivant à l'opinion du juge Brossard, le juge LeBel a affirmé que la Loi contrevenait à la liberté d'expression garantie par l'al. 2*b*) de la *Charte*, mais il a conclu que cette contravention pouvait se justifier en vertu de l'article premier. Le juge LeBel a conclu que le juge Chabot avait commis une erreur dans ses conclusions de fait en omettant de reconnaître que les volets du lien

Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [TRANSLATION] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

2. Brossard J.A. (dissenting in part)

Brossard J.A. agreed with LeBel J.A. that the *Tobacco Products Control Act* should be characterized as public health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

However, he did not think that the violation of s. 2(*b*) of the *Charter* could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

IV. Jurisdiction

A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued

rationnel et de l'atteinte minimale, du critère formulé dans l'arrêt *Oakes*, avaient été assouplis dans des arrêts ultérieurs de la Cour suprême du Canada. Il a conclu que le critère exigé par l'article premier était satisfait puisqu'il se peut que l'interdiction de la publicité sur le tabac entraîne une réduction de la consommation du tabac, d'après l'existence même d'un «corps d'opinions» favorables à l'adoption d'une telle interdiction. Par ailleurs, il a conclu que la Loi paraît conforme au critère de l'atteinte minimale en ce qu'elle n'interdît pas la consommation, n'interdît pas la publicité étrangère et n'écarte pas la possibilité d'obtenir de l'information sur les produits du tabac.

2. Le juge Brossard (dissident en partie)

Le juge Brossard a souscrit à l'opinion du juge LeBel que la *Loi réglementant les produits du tabac* devrait être qualifiée de loi visant le domaine de la santé publique et qu'elle satisfait au volet de «la dimension nationale» du pouvoir de légiférer pour la paix, l'ordre et le bon gouvernement.

Cependant, le juge Brossard n'était pas d'avis que la violation de l'al. 2*b*) de la *Charte* pouvait se justifier. Il a examiné la preuve et affirmé qu'elle n'établissait pas l'existence d'un lien, ou même l'existence d'une probabilité de lien, entre l'interdiction de publicité et la consommation des produits du tabac. À son avis, il faut établir, selon une prépondérance des probabilités, qu'il est tout au moins possible que les buts visés soient atteints. Il n'a pas souscrit à l'opinion que la Loi satisfaisait au critère de l'atteinte minimale puisque, selon lui, les objectifs de la Loi pourraient être atteints par une restriction de la publicité sans qu'il soit nécessaire d'imposer une prohibition totale.

IV. Compétence

Une question préliminaire a été soulevée relativement à la compétence de notre Cour d'accorder le redressement demandé par les requérantes. Le procureur général du Canada et les intervenants dans les demandes de sursis, (plusieurs organisations de santé dont la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et

that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was *intra vires* s. 91 of the *Constitution Act, 1867* and justified under s. 1 of the *Charter*. Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations that were not even in existence at the time the appeal judgment was rendered.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the *Supreme Court Act* and r. 27 of the *Rules of the Supreme Court of Canada*.

Médecins pour un Canada sans fumée) ont soutenu que notre Cour n'avait pas compétence pour ordonner un sursis d'exécution ou une suspension d'instance qui libérerait les requérantes de l'obligation de se conformer au nouveau règlement. Plusieurs moyens ont été invoqués à l'appui de cette position.

Premièrement, le procureur général soutient que les dispositions concernant les messages relatifs à la santé prévus dans l'ancien ou le nouveau règlement n'ont pas été contestées devant les tribunaux d'instance inférieure et, partant, que les requérantes se trouvent en fait à demander à notre Cour d'exercer une compétence de première instance sur la question. Deuxièmement, ils soutiennent que le jugement de la Cour d'appel du Québec ne peut être exécuté puisqu'il ne fait que déclarer que la Loi est *intra vires* de l'art. 91 de la *Loi constitutionnelle de 1867*, et qu'elle est justifiable en vertu de l'article premier de la *Charte*. Parce que la décision de l'instance inférieure équivaut à un jugement déclaratoire, il n'existe en conséquence aucune «procédure» qui pourrait faire l'objet d'un sursis. Enfin, selon le procureur général, les demandes des requérantes reviennent à demander une suspension par anticipation du délai de 12 mois avant la mise en application du règlement, pour leur permettre de continuer de vendre des produits du tabac dans les emballages comportant les mises en garde exigées par le règlement actuel. Il soutient que notre Cour n'a pas compétence pour suspendre l'application du nouveau règlement.

Les intervenants ont appuyé et étayé ces arguments. Ils ont aussi soutenu que l'art. 27 ne pouvait s'appliquer parce que l'autorisation d'appel n'avait pas été accordée. Quoi qu'il en soit, ils ont soutenu que l'expression «ou un autre redressement» n'est pas suffisamment générale pour permettre à notre Cour de retarder l'application d'un règlement qui n'existait même pas au moment du jugement rendu par la Cour d'appel.

Les pouvoirs de la Cour suprême du Canada en cette matière sont prévus à l'art. 65.1 de la *Loi sur la Cour suprême*, et à l'art. 27 des *Règles de la Cour suprême du Canada*.

Supreme Court Act

65.1 The Court or a judge may, on the request of a party who has 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 such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see *Rules of the Supreme Court of Canada*, 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of the Act whence the Court derives its rule-making power. Subsection (1)(*a*) of that section provides that the rules may be enacted:

97....

(*a*) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are

Loi sur la Cour suprême

65.1 La Cour ou un juge peut, à la demande d'une partie qui a déposé l'avis de la demande d'autorisation d'appel, ordonner, aux conditions que l'une ou l'autre estime indiquées, le sursis d'exécution du jugement objet de la demande.

Règles de la Cour suprême du Canada

27. La partie contre laquelle la Cour ou un autre tribunal a rendu un jugement ou une ordonnance peut demander à la Cour un sursis à l'exécution de ce jugement ou de cette ordonnance ou un autre redressement, et la Cour peut accéder à cette demande aux conditions qu'elle juge appropriées.

Le libellé de l'art. 27 et de celui qui le précédait n'a pratiquement pas été modifié depuis au moins 1888 (voir les *Règles de la Cour suprême du Canada*, 1888, Ordonnance générale nº 85(17)). Son libellé général correspond au libellé de l'art. 97 de la Loi duquel notre Cour tire son pouvoir de réglementation. L'alinéa (1)*a*) de cette disposition prévoit que des règles peuvent être adoptées pour:

97....

a) réglementer la procédure à la Cour et les modalités de recours devant elle contre les décisions de juridictions inférieures ou autres et prendre les mesures nécessaires à l'application de la présente loi;

Bien qu'il s'agisse maintenant d'une question théorique, les autorisations de pourvoi ayant été accordées, nous ne sommes pas disposés à admettre que cette règle inclut les restrictions proposées par les intervenants. À notre avis, ni le libellé de la règle ni celui de l'art. 97 ne renferment de telles restrictions. À notre avis, dans l'interprétation du libellé de la règle, il faut en examiner l'objet, lequel est clairement exprimé dans la disposition habilitante: faciliter les «recours» devant la Cour et «prendre les mesures nécessaires à l'application de la présente loi». Pour réaliser son objet, la règle ne peut être limitée aux cas où l'autorisation d'appel a déjà été accordée ni recevoir une interprétation restrictive de façon à s'appliquer seulement à une ordonnance qui suspend ou arrête l'exécution des procédures de la Cour par une tierce partie ou encore qui bloque l'exécution du jugement objet

contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See *Keable v. Attorney General (Can.)*, [1978] 2 S.C.R. 135. The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.). Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new

de l'appel. Des exemples des premiers cas, traditionnellement qualifiés de sursis d'exécution, sont prévus à l'art. 65 de la Loi que l'on a interprété comme visant à empêcher l'intervention d'une tierce partie comme un shérif, mais non l'exécution d'une ordonnance visant une partie. Voir l'arrêt *Keable c. Procureur général (Can.)*, [1978] 2 R.C.S. 135. L'arrêt ou le blocage de toutes les procédures est généralement appelé une suspension d'instance. Voir l'arrêt *Battle Creek Toasted Corn Flake Co. c. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.). Un tel redressement peut être accordé conformément aux pouvoirs que l'art. 27 ou l'art. 65.1 de la Loi confèrent à notre Cour.

Par ailleurs, nous ne pouvons souscrire à l'opinion que l'adoption de l'art. 65.1 en 1992 (L.C. 1990, ch. 8, art. 40) visait à restreindre les pouvoirs de notre Cour en vertu de l'art. 27. La modification visait à permettre à un seul juge d'exercer la compétence d'accorder un sursis dans les cas où, avant la modification, c'était la Cour qui pouvait accorder un sursis. En conséquence, l'art. 65.1 doit être interprété de façon à conférer les mêmes pouvoirs généraux que ceux inclus dans l'art. 27.

Compte tenu de ce qui précède et du libellé même de l'art. 97 de la Loi, nous sommes d'avis que, contrairement aux deux premiers points soulevés par le procureur général, notre Cour peut faire droit aux demandes de sursis des requérantes. Nous sommes d'avis que la Cour est habilitée, tant en vertu de l'art. 65.1 que de l'art. 27, non seulement à accorder un sursis d'exécution et une suspension d'instance dans le sens traditionnel, mais aussi à rendre toute ordonnance visant à maintenir les parties dans une situation qui, dans la mesure du possible, ne sera pas cause de préjudice en attendant le règlement du différend par la Cour, de façon que cette dernière puisse rendre une décision qui ne sera pas dénuée de sens et d'efficacité. Notre Cour doit être en mesure d'intervenir non seulement à l'égard des termes mêmes du jugement, mais aussi à l'égard de ses effets. Cela signifie que notre Cour doit posséder la compétence d'interdire à une partie d'accomplir tout acte fondé

regulations constitute conduct under a law that has been declared constitutional by the lower courts.

This, in our opinion, is the view taken by this Court in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594. The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court. I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory

sur le jugement, qui, s'il était accompli, tendrait à annuler ou à diminuer l'effet de la décision de notre Cour. En l'espèce, le nouveau règlement est un acte pris en application d'une loi qui a été déclarée constitutionnelle par les tribunaux d'instance inférieure.

À notre avis, c'est l'opinion même que notre Cour avait exprimée dans l'arrêt *Brasseries Labatt du Canada Ltée c. Procureur général du Canada*, [1980] 1 R.C.S. 594. Dans cette affaire, l'appelante Labatt, dans des circonstances semblables à celles de l'espèce, demandait à notre Cour d'ordonner un sursis à l'application du règlement qu'elle attaquait dans une action visant à obtenir un jugement déclarant que le règlement était inapplicable au produit de Labatt. La Cour d'appel fédérale a infirmé la décision que le tribunal de première instance avait rendue en faveur de Labatt. Labatt a demandé le sursis des procédures jusqu'à ce que notre Cour rende jugement. Bien que les parties eussent apparemment accepté les conditions d'une ordonnance visant la suspension de toute autre procédure, le juge en chef Laskin a examiné la question de compétence, que l'on aurait apparemment contestée malgré l'entente entre les parties. Le Juge en chef, s'exprimant au nom de la Cour, a déterminé que notre Cour était habilitée à rendre une ordonnance visant à suspendre l'application du règlement attaqué par le ministère de la Consommation et des Corporations. Voici comment le juge en chef Laskin a répondu aux arguments soulevés relativement à la conception traditionnelle du pouvoir d'accorder un sursis (p. 600):

On prétend que cette règle s'applique aux jugements ou ordonnances de cette Cour et non aux jugements ou ordonnances de la cour dont on interjette appel. Le texte de la règle me paraît inconciliable avec une pareille interprétation. En outre, la thèse de l'intimé selon laquelle il n'existe aucun jugement dont l'exécution puisse être suspendue me semble intenable et, même si c'était le cas, il est clair qu'une ordonnance a été rendue contre l'appelante. De plus, la règle 126, qui autorise cette Cour à accorder un redressement contre une ordonnance, ne doit pas être interprétée de façon à permettre à la Cour d'intervenir uniquement contre l'ordonnance et non contre son effet s'il y a pourvoi contre cette ordonnance devant cette Cour. En conséquence, l'appelante a le droit de demander un redressement interlocutoire

action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

While the above passage appears to answer the submission of the respondents on this motion that *Labatt* was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

> Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Indeed, an examination of the factums filed by the parties to the motion in *Labatt* reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110. In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in *Metropolitan Stores* strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

visant le sursis d'exécution de l'ordonnance qui rejette son action déclaratoire et cette Cour a le pouvoir d'accorder un redressement aux conditions qu'elle estime équitables. [Nous soulignons.]

Bien que ce passage paraisse répondre à l'argument des intimés en l'espèce qu'il faut faire une distinction avec l'arrêt *Labatt* parce que notre Cour devait se prononcer sur une ordonnance convenue par les parties, les commentaires ajoutés par le juge en chef Laskin dissipent tout doute sur cette question, à la p. 601:

> Même si j'estime que la règle 126 s'applique et permet le prononcé d'une ordonnance de la nature de celle convenue par les avocats des parties, cela ne signifie pas que cette Cour n'a pas, en d'autres circonstances, le pouvoir d'éviter que des procédures en instance devant elle avortent par suite de l'action unilatérale d'une des parties avant la décision finale.

En fait, il ressort des mémoires déposés par les parties à la requête dans l'arrêt *Labatt* que les parties avaient convenu de faire trancher leur différend par un jugement déclaratoire, mais non de faire surseoir à l'exécution du règlement en attendant la résolution du différend.

À notre avis, notre Cour possède la compétence d'accorder le redressement demandé par les requérantes, même si les requérantes demandent une «suspension» du règlement plutôt qu'une exemption de son application. Prétendre le contraire irait à l'encontre de la conclusion de notre Cour dans l'arrêt *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, [1987] 1 R.C.S. 110. Selon cet arrêt, la distinction entre les cas de «suspension» et les cas d'«exemption» se fait seulement après que la compétence est par ailleurs établie et quand la question de l'intérêt public est soupesée par rapport aux intérêts de la personne qui demande la suspension d'instance. Si le pouvoir de «suspension d'instance» doit être exercé, comme nous l'avons déjà mentionné, avec modération, on y parvient par l'application de critères formulés dans l'arrêt *Metropolitan Stores* et non par une interprétation restrictive de la compétence de notre Cour. En conséquence, le dernier argument soulevé par le procureur général relativement à la question de compétence échoue également.

Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the *Charter*. A *Charter* remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

The applicants rely upon the following grounds:

1. The challenged *Tobacco Products Control Regulations, amendment* were promulgated pursuant to ss. 9 and 17 of the *Tobacco Products Control Act*, S.C. 1988, c. 20.

2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the *Canadian Charter of Rights and Freedoms*.

3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.

4. The tests for granting of a stay are met in this case:

   (i) There is a serious constitutional issue to be determined.

   (ii) Compliance with the new regulations will cause irreparable harm.

Enfin, si la compétence de notre Cour ne pouvait reposer sur l'art. 65.1 de la Loi et l'art. 27 des Règles, nous sommes d'avis que le fondement de cette compétence pourrait être le par. 24(1) de la *Charte*. Une lacune dans les pouvoirs accessoires de notre Cour en matière de procédure permettant de préserver les droits des parties en attendant le règlement final d'un différend touchant des droits constitutionnels ne devrait pas faire obstacle à une réparation fondée sur la *Charte*.

V. Motifs de suspension d'instance

Les requérantes se fondent sur les moyens suivants:

1. Le *Règlement sur les produits du tabac—Modification*, qui est contesté, a été pris conformément aux art. 9 et 17 de la *Loi réglementant les produits du tabac*, L.C. 1988, ch. 20.

2. Les requérantes ont présenté à notre Cour une demande d'autorisation d'appel contre un jugement de la Cour d'appel du Québec, rendu le 15 janvier 1993. La Cour d'appel a infirmé une décision de la Cour supérieure du Québec déclarant que certaines dispositions de la Loi outrepassaient les pouvoirs du Parlement du Canada et constituaient une violation injustifiable de la *Charte canadienne des droits et libertés*.

3. L'effet du nouveau règlement est tel que les requérantes devront engager des dépenses non recouvrables considérables pour procéder à une nouvelle conception de leurs emballages avant que notre Cour ne se soit prononcée sur la validité constitutionnelle de la loi habilitante et, advenant le cas où notre Cour rétablirait la décision de la Cour supérieure, d'engager les mêmes dépenses une deuxième fois si elles désirent revenir à l'emballage actuel.

4. Les critères applicables à une suspension d'instance sont satisfaits:

   (i) Il existe une question constitutionnelle sérieuse à juger.

   (ii) Le respect du nouveau règlement causera un préjudice irréparable.

(iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra.* If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. *Interlocutory Injunctions, Stays of Proceedings and the Charter*

The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the

(iii) La prépondérance des inconvénients, compte tenu de l'intérêt public, favorise le maintien du statu quo jusqu'à ce que notre Cour ait réglé les questions juridiques.

VI. Analyse

La principale question soulevée dans les présentes demandes est de savoir s'il faut accorder aux requérantes le redressement interlocutoire sollicité. Elles y ont droit seulement si elles satisfont aux critères formulés dans *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, précité. Dans la négative, les requérantes devront se conformer au nouveau règlement, au moins jusqu'à ce qu'une décision soit rendue relativement aux actions principales.

A. *Les injonctions interlocutoires, la suspension d'instance et la Charte*

Les requérantes demandent à notre Cour de retarder l'effet juridique d'un règlement qui a déjà été adopté et d'empêcher les autorités publiques d'en assurer l'application. Elles demandent également d'être protégées contre le contrôle d'application du règlement pendant une période de 12 mois même si, ultérieurement, la loi habilitante devait être déclarée valide du point de vue constitutionnel. Le redressement demandé est important et ses effets sont d'une portée considérable. Il faut procéder à un processus de pondération soigneux.

D'une part, les tribunaux doivent être prudents et attentifs quand on leur demande de prendre des décisions qui privent de son effet une loi adoptée par des représentants élus.

D'autre part, la *Charte* impose aux tribunaux la responsabilité de sauvegarder les droits fondamentaux. Si les tribunaux exigeaient strictement que toutes les lois soient observées à la lettre jusqu'à ce qu'elles soient déclarées inopérantes pour motif d'inconstitutionnalité, ils se trouveraient dans certains cas à fermer les yeux sur les violations les plus flagrantes des droits garantis par la *Charte*. Une telle pratique contredirait l'esprit et l'objet de la *Charte* et pourrait encourager un gouvernement

Charter and might encourage a government to prolong unduly final resolution of the dispute.

Are there, then, special considerations or tests which must be applied by the courts when *Charter* violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores*, at p. 127, Beetz J. expressed the position in these words:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

à prolonger indûment le règlement final des différends.

Existe-t-il alors des considérations ou des critères spéciaux que les tribunaux doivent appliquer quand on allègue la violation de la *Charte* et que le redressement provisoire demandé touche l'exécution et l'applicabilité de la loi?

Généralement, un tribunal devrait appliquer les mêmes principes, que le redressement demandé soit une injonction ou une suspension d'instance. Dans l'arrêt *Metropolitan Stores*, le juge Beetz exprime ainsi cette position (p. 127):

> La suspension d'instance et l'injonction interlocutoire sont des redressements de même nature. À moins qu'un texte législatif ne prescrive un critère différent, elles ont suffisamment de traits en commun pour qu'elles soient assujetties aux mêmes règles et c'est avec raison que les tribunaux ont eu tendance à appliquer à la suspension interlocutoire d'instance les principes qu'ils suivent dans le cas d'injonctions interlocutoires.

Nous ajouterons seulement que les requérantes en l'espèce demandent à la fois un redressement interlocutoire (en attendant le règlement du pourvoi) et provisoire (pendant une période d'une année suivant le jugement). Nous utiliserons l'expression générale «redressement interlocutoire» pour décrire le caractère mixte du redressement demandé. Les mêmes principes régissent les deux types de redressements.

L'arrêt *Metropolitan Stores* établit une analyse en trois étapes que les tribunaux doivent appliquer quand ils examinent une demande de suspension d'instance ou d'injonction interlocutoire. Premièrement, une étude préliminaire du fond du litige doit établir qu'il y a une question sérieuse à juger. Deuxièmement, il faut déterminer si le requérant subirait un préjudice irréparable si sa demande était rejetée. Enfin, il faut déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse le redressement en attendant une décision sur le fond. Il peut être utile d'examiner chaque aspect du critère et de l'appliquer ensuite aux faits en l'espèce.

B. *The Strength of the Plaintiff's Case*

Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first test. In *American Cyanamid*, however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

In *Metropolitan Stores*, Beetz J. advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in *Charter* cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following *dicta* of this Court in *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269, at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits.

B. *La force de l'argumentation du requérant*

Avant la décision de la Chambre des lords *American Cyanamid Co. c. Ethicon Ltd.*, [1975] A.C. 396, la personne qui demandait une injonction interlocutoire devait établir une [TRADUCTION] «forte apparence de droit» quant au fond de l'affaire pour satisfaire au premier critère. Toutefois, dans *American Cyanamid*, lord Diplock avait précisé que le requérant n'avait plus à établir une forte apparence de droit et qu'il lui suffisait de convaincre le tribunal que [TRADUCTION] «la demande n'est ni futile ni vexatoire, ou, en d'autres termes, que la question à trancher est sérieuse». Le critère formulé dans *American Cyanamid* est maintenant généralement accepté par les tribunaux canadiens qui, toutefois, reviennent à l'occasion à un critère plus strict: voir Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), aux pp. 2-13 à 2-20.

Dans *Metropolitan Stores*, le juge Beetz a énoncé plusieurs raisons pour lesquelles, dans un cas relevant de la *Charte*, le critère formulé dans *American Cyanamid* convient mieux qu'un examen plus rigoureux du fond. Il a notamment parlé des difficultés à trancher des questions factuelles et juridiques complexes à partir d'éléments de preuve limités dans une procédure interlocutoire, des difficultés pratiques à procéder à une analyse fondée sur l'article premier à ce stade, et de la possibilité qu'une décision provisoire sur le fond soit rendue en l'absence de plaidoiries complètes ou avant qu'un avis soit donné aux procureurs généraux.

L'intimé a soulevé la possibilité que, compte tenu de l'état actuel de l'action principale, les requérantes soient tenues de démontrer davantage que l'existence «d'une question sérieuse à juger». L'intimé se fonde sur l'opinion incidente de notre Cour dans *Laboratoire Pentagone Ltée c. Parke, Davis & Co.*, [1968] R.C.S. 269, à la p. 272:

> [TRADUCTION] La charge imposée à l'appelante est beaucoup plus lourde que s'il s'agissait d'une injonction interlocutoire. Dans un tel cas, le tribunal doit examiner la prépondérance des inconvénients entre les parties parce que le procès n'a pas encore eu lieu. En l'espèce, on nous demande de suspendre l'exécution d'un jugement de la Cour d'appel, rendu après examen complet

It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in *Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.), at p. 620:

> Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574 (H.C.), at p. 576:

> While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in *Charter* cases.

sur le fond. Pour justifier une telle ordonnance, il ne suffit pas d'affirmer que l'incidence de l'injonction sur l'appelante sera plus importante que celle d'une suspension d'instance sur l'intimée.

Le juge Kelly a fait des commentaires au même effet dans *Adrian Messenger Services c. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.), à la p. 620:

> [TRADUCTION] Contrairement à la situation antérieure au procès, lorsque les prétentions opposées des parties ne sont pas encore réglées, dans le cas d'une demande d'injonction interlocutoire en attendant un appel contre le rejet de l'action, le défendeur est fort du jugement que la cour a rendu en sa faveur. Même en reconnaissant la possibilité omniprésente que ce jugement soit infirmé en appel, il est, à mon avis, relativement rare que la cour d'appel intervienne pour conférer à un demandeur, même de façon provisoire, le droit même qui lui a été refusé par le tribunal de première instance.

Plus récemment, le juge Philp affirmait dans *Bear Island Foundation c. Ontario* (1989), 70 O.R. (2d) 574 (H.C.), à la p. 576:

> [TRADUCTION] Bien que je reconnaisse que la question du titre de ces terres soit une question sérieuse, elle a été réglée en première instance et en appel. La raison pour laquelle la Cour suprême du Canada a accordé une autorisation de pourvoi est inconnue et continuera de l'être tant que la Cour n'aura pas procédé à l'audition et rendu jugement. Je ne suis pas en l'espèce saisi d'une question sérieuse à juger. Il y a déjà eu un procès et un appel sur cette question. Les demanderesses en l'espèce n'ont jamais tenté d'arrêter la récolte avant le procès, ni avant l'appel à la Cour d'appel de l'Ontario. La question ne constitue plus une question en litige.

D'après l'intimé, de telles affirmations laissent entendre que, dès qu'une décision est rendue sur le fond au procès, le requérant d'un redressement interlocutoire a un fardeau plus lourd ou ne peut plus obtenir le redressement. Bien qu'il soit possible d'établir en l'espèce une distinction par rapport aux décisions citées, puisque le juge de première instance a accepté la position de la requérante, il n'est pas nécessaire de le faire. Que ces affirmations traduisent ou non l'état du droit applicable aux demandes de redressement interlocutoire à caractère privé, question qui demeure sujette à débat, elles ne sont pas applicables aux cas relevant de la *Charte*.

The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores*, at p. 128, that "the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

La *Charte* protège les libertés et droits fondamentaux. Compte tenu de l'importance des intérêts auxquels, selon la requête, il a été porté atteinte, tout tribunal appelé à se prononcer sur une violation de la *Charte* doit procéder à un examen soigneux de la question. Tel est le cas même lorsque d'autres tribunaux ont conclu qu'il n'y avait pas eu violation de la *Charte*. Par ailleurs, compte tenu du caractère complexe de la plupart des droits garantis par la Constitution, le tribunal saisi d'une requête aura rarement le temps de faire l'analyse approfondie requise du fond de la demande du requérant. Ceci est vrai pour toute demande de redressement interlocutoire, que le procès ait eu lieu ou non. Nous sommes donc pleinement d'accord avec la conclusion du juge Beetz dans l'arrêt *Metropolitan Stores*, à la p. 128: «la formulation dans l'arrêt *American Cyanamid*, savoir celle de l'existence d'une «question sérieuse» suffit dans une affaire constitutionnelle où, comme je l'indique plus loin dans les présents motifs, l'intérêt public est pris en considération dans la détermination de la prépondérance des inconvénients.»

What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores*, *supra*, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

Quels sont les indicateurs d'une «question sérieuse à juger»? Il n'existe pas d'exigences particulières à remplir pour satisfaire à ce critère. Les exigences minimales ne sont pas élevées. Le juge saisi de la requête doit faire un examen préliminaire du fond de l'affaire. La décision sur le fond que rend le juge de première instance relativement à la *Charte* est une indication pertinente, mais pas nécessairement concluante que les questions soulevées en appel constituent des questions sérieuses: voir *Metropolitan Stores*, précité, à la p. 150. De même, l'autorisation d'appel sur le fond qu'une cour d'appel accorde constitue une indication que des questions sérieuses sont soulevées, mais un refus d'autorisation dans un cas qui soulève les mêmes questions n'indique pas automatiquement que les questions de fond ne sont pas sérieuses.

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely

Une fois convaincu qu'une réclamation n'est ni futile ni vexatoire, le juge de la requête devrait examiner les deuxième et troisième critères, même s'il est d'avis que le demandeur sera probablement

to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294, at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

In *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

débouté au procès. Il n'est en général ni nécessaire ni souhaitable de faire un examen prolongé du fond de l'affaire.

Il existe deux exceptions à la règle générale selon laquelle un juge ne devrait pas procéder à un examen approfondi sur le fond. La première est le cas où le résultat de la demande interlocutoire équivaudra en fait au règlement final de l'action. Ce sera le cas, d'une part, si le droit que le requérant cherche à protéger est un droit qui ne peut être exercé qu'immédiatement ou pas du tout, ou, d'autre part, si le résultat de la demande aura pour effet d'imposer à une partie un tel préjudice qu'il n'existe plus d'avantage possible à tirer d'un procès. En fait, dans l'arrêt *N.W.L. Ltd. c. Woods*, [1979] 1 W.L.R. 1294, à la p. 1307, lord Diplock a modifié le principe formulé dans l'arrêt *American Cyanamid*:

> [TRADUCTION] Toutefois, lorsque l'octroi ou le refus d'une injonction interlocutoire aura comme répercussion pratique de mettre fin à l'action parce que le préjudice déjà subi par la partie perdante est complet et du type qui ne peut donner lieu à un dédommagement, la probabilité que le demandeur réussirait à établir son droit à une injonction, si l'affaire s'était rendue à procès, constitue un facteur dont le juge doit tenir compte lorsqu'il fait l'appréciation des risques d'injustice possibles selon qu'il tranche d'une façon plutôt que de l'autre.

Cette exception pourrait bien englober les cas où un requérant cherche à faire interdire le piquetage. Plusieurs décisions indiquent que cette exception est déjà appliquée dans une certaine mesure au Canada.

Dans l'arrêt *Trieger c. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (H.C. Ont.), le chef du Parti Vert avait demandé une ordonnance interlocutoire visant à lui permettre de participer à un débat télévisé des chefs de partis devant avoir lieu peu de jours après l'audition. Le requérant était seulement intéressé à participer au débat et non à obtenir une déclaration ultérieure de ses droits. Le juge Campbell a refusé la demande en ces termes à la p. 152:

This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

In *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

The second exception to the *American Cyanamid* prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in *Metropolitan Stores*, at p. 133:

There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*, could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

[TRADUCTION] Il ne s'agit pas du type de redressement qui devrait être accordé dans le cadre d'une demande interlocutoire de cette nature. Les questions juridiques en cause sont complexes et je ne suis pas convaincu que le requérant a démontré l'existence d'une question sérieuse à juger au sens d'une affaire dont le fond juridique est suffisant pour justifier l'intervention extraordinaire de la cour sans aucun procès. [Nous soulignons.]

Dans l'arrêt *Tremblay c. Daigle*, [1989] 2 R.C.S. 530, l'appelante Daigle interjetait appel contre une injonction interlocutoire rendue par la Cour supérieure du Québec lui interdisant de se faire avorter. Compte tenu de l'état avancé de la grossesse de l'appelante, notre Cour est allée au-delà de la question de l'injonction interlocutoire et a rendu immédiatement une décision sur le fond de l'affaire.

Les circonstances justifiant l'application de cette exception sont rares. Lorsqu'elle s'applique, le tribunal doit procéder à un examen plus approfondi du fond de l'affaire. Puis, au moment de l'application des deuxième et troisième étapes de l'analyse, il doit tenir compte des résultats prévus quant au fond.

La deuxième exception à l'interdiction, formulée dans l'arrêt *American Cyanamid*, de procéder à un examen approfondi du fond d'une affaire, vise le cas où la question de constitutionnalité se présente uniquement sous la forme d'une pure question de droit. Le juge Beetz l'a reconnu dans l'arrêt *Metropolitan Stores*, à la p. 133:

Il peut exister des cas rares où la question de la constitutionnalité se présente sous la forme d'une question de droit purement et simplement, laquelle peut être définitivement tranchée par un juge saisi d'une requête. Un exemple théorique qui vient à l'esprit est la situation où le Parlement ou une législature prétendrait adopter une loi imposant les croyances d'une religion d'État. Pareille loi enfreindrait l'al. 2*a*) de la *Charte canadienne des droits et libertés*, ne pourrait possiblement pas être justifiée par l'article premier de celle-ci et courrait peut-être le risque d'être frappée d'illégalité sur-le-champ: voir *Procureur général du Québec c. Quebec Association of Protestant School Boards*, [1984] 2 R.C.S. 66, à la p. 88. Or, il va sans dire qu'il s'agit là de cas exceptionnels.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

The suggestion has been made in the private law context that a third exception to the *American Cyanamid* "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in *Charter* cases. Even if the facts upon which the *Charter* breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. *Irreparable Harm*

Beetz J. determined in *Metropolitan Stores*, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted,

Un juge appelé à trancher une demande s'inscrivant dans les limites très étroites de la deuxième exception n'a pas à examiner les deuxième ou troisième critères puisque l'existence du préjudice irréparable ou la prépondérance des inconvénients ne sont pas pertinentes dans la mesure où la question constitutionnelle est tranchée de façon définitive et rend inutile le sursis.

Dans le contexte du droit privé, on a soutenu qu'il faudrait reconnaître une troisième exception au critère de «la question sérieuse à juger», formulé dans l'affaire *American Cyanamid*, lorsque le dossier factuel est en grande partie réglé avant le dépôt de la demande. Ainsi, dans l'affaire *Dialadex Communications Inc. c. Crammond* (1987), 34 D.L.R. (4th) 392 (H.C. Ont.), à la p. 396, on a conclu:

> [TRADUCTION] Lorsque les faits ne sont pas vraiment contestés, les demandeurs doivent être en mesure d'établir qu'il existe une forte apparence de droit et qu'ils subiront un préjudice irréparable si l'injonction est refusée. Si les faits sont contestés, le critère à satisfaire est moins exigeant. Dans ce cas, les demandeurs doivent établir que leur action n'est pas futile et qu'il existe une question sérieuse à juger, et que, selon la prépondérance des inconvénients, une injonction devrait être accordée.

Si cette exception existe, elle ne devrait pas s'appliquer aux cas relevant de la *Charte*. Même si les faits qui fondent l'allégation de violation de la *Charte* ne sont pas contestés, le tribunal des requêtes pourrait bien ne pas avoir devant lui tous les éléments de preuve requis pour un examen fondé sur l'article premier. Par ailleurs, à cette étape, une cour d'appel n'aura habituellement pas le temps d'examiner suffisamment même un dossier factuel complet. Il s'ensuit qu'un tribunal des requêtes ne devrait pas tenter de procéder à l'analyse approfondie que nécessite un examen de l'article premier dans le cadre d'une procédure interlocutoire.

C. *Le préjudice irréparable*

Le juge Beetz a affirmé dans l'arrêt *Metropolitan Stores* (à la p. 128) que «[l]e deuxième critère consiste à décider si la partie qui cherche à obtenir l'injonction interlocutoire subirait, si elle n'était

suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, *supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

pas accordée, un préjudice irréparable». Certains tribunaux ont examiné, à cette étape, le préjudice que l'intimé risque de subir si le redressement demandé est accordé. Nous sommes d'avis qu'il est plus approprié de le faire à la troisième étape de l'analyse. Le préjudice allégué à l'intérêt public devrait également être examiné à cette étape.

À la présente étape, la seule question est de savoir si le refus du redressement pourrait être si défavorable à l'intérêt du requérant que le préjudice ne pourrait pas faire l'objet d'une réparation, en cas de divergence entre la décision sur le fond et l'issue de la demande interlocutoire.

Le terme «irréparable» a trait à la nature du préjudice subi plutôt qu'à son étendue. C'est un préjudice qui ne peut être quantifié du point de vue monétaire ou un préjudice auquel il ne peut être remédié, en général parce qu'une partie ne peut être dédommagée par l'autre. Des exemples du premier type sont le cas où la décision du tribunal aura pour effet de faire perdre à une partie son entreprise (*R.L. Crain Inc. c. Hendry* (1988), 48 D.L.R. (4th) 228 (B.R. Sask.)); le cas où une partie peut subir une perte commerciale permanente ou un préjudice irrémédiable à sa réputation commerciale (*American Cyanamid*, précité); ou encore le cas où une partie peut subir une perte permanente de ressources naturelles lorsqu'une activité contestée n'est pas interdite (*MacMillan Bloedel Ltd. c. Mullin*, [1985] 3 W.W.R. 577 (C.A.C.-B.)). Le fait qu'une partie soit impécunieuse n'entraîne pas automatiquement l'acceptation de la requête de l'autre partie qui ne sera pas en mesure de percevoir ultérieurement des dommages-intérêts, mais ce peut être une considération pertinente (*Hubbard c. Pitt*, [1976] Q.B. 142 (C.A.)).

L'appréciation du préjudice irréparable dans le cas de demandes interlocutoires concernant des droits garantis par la *Charte* est une tâche qui sera habituellement plus difficile qu'une appréciation comparable dans le cas d'une demande en matière de droit privé. Une des raisons en est que la notion de préjudice irréparable est étroitement liée à la réparation que sont les dommages-intérêts, lesquels ne constituent pas la principale réparation dans les cas relevant de la *Charte*.

This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter*. In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. *The Balance of Inconvenience and Public Interest Considerations*

The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautioned, at p. 408, that:

> [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

À plusieurs reprises, notre Cour a accepté le principe que des dommages-intérêts peuvent être accordés relativement à une violation des droits garantis par la *Charte*: (voir par exemple *Mills c. La Reine*, [1986] 1 R.C.S. 863, aux pp. 883, 886, 943 et 971; *Nelles c. Ontario*, [1989] 2 R.C.S. 170, à la p. 196). Toutefois, il n'existe pas encore de théorie juridique relative aux principes susceptibles de régir l'octroi de dommages-intérêts en vertu du par. 24(1) de la *Charte*. Compte tenu de l'incertitude du droit quant à la condamnation à des dommages-intérêts en cas de violation de la *Charte*, il sera dans la plupart des cas impossible pour un juge saisi d'une demande interlocutoire de déterminer si un dédommagement adéquat pourrait être obtenu au procès. En conséquence, jusqu'à ce que le droit soit clarifié en cette matière, on peut supposer que le préjudice financier, même quantifiable, qu'un refus de redressement causera au requérant constitue un préjudice irréparable.

D. *La prépondérance des inconvénients et l'intérêt public*

Dans l'arrêt *Metropolitan Stores*, le juge Beetz décrit, à la p. 129, le troisième critère applicable à une demande de redressement interlocutoire comme un critère qui consiste «à déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse une injonction interlocutoire en attendant une décision sur le fond». Compte tenu des exigences minimales relativement peu élevées du premier critère et des difficultés d'application du critère du préjudice irréparable dans des cas relevant de la *Charte*, c'est à ce stade que seront décidées de nombreuses procédures interlocutoires.

Il y a de nombreux facteurs à examiner dans l'appréciation de la «prépondérance des inconvénients» et ils varient d'un cas à l'autre. Dans l'arrêt *American Cyanamid*, lord Diplock fait la mise en garde suivante (à la p. 408):

> [TRADUCTION] [i]l serait peu sage de tenter ne serait-ce que d'énumérer tous les éléments variés qui pourraient demander à être pris en considération au moment du choix de la décision la plus convenable, encore moins de proposer le poids relatif à accorder à chacun de ces éléments. En la matière, chaque cas est un cas d'espèce.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

The decision in *Metropolitan Stores*, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores*. A few additional points may be made. It is the "polycentric" nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives*, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to

Il ajoute, à la p. 409: [TRADUCTION] «Il peut y avoir beaucoup d'autres éléments particuliers dont il faut tenir compte dans les circonstances particulières d'un cas déterminé.»

L'arrêt *Metropolitan Stores*, établit clairement que, dans tous les litiges de nature constitutionnelle, l'intérêt public est un «élément particulier» à considérer dans l'appréciation de la prépondérance des inconvénients, et qui doit recevoir «l'importance qu'il mérite» (à la p. 149). C'est la démarche qui a été correctement suivie par le juge Blair de la Division générale de la Cour de l'Ontario dans l'affaire *Ainsley Financial Corp. c. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, aux pp. 303 et 304:

> [TRADUCTION] Une injonction interlocutoire comportant une contestation de la validité constitutionnelle d'une loi ou de l'autorité d'un organisme chargé de l'application de la loi diffère des litiges ordinaires dans lesquels les demandes de redressement opposent des plaideurs privés. Il faut tenir compte des intérêts du public, que l'organisme a comme mandat de protéger, et en faire l'appréciation par rapport à l'intérêt des plaideurs privés.

1. L'intérêt public

Dans *Metropolitan Stores*, le juge Beetz a formulé des directives générales quant aux méthodes à utiliser dans l'appréciation de la prépondérance des inconvénients. On peut y apporter quelques précisions. C'est le caractère «polycentrique» de la *Charte* qui exige un examen de l'intérêt public dans l'appréciation de la prépondérance des inconvénients: voir Jamie Cassels, «An Inconvenient Balance: The Injunction as a Charter Remedy» dans J. Berryman, dir., *Remedies: Issues and Perspectives*, 1991, 271, aux pp. 301 à 305. Toutefois, le gouvernement n'a pas le monopole de l'intérêt public. Comme le fait ressortir Cassels, à la p. 303:

> [TRADUCTION] Bien qu'il soit fort important de tenir compte de l'intérêt public dans l'appréciation de la prépondérance des inconvénients, l'intérêt public dans les cas relevant de la *Charte* n'est pas sans équivoque ou asymétrique comme le laisse entendre l'arrêt *Metropolitan Stores*. Le procureur général n'est pas le représentant exclusif d'un public «monolithe» dans les litiges sur la *Charte*, et le requérant ne présente pas toujours une

represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.

> The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that *these women* would suffer irreparable harm, such evidence would not indicate any irreparable harm to *these applicants*, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the

revendication individualisée. La plupart du temps, le requérant peut également affirmer qu'il représente une vision de «l'intérêt public». De même, il se peut que l'intérêt public ne milite pas toujours en faveur de l'application d'une loi existante.

À notre avis, il convient d'autoriser les deux parties à une procédure interlocutoire relevant de la *Charte* à invoquer des considérations d'intérêt public. Chaque partie a droit de faire connaître au tribunal le préjudice qu'elle pourrait subir avant la décision sur le fond. En outre, le requérant ou l'intimé peut faire pencher la balance des inconvénients en sa faveur en démontrant au tribunal que l'intérêt public commande l'octroi ou le refus du redressement demandé. «L'intérêt public» comprend à la fois les intérêts de l'ensemble de la société et les intérêts particuliers de groupes identifiables.

En conséquence, nous sommes d'avis qu'il faut rejeter une méthode d'analyse qui exclut l'examen d'un préjudice non directement subi par une partie à la requête. Telle était la position adoptée par le juge de première instance dans l'affaire *Morgentaler c. Ackroyd* (1983), 150 D.L.R. (3d) 59 (H.C. Ont.). Le juge Linden conclut à la p. 66:

> [TRADUCTION] Les requérants fondent principalement leur argumentation sur le préjudice irréparable que risquent de subir leurs patientes éventuelles qui ne pourront obtenir un avortement si la clinique n'est pas autorisée à les faire. Même s'il était établi que *ces femmes* subiraient un préjudice irréparable, une telle preuve n'indiquerait pas que les requérants en l'espèce subiraient un préjudice irréparable, justifiant la cour de délivrer une injonction à leur demande. [En italique dans l'original.]

Lorsqu'un particulier soutient qu'un préjudice est causé à l'intérêt public, ce préjudice doit être prouvé puisqu'on présume ordinairement qu'un particulier poursuit son propre intérêt et non celui de l'ensemble du public. Dans l'examen de la prépondérance des inconvénients et de l'intérêt public, il n'est pas utile à un requérant de soutenir qu'une autorité gouvernementale donnée ne représente pas l'intérêt public. Il faut plutôt que le

court of the public interest benefits which will flow from the granting of the relief sought.

Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the *Fisheries Act*, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

(b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in *Metropolitan Stores* at p. 139. It was applied by the Trial Division of the Federal Court in *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304.

A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The pub-

requérant convainque le tribunal des avantages, pour l'intérêt public, qui découleront de l'octroi du redressement demandé.

Cette question de l'atteinte à l'intérêt public invoquée par une autorité publique a été abordée de diverses façons par les tribunaux. D'un côté, on trouve le point de vue exprimé par la Cour d'appel fédérale dans l'arrêt *Procureur général du Canada c. Fishing Vessel Owners' Association of B.C.*, [1985] 1 C.F. 791, qui a infirmé la décision de la Division de première instance d'accorder une injonction empêchant des fonctionnaires des pêcheries de mettre en œuvre un plan de pêche adopté en vertu de la *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14. Parmi d'autres motifs, la cour a souligné celui-ci (à la p. 795):

b) le juge a eu tort de tenir pour acquis que le fait d'accorder l'injonction ne causerait aucun tort aux appelants. Lorsqu'on empêche un organisme public d'exercer les pouvoirs que la loi lui confère, on peut alors affirmer, en présence d'un cas comme celui qui nous occupe, que l'intérêt public, dont cet organisme est le gardien, subit un tort irréparable.

Le juge Beetz a approuvé avec réserve ces remarques dans l'arrêt *Metropolitan Stores* (à la p. 139). Elles ont été appliquées par la Division de première instance de la Cour fédérale dans *Esquimalt Anglers' Association c. Canada (Ministre des pêches et océans)* (1988), 21 F.T.R. 304.

Un point de vue contraire a été exprimé par le juge McQuaid de la Cour d'appel de l'Île-du-Prince-Édouard dans *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, qui, en autorisant un sursis d'exécution d'une ordonnance de la Public Utilities Commission porté en appel, a affirmé, à la p. 164:

[TRADUCTION] Je ne vois aucune circonstance susceptible de causer un inconvénient à la Commission s'il y a sursis d'exécution en attendant l'appel. En tant qu'organisme de réglementation, la Commission ne possède aucun intérêt acquis quant à l'issue de l'appel. En fait, on peut concevoir qu'elle soit favorable à un appel qui porte tout particulièrement sur sa compétence, car elle se trouve à recevoir des directives claires pour l'avenir

lic interest is equally well served, in the same sense, by any appeal . . . .

In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores*, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law than when the application of the law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General*

relativement à des situations où il aurait pu exister des doutes. De la même manière, un appel sert également bien l'intérêt public . . .

À notre avis, le concept d'inconvénient doit recevoir une interprétation large dans les cas relevant de la *Charte*. Dans le cas d'un organisme public, le fardeau d'établir le préjudice irréparable à l'intérêt public est moins exigeant que pour un particulier en raison, en partie, de la nature même de l'organisme public et, en partie, de l'action qu'on veut faire interdire. On pourra presque toujours satisfaire au critère en établissant simplement que l'organisme a le devoir de favoriser ou de protéger l'intérêt public et en indiquant que c'est dans cette sphère de responsabilité que se situent le texte législatif, le règlement ou l'activité contestés. Si l'on a satisfait à ces exigences minimales, le tribunal devrait, dans la plupart des cas, supposer que l'interdiction de l'action causera un préjudice irréparable à l'intérêt public.

En règle générale, un tribunal ne devrait pas tenter de déterminer si l'interdiction demandée entraînerait un préjudice réel. Le faire amènerait en réalité le tribunal à examiner si le gouvernement gouverne bien, puisque l'on se trouverait implicitement à laisser entendre que l'action gouvernementale n'a pas pour effet de favoriser l'intérêt public et que l'interdiction ne causerait donc aucun préjudice à l'intérêt public. La *Charte* autorise les tribunaux non pas à évaluer l'efficacité des mesures prises par le gouvernement, mais seulement à empêcher celui-ci d'empiéter sur les garanties fondamentales.

L'examen de l'intérêt public peut également être touché par d'autres facteurs. Dans *Metropolitan Stores*, on a fait remarquer que les considérations d'intérêt public ont davantage de poids dans les cas de «suspension» que dans les cas d'«exemption». La raison en est que l'atteinte à l'intérêt public est beaucoup moins probable dans le cas où un groupe restreint et distinct de requérants est exempté de l'application de certaines dispositions d'une loi que dans le cas où l'application de la loi est suspendue dans sa totalité. Voir les affaires *Black c. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General Hospital c. Stoffman*

Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix.

Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.), the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. The Status Quo

In the course of discussing the balance of convenience in *American Cyanamid*, Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to . . . preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the *Charter* is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. *Summary*

It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a *Charter* case.

As indicated in *Metropolitan Stores*, the three-part *American Cyanamid* test should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

(1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. c. Commission des licences et permis d'alcool*, [1986] 2 R.C.S. ix.

Par ailleurs, même dans les cas de suspension, un tribunal peut être en mesure d'offrir quelque redressement s'il arrive à suffisamment circonscrire la demande de redressement du requérant de façon à ne pas modifier l'application continue de la loi que commande l'intérêt public général. Ainsi, dans la décision *Ontario Jockey Club c. Smith* (1922), 22 O.W.N. 373 (H.C.), le tribunal a restreint à l'égard du requérant l'application d'une loi fiscale contestée, mais lui a ordonné de consigner à la cour la somme correspondant aux taxes exigées, en attendant le règlement de l'action principale.

2. Le statu quo

Dans le cadre de l'examen de la prépondérance des inconvénients dans l'affaire *American Cyanamid*, lord Diplock a affirmé que, toutes choses demeurant égales, [TRADUCTION] «il sera plus prudent d'adopter les mesures propres à maintenir le statu quo» (p. 408). Cette méthode semble être d'une utilité restreinte dans les litiges de droit privé; quoiqu'il puisse y avoir des exceptions, en règle générale, l'application de cette méthode n'est pas fondée comme telle lorsqu'on invoque la violation de droits fondamentaux. L'une des fonctions de la *Charte* est de fournir aux particuliers un moyen de contester l'ordre actuel des choses ou le statu quo. Les diverses questions doivent être pondérées de la façon décrite dans les présents motifs.

E. *Sommaire*

Il est utile à ce stade de résumer les facteurs à examiner dans le cas d'une demande de redressement interlocutoire dans un cas relevant de la *Charte*.

Comme l'indique *Metropolitan Stores* l'analyse en trois étapes d'*American Cyanamid* devrait s'appliquer aux demandes d'injonctions interlocutoires et de suspensions d'instance, tant en droit privé que dans les affaires relevant de la *Charte*.

At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

À la première étape, le requérant d'un redressement interlocutoire dans un cas relevant de la *Charte* doit établir l'existence d'une question sérieuse à juger. Le juge de la requête doit déterminer si le requérant a satisfait au critère, en se fondant sur le bon sens et un examen extrêmement restreint du fond de l'affaire. Le fait qu'une cour d'appel a accordé une autorisation d'appel relativement à l'action principale constitue certes une considération pertinente et importante, de même que tout jugement rendu sur le fond; toutefois, ni l'une ni l'autre de ces considérations n'est concluante. Le tribunal saisi de la requête ne devrait aller au-delà d'un examen préliminaire du fond de l'affaire que lorsque le résultat de la requête interlocutoire équivaudra en fait à un règlement final de l'action, ou que la question de constitutionnalité d'une loi se présente comme une pure question de droit. Les cas de ce genre sont extrêmement rares. Sauf lorsque la réclamation est futile ou vexatoire ou que la question de la constitutionnalité d'une loi se présente comme une pure question de droit, le juge de la requête devrait procéder à l'examen des deuxième et troisième étapes de l'analyse décrite dans l'arrêt *Metropolitan Stores*.

At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

À la deuxième étape, le requérant doit convaincre la cour qu'il subira un préjudice irréparable en cas de refus du redressement. Le terme «irréparable» a trait à la nature du préjudice et non à son étendue. Dans les cas relevant de la *Charte*, même une perte financière quantifiable, invoquée à l'appui d'une demande, peut être considérée comme un préjudice irréparable s'il n'est pas évident qu'il pourrait y avoir recouvrement au moment de la décision sur le fond.

The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to

C'est la troisième étape du critère, celle de l'appréciation de la prépondérance des inconvénients, qui permettra habituellement de trancher les demandes concernant des droits garantis par la *Charte*. En plus du préjudice que chaque partie prétend qu'elle subira, il faut tenir compte de l'intérêt public. L'effet qu'une décision sur la demande aura sur l'intérêt public peut être invoqué par l'une ou l'autre partie. Les considérations d'intérêt public auront moins de poids dans les cas d'exemption que dans les cas de suspension. Si la

promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. *A Serious Question to be Tried*

The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the *Charter*. The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in *R. v. Oakes*, [1986] 1 S.C.R. 103, to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious

nature et l'objet affirmé de la loi sont de promouvoir l'intérêt public, le tribunal des requêtes ne devrait pas se demander si la loi a réellement cet effet. Il faut supposer que tel est le cas. Pour arriver à contrer le supposé avantage de l'application continue de la loi que commande l'intérêt public, le requérant qui invoque l'intérêt public doit établir que la suspension de l'application de la loi serait elle-même à l'avantage du public.

Enfin, en règle générale, les mêmes principes s'appliqueraient lorsqu'un organisme gouvernemental présente une demande de redressement interlocutoire. Cependant, c'est à la deuxième étape que sera examinée la question de l'intérêt public, en tant qu'aspect du préjudice irréparable causé aux intérêts du gouvernement. Cette question sera de nouveau examinée à la troisième étape lorsque le préjudice du requérant est examiné par rapport à celui de l'intimé, y compris le préjudice que ce dernier aura établi du point de vue de l'intérêt public.

VII. Application des principes en l'espèce

A. *Une question sérieuse à juger*

Les requérantes soutiennent que les présentes affaires soulèvent plusieurs questions sérieuses à juger, dont celle de l'application des critères du lien rationnel et de l'atteinte minimale, qui servent à justifier l'atteinte à la liberté d'expression entraînée par l'interdiction générale de la publicité sur les produits du tabac. Sur ce point, le juge Chabot de la Cour supérieure du Québec et le juge Brossard, dissident, de la Cour d'appel ont conclu que le gouvernement n'avait pas satisfait à ces critères et que l'interdiction ne pouvait se justifier en vertu de l'article premier de la *Charte*. La Cour d'appel à la majorité a statué que l'interdiction pouvait se justifier. Ces divergences d'opinions résultent d'interprétations différentes de la portée de l'assouplissement à la théorie du fardeau imposé au ministère public dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, lorsqu'il veut justifier son intervention dans le domaine du bien-être public. Notre Cour a accordé les autorisations de pourvoi sur le fond. Relativement à des requêtes distinctes de redressement interlocutoire en l'espèce, la Cour d'appel du

constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. *Irreparable Harm*

The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. *Balance of Inconvenience*

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as

Québec a affirmé que: [TRADUCTION] «[q]uelle que soit l'issue de ces appels, ils soulèvent clairement des questions constitutionnelles sérieuses.» Cette observation de la Cour d'appel du Québec et les autorisations d'appel données par notre Cour indiquent clairement que les présentes affaires soulèvent des questions de droit sérieuses.

B. *Le préjudice irréparable*

Les requérantes soutiennent que si elles n'obtiennent pas le redressement interlocutoire, elles seront immédiatement forcées de faire des dépenses très importantes pour se conformer au règlement et que, advenant le cas où notre Cour accueillerait les pourvois des requérantes, elles ne seront pas en mesure de recouvrer du gouvernement les coûts subis ou de revenir à leurs méthodes actuelles d'emballage sans engager de nouveau les mêmes dépenses.

Une perte monétaire de cette nature n'équivaudra habituellement pas à un préjudice irréparable dans des affaires de droit privé. Toutefois, lorsque le gouvernement est la partie qui échoue dans une affaire de nature constitutionnelle, un demandeur aura beaucoup plus de difficulté à établir la responsabilité constitutionnelle et à obtenir une réparation monétaire. Les dépenses requises par le nouveau règlement causeront donc un préjudice irréparable aux requérantes si les présentes demandes sont refusées, mais les actions principales accueillies en appel.

C. *La prépondérance des inconvénients*

Pour déterminer lequel de l'octroi ou du refus du redressement interlocutoire occasionnerait le plus d'inconvénients, il faut notamment procéder à l'examen des facteurs suivants: la nature du redressement demandé et du préjudice invoqué par les parties, la nature de la loi contestée et l'intérêt public.

Les pertes que subiraient les requérantes, en cas de refus du redressement, sont de nature strictement financière. Les dépenses nécessaires sont importantes et imposeraient certainement un fardeau économique considérable aux deux sociétés.

pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of $50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondarily, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the *Tobacco Products Control Act*. On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in *Metropolitan Stores*. However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation" (p. 147).

The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in *Metropolitan Stores*:

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by demo-

Néanmoins, comme l'a fait ressortir l'intimé, les requérantes sont des sociétés importantes et prospères, dont les revenus annuels dépassent les 50 millions de dollars. Elles peuvent absorber des pertes plus facilement que des entreprises plus petites. De plus, si l'on présume que, pour les cigarettes, la demande ne dépend pas uniquement du prix, ces sociétés peuvent reporter tout accroissement des dépenses sur leurs clients par le biais de majorations de prix. En conséquence, bien que le préjudice subi puisse être irréparable, il n'aura pas d'incidence à long terme sur la viabilité des entreprises requérantes.

Deuxièmement, les requérantes sont deux sociétés qui veulent être exemptées de l'application des dernières modifications du règlement pris en vertu de la *Loi réglementant les produits du tabac*. Au vu du dossier, le litige paraît être un «cas d'exemption» au sens où cette expression a été employée par le juge Beetz dans *Metropolitan Stores*. Toutefois, puisqu'il n'existe que trois sociétés de production de tabac au Canada, les demandes constituent en réalité une sorte de «cas de suspension». Les requérantes ont admis au cours des débats qu'elles cherchaient en fait à faire suspendre l'application du nouveau règlement à l'égard de toutes les sociétés de production de tabac au Canada pendant une période d'un an suivant le jugement de notre Cour sur le fond. La décision rendue relativement aux demandes aura donc des répercussions sur l'ensemble de l'industrie canadienne du tabac. Par ailleurs, les dispositions attaquées sont de nature générale. Il convient donc de considérer ces demandes comme un cas de suspension et, en conséquence, comme un cas où «l'intérêt public commande normalement davantage le respect de la législation existante» (p. 147).

L'importance accordée aux préoccupations d'intérêt public dépend en partie de la nature de la loi en général et en partie de l'objet de la loi contestée. Comme le juge Beetz l'explique, à la p. 135 de l'arrêt *Metropolitan Stores*:

> Qu'elles soient ou non finalement jugées constitutionnelles, les lois dont les plaideurs cherchent à obtenir la suspension, ou de l'application desquelles ils demandent d'être exemptés par voie d'injonction interlocutoire, ont

cratically-elected legislatures and are generally passed for the common good, for instance: . . . the protection of public health . . . . It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

The regulations under attack were adopted pursuant to s. 3 of the *Tobacco Products Control Act* which states:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

(*a*) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(*b*) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and

(*c*) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

The Regulatory Impact Analysis Statement, in the *Canada Gazette*, Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

été adoptées par des législatures démocratiquement élues et visent généralement le bien commun, par exemple: [. . .] protéger la santé [. . .] Il semble bien évident qu'une injonction interlocutoire dans la plupart des cas de suspension et, jusqu'à un certain point, comme nous allons le voir plus loin, dans un bon nombre de cas d'exemption, risque de contrecarrer temporairement la poursuite du bien commun. [Nous soulignons.]

Le règlement attaqué a été adopté conformément à l'art. 3 de la *Loi réglementant les produits du tabac* qui prévoit:

3. La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave, urgent et d'envergure nationale et, plus particulièrement:

a) de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant de façon indiscutable un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;

b) de préserver notamment les jeunes, autant que faire se peut dans une société libre et démocratique, des incitations à la consommation du tabac et du tabagisme qui peut en résulter;

c) de mieux sensibiliser les Canadiennes et les Canadiens aux méfaits du tabac par la diffusion efficace de l'information utile aux consommateurs de celui-ci.

Le Résumé de l'étude d'impact de la réglementation (*Gazette du Canada*, partie II, vol. 127, nº 16, p. 3284, à la p. 3285, qui accompagne le règlement précise:

L'augmentation du nombre des messages relatifs à la santé et la modification de la présentation de ces messages témoignent du consensus profond auquel sont parvenus les responsables de la santé publique, à savoir qu'il faut faire connaître de façon plus complète et plus efficace aux consommateurs les graves dangers de l'usage du tabac sur la santé. Des appuis pour les modifications réglementaires ont été exprimés dans des centaines de lettres et dans un certain nombre de mémoires présentés par des groupes du secteur de la santé publique, qui ont critiqué les premiers règlements adoptés en application de la loi, ainsi que dans un certain nombre d'études ministérielles soulignant la nécessité de ces modifications.

These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the pre-

Ce qui a été cité indique clairement que le gouvernement a adopté le règlement en cause dans l'intention de protéger la santé publique et donc pour promouvoir le bien public. Par ailleurs, les deux parties ont reconnu que des études réalisées dans le passé ont démontré que les mises en garde apposées sur les emballages de produits du tabac produisent des résultats en ce qu'ils sensibilisent davantage le public aux dangers du tabagisme et contribuent à réduire l'usage général du tabac dans notre société. Toutefois, les requérantes ont soutenu avec vigueur que le gouvernement n'a pas établi et qu'il ne peut établir que les exigences spécifiques imposées par le règlement attaqué présentent des avantages pour le public. À notre avis, cet argument ne vient pas en aide aux requérantes à ce stade interlocutoire.

Si le gouvernement déclare qu'il adopte une loi pour protéger et promouvoir la santé publique et s'il est établi que les limites qu'il veut imposer à l'industrie sont de même nature que celles qui, dans le passé, ont eu des avantages concrets pour le public, il n'appartient pas à un tribunal saisi d'une requête interlocutoire d'évaluer les véritables avantages qui découleront des exigences particulières de la loi. Cela est d'autant plus vrai en l'espèce qu'il s'agit de l'une des questions principales à trancher en appel. Les requérantes doivent plutôt faire contrepoids à ces considérations d'intérêt public en établissant que la suspension de l'application de la loi serait davantage dans l'intérêt public.

En l'espèce, les requérantes n'ont pas tenté de faire valoir que l'intérêt public commande l'application continue des exigences actuelles en matière d'emballage plutôt que des nouvelles exigences. Il n'y a que la non-majoration du prix d'un paquet de cigarettes pour les fumeurs qui pourrait être dans l'intérêt public. Une telle majoration des prix ne sera vraisemblablement pas excessive et sera de nature purement économique. En conséquence, l'argument qu'il existe un intérêt pour le public à maintenir le prix actuel des produits du tabac ne peut avoir beaucoup de poids. Cela est tout particulièrement vrai lorsque ce facteur est examiné par rapport à l'importance incontestable de l'intérêt du

vention of the widespread and serious medical problems directly attributable to smoking.

The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance that the applications for a stay must be dismissed with costs to the successful party on the appeal.

Applications dismissed.

Solicitors for the applicant RJR — MacDonald Inc.: Mackenzie, Gervais, Montreal.

Solicitors for the applicant Imperial Tobacco Inc.: Ogilvy, Renault, Montreal.

Solicitors for the respondent: Côté & Ouellet, Montreal.

Solicitors for the interveners on the application for interlocutory relief the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: McCarthy, Tétrault, Toronto.

public dans la protection de la santé et la prévention de problèmes médicaux répandus et graves, directement attribuables à la cigarette.

La prépondérance des inconvénients est fortement en faveur de l'intimé et n'est pas contrebalancée par le préjudice irréparable que pourraient subir les requérantes si le redressement est refusé. L'intérêt public dans le domaine de la santé revêt une importance si impérieuse que les demandes de sursis doivent être rejetées avec dépens adjugés à la partie qui aura gain de cause en appel.

Demandes rejetées.

Procureurs de la requérante RJR — MacDonald Inc.: Mackenzie, Gervais, Montréal.

Procureurs de la requérante Imperial Tobacco Inc.: Ogilvy, Renault, Montréal.

Procureurs de l'intimé: Côté & Ouellet, Montréal.

Procureurs des intervenants dans la demande de redressement interlocutoire la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et Médecins pour un Canada sans fumée: McCarthy, Tétrault, Toronto.

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

JTI-MACDONALD CORP.	**Court File No. CV-19-615862-00CL**
IMPERIAL TOBACCO CANADA LIMITED AND **IMPERIAL TOBACCO COMPANY LIMITED**	**Court File No. CV-19-616077-00CL**
ROTHMANS, BENSON & HEDGES INC.	**Court File No. CV-19-616779-00CL**

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

BOOK OF AUTHORITIES
PCC Representative Counsel's Motion for Injunctive Relief
(Returnable March 26, 2025)

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