# COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-025385-154, 500-09-025386-152, 500-09-025387-150
(500-06-000070-983, 500-06-000076-980)

DATE: July 23, 2015

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**CORAM: THE HONOURABLE MARIE-FRANCE BICH, J.A.**
**PAUL VÉZINA, J.A.**
**MARK SCHRAGER, J.A.**

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No: 500-09-025385-154

**IMPERIAL TOBACCO CANADA LTD.**
APPELLANT/INCIDENTAL RESPONDENT – Defendant

v.

**CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ**
**JEAN-YVES BLAIS**
**CÉCILIA LÉTOURNEAU**
RESPONDENTS/INCIDENTAL APPELLANTS – Plaintiffs

and

**JTI-MACDONALD CORP.**
**ROTHMANS, BENSON & HEDGES INC.**
IMPLEADED PARTIES – Defendants

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No: 500-09-025386-152

**JTI-MACDONALD CORP.**
APPELLANT/INCIDENTAL RESPONDENT – Defendant

v.

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**JEAN-YVES BLAIS**
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**IMPERIAL TOBACCO CANADA LTD.**
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No: 500-09-025387-150

**ROTHMANS, BENSON & HEDGES INC.**
APPELLANT/INCIDENTAL RESPONDENT – Defendant

v.

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IMPLEADED PARTIES – Defendants

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JUDGMENT

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[1] Each of the Appellants in the three appeals before us seeks the cancellation of orders of provisional execution contained in the judgment of May 27, 2015 (corrected on June 8) of the Superior Court, District of Montreal (the Honourable Justice Brian Riordan).[1]

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[1] *Létourneau v. JTI-MacDonald Corp.*, 2015 QCCS 2382 ["the judgment"].

[2] Appellants, Imperial Tobacco Canada Ltd. ("ITL") and Rothmans, Benson & Hedges Inc. ("RBH") also seek confidentiality and sealing orders regarding certain information and documentation filed in support of their motions to cancel provisional execution. At the beginning of the hearing, this Court issued a safeguard order to such effect to stay in force until signature of this judgment.

[3] The 237 page judgment in first instance culminates two class actions commenced in 1998 against the Appellants who are cigarette manufacturers. The class actions were authorized in 2005; the joint trial commenced on March 12, 2012 and terminated on December 11, 2014. More than 70 witnesses, including 27 experts were heard over a total of 251 hearing days. In excess of 20,000 exhibits were filed in evidence.

[4] The judgment is prefaced by the following summary of its contents:

> The two class actions[2] against the Canadian cigarette companies[3] are maintained in part.
>
> In both actions, the claim for common or collective damages was limited to moral damages and punitive damages, with both classes of plaintiffs renouncing their potential right to make individual claims for compensatory damages, such as loss of income.
>
> In the Blais File, taken in the name of a class of persons with lung cancer, throat cancer or emphysema, the Court finds the defendants liable for both moral and punitive damages. It holds that they committed four separate faults, including under the general duty not to cause injury to another person, under the duty of a manufacturer to inform its customers of the risks and dangers of its products, under the Quebec Charter of Human Rights and Freedoms[4] and under the Quebec Consumer Protection Act.[5]
>
> In Blais, the Court awards moral damages in the amount of $6,858,864,000 solidarily among the defendants. Since this action was instituted in 1998, this sum translates to approximately $15,500,000,000 once interest and the additional indemnity are added. The respective liability of the defendants among themselves is as follows:
>
> ITL - 67%, RBH - 20% and JTM - 13%.

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2 The "Blais" file and the "Létourneau" file, both named for the Plaintiffs / class representatives.

3 Imperial Tobacco Canada Ltd. ("ITL"), Rothmans, Benson & Hedges Inc. ("RBH") and JTI-Macdonald Corp. ("JTM"), the Appellants.

4 CQLR, c. C-12.

5 CQLR, c. P-40.1.

Recognizing that it is unlikely that the defendants could pay that amount all at once, the Court exercises its discretion with respect to the execution of the judgment. It thus orders an initial aggregate deposit of $1,000,000,000, divided among the defendants in accordance with their share of liability and reserves the plaintiffs' right to request further deposits, if necessary.

In the Létourneau File, taken in the name of persons who were dependent on nicotine, the Court finds the defendants liable for both heads of damage with respect to the same four faults. In spite of such liability, the Court refuses to order the payment of moral damages because the evidence does not establish with sufficient accuracy the total amount of the claims of the members.

The faults under the *Quebec Charter* and the *Consumer Protection Act* allow for the awarding of punitive damages. The Court sets the base for their calculation at one year's before-tax profits of each defendant, this covering both files. Taking into account the particularly unacceptable behaviour of ITL over the Class Period and, to a lesser extent, JTM, the Court increases the sums attributed to them above the base amount to arrive at an aggregate of $1,310,000,000, divided as follows:

ITL - $725,000,000, RBH - $460,000,000 and JTM - $125,000,000.

It is necessary to divide this amount between the two files. For that, the Court takes account of the significantly higher impact of the defendants' faults on the Blais Class compared to Létourneau. It thus attributes 90% of the total to Blais and 10% to the Létourneau Class.

Nevertheless, in light of the size of the award for moral damages in Blais, the Court feels obliged to limit punitive damages there to the symbolic amount of $30,000 for each defendant. This represents one dollar for each Canadian death the tobacco industry causes in Canada every year, as stated in a 1995 Supreme Court judgment.

In Létourneau, therefore, the aggregate award for punitive damages, at 10% of the total, is $131,000,000. That will be divided among the defendants as follows:

ITL - $72,500,000, RBH - $46,000,000 and JTM - $12,500,000

Since there are nearly one million people in the Létourneau Class, this represents only about $130 for each member. In light of that, and of the fact that there is no condemnation for moral damages in this file, the Court refuses distribution of an amount to each of the members on the ground that it is not possible or would be too expensive to do so.

Finally, the Court orders the provisional execution of the judgment notwithstanding appeal with respect to the initial deposit of one billion dollars of moral damages, plus all punitive damages awarded. The Defendants must deposit these sums in trust with their respective attorneys within sixty days of the

> date of the judgment. The Court will decide how those amounts are to be disbursed at a later hearing.
>
> [Footnotes added]

[5] Though Respondents originally indicated that they would seek an order of provisional execution based on the assertion that Appellants were guilty of improper use of procedure, in the end, they argued for the application of the penultimate paragraph of article 547 *C.C.P.* as the grounds for an order of provisional execution:

> **547.** (…)
>
> In addition, the court may, upon application, order provisional execution in case of exceptional urgency or for any other reason deemed sufficient in particular where the fact of bringing the case to appeal is likely to cause serious or irreparable injury, for the whole or for part only of a judgment.
>
> (…)

> **547.** […]
>
> De plus, le tribunal peut, sur demande, ordonner l'exécution provisoire dans les cas d'urgence exceptionnelle ou pour quelqu'autre raison jugée suffisante notamment lorsque le fait de porter l'affaire en appel risque de causer un préjudice sérieux ou irréparable, pour la totalité ou pour une partie seulement du jugement.
>
> […]

[6] In the conclusions of the judgment, the judge ordered an initial deposit towards partial satisfaction of the two awards within 60 days of $1,131,090,000 broken down as follows:

| | **BLAIS** | | **LÉTOURNEAU** | |
|---|---|---|---|---|
| ITL | $670,000,000 | (compensatory) | $72,500,000 | (punitive) |
| | $30,000 | (punitive) | | |
| RBH | $200,000,000 | (compensatory) | $46,000,000 | (punitive) |
| | $30,000 | (punitive) | | |
| JTM | $130,000,000 | (compensatory) | $12,500,000 | (punitive) |
| | $30,000 | (punitive) | | |
| **TOTAL** | **$1,000,090,000** | | **$131,000,000** | |

[7] The judge ordered provisional execution "with respect to the initial deposit of one billion dollars of moral damages, plus all punitive damages".

[8] The condemnation for moral damages in the Blais file (excluding interest and special indemnity) is $6,858,864,000 plus additional amounts per members of sub-classes. In the Létourneau file, there is no condemnation for compensatory damages.

[9] The judge's reasons for ordering provisional execution were that the actions had been pending for over 17 years and he found that Respondents' estimate of 6 years for the appeal process was optimistic. He viewed as serious and irreparable injury that class members would die during those 6 years, in many instances as a result of Appellants' faults.

[10] He also deemed it "critical in the interest of justice" that Plaintiffs, including the Fond d'aide aux recours collectifs be given some relief from the cost of litigation accumulated over the years.

[11] The judge ordered provisional execution for moral and punitive damages with "full knowledge of the Court of Appeal's statement to the effect that provisional execution of moral and punitive damages is very exceptional".[6]

[12] He ordered that the monies be deposited in the trust accounts of the respective attorneys of Appellants and indicated his openness to the "possibility of distributing certain amounts immediately".[7]

[13] As a general rule, execution is suspended by the bringing of an appeal[8] but article 547 *C.C.P.* provides, by way of exception that provisional execution may apply because of the nature of the case or in exceptional circumstances, by order of the trial judge. Article 550 *C.C.P.* permits a judge of the Court of Appeal to "cancel or suspend" orders of provisional execution issued in first instance. The matter may be referred to the Court as is presently the case.

[14] To obtain the suspension or cancellation of an order of provisional execution, Appellants must demonstrate:

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6 Para. 1202 of the judgment, referring to *Hollinger v. Hollinger*, 2007 QCCA 1051, para. 3 per Dalphond, J.A.; see also *Immeubles H.T.H. Inc. v. Plaza Chevrolet Buick GMC Cadillac Inc.*, 2012 QCCA 2302, para. 4 (Morissette, J.A.).

7 Para. 1203 of the judgment.

8 Article 497 *C.C.P.*

i) an apparent weakness in the judgment of first instance;

ii) a risk of serious prejudice if provisional execution is maintained; and

iii) that the balance of inconvenience favours the cancellation.[9]

[15] In support of their motions, each Appellant has filed an affidavit (and in the case of ITL, documentation as well) to indicate the prejudice they suffer as a result of the orders of provisional execution. Each affiant was deposed by Respondents' attorneys who requested the production of certain documents.

[16] ITL seeks a sealing order to protect the confidentiality of some of this information found at paragraphs 6, 7, 16 (iii), 20-27, 29-30 and 33 of the affidavit of its officer as well as the documents comprising its exhibit A.

[17] Summarily, this information includes wage and pension obligations and financial data including earnings and availability of cash and credit facilities to pay the awards. Also ITL has filed its consolidated financial statements for the year ending December 31, 2014.

[18] During the deposition of the affiant, Respondents requested RBH's 2014 financial statement and cash flow projections. RBH then also filed a motion to seal documents and the portion of the testimony referring to them.

[19] ITL and RBH invoke the judgment of the Supreme Court of Canada in the matter of *Sierra Club*[10] where the test for a court to issue a confidentiality order was set down as follows:

| | |
|---|---|
| 53 (…) | 53 […] |
| (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent | a) elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque; |

[9] André Rochon (with the collab. of Frédérique Le Colletter), *Guide des requêtes devant le juge unique de la Cour d'appel*, Cowansville, Éditions Yvon Blais, 2013, p. 145.

[10] *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41 [*Sierra Club*].

the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

b) ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires.

[20] The Court added:

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness".

55 De plus, l'expression « intérêt commercial important » exige une clarification. Pour être qualifié d'« intérêt commercial important », l'intérêt en question ne doit pas se rapporter uniquement et spécifiquement à la partie qui demande l'ordonnance de confidentialité; il doit s'agir d'un intérêt qui peut se définir en termes d'intérêt public à la confidentialité. Par exemple, une entreprise privée ne pourrait simplement prétendre que l'existence d'un contrat donné ne devrait pas être divulguée parce que cela lui ferait perdre des occasions d'affaires, et que cela nuirait à ses intérêts commerciaux. Si toutefois, comme en l'espèce, la divulgation de renseignements doit entraîner un manquement à une entente de non divulgation, on peut alors parler plus largement de l'intérêt commercial général dans la protection des renseignements confidentiels. Simplement, si aucun principe général n'entre en jeu, il ne peut y avoir d'« intérêt commercial important » pour les besoins de l'analyse. Ou, pour citer le juge Binnie dans *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35, par. 10, la règle de la publicité des débats judiciaires ne cède le pas que « dans les cas où le droit du public à

> la confidentialité l'emporte sur le droit du public à l'accessibilité ».
>
> (Emphasis added)

[21] On application of this test, the motions to seal and keep confidential the information proposed by ITL and RBH must fail. The information does not appear significant nor confidential even if the parties may consider it sensitive.

[22] Assuming that the issue of confidentiality raised by ITL and RBH merits application of the criteria in *Sierra Club*, an appreciation of the context of the requests is necessary. It should be remembered that in *Sierra Club*, Atomic Energy of Canada Ltd., the party seeking confidentiality, was contractually bound to a third party (i.e. a branch of the Chinese government with which it had contracted to build nuclear reactors) not to disclose the information in question. However, for purposes of its litigation with Sierra Club, the Atomic Energy Commission required the documents as part of its defence. In the case before us, ITL and RBH are in no such conflict between maintaining a confidence imposed by contract and having at their disposal the appropriate evidence in order that they may benefit from a full defence and fair trial of the issue. In this case, the issue is the applicability of provisional execution and more specifically the prejudice allegedly suffered by ITL and RBH due to the trial judge's order. The information which ITL and RBH seek to have sealed is information belonging to them which they filed in evidence with a view to establishing the prejudice they suffer from the order of provisional execution.

[23] Regarding the first branch of the test in *Sierra Club*, there is no general principle at play in this case in maintaining the confidentiality of the information filed by ITL and RBH. Therefore, there is no "important commercial interest" in issue. The present case is that of private parties not wishing to reveal financial information that they submit as evidence in support of their position before this Court. The reason invoked is the competitive nature of the industry and particularly that the other co-defendants are competitors. However, in ITL's motion, no explanation is attempted as to how the information affects ITL's ability to compete in the market place. Will the consumer's decision to buy its cigarettes over that of its competitors be affected by its balance sheet or availability of cash and credit? The prejudice invoked by ITL is vague. It makes reference to trade secrets and competitive disadvantages without specifically setting out how those interests are negatively affected by the disclosure. ITL has not satisfied its burden to demonstrate that this Court should issue the requested sealing order. ITL certainly does not define any general principle in the public interest to maintaining the confidentiality of the information in question.

[24] RBH has set out in greater detail its case for commercial sensitivity. It maintains that even though the data in its financial statements is ultimately reflected in the

consolidated financial statements of its parent company which is public, the information in its financial statements and projections regarding costing and profit margins could be used by competitors to their advantage (and RBH's detriment) in the market place. It adds that the manner it treats its financial statements internally demonstrates the confidential nature of those documents. Lastly, it refers to the fact that by consent in first instance the judge permitted the Appellants to file limited financial data.

[25] However more detailed may be RBH's description of the potential consequences for it of the disclosure of its financial statements, it does not define any general principle compelling a confidentiality order. Judges of our Court, in applying the principles in *Sierra Club* to commercial situations have underlined the necessity of demonstrating an interest which is not purely private in nature.[11] Indeed, as the Ontario Court of Appeal has stated:

> Where the interest in confidentiality engages no public component, the inquiry is at an end.[12]

The right of a litigant to privacy does not give rise to court ordered confidentiality each time information of a financial nature is put in evidence where the party prefers not to reveal that information.

[26] Neither of ITL or RBH's submissions on confidentiality raise a public component; nor do their positions pertain to their ability to enjoy a fair hearing.

[27] While the analysis could end here as indicated by the Ontario Court of Appeal, we would add the following regarding the second branch of the test in *Sierra Club*. The "open court and public access" principles are related to the fundamental right of free speech outlined by the Supreme Court in *Sierra Club*.[13] These principles are reflected in article 13 *C.C.P.* and article 23 of the *Charter of Human Rights and Freedoms*.[14] In the present case, regarding the issue of the prejudice caused by the order of provisional execution, these principles of openness weigh heavier in the balance than any private interest pleaded by ITL and RBH to seal the information in question. Accordingly, the motions of ITL and RBH for sealing orders will be dismissed.

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11 *7999267 Canada inc. v. 9109-8657 Québec inc.*, 2012 QCCA 1649, paras. 14-15 (Gascon, J.A.); *3834310 Canada inc. v. R.C.*, REJB 2004-68462, 2004 CanLII 4122 (C.A.), para. 24.

12 See also *Out-Of-Home Marketing Association of Canada v. Toronto (City of)*, 2012 ONCA 212, para. 55 (see also para. 45ff.) where a sealing order to protect a commercial party's information from competitors and suppliers was refused absent the demonstration of a public interest in such confidentiality.

13 *Sierra Club*, *supra*, note 10, para. 52.

14 CQRL, c. C-12.

[28] However and despite the deference due to the trial judge,[15] we are of the view that the Appellants have satisfied the criteria so that the order of provisional execution should be cancelled.

[29] We believe that the part of the judgment addressing the order of provisional execution contains an apparent weakness which justifies our intervention.[16] We make no comment whatsoever on the strengths or weaknesses of any of the other parts of the judgment. The presumption of validity of the judgment on the merits[17] forms no part of our reasoning which is restricted to that part of the judgment addressing provisional execution.

[30] Delay as a justification for ordering provisional execution does not stand up to scrutiny. If the 17 years experienced in bringing the case to trial and judgment is due to an abuse of procedure by Appellants then this could potentially justify provisional execution pursuant to article 547 (1) (j) *C.C.P.*, but we note from the judgment[18] that this issue was "put over" until after judgment and that Respondents, in argument, relied on the penultimate paragraph of article 547 *C.C.P.* to seek provisional execution.

[31] As for the 6 years in appeal referred to by the judge, there is no evidentiary basis for this assumption. We take judicial cognizance of the statistics published by this Court on its website and specifically that the delays in civil cases such as those at bar for a hearing date is 12 months from the filing of factums. The legal delays for the filings of the factums' aggregate 7 months reckoned from the inscription.[19] We will not speak to potential delays before the Supreme Court of Canada where an appeal does not automatically suspend execution.[20] Suffice it to say that the 6 years referred to by the judge seems somewhat exaggerated particularly if we consider the possibility of an expedited process.[21] In any event, if delays in appeal were in themselves sufficient to satisfy the criteria of article 547 *C.C.P.* then provisional execution would become the

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15 A. Rochon*, supra,* note 9*;* citing Pelletier, J.A., *Québec (Ministre de l'agriculture, des pêcheries et de l'alimentation au Québec) v. Produits de l'érable Bolduc & Fils ltée*, J.E. 2002-1239.

16 *Gestion Denis Chesnel Inc. v. Syndicat des copropriétaires du domaine de l'Éden Phase I*, 2015 QCCA 292 (Schrager, J.A.).

17 *Québec (Ministre de l'agriculture, des pêcheries et de l'alimentation au Québec) v. Produits de l'érable Bolduc & Fils ltée*, *supra*, note 15; *Soft Informatique Inc. v. Gestion Gérald Bluteau Inc.*, 2012 QCCA 2018 (Dalphond, J.A.).

18 Paras. 1196 and 1197.

19 Articles 503 and 504.1 *C.C.P.*

20 *Supreme Court Act*, R.S.C., 1985, c. S-26, s. 65(1)(d).

21 Appellants have indicated that they have no objection to an accelerated date for the hearing of the appeal.

rule instead of the exception as Chief Justice Duval Hesler in her then capacity as a trial judge remarked.[22]

[32] The judge found that this case is exceptional, which there is no denying with regard to its magnitude by measure of quantum of condemnation and potential number of class members. However, there must be some link between the exceptional circumstances and the provisional execution. We do not agree that the exceptional circumstances of this case warrant provisional execution. The award subject to provisional execution is for moral and punitive damages only. The quantum of damages and even scale of impact on the class members (let alone Quebec society at large) speak equally to allowing the appeal to be decided before any execution. Moreover, the bringing of an appeal in itself will not cause serious or irreparable injury to Respondents. Injury that has been suffered is not due to nor does it appear that it will be aggravated at this point by the judicial process, particularly if that process is adequately managed.

[33] We are certainly not without empathy for potential class members who may die of a tobacco related illness prior to receiving any compensation. The judge may have a point that this state of affairs represents serious prejudice measured against the time to bring the case to an end. Unfortunately, the law relating to class actions makes it such that the order of provisional execution is of questionable benefit to potential class members.

[34] On a strict legal basis one may wonder whether provisional execution is simply incompatible with class actions so that articles 547 to 551 *C.C.P.* would be inapplicable altogether in virtue of article 1051 *C.C.P.* Article 1030 *C.C.P.* provides that it is only upon the judgment acquiring "the authority of *res judicata*" ("l'autorité de la chose jugée") that the process to have class members file claims is commenced. Whether the legislator meant to require that the judgment becomes final[23] ("passé en force de chose jugée") in the sense that the appeal process is exhausted, or merely binding upon the parties ("autorité de la chose jugée") need not be decided in this case because the appeal suspends the effect of the "autorité de la chose jugée" and prevents the judgment from acquiring the "force" of the "chose jugée".[24] Furthermore, it is certainly a challenge to execute a judgment when its beneficiaries have yet to be appropriately identified although article 1031 *C.C.P.* provides that the court may determine the amount due by the judgment debtor "even if the identity of each of the class members"

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22 *Société nationale d'assurance inc. – Les Clairvoyants Compagnie d'assurance générale et al. v. Gaz Métropolitain inc. et al.,* [2001] R.R.R. 757, 764, AZ-01021615, p. 11 (Duval Hesler, J.S.C.).

23 See article 591, para. 2 *Code of Civil Procedure*, S.Q. 2014, c. 1 to come into force January 1, 2016, and see also Quebec, National Assembly, *Journal des débats de la Commission permanente de la justice*, 31st legislature, 3rd session, vol. 20, no 102 (June 1, 1978), p. B-3906.

24 Léo Ducharme, *Précis de la preuve*, 6th ed., 2005, Montreal, Wilson & Lafleur, para. 602; Jean-Claude Le Royer et Sophie Lavallée, *La preuve civile*, 4th ed., 2008, Cowansville, Éditions Yvon Blais, para. 816.

is not established. Deposit of the appropriate amount appears in law to be the first step of or at least towards the execution of a class action judgment as provided in article 1032 *C.C.P.*

[35] With one possible exception no judgment awarding provisional execution in a class action has been shown to us. The possible exception is the case of *Comartin v. Bordet*[25] relied upon by the trial judge. However, in that case the provisional execution was an order to deposit a portion of the damage award ($50,000) with the prothonotary pending appeal without any discussion of the availability in law of provisional execution. Since there was no appeal, this Court did not examine the question. Again, the order in the circumstances of that case resembles security more than provisional execution. In the present case, the impact of articles 1030 and 1051 *C.C.P.* raise a serious question which does not appear to have been considered by the trial judge but need not be decided by us in order to dispose of the issue given the other reasons expressed in this judgment.

[36] In view of the foregoing, there are legal and practical difficulties with distribution to class members on a provisional basis. Moreover, article 1035 *C.C.P.* provides that law costs are paid first in a class action but provisional execution cannot be ordered for costs (article 548 *C.C.P.*).

[37] Fees of Respondents' attorneys would be collocated second after law costs and before class member entitlements. However, provisional payment of legal fees is not justified by the judge's desire to direct some compensation to class members during their lifetime. Provisional execution as relief from litigation costs and to provide the ability to see the file through the appeal process has no evidentiary basis on the record before us. The judge refers to support made available by Fonds d'aide aux recours collectifs. Has other financing been made available in the past? Is financing available for the appeal process? What are the fee arrangements with the professionals? There is no indication of any element of response to these queries in the judgment nor in the file as constituted before us. We therefore view as a weakness in the judgment an award of provisional execution of over 1 billion dollars, in consideration of the ability to support the litigation going forward, without any evidentiary basis for such consideration. Specific evidence is required as a foundation for an order of provisional execution.[26]

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[25] *Comartin v. Bordet,* [1984] C.S. 584.

[26] *Banque Nationale du Canada v. Bédard*, 2007 QCCA 1796, para. 6 (Giroux, J.A.) citing *Lebeuf v. Groupe SNC Lavalin inc.*, [1995] R.D.J. 366, p. 370 (Gendreau, J.A.); *Tonetti v. Entreprises Gaétan Brunette & Fils*, 2015 QCCA 87, para. 3 (Savard, J.A.); *Gaudet v. Judand ltée*, 2012 QCCA 1124, para. 5 (Léger, J.A.).

[38] Another significant weakness in the judge's order of provisional execution is the unaddressed question of "what happens if Appellants are successful in appeal?". We are hardly in a position to say that the inscriptions in appeal raise questions that have no chance of success. Accordingly, it is essential to examine the hypothesis of a successful appeal against an order of provisional execution of over 1 billion dollars.

[39] The judge ordered the initial deposit to be paid over to counsel of Appellants in trust, stating that he is "open to the possibility of distributing certain amounts immediately". Certainly, if nothing is distributed there will be no benefit derived by class members. In such event, the deposits will serve, in effect, as security for such execution but security is not in issue before us. Unless accompanied by some guarantee from or for Respondents, the possibility of reimbursement makes it such that the order of provisional execution suffers from an apparent weakness. Given the amount of the provisional execution in this case it would take specific proof of the capacity to provide such security for us to entertain such an order. While judges of our Court have issued orders of provisional execution of awards of (material) damages in exceptional circumstances, such orders have been made where a need for funds was demonstrated and when the provisional execution was accompanied by the giving of security for reimbursement.[27] All of these instances involve the examination of individual particular cases; none were class actions.

[40] Regarding any potential distribution that the judge may have envisaged, we note that the entire amount of the judgment in the Létourneau case is for punitive damages. The judge stated that none of this will ever be distributed to class members because of the disproportion between the amount due per class member and the costs of distribution.[28] Where no distribution will ever take place, there is no basis to consider provisional distribution or execution. Though not mentioned by the judge, this logic could apply to the $30,000 punitive award against each Appellant in Blais. In such circumstance, the only justification for the order of provisional execution, as the judge himself stated, is that "it is high time that the Companies started to pay for their sins".[29] However, there is no benefit directly to the opposing party litigants (i.e. class members) and the existence of those "sins" is *sub judice* before the Court of Appeal. We find that this weakness in the order behooves our intervention.

[41] Similarly, the provisional deposit of the condemnation in the Blais case, though comprised of moral in addition to punitive damages is nevertheless not destined to compensate material loss. The tangible benefit to class members is negligible. There

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[27] *St-Cyr v. Fisch,* J.E. 2003-1244, AZ-50179198 (Morin, J.A.); *Financière Banque Nationale v. Cannone*, 2007 QCCA 1453 (Morin, J.A.); *Manoir Montpellier Ltd v. Simitian*, [1985] R.D.J. 435, AZ-85011124 (Bisson, J.A.).

[28] Judgment summary and paras. 951 and 954 of the judgment.

[29] Para. 1200 of the judgment.

remains the nagging issue of reimbursement if Appellants succeed on appeal. We see in this a serious prejudice *per se* for the Appellants.[30] The potential necessity of seeking reimbursement of $10,000 from each of 100,000 class members is by any objective standard a prejudice that cannot be ignored.

[42] The affidavits filed by ITL and RBH in support of their motions to cancel provisional execution indicate that payment within 60 days of judgment causes serious financial prejudice to them. The evidence filed discloses a significant impact for Appellants despite that they are profitable and sizeable. In the case of JTM, its portion of $142,530,000 exceeds its annual earnings before interest, taxes and other expenses and well exceeds cash on hand of approximately $5.1 million. RBH's $246,030,000 exceeds its projected cash on hand at the end of July by approximately $125 million. ITL's provisional execution amount of $742,530,000 is approximately double its annual profit (before extraordinary items) and greatly exceeds current cash and credit availability to pay such sum.

[43] Serious prejudice has been held sufficient to cancel provisional execution where the effect is to negate the right of appeal.[31] At least, in the case of JTM and ITL, based on the affidavits, this appears to be the case. The judge based his calculations of Appellants' ability to pay on historical earnings and balance sheet worth. He obviously did not analyze current cash and credit availability as set forth in the affidavits submitted to us. Respondents have pointed to numerous facts put in evidence in the lower court where Appellants have transferred profits and assets to related companies. Respondents assert that if Appellants are today unable to pay, this is their own doing and that of corporations related to them. However, these arguments are not helpful to Respondents given the other considerations germane to provisional execution and elicited above. This is not to say however that such facts and arguments could not give rise to other recourses or orders.

[44] Given the absence of or negligible benefit for class members from the order of provisional execution and the prejudice for the Appellants in paying those amounts, the balance of convenience on the issue of provisional execution favours the Appellants.

[45] In summary, assuming that provisional execution is possible in law for a class action judgment, we consider the justification for the provisional execution weak, the

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30 *HSBC Bank Canada v. Aliments Infiniti inc.*, 2010 QCCA 717, para. 22 (Bich, J.A.).

31 *Roussel v. Gosselin*, 2015 QCCA 710, para. 11 (Giroux, J.A.); *Kornarski v. Gornitsky*, 2010 QCCA 1291, para. 10 (Rochon, J.A.); *Lutfy ltd v. Lutfy*, [1996] R.D.J. 317, p. 318, AZ-96011470, p. 4 (Chamberland, J.A.); see also *Berthiaume v. Carignan*, 2013 QCCA 1436, [2013] R.J.Q. 1369 (Dalphond, J.A.).

prejudice for Appellants serious and that the balance of convenience weighs in their favour. Accordingly, the order of provisional execution will be cancelled.

[46] **FOR ALL THE FOREGOING REASONS, THE COURT:**

[47] **DISMISSES** the motion by Appellant Imperial Tobacco Canada Ltd. for a sealing order, with costs;

[48] **DISMISSES** the motion by Appellant Rothmans, Benson & Hedges Inc. for a sealing order, with costs;

[49] **GRANTS** the motion of Appellant Imperial Tobacco Canada Ltd. to cancel the order of provisional execution in the judgment of the Superior Court affecting it, and **CANCELS** the order of provisional execution contained therein, costs to follow.

[50] **GRANTS** the motion of Appellant Rothmans, Benson & Hedges Inc. to cancel the order of provisional execution in the judgment of the Superior Court affecting it, and **CANCELS** the order of provisional execution contained therein, costs to follow.

[51] **GRANTS** the motion of Appellant JTI-MacDonald Corp. to cancel the order of provisional execution in the judgment of the Superior Court affecting it, and **CANCELS** the order of provisional execution contained therein, costs to follow.

MARIE-FRANCE BICH, J.A.

PAUL VÉZINA, J.A.

MARK SCHRAGER, J.A.

Mtre Éric Préfontaine
Mtre Deborah Glendinning
Mtre Mahmud Jamal
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Mtre Guy Pratte
Mtre François Grondin
BORDEN LADNER GERVAIS
For JTI-MacDonald Corp.

Mtre Simon V. Potter
Mtre Pierre-Jérôme Bouchard
McCARTHY TÉTRAULT
For Rothmans, Benson & Hedges Inc.

Mtre Gordon Kugler
KUGLER, KANDESTIN
Mtre André Lespérance
Mtre Bruce Johnston
TRUDEL, JOHNSTON & LESPÉRANCE
Mtre Marc Beauchemin (absent)
DE GRANDPRÉ CHAIT
For Conseil québécois sur le tabac et la santé, Jean-Yves Blais et Cécilia Létourneau

Date of hearing: July 9, 2015