COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

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

DATE: October 27, 2015

PRESIDING: THE HONOURABLE MARK SCHRAGER, J.A.

IMPERIAL TOBACCO CANADA LTD.
ROTHMANS, BENSON & HEDGES INC.
APPELLANTS – Defendants

v.

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

JUDGMENT

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[1] Respondents have filed identical motions in each of the three appeals seeking orders against Appellants, jointly, to furnish security.

[2] At the commencement of the hearing, the motion against JTI-Macdonald Corp ("JTM").[1] was withdrawn because attorneys were unavailable due to health issues. Hence, reference in this judgment to the "Appellants" should be read as referring to Imperial Tobacco Canada Ltd ("ITL") and Rothmans, Benson & Hedges Inc. ("RBH"), unless the context indicates otherwise.

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1 Record no: 500-09-025386-152.

[3] On May 27, 2015, the Superior Court, District of Montreal (the Honourable Brian Riordan) condemned the three Appellants to pay moral and punitive damages aggregating in excess of $8 billion, which today would exceed $15 billion with interest and additional indemnity.

[4] The 237 page judgment in first instance culminated two class actions commenced in 1998 against the three Appellant cigarette companies. 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. The judgment found that Appellants were liable under the *Charter of Human Rights and Freedoms*,[2] the *Consumer Protection Act*[3] and under the *Civil Code of Quebec*[4] (*C.C.Q.*) for faults causing injury to others and for failure to properly inform consumers of the risks and dangers associated with the products manufactured by Appellants.

[5] In the conclusions of the judgment, the judge ordered an initial deposit of $1,131,090,000 in partial satisfaction of the two awards within 60 days 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**	

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

[7] Applying the proportions of liability found by the trial judge (JTM 13%, ITL 67% and RBH 20%), provisional execution payments amounted to:

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2 *Charter of Human Rights and Freedoms*, CQLR, c. C-12.
3 *Consumer Protection Act*, CQLR, c. P-40.1.
4 *Civil Code of Quebec*, CQLR c C-25.

i) JTM $130 million

ii) ITL $670 million

iii) RBH $200 million

[8] All Appellants petitioned this Court to cancel the order for provisional execution. In support of their motions, Appellants filed affidavits and financial information to support their claims that, on a cash basis, they could not pay their respective amounts of the provisional execution orders within the sixty day period imposed by the judgment. RBH stated explicitly that the obligation to pay rendered it insolvent on a cash basis and ITL alluded to the possibility of filing proceedings under the *Companies' Creditors Arrangement Act* ("*C.C.A.A.*").[5]

[9] By judgment of July 23, 2015,[6] this Court granted Appellants' motions and cancelled the provisional execution after identifying a weakness in that part of the judgment ordering provisional execution and the existence of a prejudice for the Appellants arising from the order of provisional execution.

[10] The Court pointed out that provisional execution may be incompatible with class actions because it is only upon final judgment that class members are definitively determined. Moreover, the Court observed that unless funds were provisionally distributed to class members, there would be no benefit to them but added that distribution on a provisional basis raised the problem of obtaining reimbursement should Appellants ultimately succeed in their appeals.

[11] On the issue of prejudice the Court said the following:

> [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.
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> [43] Serious prejudice has been held sufficient to cancel provisional execution where the effect is to negate the right of appeal. At least, in the case of JTM and ITL, based on the affidavits, this appears to be the case. The judge based his

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5 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

6 *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2015 QCCA 1224.

> 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.

[12] In virtue of the instant motions, Respondents seek security from Appellants in the aforementioned proportions, aggregating $5 billion, within 30 days of judgment or, subsidiarily that such security be provided by way of quarterly instalments of $250 million each commencing as at June 26, 2015. The proposed form of the security requested is irrevocable letters of credit issued by a Canadian bank listed in Schedule I of the *Bank Act*.[7]

[13] Other than facts found by the judge, the Respondents rely on the affidavits filed by Appellants in support of their motions to cancel provisional execution as well as the depositions of the affiants. Respondents submit that Appellants have arranged their affairs so as to be, in effect, judgment proof for any substantial condemnation and that there is every indication that, pending appeal, Appellants will continue to direct their earnings to related entities located out of jurisdiction so that they will be unable to pay any significant condemnation that may be maintained in appeal.

[14] Appellants have argued for the dismissal of the motions. Following are summaries of their submissions.

POSITION OF ITL

[15] ITL pleads that there are no grounds upon which to order it furnish security. The facts which Respondents invoke in support of their motion are not current. The transfer of trademarks to a subsidiary, which hypothecated them in favour of a related out-of-jurisdiction company occurred in the year 2000. The payment out of earnings as dividends to the out-of-jurisdiction parent, stopped in 2014, but in any event these payments merely reflect "business as usual". Thus, because there are no relevant facts occurring after judgment which might jeopardize the satisfaction of that judgment, there is no "special reason" to justify the ordering of security pursuant to article 497 of the *Code of Civil Procedure* (*"C.C.P"*).[8]

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7 *Bank Act*, S.C. 1991, c. 46.

8 *Code of Civil Procedure,* CQLR c. C-25.

[16] ITL adds that should I rule that there are grounds justifying security, the amounts requested are such as to drain all pre-tax earnings and put the going concern viability of ITL in peril. Moreover, ITL is unable to grant security in order to obtain borrowed funds because of its covenant to a related corporation. The latter currently provides credit facilities to ITL. Furthermore, an order of security payable in quarterly instalments would not alleviate this inability to pay.

POSITION OF RBH

[17] RBH submits that because of the magnitude of the judgment, Respondents are in effect seeking an appeal bond. However, the quantum of the judgment is an insufficient ground under article 497 *C.C.P.* The courts have stated that security will only be ordered where indicated by clear and precise facts; hypotheses based on subjective fear of Respondents that a judgment will not be satisfied does not suffice.

[18] RBH has been paying dividends in amounts less than net earnings throughout the litigation, so that Respondents' position once and if they obtain judgment from the Court of Appeal will be the same as it was at the outset of proceedings. Security should not be ordered for a situation existing prior to judgment; Respondents must demonstrate that their position has worsened and that their ability to obtain satisfaction of an eventual judgment will be in jeopardy. Respondents will simply have to obtain satisfaction out of the companies' revenues.[9] Counsel conceded that RBH's tangible or hard assets were of no value upon which to execute a judgment since plant and machinery were only appropriate to the manufacture and sale of cigarettes and inventory required government licensing to sell.

[19] Although RBH maintained in July 2015 before this Court that it could not pay its share of the provisional execution order, this only meant that it could not pay during the 60 day period provided in the judgment and should not be taken as a general admission of insolvency. The cancellation by RBH's parent of its credit facility within 2 days following the Superior Court judgment made it clear that it could not pay the provisional execution order, but is not a justification to order RBH to furnish security. In other words, the inability to satisfy the order of provisional execution should not be projected or be understood as an inability to satisfy a final judgment.

[20] RBH joined ITL by declaring that any security (particularly a letter of credit) cannot be ordered payable following the institution of proceedings (as Respondents seek) under either the *Bankruptcy and Insolvency Act* ("*B.I.A.*")[10] or *C.C.A.A.* That would be a "fraud on the bankruptcy". Moreover, as to the furnishing of security, RBH objects

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9 This appeared to contradict counsel's assertion that there was no proof that RBH would continue to pay dividends notwithstanding the judgment since its representative was not directly asked the question during the examination on the affidavit supporting the motion to cancel provisional execution.

10 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 2.

to a letter of credit arguing that this would potentially give Respondents priority over other creditors should RBH become subject to any of the insolvency legislation. Should security be ordered, RBH would prefer that it be in the form of cash deposited in a lawyer's trust account.

[21] RBH points out that security for court costs was not requested in the motion originally filed and of which the undersigned is seized and, in any event, in a class action, costs are paid out of first proceeds of recovery.

[22] Lastly, RBH pleaded that the security requested requires the equivalent of an order not to declare any further dividends which, in essence, is a seizure before judgment under article 733 *C.C.P.* or a safeguard order, both of which are within the jurisdiction of the Court but not of a judge sitting alone.

DISCUSSION

[23] Article 497 *C.C.P.* provides that:

497. Sauf les cas où l'exécution provisoire est ordonnée et ceux où la loi y pourvoit, l'appel régulièrement formé suspend l'exécution du jugement.	**497.** Saving the cases where provisional execution is ordered and where so provided by law, an appeal regularly brought suspends the execution of judgment.
Toutefois, un juge de la Cour d'appel peut, sur requête, pour une raison spéciale [...], ordonner à l'appelant de fournir, dans le délai fixé dans cette ordonnance, un cautionnement pour une somme déterminée, destiné à garantir, en totalité ou en partie, le paiement des frais d'appel et du montant de la condamnation, au cas où le jugement serait confirmé.	However, a judge of the Court of Appeal may, on a motion, for a special reason (...), order the appellant to furnish, within the time fixed in the order, security in a specified amount to guarantee in whole or in part the payment of the costs of appeal and the amount of the condemnation, if the judgment is upheld.
Si l'appelant ne fournit pas le cautionnement dans le délai fixé, un juge de la Cour d'appel peut, sur requête, rejeter l'appel.	If the appellant does not furnish security within the fixed time, a judge of the Court of Appeal may, upon motion, dismiss the appeal.

[24] The granting of security is a matter of discretion. It is an exceptional remedy and as such, Respondents must indicate facts upon which I may draw the conclusion that

there is a danger that the judgment, if maintained in appeal, may not be susceptible of execution.[11] Clear and precise facts are required; mere hypotheses will not suffice.[12]

[25] The judgment of Baudouin, J.A., in *Blue Bonnets* is the oft quoted starting point in considering a motion for security. The condemnation in that case of wrongful dismissal amounted to $412,956 plus interest and additional indemnity. This sum corresponded to 36 months of salary. Just prior to the presentation of the motion for security, the appellant deposited the equivalent of 12 months of salary which it recognized owing. Baudouin, J.A., summarized the then existing decisions of judges of this Court applying article 497 *C.C.P.* to state that given the change in the law (in 1966) to make security on appeal the exception instead of the rule, it is insufficient to merely allege fear to be unable to execute the eventual judgment or that appellant will become insolvent. He continued that to justify the granting of security a moving party must:

> [...] présenter une preuve claire, précise et articulée basée sur des faits et non sur de simples hypothèses ou conjectures de circonstances particulières à l'espèce qui montrent que, sans l'octroi de ce cautionnement, ses droits reconnus par le jugement de première instance seront effectivement mis en péril.

[26] Baudouin, J.A., in applying these criteria to the facts before him dismissed the motion for security because even though the appellant distributed its earnings as dividends, it did so net of expenses, so that it was not in a "permanent state of insolvency" and that the "heavy" hypothecation of its assets in the absence of fraud was not sufficient as a "special reason" to order security under article 497 *C.C.P.* The report does not disclose the quantum of the appellant's earnings so that there is no means of comparison with the liability in virtue of the judgment appealed.

[27] Several years later, in *Europaper S.A. v. Avenor inc.*[13] Baudouin, J.A., again sitting on a motion[14] seeking security for a costs award of $92,694 found that recovery was in jeopardy because of the appellant's "insolvabilité complète" reflected by the fact that it had ceased activity, and had no place of business, no employees or assets of value. He concluded:

> Il y a donc là une importante différence factuelle avec l'arrêt *Blue Bonnets* [...], où le moyen invoqué était la simple crainte éventuelle de difficultés financières d'une des principales parties du litige.

[28] The decided cases on point have considered a variety of factual circumstances as potentially constituting special reasons and, as such, have refined our understanding

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11 *Brouillette v. Grégoire*, 2011 QCCA 376 (Kasirer, J.A.); *Sodexin Financement mercantile inc. v. Aly*, 2009 QCCA 1860 (Pelletier, J.A.) [*Sodexin*]; *Nadeau v. Nadeau*, 2008 QCCA 300; *Hippodrome Blue Bonnets inc. v. Jolicoeur*, [1990] R.D.J. 458 (Baudouin, J.A.) [*Blue Bonnets*].

12 *Blue Bonnets*, *supra*, note 11.

13 *Europaper S.A. v. Avenor inc.*, AZ-97011392, 1997 CanLII 10448 (Baudouin, J.A.).

14 *Ibid.*, p. 2.

of the test. An accounting firm subject to a multi-million dollar judgment amalgamated with another firm, which asserted that it was not liable for the delictual acts of the partners of the judgment debtor firm. It was ordered to furnish security of $16.9 million.[15] The sale of a company's principal assets has been held sufficient grounds to order security,[16] just as the funnelling of all revenues to a related company has been deemed a special reason.[17] While the apparent insolvency of the judgment debtor continues to be a justification for the furnishing of security, at the end of the day, the correct criterion for the exercise of the discretion, is whether in the absence of security, the execution of the judgment would be in jeopardy.[18] The interpretation of "special reason" in article 497 *C.C.P.* has gone beyond restricting it to cases akin to those where a seizure before judgment could be issued.[19] Naturally, insolvency may constitute a special reason as may fraudulent behaviour, but neither is the criterion *per se*. Moreover, the insolvency discussed by Appellants and seemingly in many of the judgments, is insolvency on a cash basis. The *B.I.A.* defines an insolvent person in a threefold manner including a definition based on the value of assets on a forced sale being less than liabilities (or, a balance sheet test).[20]

[29] I do not subscribe to Appellants' theory that the clear and precise facts underlying an order of security, in appeal, must have occurred since judgment was rendered in first instance. While the existence prior to judgment of the facts invoked may have been noted in certain decisions of my colleagues,[21] no judgment has asserted the existence of such a hard and fast rule. Indeed, in *Widdrington* (which is the highest award of security in appeal of which I am aware), the most salient fact alluded to is the amalgamation of the two accounting firms, which occurred in July, 1998 i.e. after the institution of proceedings in first instance but years before the appeal.

[30] Appellants have submitted a judgment of Mongeon, J.S.C., of 2013,[22] dismissing an application for a safeguard order against JTM because it had transferred its trademarks valued at $1.2 billion to an "offshore" subsidiary in 1999, the year following the institution of proceedings in the Superior Court. The transferee then pledged the trademark to secure an indebtedness. JTM pays substantial royalties to the transferee in consideration of the use by it of the trademark. Its president agreed that the purpose

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15 *Wightman v. Widdrington (Succession de)*, 2011 QCCA 1393 [*Widdrington*].

16 *Gagné v. Québec (Commission des droits de la personne et des droits de la jeunesse)*, 2003 CanLII 55068, J.E. 2003-497 (Dalphond, J.A.).

17 *Entreprise Enapex inc. v. Recouvrements métalliques Bussières ltée*, 2008 QCCA 261 (Rochette, J.A.).

18 *Pothitos v. Demers*, 2013 QCCA 603, para. 15 (St-Pierre, J.A.); *Shama Textiles inc. v. Certain Underwriters at Lloyd's*, 2012 QCCA 473, paras. 13-14 (Dalphond, J.A.).

19 André Rochon, *Guide des requêtes devant le juge unique de la Cour d'appel*, Cowansville, Éditions Yvon Blais, 2013, pp. 158-159.

20 *B.I.A.*, *supra*, note 10, s. 2, "insolvent person".

21 *Sodexin*, *supra*, note 11.

22 *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, 2013 QCCS 6085; leave to appeal denied in *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, 2014 QCCA 520 (Savard, J.A.).

of the transaction was "creditor proofing" and Riordan, J.S.C., also characterized "the tangled web of interconnecting contracts" as a creditor proofing exercise.[23] The judgment of Mongeon, J.S.C., however is of no assistance to Appellants as it did not address any point before me for adjudication. It did not support the contention that facts pre-appeal cannot be relied upon. Mongeon, J.S.C., faced with a demand to enjoin JTM from continuing the royalty payments, concluded that he could not do so because the other party to the royalty contract was not a party to the litigation. Mongeon, J.S.C., held that all parties to the contract should be parties to the litigation, in order that he alter their contractual rights.

[31] As a final argument, counsel for RBH likened the motions before me to applications for a seizure before judgment under article 733 *C.C.P.* or a safeguard order and in any event beyond the jurisdiction of a judge in chambers and within the jurisdiction of the Court. The argument is clearly wrong as it flies in the face of the clear wording of article 497 *C.C.P.* according jurisdiction over the motions before me to a "judge of the Court of Appeal".

[32] From 2008 to 2013, RBH's average annual earnings from operations was approximately $450 million. It paid $300 million annually on average to its parent, Phillip Morris International ("PMI"). RBH had benefited from a credit facility with PMI but as indicated, that was cancelled the day following the judgment in first instance. Historically, RBH's short term credit comes from the PMI cash pool, so given the cancellation, it appears to have little short term availability of cash. In June, RBH's representative confirmed its inability to pay its share of the provisional execution ($200 million) within sixty days, but projected that it could pay the amount by March 2016. At the time of the judgment, its available cash was $70 million.

[33] Despite RBH's assertion that it does not pay out all of its earnings, its financial statements clearly show negative shareholder equity for 2013 and 2014. Counsel's attempts to qualify its insolvency on a cash basis by stating that it only said it could not pay the provisional execution within 60 days does not change the conclusion that it was insolvent if it was obliged to pay. The *B.I.A.* measures insolvency by the ability to pay debts when due.[24] In answer to my questioning how Respondents would obtain satisfaction upon receipt of a favourable judgment on the merits, counsel stated that they would have to wait to be paid out of cash flow. By way of illustration, if RBH owed $1 billion (including interest and additional indemnity) upon judgment of the Court on the merits, it would require more than two years, at least, to satisfy that judgment. This is not payment when due.

[34] RBH confirms that its real estate and equipment being appropriate for tobacco production only are not readily marketable. Counsel informed me that the sale of tobacco products requires special government permits so that inventory could be

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[23] *Létourneau v. JTI-MacDonald Corp.*, 2015 QCCS 2382, para. 1101.
[24] *B.I.A.*, *supra*, note 10, s. 2, "insolvent person".

difficult if not impossible to seize and sell in execution of a judgment. Also, the trademarks are not owned by RBH. Thus, it appears that the only real "assets" on the balance sheet against which a creditor might execute judgment are the accounts receivable which is the cash flow and which is substantially and regularly paid out in dividends to PMI.

[35] Irrespective of whether RBH is technically insolvent, it is certainly unable to satisfy the judgment of the Superior Court even if the quantum was reduced. That fact and the on-going practice of distributing earnings leads the undersigned to conclude that Respondents are in jeopardy of not being able to execute any substantial award that this Court may uphold.

[36] ITL earned $535 million from operations in 2014 and paid $334 million in dividends to its out of jurisdiction parent, British American Tobacco Corp. ("BAT").

[37] Not only has ITL never set aside funds for a condemnation in this matter, it has still not done so even after the judgment of first instance herein because it does not consider the outcome unfavourable according to its representative during the deposition. I understand that he meant that the outcome would not be unfavourable until all appeals have been exhausted.

[38] Similar statements could be made concerning ITL's tangible assets as those of RBH. The trademarks are also encumbered.

[39] ITL is indebted to BAT under various financing agreements. The credit facilities are fully drawn upon. BAT was not willing to fund the provisional execution award and I am given to understand that BAT makes no commitment to fund a final judgment.

[40] Though counsel asserted that payments of dividends stopped at the end of 2014, this results from payments made to BAT for the repayment of the loan made to finance the settlement of other litigation (*i.e.* the Flinkote matter). In other words, the funds were not available to pay a dividend. Though there is equity for the shareholders on the balance sheet of 2014, there is no liquidity to pay a judgment.

[41] I am also of the opinion that Respondents are in jeopardy of not being able to satisfy any substantial judgment against ITL.

[42] The depositions conducted by Respondents' attorneys of the affiants upon the motions to cancel the provisional execution make it clear that the Appellants intend to continue payments (dividends and otherwise) to their out-of-jurisdiction related entities while the appeal is pending. That practice caused them to protest their inability to satisfy the order of provisional execution. It is reasonable to deduce that should their appeals fail completely or merely reduce the condemnation marginally, leaving a substantial condemnation, the Appellants will be unable to pay just as they were unable to pay the provisional execution in a timely fashion. This state of affairs is not due to any cause

extraneous to the will of Appellants such as an unsuccessful business. Rather, their businesses are profitable. The situation is the result of the ongoing business practice continued consistently during the litigation of paying out surplus earnings. This was not illegal. However, there is now and has been since May 27, 2015, a judgment, which includes a condemnation with interest and additional indemnity aggregating approximately $15.5 billion at today's value. Interest and additional indemnity run at approximately $1 million per day. This changes the equation radically. Even if the grounds of appeal are not frivolous, in the circumstances Appellants cannot be allowed to continue on a course of conduct where they will not be able to satisfy the judgment.

[43] A judgment pending appeal benefits from a presumption of validity.[25] Findings of fact of the trial judge are compelling as only a palpable error of fact justifies a reversal by an appellate court. It is not an answer for the Appellants to state that they are not behaving differently now than they were prior to the judgment of the Superior Court. That judgment, in the circumstances, and despite the appeal requires that they do behave differently given the circumstances presented to me. It is in my opinion far too cynical to adopt the position that we were so foresightful and efficient in ordering our affairs so as not to have the liquidity to satisfy the judgment, that there is no special reason existing to re-balance the situation. Counsel for Respondents characterized the situation as "heads I win, tails you lose". Sometimes, the vernacular is pointedly apt.

[44] Both Appellants have structured their affairs in a manner that drastically, if not completely, reduces their exposure to satisfy any substantial condemnation that might be made against them in this litigation. Of course, the companies are not empty shells because it is in their obvious interest and that of their parent companies that they continue to operate so as to continue to generate profits. The structure and *modus operandi* was put in place years ago because no doubt Appellants could observe the seriousness of the case and resolve of the Respondents to conclude that a substantial award was possible, even perhaps likely. In these circumstances, now that there is a judgment condemning them to pay $8 billion ($15.5 billion at today's value) and nothing to suggest that the practice (of distributing virtually all earnings) will not continue and notwithstanding that the transfer and encumbrance of trademarks may have occurred long ago, I am faced with a situation where on balance I conclude that the Respondents are in jeopardy of not obtaining satisfaction of any substantial amount confirmed in appeal. I am mindful that Appellants stated clearly that they could not pay the provisional execution award as ordered. Positive action is necessary to convince me that the reaction to a final judgment would not be the same. These circumstances taken together are a "special reason". I will order that security be furnished.

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[25] *Épiciers unis Métro-Richelieu inc. v. Syndicat des travailleuses et des travailleurs des épiciers unis Métro-Richelieu (C.S.N.)*, 1997 CanLII 10141 (Baudouin, J.A.); *Québec (Ministre de l'Agriculture, des Pêcheries et de l'Alimentation du Québec) v. Produits de l'érable Bolduc & Fils ltée*, AZ-50134137, J.E. 2002-1239, para. 6 (Pelletier, J.A.); *Droit de la famille — 102409*, 2010 QCCA 1725, para. 2 (Rochon, J.A.); *Soft Informatique Inc. v. Gestion Gérald Bluteau Inc.*, 2012 QCCA 2018, para. 12 (Dalphond, J.A.); *Droit de la famille — 151906*, 2015 QCCA 1309, para. 6 (Kasirer, J.A.).

[45] What amount of security is appropriate? The initial deposit required in the class action as awarded by Justice Riordan was $1.131 billion on the rationale that 80% of the estimated compensatory damages might be enough to satisfy claims:

> [927] In nearly every class action, especially ones with a large number of class members, only a small portion of the eligible members actually make claims. Thus, the remaining balance, or "reliquat", could often be greater than the amount actually paid out. Hence, it is not unreasonable to proceed on the basis that the full amount of the initial deposits might not be claimed.
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> [928] We thus feel comfortable in ordering the Companies initially to deposit only 80% of the estimated total compensatory damages, i.e., before any reduction based on the smoking dates. If that proves insufficient to cover all claims eventually made, it will be possible to order additional deposits later, unless something unforeseen occurs and all three Companies disappear. The Court is willing to assume that this will not happen. We shall thus reserve the Plaintiffs' rights with respect to such additional deposits.

[46] Counsel for Respondents noted that Justice Riordan's reasoning here may be strained because lower "take up rates" in class actions are prevalent where the amount distributed to each member is minimal which will not be the case here. However, I have no evidence of these assertions. I prefer to rely on the judgment.

[47] Also, as the Court noted in cancelling the provisional execution, it cannot be said that the grounds of appeal are frivolous, so that the $5 billion of security requested being nearly the capital amount of the judgment and given Justice Riordan's reasoning above, is not an appropriate amount of security. An amount of security approaching the entire amount of the judgment in first instance is to be avoided as too closely equivalent to provisional execution.[26]

[48] No amount of security for legal costs was requested in the motions as filed so that consideration does not enter into the calculation. Moreover, article 1035 *C.C.P.* provides that first proceeds of collection of class action judgments are directed towards the payment of costs.

[49] Considering the foregoing, the security will be calculated on the basis of the initial deposit of $1.131 billion or, based on the proportions of liability determined by the judge (ITL 67% and RBH 20%), the order against ITL will be $758 million and against RBH $226 million. Both figures are rounded.

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[26] *Bell v. Molson*, 2013 QCCA 377 [*Bell*]; *Agaisse v. Duranceau*, 2015 QCCA 1320, para. 7; *Laforest v. Côté*, 2015 QCCA 119 (G. Gagnon, J.A.), para. 17.

[50] I am mindful of judgments holding that the amount of security ordered should not, in effect, negate an Appellant's right to appeal.[27]

[51] This Court considered a similar principle in cancelling the provisional execution where Appellants pleaded their inability (or at least inability within 60 days following judgment) to pay the amount of the provisional execution as set forth in the extract quoted above.

[52] I see the current situation as somewhat different. The Appellants chose not to reserve funds to satisfy an eventual condemnation as was their right. However, now that there is a judgment, which I have stated, benefits from a presumption of validity, the situation is changed. Given my conclusions based on the facts in the record, it is not acceptable that Appellants merely say that they have no funds to satisfy the judgment or an order to furnish security and continue to distribute earnings because that is "business as usual". A strategic decision is required by Appellants in caucus with their parent companies and related entities who have received the benefit of the profitable operations over the years and who continue to do so. Are they willing to do the necessary to help fund security to allow Appellants to continue their appeal? I do not question Appellants' right to appeal but neither can I stand idly by while Appellants pursue an appeal which will benefit them if they win but which will not operate to their detriment if they lose. Continuing the practice of distributing earnings out-of-jurisdiction at this point is at best disingenuous and at worst, bad faith.

[53] That being said, in fixing the mode of payment, I am willing to make some compromise to the cash requirements of Appellants. As Justice Riordan said, the object of the exercise is not to bankrupt the Appellants,[28] nor should Appellants appeal rights be defeated by the amount of security.[29]

[54] Accordingly, I will order that the security be provided in quarterly instalments as Respondents concluded, subsidiarily, in their motions. I am unaware of any legal impediment to so ordering. In this manner, each instalment of security will not exceed quarterly earnings.

[55] The trial judge found that the average annual net earnings before tax of Appellants was as follows:

ITL – $483 million

RBH – $460 million

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27 *Bell*, *supra*, note 26, para. 10; *Camirand v. Gagnon*, 2013 QCCA 375; *Inversiones Bellrim, s.a. v. Guzzler Manufacturing inc.*, 2009 QCCA 1685 (Dalphond, J.A.); *Inversiones Bellrim, s.a. v. Guzzler Manufacturing Inc.*, 2009 QCCA 550 (Dufresne, J.A.); *Sharma Textiles inc. v. Certain Underwriters at Lloyd's*, 2007 QCCA 771 (Bich, J.A.).

28 *Létourneau v. JTI-MacDonald Corp.*, 2015 QCCS 2382, para. 1068.

29 *Labene v. Paquette*, 2015 QCCA 962 (Mainville, J.A.), para. 6, and *supra*, note 27.

On a quarterly basis, this computes to:

ITL – $121 million (rounded up)

RBH – $115 million

[56] I have financial statements for 2014 of ITL and RBH, which were filed in the record of this Court with the affidavits in support of the motions to cancel provisional execution. For 2014, RBH's net pre-tax earnings were $495 million. ITL shows a loss due to the pay out of the settlement of the Flinkote litigation. For consistency, I will use the averages determined by the judge for the period 2008 to 2013 as quoted above.

[57] Respondents concluded in the alternative for security to be deposited by way of quarterly instalments of $250 million each in the aggregate. As indicated, I have decided to award security equal to the initial deposit of $1.131 billion or $758 million for ITL and $226 million for RBH. The RBH security will be payable by way of six quarterly instalments and that of ITL in seven quarterly instalments so that the amount of each instalment does not exceed average quarterly earnings. In both cases, payments will commence at the end of December, 2015. In addition to the six months since the judgment, this allows 60 days before the first instalment as requested at the hearing by counsel of RBH.

[58] Accordingly, the Appellants will be ordered to furnish security as follows:

Payable on or before last juridical day of	ITL ($758 million)	RBH ($226 million)
December, 2015	$108,285,000	$37,666,000
March, 2016	$108,285,000	$37,666,000
June, 2016	$108,285,000	$37,666,000
September, 2016	$108,285,000	$37,666,000
December, 2016	$108,285,000	$37,666,000
March, 2017	$108,285,000	$37,666,000
June, 2017	$108,285,000	

The instalments bring us to March 2017 and June 2017. A hearing for the appeal has been tentatively scheduled before this Court during the autumn of 2016. I think it safe to assume that given the projected volume of the joint record, a lengthy advisement can be anticipated. If judgment is rendered before June or even March 2017, the remaining instalments of security will not be payable.

[59] The above amounts are less than average quarterly revenue. They are far easier to manage financially than a single lump sum. Again, according to the figures that we have, I am fully cognizant that Appellants may require some infusion or assistance of their related entities on a short or medium term basis in order to furnish the security. However, the amounts compared to earnings are such that it cannot be said, in my view, that the security ordered has negated the right to appeal.

[60] The security will be in the form of cash or irrevocable letters of credit issued by a Schedule I Canadian bank to remain in force until final judgment of this Court, or further order of this Court.

[61] As to the form of security, an argument was attempted by counsel for Appellants concerning the legality or appropriateness of letters of credit as security.

[62] This Court has held that an irrevocable letter of credit of a Canadian bank could constitute valid security in lieu of the deposit of cash.[30]

[63] A letter of credit of a bank is an undertaking by that bank. The latter is not a party to the litigation. The Appellants voiced concerns that this undertaking would remain despite any insolvency proceedings initiated by the Appellants. However, the deposit of cash at the office of the Court (in effect with the Ministre des Finances)[31] is also security in the sense that a litigant has, conditionally, a right exercisable in respect of the deposit.[32] This is not as Appellants seem to suppose a "fraud on the bankruptcy" or the granting of a "super priority". Valid security, consensual or court ordered, is supposed to offer priority to its beneficiaries in an insolvency and is so recognized in the *B.I.A.*[33] The effect of such security in the event of an insolvency may be the subject of a decision by a judge or court having jurisdiction but at present the question is hypothetical. In any event, Appellants will have the option of depositing the cash or furnishing letters of credit.

[64] Counsel for RBH suggested that any security take the form of a deposit in one of the lawyer's trust accounts. This is a matter for consent if any, by the parties but should not, in my view, form part of a court order.

[65] Accordingly, I will order security and allow letters of credit to be provided to Respondents' counsel instead of cash deposits in court at each Appellants' option.

[66] The security becomes payable upon a final judgment of this Court maintaining in whole or in part the judgment of first instance. It cannot be payable, as suggested by Respondents on a *B.I.A.* or *C.C.A.A.* filing. Any applicable stay of proceedings arising from such a filing would have to be respected; any exception should be court ordered at

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30 *Droit de la famille – 2054*, AZ-97011711, 1997 CanLII 10660 (C.A.); see also article 1574 *C.C.Q.*
31 *Deposit Act*, CQLR, c. D-5, s. 8.
32 *Basille v. 9159-1503 Québec inc.*, 2014 QCCA 1653 (Kasirer, J.A.).
33 Ss. 69(2), 69.1(2), 69.3 (2), 71 and 136 *B.I.A.*, *supra*, note 10.

the appropriate time by the court having jurisdiction. The undersigned cannot order now that a letter of credit be payable following an insolvency filing which may impose a suspension of such recourse.

[67] The letter of credit will be payable upon receipt by the issuing bank of a sworn statement by one of Respondents' attorneys certifying that the Court of Appeal has rendered judgment in this matter and specifying the amounts due by Appellants. A copy of the judgment will be annexed to the sworn statement. Since an appeal to the Supreme Court does not automatically operate a stay, I need not include that possibility in the conditions of payment of the letters of credit. In the alternative, the letters of credit will be payable subject to further order of the Court. Any letter of credit must of course be issued by a Canadian bank listed in Schedule I of the *Bank Act* and be irrevocable, payable in whole or in part and remain in force until final judgment either by renewal or replacement prior to expiry.

CONCLUSIONS:

[68] **IN RECORD FILE NO: 500-09-025385-154**

FOR ALL THE FOREGOING REASONS, THE UNDERSIGNED:

[69] **GRANTS** in part Respondents' motion to order Appellants to furnish security;

[70] **ORDERS** Appellant, Imperial Tobacco Canada Ltd, to furnish security in accordance with article 497 *C.C.P.* in an amount of $758 million, which security may at Appellant's option, be in the form of cash or letter of credit and shall be furnished in equal consecutive quarterly instalments of $108,285,000 each, on or before the last juridical day of the following months: December, 2015, March, 2016, June, 2016, September, 2016, December, 2016, March, 2017 and June, 2017.

[71] **DECLARES** that security in the form of cash shall be deposited at the Registry of the Court of Appeal, Montreal, and that security by way of letter of credit be delivered to one of the attorneys of Respondents and comply with the following:

i) be issued by a Canadian bank listed in Schedule I of the *Bank Act*;

ii) make reference to the record number of the Court of Appeal;

iii) be irrevocable;

iv) remain in force until: a) judgment on the merits in this Court record either by renewal or replacement prior to expiry or b) further order of the Court of Appeal;

v) be payable: a) upon receipt by the issuing bank of a sworn statement of one of Respondents' attorneys declaring that judgment has been rendered

and stating the amount owing by the Appellant pursuant to the judgment on the merits, a copy of such judgment to be annexed to such sworn statement or b) upon further order of the Court of Appeal.

[72] **DECLARES** that any and all costs or expenses incurred to furnish the said security will be for the account of Appellant, Imperial Tobacco Canada Ltd.

[73] **THE WHOLE** with costs to follow suit.

[74] **IN RECORD FILE NO: 500-09-025387-150**

FOR ALL THE FOREGOING REASONS, THE UNDERSIGNED:

[75] **GRANTS** in part Respondents' motion to order Appellants to furnish security;

[76] **ORDERS** Appellant, Rothmans, Benson & Hedges Inc., to furnish security in accordance with article 497 *C.C.P.* in an amount of $226 million, which security may at Appellant's option, be in the form of cash or letter of credit and shall be furnished in equal consecutive quarterly instalments of $37,666,000.00 each on or before the last juridical day of the following months: December, 2015, March, 2016, June, 2016, September, 2016, December, 2016 and March, 2017.

[77] **DECLARES** that security in the form of cash shall be deposited at the Registry of the Court of Appeal, Montreal, and that security by way of letter of credit be delivered to one of the attorneys of Respondents and comply with the following:

i) be issued by a Canadian bank listed in Schedule I of the *Bank Act*;

ii) make reference to the record number of the Court of Appeal;

iii) be irrevocable;

iv) remain in force until: a) judgment on the merits in this Court record either by renewal or replacement prior to expiry or b) further order of the Court of Appeal;

v) be payable: a) upon receipt by the issuing bank of a sworn statement of one of Respondents' attorneys declaring that judgment has been rendered and stating the amount owing by the Appellant pursuant to the judgment on the merits, a copy of such judgment to be annexed to such sworn statement or b) upon further order of the Court of Appeal.

[78] **DECLARES** that any and all costs or expenses incurred to furnish the said security will be for the account of Appellant, Rothmans, Benson & Hedges Inc.

[79] **THE WHOLE** with costs to follow suit.

MARK SCHRAGER, J.A.

Mtre Deborah Glendinning
Mtre Éric Préfontaine
OSLER, HOSKIN & HARCOURT
For Imperial Tobacco Canada Ltd.

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

Mtre Gordon Kugler
KUGLER, KANDESTIN
Mtre Philippe Trudel
TRUDEL, JOHNSTON & LESPÉRANCE
For Conseil québécois sur le tabac et la santé, Jean-Yves Blais et Cécilia Létourneau

Date of hearing: October 6, 2015