

**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 IMPERIAL TOBACCO CANADA LIMITED  
AND IMPERIAL TOBACCO COMPANY LIMITED

Applicants

---

---

**FACTUM OF THE APPLICANTS**  
**(STAY EXTENSION FACTUM)**

---

---

September 22, 2023

**OSLER, HOSKIN & HARCOURT LLP**  
P.O. Box 50, 1 First Canadian Place  
Toronto, ON M5X 1B8

Deborah Glendinning (LSO# 31070N)  
Marc Wasserman (LSO# 44066M)  
John A. MacDonald (LSO# 25884R)  
Craig Lockwood (LSO# 46668M)

Tel: (416) 362-2111  
Fax: (416) 862-6666

Lawyers to the Applicants, Imperial Tobacco  
Canada Limited and Imperial Tobacco  
Company Limited

**TO: THE COMMON SERVICE LIST**

**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 IMPERIAL TOBACCO CANADA  
LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

APPLICANTS

---

**FACTUM OF THE APPLICANTS**

**PART I - OVERVIEW**

1. The Applicants were granted CCAA protection by an order of the Ontario Superior Court of Justice (Commercial List) dated March 12, 2019 (as amended from time to time, the “**Initial Order**”). The Initial Order appointed FTI as the Monitor and granted a stay of proceedings (the “**Stay**”) in favour of the Applicants and certain related parties until and including April 11, 2019 or such later date as the Court may order (as extended by further court orders, the “**Stay Period**”). At the most recent stay extension hearing, held on March 28, 2023, this Court extended the Stay Period until and including September 29, 2023.

2. The Applicants submit that the requested Stay Period extension should be granted. The Applicants have been acting in good faith and with due diligence and intend to continue doing so. Moreover, the requested order is appropriate. Consistent with the objectives of the CCAA, the requested order furthers the objectives of providing a reasonable time period to continue the extremely complex process of resolving the multiple tobacco litigation claims that are at the core of this proceeding, through the court-ordered mediation.

3. Finally, the requested six-month Stay Period extension is necessary in the circumstances. It is supported by the Monitor. This proceeding is, as McEwen J. has previously held, one of the most complex restructurings in CCAA history. While progress has been made during prior Stay Period extensions, additional time is required. The requested six-month Stay Period extension reflects the very high degree of complexity involved in achieving a resolution that balances the interests of all of the stakeholders in this proceeding.

## PART II - FACTS

4. The facts in support of this motion are set out in the Affidavit of Eric Thauvette.<sup>1</sup>

### A. Background to the Filing

5. The Applicants sought CCAA protection following the judgment (the “**Quebec Judgment**”) of the Quebec Court of Appeal on March 1, 2019, affirming a lower court decision in favour of the Quebec Class Action Plaintiffs (the “**QCAPs**”) that held ITCAN, JTI-Macdonald Corp. (“**JTIM**”), and Rothmans Benson & Hedges Inc. (“**RBH**” and, with the Applicants and JTIM, the “**Tobacco Companies**”) jointly and severally liable for a maximum of \$13.6 billion. This class proceeding, together with the various consumer and government claims across the country (the “**Tobacco Litigation**”), collectively seek notional recovery of hundreds of billions of dollars from the Applicants and the other legal Canadian tobacco manufacturers.<sup>2</sup>

6. In the evidence supporting this CCAA proceeding, the Applicants identified, in addition to the judgment in favour of the QCAPs, more than 20 large tobacco litigation claims filed across

---

<sup>1</sup> Affidavit of Eric Thauvette, sworn September 13, 2023 [“**Thauvette Affidavit**”]. Capitalized terms not otherwise defined have the same meaning as in the Thauvette Affidavit.

<sup>2</sup> Thauvette Affidavit, para. 5.

Canada claiming damages in excess of well over \$600 billion.<sup>3</sup> Additionally, Representative Counsel was appointed to represent individuals asserting or entitled to assert claims for a Tobacco-Related Wrong (the “**TRW Claims**”) by order dated December 9, 2019.<sup>4</sup>

7. Although the Applicants dispute both the legal and factual foundation of the claims asserted in the Tobacco Litigation, as well as the corresponding quantification of damages, they ultimately determined that it is in the best interests of the Applicants’ stakeholders to engage in a restructuring process with the overriding objective of preserving the value of their business and resolving all Tobacco Claims (as defined in the Initial Order) in an orderly process under Court supervision.<sup>5</sup>

8. ITCAN, JTIM, and RBH are the three major Canadian manufacturers and distributors of tobacco products. JTIM and RBH have also been granted CCAA protection under orders made on March 8, 2019 and March 22, 2019, respectively. Counsel for the Tobacco Companies have consulted on common issues in order to coordinate the three CCAA proceedings to the maximum extent possible.<sup>6</sup>

## **B. The Mediation**

9. At the joint comeback hearing for the ITCAN, JTIM, and RBH CCAA proceedings on April 4 – 5, 2019, Justice Winkler was appointed the “Court-Appointed Mediator” in all three

---

<sup>3</sup> Thauvette Affidavit, paras. 16 and 17. The nature of these proceedings is summarized here. See also Exhibit A for a Chart showing the litigation claims.

<sup>4</sup> Thauvette Affidavit, para. 18.

<sup>5</sup> Thauvette Affidavit, para. 6.

<sup>6</sup> Thauvette Affidavit, para. 7.

CCAA proceedings with a mandate to, among other things, adopt any process he considered appropriate for facilitating a global settlement of the Tobacco Claims.<sup>7</sup>

10. Pursuant to an endorsement dated May 24, 2019, the mediation conducted by the Court-Appointed Mediator (the “**Mediation**”) is confidential and all steps taken or information produced by any of the parties in the Mediation shall not be disclosed. Therefore, the description of the Mediation and the Applicants’ participation in this factum is general in nature.<sup>8</sup>

### **PART III - ISSUES AND THE LAW**

#### **A. Issue**

11. The only issue on this motion is whether the requested stay extension to March 29, 2024 should be granted.

#### **B. Test for Extending a CCAA Stay**

12. The test for extending a CCAA Stay is well-established. On an application other than an initial application, s. 11.02(2) of the CCAA provides that the Court may make a stay order for any period that the court considers necessary, if the applicant satisfies the Court (a) the circumstances exist that make the order appropriate, and (b) that the applicant has acted, and is acting, in good faith and with due diligence.<sup>9</sup>

13. In other words, this Court has the discretion to make an order for “any period that the court considers necessary”, provided the two mandatory pre-conditions have been satisfied (the

---

<sup>7</sup> Thauvette Affidavit, para. 8.

<sup>8</sup> Thauvette Affidavit, para. 9.

<sup>9</sup> CCAA, s. 11.02(2). See also s. 11.02(3).

order is appropriate and the Applicant is acting with due diligence and in good faith). “Necessary” must logically be understood to mean “necessary to the restructuring”.

14. “Appropriate” must similarly be viewed in light of the objectives of the CCAA and the circumstances of the particular restructuring. As the Supreme Court of Canada held in *Century Services*, “appropriateness” is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. As Deschamps J. wrote, “[t]he question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA...”. Additionally, appropriateness is measured against the means that the proposed order employs. “Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.”<sup>10</sup>

15. Other factors that are considered on an application for a stay extension include the debtor’s progress during the previous stay period toward a restructuring, whether creditors will be prejudiced if the court grants the extension, and the comparative prejudice to the debtor, creditors and other stakeholders if the extension is not granted.<sup>11</sup>

16. The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the court and to prevent manoeuvring for positioning among creditors in the interim.<sup>12</sup> What is reasonable necessarily depends on the circumstances of the restructuring.

---

<sup>10</sup> *Ted Leroy Trucking Ltd. (Re)*, [2010] 3 SCR 379 at para. 70.

<sup>11</sup> *Federal Gypsum Co. (Re)*, 2007 NSSC 347 at paras. 24-29.

<sup>12</sup> *Federal Gypsum Co. (Re)*, 2007 NSSC 347 at para. 16.

**C. Requested Stay Extension Should Be Granted**

**(a) Good Faith and Due Diligence**

17. The question of good faith relates to the conduct of the debtor during the CCAA proceeding.<sup>13</sup> There can be no question that the Applicants have acted and are acting in good faith in these proceedings. If the requested stay extension is granted, the Applicants intend to continue doing so with a view to achieving a global settlement of the Tobacco Litigation and proposing a plan of compromise or arrangement to their creditors. The support of the Monitor for the requested Stay Period extension represents an implicit affirmation that the Applicants are not acting in bad faith.<sup>14</sup>

18. The Applicants have and are acting with due diligence. During the most recent Stay Period, the Applicants have continued to engage in the Mediation in accordance with the directions provided by the Court-Appointed Mediator, including participating in numerous meetings with the Court-Appointed Mediator and others. The Applicants have also responded from time to time to requests for information from Tobacco Litigation stakeholders and have uploaded documents as needed to the confidential data room related to the Mediation.<sup>15</sup>

19. As further set out in the Thauvette Affidavit, a number of other matters involving the business of the Applicants have been appropriately addressed as they have arisen.<sup>16</sup> Consistent

---

<sup>13</sup> *Muscletech Research & Development Inc. (Re)*, 2006 CanLII 3282 (Ont. Sup. Ct. [Comm. List]) at para. 4.

<sup>14</sup> *Laurentian University of Sudbury (Re)*, 2021 ONSC 3272 at para. 73, motion for leave to appeal dismissed 2021 ONCA 448. Thauvette Affidavit, para. 26.

<sup>15</sup> Thauvette Affidavit, para. 10.

<sup>16</sup> Thauvette Affidavit, paras 12 and 13.



with the purposes of the CCAA, the Stay has allowed the Applicants to maintain operational stability and to foster stakeholder discussions, while preserving their going-concern businesses.<sup>17</sup>

**(b) Six-Month Stay Extension is Appropriate and Necessary**

20. The current Stay Period expires on September 29, 2023. The Applicant is seeking to extend the Stay Period to March 29, 2024 – namely, a further six-month period. The request for a further six-month period in this case is based on the Applicant’s understanding of the outstanding matters at issue in the Mediation, and its assessment of the time required to permit the Mediation to meaningfully continue.<sup>18</sup> This request for a six-month extension is supported by the Monitor, and is not seemingly opposed by the claimants.

21. While a six-month period may be viewed as lengthy in certain CCAA proceedings, this proceeding is unprecedented in scope. It involves the resolution of over 20 large tobacco litigation claims (claiming damages totalling in excess of \$600 billion), as well as the TRW Claims that are represented by the Representative Counsel.<sup>19</sup> An added layer of complexity is created by the fact that these restructuring proceedings encompass three separate global industry groups, rather than individual Canadian companies, each of which are operating different businesses in Canada with different business models and structures.<sup>20</sup>

22. In granting the Initial Order in these proceedings, McEwen J. recognized the global resolution of litigation claims as a legitimate purpose of the CCAA, stating:<sup>21</sup>

---

<sup>17</sup> Thauvette Affidavit, para. 14.

<sup>18</sup> Thauvette Affidavit, paras. 24 and 26.

<sup>19</sup> Thauvette Affidavit, paras. 16 to 18.

<sup>20</sup> Thauvette Affidavit, para. 20.

<sup>21</sup> *Imperial Tobacco Canada Limited, et al, Re*, 2019 ONSC 1684 at para. 9.

[9] It is settled law that the principal purpose of the CCAA is to maintain the status quo while a debtor company has the opportunity to consult with its creditors and stakeholders with a view to continue the company's operations. In the circumstances of this case, ITCAN cannot pay the amount of the Quebec Appeal Judgment and the Judgment is currently enforceable. Enforcement would cause the Applicants serious harm. As I have outlined above, it would also jeopardize tax revenue and legal trade in tobacco. It is therefore appropriate to grant the stay of proceedings requested by the Applicants as all stakeholders would likely be detrimentally affected if the Quebec Appeal Judgment was enforced. These stakeholders include employees, retirees, customers, landlords, suppliers, the provincial and federal governments, and contingent litigation creditors. Specifically, a stay creates a level playing field amongst the litigation claimants.

23. The goal is to achieve a consensual resolution of the Tobacco Litigation claims in a manner that creates a level-playing field for claimants, regardless of the stage their litigation had reached at the time of the filing, in order to ensure that recoveries are based on the nature of their claims, not whether they have placed first in the race to judgment. As McEwen J. stated in his endorsement approving the appointment of Representative Counsel for persons with TRW Claims, "these restructurings are amongst the most complex in CCAA history for a number of reasons, which include the vast number and size of the complicated tobacco-related actions that have been, or could be, commenced against the Applicants."<sup>22</sup>

24. A number of Stay Period extensions have been granted in the course of these proceedings, including for durations of six months, many of which were unopposed. In certain cases, where particular stakeholders sought to impose a shorter Stay Period extension, McEwen J. provided reasons for his determination that the proposed six-month time period was necessary and appropriate. Among other things, McEwen J. noted that a "shorter extension period would distract the stakeholders from the court-ordered mediation process" and could "tilt the playing

---

<sup>22</sup> *Imperial Tobacco Canada Ltd., Re*, 2020 ONSC 61 at para. 42.

field” in favour of the particular stakeholders in the process.<sup>23</sup> For this reason, His Honour previously concluded that 6-month extensions were “fair and reasonable in the difficult circumstances of this case”, and that a shorter Stay Period extension could in fact “backfire and have the exact opposite effect” of enhancing the prospects of settlement.<sup>24</sup> The Applicant submits that this same logic applies with equal force to the 6-month stay extension request at issue on this motion.

25. In granting these Stay Period extensions, McEwen J. previously encouraged all stakeholders to engage fully with the Court-appointed Mediator, to fully cooperate with the Monitors in a timely manner, and to approach the resolution discussions with a sense of urgency.<sup>25</sup> The Applicants have done so, and there is no suggestion to the contrary.

26. There has been significant progress in the Mediation and the Applicants believe that the requested Stay Period extension will further the Mediation process. The timelines for the Mediation are governed by, among other things, the Mediator, the numerous participants and the underlying issues in dispute. Accordingly, they are largely beyond the Applicants’ control. The confidential nature of the Mediation precludes the Applicant from providing any further details regarding the progress of the Mediation, its likely outcome, or the length of time required to complete it.<sup>26</sup> However, the Monitor supports the requested Stay Period extension<sup>27</sup> and the judgment of the Monitor is deserving of deference by this Court.

---

<sup>23</sup> *JTI-MacDonald Corp. Re*, 2019 CarswellOnt 24203 (Ont. Sup. Ct. [Comm. List]) at paras. 8, 20-21. The QCAPs do not oppose the Applicants’ current stay extension request.

<sup>24</sup> Endorsement of Justice McEwen, dated March 30, 2023 [March 30 Endorsement], attached to the Thauvette Affidavit as Exhibit “D”.

<sup>25</sup> See, for example, September 29 Endorsement and March 30 Endorsement.

<sup>26</sup> Thauvette Affidavit, para. 24.

<sup>27</sup> Thauvette Affidavit, para. 26.

27. The ongoing Mediation must balance the interests of a broad array of Tobacco Litigation claimants, ranging from the provincial governments asserting statutory claims for health care cost recovery, to individuals with personal injury claims that have been reduced to judgment, to individuals that have asserted or may assert their claims in class actions or proposed class actions, as represented by Representative Counsel.<sup>28</sup> As this Honourable Court has recognized, the Mediation is of significant importance to all stakeholders, including the Tobacco Companies.<sup>29</sup>

28. The Applicants' Cash Flow Forecast, which was prepared with the assistance of the Monitor, demonstrates that the Applicants are projected to have sufficient funding to continue to operate in the normal course during the proposed extension of the Stay Period.<sup>30</sup>

#### **PART IV -NATURE OF THE ORDER SOUGHT**

29. The Applicants therefore request that the Order extending the Stay Period until and including March 29, 2024 be granted, substantially in the form of the draft Order attached as Tab 3 to the Applicants' Motion Record.

---

<sup>28</sup> Thauvette Affidavit, para. 19.

<sup>29</sup> Thauvette Affidavit, para. 21.

<sup>30</sup> Thauvette Affidavit, para. 25.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:



V. Nikolov, per  
D. Glendinning

---

Deborah Glendinning



V. Nikolov, per  
M. Wasserman

---

Marc Wasserman



V. Nikolov, per  
J.A. MacDonald

---

John A. MacDonald



V. Nikolov, per  
C. Lockwood

---

Craig Lockwood

## **SCHEDULE “A”**

### **LIST OF AUTHORITIES**

#### **Case Law**

1. *Federal Gypsum Co. (Re)*, 2007 NSSC 347
2. *Imperial Tobacco Canada Limited, et al, Re*, 2019 ONSC 1684
3. *Imperial Tobacco Canada Ltd., Re*, 2020 ONSC 61
4. *JTI-MacDonald Corp. Re*, 2019 CarswellOnt 24203 (Ont. Sup. Ct. [Comm. List])
5. *Laurentian University of Sudbury (Re)*, 2021 ONSC 3272, motion for leave to appeal dismissed 2021 ONCA 448
6. *Muscletech Research & Development Inc. (Re)*, 2006 CanLII 3282 (Ont. Sup. Ct. [Comm. List])
7. *Ted Leroy Trucking Ltd. (Re)*, [2010] 3 SCR 379

## **SCHEDULE “B”**

### **TEXT OF STATUTES, REGULATIONS & BY-LAWS**

#### *Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36*

#### **Stays, etc. — initial application**

**11.02 (1)** A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

#### **Stays, etc. — other than initial application**

**(2)** A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

#### **Burden of proof on application**

**(3)** The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

#### **Restriction**

**(4)** Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

**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 IMPERIAL TOBACCO CANADA LIMITED., et al.**

Applicants

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

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

PROCEEDING COMMENCED AT  
TORONTO

**FACTUM OF THE APPLICANTS**

**OSLER, HOSKIN & HARCOURT LLP**

P.O. Box 50, 1 First Canadian Place  
Toronto, ON M5X 1B8

Deborah Glendinning (LSO# 31070N)  
Marc Wasserman (LSO# 44066M)  
John A. MacDonald (LSO# 25884R)  
Craig Lockwood (LSO# 46668M)

Tel: (416) 362-2111  
Fax: (416) 862-6666

Lawyers to the Applicants,

Imperial Tobacco Canada Limited and  
Imperial Tobacco Company Limited