

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

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 MOTION)**

October 29, 2024

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TO: THE COMMON SERVICE LIST

FACTUM OF THE APPLICANTS

PART I - OVERVIEW

1. The Applicants, Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited, 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**”).
2. The Stay has since been extended by this Court, most recently at the stay extension hearing held on March 25, 2024. At that time, the Court extended the Stay Period to September 30, 2024. On October 1, 2024, the Court adjourned the Applicants’ stay extension motion to October 31, 2024, and extended the Stay Period to October 31, 2024. The Applicants bring this motion to seek a further extension of the Stay Period.
3. 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. 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. Accordingly, the requested order is necessary in all of the circumstances.
4. The requested five-month Stay Period extension is reasonable and appropriate, and is supported by the Monitor. As McEwen J. has previously held, this proceeding is one of the most complex restructurings in CCAA history. While significant progress has been made during prior

Stay Period extensions, with the Monitors recently delivering draft plans of compromise and arrangement, additional time is required to finalize and potentially implement such plans. The requested five-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

5. The facts in support of this motion are set out in the Affidavit of Eric Thauvette¹ and the Nineteenth Report of the Monitor.²

A. Background to the Filing

6. The Applicants sought CCAA protection following the 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.³

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

¹ Affidavit of Eric Thauvette, sworn September 16, 2024 [“**Thauvette Affidavit**”].

² Nineteenth Report of the Monitor dated October 25, 2024 [“**Nineteenth Report**”]. Capitalized terms not otherwise defined have the same meaning as in the Thauvette Affidavit or the Nineteenth Report.

³ Thauvette Affidavit, para. 5.

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.⁴

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 (as extended by further orders of the Court). Counsel for the Tobacco Companies have consulted on common issues in order to coordinate the three CCAA proceedings to the maximum extent possible.⁵

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 CCAA proceedings with a mandate to, among other things, adopt any process he considered appropriate for facilitating a global settlement of the Tobacco Claims.⁶

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.⁷

⁴ Thauvette Affidavit, para. 6.

⁵ Thauvette Affidavit, para. 7.

⁶ Thauvette Affidavit, para. 8.

⁷ Thauvette Affidavit, para. 9.

11. The Court-Appointed Mediator and Monitors have jointly developed a plan of compromise and arrangement for the Applicants on a consolidated basis which, for purposes of approval and implementation, has been separated into individual plans for each of ITCAN, JTI and RBH. These plans were filed with the Court by the respective Tobacco Monitors on October 17, 2024.⁸

12. In connection with the filing of the Imperial Plan, the Tobacco Monitors made a motion for, among other things, orders authorizing the Monitor to: (i) call and conduct a creditors' meeting to vote on the Imperial Plan, and (ii) establish a claims procedure in respect of the Affected Creditors (as defined in the Imperial Plan) of the Applicants.⁹ The within stay extension motion is brought contemporaneously with the Tobacco Monitors' motions in order to extend the Stay Period so as to allow the proposed plans of compromise and arrangement to be considered by the affected stakeholders.

PART III - ISSUES AND THE LAW

13. The issue on this motion is whether the requested stay extension to March 31, 2025 should be granted.¹⁰

A. Test for Extending a CCAA Stay

14. 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

⁸ Nineteenth Report, para. 20.

⁹ Nineteenth Report, para. 21.

¹⁰ The Thauvette Affidavit references an extension of the Stay Period to March 28, 2025, but this date has since been revised to March 31, 2025, upon agreement of the Applicants and the Monitors.

exist that make the order appropriate, and (b) that the applicant has acted, and is acting, in good faith and with due diligence.¹¹

15. 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 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”.

16. “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.”¹²

17. 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

¹¹ CCAA, s. 11.02(2). See also s. 11.02(3).

¹² *Ted Leroy Trucking Ltd. (Re)*, [2010 SCC 60](#) [*Century Services*] at para. [70](#).

prejudiced if the court grants the extension, and the comparative prejudice to the debtor, creditors and other stakeholders if the extension is not granted.¹³

18. 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 maneuvering for positioning among creditors in the interim.¹⁴ What is reasonable necessarily depends on the circumstances of the restructuring.

B. Requested Stay Extension Should Be Granted

(a) Good Faith and Due Diligence

19. The question of good faith relates to the conduct of the debtor during the CCAA proceeding.¹⁵ There can be no question that the Applicants have acted and are acting in good faith in these proceedings.¹⁶ 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 and arrangement to their creditors.¹⁷ The support of the Monitor for the requested Stay Period extension affirms the Applicants' good faith conduct.¹⁸

¹³ *Federal Gypsum Co. (Re)*, [2007 NSSC 347](#) [*Federal Gypsum*] at paras. [24-29](#).

¹⁴ *Federal Gypsum* at para. [16](#).

¹⁵ *Muscletech Research & Development Inc. (Re)*, [2006 CanLII 3282 \(Ont. Sup. Ct. \[Comm. List\]\)](#) at para. [4](#).

¹⁶ Nineteenth Report, para. 39(a).

¹⁷ Thauvette Affidavit, para. 11.

¹⁸ *Laurentian University of Sudbury (Re)*, [2021 ONSC 3272](#) at para. [73](#), motion for leave to appeal dismissed 2021 ONCA 448.

20. The Applicants have acted, and continue to act, with due diligence. During the most recent Stay Period, the Applicants have engaged in the Mediation in accordance with the direction provided by the Court-Appointed Mediator, including their participation in numerous meetings with the Court-Appointed Mediator and others.¹⁹ These efforts culminated in the proposed plans of compromise and arrangement that were recently proffered by the Monitors.

21. As further set out in the Thauvette Affidavit, a number of other matters involving the business of the Applicants have also been appropriately addressed as they have arisen.²⁰ Consistent with the purposes of the CCAA, the Stay has allowed the Applicants to maintain operational stability and to foster an environment that encourages stakeholder discussions.²¹

(b) Five-Month Stay Extension is Appropriate and Necessary

22. The current Stay Period expires on October 31, 2024. The Applicants are seeking to extend the Stay Period to March 31, 2025 (*i.e.*, a five-month extension). The request for a further five-month period in this case is based on the Applicants' understanding of the outstanding matters at issue in the Mediation, and their assessment of the time required to permit the Mediation to meaningfully continue (including the steps necessary for the stakeholders to consider and, if deemed appropriate, to approve the draft plans of compromise and arrangement).²²

23. The proposed five-month stay extension is supported by the Monitor in order to allow for the meeting of creditors and, subject to approval by a requisite majority of the Applicants'

¹⁹ Thauvette Affidavit, para. 10.

²⁰ Thauvette Affidavit, paras. 12 and 13.

²¹ Thauvette Affidavit, para. 14.

²² Thauvette Affidavit, paras. 15-17.

creditors, a sanction hearing to take place.²³ The judgment of the Monitor in this regard is deserving of deference by this Court. While the Applicants support the proposed extension of the Stay Period, and intend to work with all parties to diligently advance these matters, the exact timeline for Plan adoption and implementation is not known at this time. The Applicants will update the Court on progress before the expiry of the proposed extended Stay Period.

24. 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:²⁴

[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.

25. 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".²⁵ For this

²³ Nineteenth Report, para. 39(c).

²⁴ *Imperial Tobacco Canada Limited, et al, Re*, [2019 ONSC 1684](#) at para. 9.

²⁵ *Imperial Tobacco Canada Ltd., Re*, [2020 ONSC 61](#) at para. 42.

same reason, McEwen J. previously ruled that six-month stay extensions were “fair and reasonable in the difficult circumstances of this case”.²⁶ 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 field” in favour of the particular stakeholders in the process.²⁷ His Honour concluded that a shorter Stay Period extension could in fact “backfire and have the exact opposite effect” of enhancing the prospects of settlement.²⁸ The Applicants submit that this same logic applies with equal force to the five-month stay extension sought on this motion.

26. In granting previous Stay Period extensions, McEwen J. 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.²⁹ The Applicants have done so (and there is no suggestion to the contrary), and will continue to do so.

27. At the most recent stay extension motion, this Court was satisfied that Applicants were working in good faith and with due diligence to formulate plans of arrangement in these CCAA proceedings and that additional time was required to formulate a plan. Further, this Court was satisfied that significant progress had been made to continue these efforts and that all parties were active participants in the ongoing mediation.³⁰ Since that time, the Applicants have continued to

²⁶ [Endorsement of Justice McEwen](#), dated March 30, 2023 [March 30 Endorsement].

²⁷ [Endorsement of Justice McEwen](#), dated October 18, 2019.

²⁸ [March 30 Endorsement](#).

²⁹ See, for example, [Endorsement of Justice McEwen](#), dated September 29, 2022 and [March 30 Endorsement](#).

³⁰ *Imperial Tobacco Canada Limited*, [2024 ONSC 1751](#) at paras. 8 and 11.

engage in the Mediation process in good faith and have made significant progress. Accordingly, the Applicants believe that the requested Stay Period extension will further the resolution process.

28. The Monitor's Cash Flow Forecast indicates that the Applicants are projected to have sufficient funding to continue to operate in the normal course throughout the proposed extension of the Stay Period.³¹

PART IV - NATURE OF THE ORDER SOUGHT

29. The Applicants therefore request that the Order extending the Stay Period until and including March 31, 2025 be granted, substantially in the form of the draft Order attached as Tab 3 to the Applicants' Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of October, 2024.



Osler, Hoskin & Harcourt LLP

³¹ Nineteenth Report, para. 39(b) and Appendix "D".

SCHEDULE “A”

LIST OF AUTHORITIES

1. [Endorsement of Justice McEwen](#), dated October 18, 2019
2. [Endorsement of Justice McEwen](#), dated September 29, 2022
3. [Endorsement of Justice McEwen](#), dated March 30, 2023
4. *Federal Gypsum Co. (Re)*, [2007 NSSC 347](#)
5. *Imperial Tobacco Canada Limited, et al, Re*, [2019 ONSC 1684](#)
6. *Imperial Tobacco Canada Ltd., Re*, [2020 ONSC 61](#)
7. *Imperial Tobacco Canada Limited*, [2024 ONSC 1751](#)
8. *Laurentian University of Sudbury (Re)*, [2021 ONSC 3272](#), motion for leave to appeal dismissed 2021 ONCA 448
9. *Muscletech Research & Development Inc. (Re)*, [2006 CanLII 3282 \(Ont. Sup. Ct. \[Comm. List\]\)](#)
10. *Ted Leroy Trucking Ltd. (Re)*, [2010 SCC 60](#)

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.

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Applicants

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

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