

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
(Comeback Hearing Issues and
Response to Quebec Class Action Plaintiffs' Motion to Vary Initial Order)

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TO: THE SERVICE LIST

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PART I - OVERVIEW

1. Imperial Tobacco Canada Limited (“**ITCAN**”) and its subsidiary Imperial Tobacco Company Limited (“**ITCO**”) (together, the “**Applicants**”) obtained an Initial Order and related relief under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the “**CCAA**”) on March 12, 2019. The Applicants obtained an initial stay of proceedings under section 11.02(1) of the CCAA (the “**CCAA Stay**”) for the primary purpose of effecting a global resolution of multiple claims in Canada that have been brought or could be brought against them in relation to the development, production, marketing, advertising of, any representations made in respect of, the purchase, sale and use of or exposure to Tobacco Products¹ (the “**Tobacco Claims**”). FTI Consulting Canada Inc. was appointed as monitor (the “**Monitor**”) in this proceeding.

2. This factum is filed by the Applicants seeking an extension of the CCAA Stay until June 28, 2019, as well as an amendment of the CCAA Stay to protect the other Defendants in the

¹ As defined in the Initial Order.

Tobacco Litigation. Since the date of the Initial Order, the Applicants have been proceeding in good faith and with due diligence. At this early stage of the Proceedings, this Court should exercise its discretion to provide the Applicants with a reasonable opportunity to determine whether a restructuring for the benefit of all stakeholders is possible.

3. This factum is also filed in response to the motion by the representative plaintiffs in the Quebec Class Actions (the “**Quebec Plaintiffs**”) seeking to vary the Initial Order together with other relief.

4. The Applicants do not oppose certain relief requested by the Quebec Plaintiffs, in particular the request to lift the CCAA Stay to allow the approval of the Insurance Settlements. Moreover, the Applicants have confirmed that they are not making any payment of dividends, principal or interest to members of the BAT Group (defined below). The Applicants do oppose other relief requested by the Quebec Plaintiffs, including the prohibition of intercompany payments for shared services and the request to file a bankruptcy application, on the basis that it is factually unfounded, premature or unsupported under the CCAA.

5. The Applicants further oppose those aspects of the relief requested that effectively seek to elevate the status of the Quebec Plaintiffs or to increase the leverage of these stakeholders relative to others. Much of the Quebec Plaintiffs’ motion appears premised on their assumption that they are unique among the Applicants’ stakeholders, primarily on the basis that their Tobacco Claims have been adjudicated. However, the Applicants’ position is that this fact alone gives them no higher claim against the Applicants than the other Tobacco Claimants with similar claims against the Applicants. The entitlements of the Quebec Plaintiffs must be resolved in due course, with the benefit of a full record and with the input of all stakeholders. Until this time, the Applicants submit that this Court must maintain the *status quo* as of the filing date and should

not countenance tactical manoeuvres in the post-filing period designed to give the Quebec Plaintiffs a “leg up” relative to other stakeholders.

6. Contrary to the Quebec Plaintiffs’ submissions, the Applicants have been fully transparent with this Court and have not failed to disclose any relevant information. Nor is there any basis for concluding that this proceeding is an improper use of the CCAA. The Quebec Plaintiffs are simply unhappy because their rights are stayed. However, this is an inevitable consequence of the Applicants’ insolvency and they are not being treated in a manner that is any different from all of the other stakeholders of the Applicants.

7. Finally, this factum is filed in response to the motion brought by Her Majesty the Queen in right of Ontario (“**Ontario**”). Ontario seeks to vary the Initial Order to authorize and permit Ontario to continue with its health care costs recovery litigation (the “**HCCR Litigation**”) against all defendants, including the Applicants, except that future proceedings to enforce any judgment and/or collect any amount owing or found to be owing by the Applicants will remain subject to the CCAA Stay. The Applicants submit that this relief cannot and should not be granted, as it is contrary to the “level playing field” principles and will defeat the purpose of this CCAA proceeding.

PART II - FACTS

8. The facts with respect to this Response are set out in the Affidavit of Eric Thauvette filed in support of the Initial Order² and in the Responding Affidavit of Eric Thauvette sworn in support of this Response.³

² Affidavit of Eric Thauvette, sworn March 12, 2019 [First Thauvette Affidavit]. Capitalized terms in this Factum not otherwise defined have the same meanings as in the First Thauvette Affidavit.

³ Responding Affidavit of Eric Thauvette, sworn April 2, 2019 [Responding Thauvette Affidavit].

PART III - ISSUES AND THE LAW

A. Issues

9. The CCAA Stay should be extended until June 28, 2019.

10. Subject to the exceptions below, this Court should deny the relief requested by the Quebec Plaintiffs:

- (a) An application for leave to appeal to the Supreme Court of Canada (“**SCC**”) from the Quebec Appeal Judgment (the “**Leave Application**”) is stayed and subject to the tolling provision in the Initial Order. There is therefore no need for this Court to consider the position of the Quebec Plaintiffs that they should be entitled to respond to the Leave Application or that the CCAA proceeding should be terminated, nor is there any need to consider the relief sought by JTI and RBH in relation to the Leave Application;
- (b) The CCAA Stay should be extended to the other Defendants in the Pending Litigation (as defined in the Applicants’ Notice of Motion and proposed amended Initial Order);
- (c) The Applicants oppose the request for the Applicants’ professional fees to be taxed every 90 days as this is unduly time consuming and onerous at a critical time in the restructuring and not necessary to promote transparency;
- (d) The Applicants oppose the request to lift the CCAA Stay to allow a bankruptcy application to be filed;

- (e) Requiring the Applicants to cease making any further payments to members of the BAT Group, except payments for physical inventory supplied at fair market value, is factually unsupported, ill-founded and contrary to the CCAA; and
- (f) The Applicants do not oppose the Quebec Plaintiffs' request to lift the CCAA Stay to obtain approval for the Insurance Settlements.

11. Ontario's request to lift the CCAA Stay to allow the HCCR Litigation to proceed should be refused as it will defeat the purpose of this CCAA Proceeding.

B. The CCAA Stay Should be Extended

12. The Applicants seek to have the CCAA Stay obtained under the Initial Order extended until June 28, 2019. This Court may exercise its discretion to extend an initial CCAA Stay where it has been demonstrated that the CCAA debtor has been proceeding in good faith and with due diligence in order to achieve a restructuring.⁴

13. As the Supreme Court held in *Ted LeRoy Trucking*, the CCAA court's discretion to make orders facilitating the debtor's restructuring subsists as long as it is not clear that the debtor's restructuring efforts are "doomed to failure":

It is well-established that efforts to reorganize under the CCAA can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" [citations omitted]. However, when an order is sought that does realistically advance the CCAA's purposes, the ability to make it is within the discretion of a CCAA court.⁵

14. The Applicants have been proceeding in good faith and with due diligence. There is no basis for the Quebec Plaintiffs' allegations that the Applicants are abusively seeking to use the

⁴ CCAA, s. 11.02(3)(b).

⁵ *Re Ted LeRoy Trucking [Century Services] Ltd.*, 2010 SCC 60 at para. 71.

CCAA as a shield to avoid posting security.⁶ ITCAN posted substantial security, in the form of a cash deposit (the “**Deposit**”), as required by the Quebec Court of Appeal in 2015.⁷

15. As set out further below, the Applicants do not intend to pursue an application for leave to appeal (the “**Leave Application**”) to the Supreme Court of Canada (“**SCC**”) during this proceeding unless they must do so in order to preserve their rights against the possibility that this CCAA proceeding does not succeed. As submitted below, there is no intention to improperly usurp the jurisdiction of the Quebec Court of Appeal or the SCC, as the Quebec Plaintiffs allege.⁸

16. There is also no basis for the Quebec Plaintiffs’ claim that the Applicants are using the CCAA for an improper purpose.⁹ Nor is there any foundation for the Quebec Plaintiffs’ claims that the Applicants did not make full and fair disclosure to this Court in seeking the Initial Order.¹⁰

17. This CCAA proceeding has only just commenced and the Applicants should have a reasonable opportunity to determine whether a global resolution of the Tobacco Claims can be achieved.

C. Leave Application is Stayed and Tolled

18. The Quebec Plaintiffs argue that if ITCL brings the Leave Application, the CCAA proceeding should be terminated, or alternatively, that the Quebec Plaintiffs should be permitted

⁶ Factum of the Quebec Plaintiffs, para. 21.

⁷ First Thauvette Affidavit, para. 137.

⁸ Factum of the Quebec Plaintiffs, para. 24.

⁹ As the Applicants submitted in their factum in support of the Initial Order, numerous CCAA Courts have endorsed the use of the CCAA to achieve a global resolution of litigation claims: Factum of the Applicants in Support of the Initial Order, dated March 12, 2019, paras. 60 to 64.

¹⁰ Responding Thauvette Affidavit, paras. 38 to 41.

to respond to the Leave Application. They further submit that this Court cannot usurp the jurisdiction of the Quebec Court of Appeal and the Supreme Court of Canada.

19. The Applicants submit that this relief is unnecessary and irrelevant. The Initial Order imposes a broad stay of proceedings, at the same time that it imposes a tolling provision that prevents the clock from running on any time periods in proceedings “in respect of the Applicants”. The Applicants submit that the Leave Application is stayed and the time period for seeking leave is tolled. Consequently, the Applicants have no intention of commencing the Leave Application during this CCAA Proceeding.

20. Specifically, clause 18 of the Initial Order provides that “no proceeding or enforcement process in any court or tribunal” (defined as a “Proceeding”), including Pending Litigation (which includes the Quebec Class Action) and any other Proceeding in relation to a Tobacco Claim shall be commenced, continued or take place “against or in respect of the Applicants” or “affecting the Business or the Property” except with the written consent of the Applicants and the Monitor or with leave of the Court. Any and all Proceedings currently underway “in respect of the Applicants” or “affecting the Business or the Property” are stayed and suspended pending further Order of the Court. This includes all counterclaims, cross-claims and third party claims of the Applicants in the Pending Litigation.

21. By its plain wording, this stay of proceedings applies not only to Proceedings (or steps in a Proceeding) brought against the Applicants, but also to those Proceedings or steps in a Proceeding that are brought by the Applicants in respect of the Applicants, the Business or the Property, unless both the Applicants and the Monitor consent, or the Court orders otherwise. The Quebec Class Action is such a Proceeding, and the Leave Application would be a continuation of that Proceeding.

22. Since all Proceedings that may be commenced or that are currently underway “in respect of the Applicants” are stayed, clause 20 of the Initial Order protects all parties that might otherwise have commenced such Proceedings or taken further steps to continue a Proceeding from prejudice arising from the passage of time. Again, by its express wording, this includes the Applicants and the Leave Application. Specifically, clause 20 provides that “to the extent any prescription, time or limitation period relating to any Proceeding against or in respect of the Applicants” (emphasis added) that is stayed may expire, the term of such prescription, limitation or time period is deemed to be extended by a period equal to the Stay Period.

23. Tolling provisions of this nature are common in CCAA proceedings and have been approved by courts when granting Initial Orders on a number of occasions, including (for example) in *Muscletech* (another CCAA case with the objective of effecting a global resolution of litigation claims).¹¹

24. The CCAA court has jurisdiction to grant such a tolling provision pursuant to its authority under s. 11.02(1) of the CCAA to grant a stay of proceedings “on any terms that it may impose” and under s. 11.02(2) to grant further stays (beyond the initial stay period) also “on any terms that it may impose”. This Court’s jurisdiction is also supported by s. 11 of the CCAA, which allows this Court to make any order it considers appropriate in the circumstances.¹²

25. The tolling provision in clause 20 of the Initial Order is a necessary corollary to the CCAA Stay in clause 18 of the Initial Order. It protects the interests of the Tobacco Claimants generally, many of which may have potential claims that have not yet been commenced or may

¹¹ *Re Muscletech Research & Development Inc.*, 2006 CarswellOnt 3632 (Sup Ct) at para. 5. See also *Re ScoZinc Ltd.*, 2009 NSSC 162 (Claims Officer) at para. 5; *Re Scaffold Connection Corp.*, 2000 ABQB 35 at para. 26.

¹² CCAA, ss. 11, 11.02(1) and 11.02(2).

be faced with time limitations within Proceedings that are currently underway. It would be unfair if the Stay were to preclude those steps at the same time that the time continues to run with respect to the ability of those claimants to take those steps if the CCAA restructuring fails.

26. The CCAA Stay and the tolling provision also protect the Applicants from having to devote substantial resources to pursuing litigation in relation to specific stakeholders when they should be allocating those same resources to developing a restructuring plan with a view to achieving a global resolution of all current and potential Tobacco Litigation for the benefit of all stakeholders.¹³ A successful global resolution of the Tobacco Claims would render any appeal from the Quebec Appeal Judgment to the SCC moot.

27. Finally, staying and tolling the Leave Application prevents the Quebec Plaintiffs from taking steps to increase their leverage in the CCAA restructuring, at the expense of the interests of other stakeholders. Those steps, if they are allowed to proceed, give the Quebec Plaintiffs unfair advantage that is not available to other stakeholders.

28. As this Court recognized in granting the Initial Order,¹⁴ it is well-established that one of the purposes of the CCAA Stay is to maintain a level playing field among the creditors and stakeholders of the debtor company. This means that the CCAA Court should, to the extent possible, ensure that there is no manoeuvring by particular creditors seeking to secure leverage relative to other claimants.¹⁵

¹³ As this Court held in *Nortel*, this is a recognized purpose of the CCAA Stay: *Re Nortel Networks Corp.*, 2009 CarswellOnt 4806 (Sup Ct) at para. 36.

¹⁴ *Re Imperial Tobacco Canada Limited*, 2019 ONSC 1684 at para. 9. See also *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 CarswellOnt 2652 (Sup Ct) at para. 16; *Re TOYS "R" US (Canada) Ltd.*, 2017 ONSC 5571 at para. 7.

¹⁵ See, for example, *Re Canadian Airlines Corp.*, 2000 CarswellAlta 622 (QB) at para. 19, citing *Re Pacific National Lease Holding Corp.* (1992), 15 CBR (3d) 265 (BC CA).

29. In their best-case scenario, it is evident that the Quebec Plaintiffs are hoping that the Leave Application will proceed, that they will be allowed to respond to the Leave Application and that the SCC will deny leave to appeal. If that happens, the Quebec Plaintiffs plainly believe that this will strengthen their position for seeking to have the Deposit that was paid to the Quebec Court of Appeal distributed to them ahead of all other claimants, including other claimants who may have similar or identical claims against the Applicants that have not yet been reduced to judgment. Whether this argument succeeds or fails, a similar opportunity to attempt to improve their leverage is not available to other stakeholder groups.

30. The entitlement to the Deposit and the extent of the resulting leverage of the Quebec Plaintiffs are live issues in this case that must be resolved based on the *status quo* as it existed on the filing date in order to treat all stakeholders in this proceeding equitably. The Quebec Plaintiffs should not be permitted to take steps post-filing that are designed to improve that leverage and that thereby run afoul of the “level playing field” principle.

31. If the SCC were to grant leave to appeal, in order to avoid the Applicants having to devote resources to pursuing this litigation at the expense of other stakeholders, this Court would have to conclude that the appeal is subject to the CCAA Stay and that the tolling provision should apply to prevent the time periods in relation to the appeal from expiring during the CCAA Stay. This latter eventuality is not much different from the position in which the Applicants and the Quebec Plaintiffs currently find themselves. However, the Quebec Plaintiffs will have had the unfair advantage of seeing whether the SCC will deny leave to appeal.

32. The CCAA Stay precludes both the Applicants and the Quebec Plaintiffs from taking further steps in the Quebec Class Actions in the interests of maintaining a level playing field among all stakeholders in this CCAA proceeding. The Applicants rely on deference by the SCC,

by way of comity, to the orders of this Court in the exercise of its bankruptcy jurisdiction to ensure that the operation of the CCAA Stay does not prejudice either party in relation to proceedings (or potential proceedings) that may be brought in the SCC.¹⁶ Clause 61 of the Initial Order – which is a common provision in CCAA initial orders – supports this deference, providing that the CCAA Court requests the aid and recognition of any court having jurisdiction in Canada to give effect to this Order and to assist the Applicants in carrying out the terms of the Order.

33. If this Court agrees that the Leave Application is subject to the CCAA Stay and the tolling provision, there is no need for this Court to consider the relief requested by the Quebec Plaintiffs – namely, the right to respond to the Leave Application and/or a declaration that the CCAA proceeding must terminate while the Leave Application is argued. Equally, there is no need to consider the relief requested by JTI and RBH that they should be authorized to file the Leave Application to preserve their rights, but that the Quebec Plaintiffs should be stayed from responding.

D. Extension of the CCAA Stay to the Other Defendants

34. The Applicants request that the CCAA Stay under clause 19 of the Initial Order be amended to provide that none of the Pending Litigation or any Proceeding in relation to any other Tobacco Claim shall be commenced, continued or take place in respect of any person named as a defendant or respondent in any of the Pending Litigation (referred to as the “**Other Defendants**”).

¹⁶ As the Federal Court stated in *Always Travel v. Air Canada*, 2003 FCT 707 at para. 10, the Federal Court – and by extension the Supreme Court of Canada – should generally give effect to such orders out of comity and on the basis that Canadian courts accord “full faith and credit” to each other. This same principle is advanced in the decision relied upon by the Quebec Plaintiffs – *Re Open Hydro Technology Canada Ltd.*, 2018 NSSC 283, Book of Authorities of the Quebec Plaintiffs, Tab 6.

35. This relief will ensure that the Initial Order is consistent with the initial order obtained by JTI and with the relief sought by RBH in this come-back hearing. Such relief recognizes the common interests of the Applicants and the Other Defendants in achieving a global resolution of the Tobacco Claims. It facilitates the restructuring of each of the CCAA debtors by ensuring that proceedings against any of the defendants to the Pending Litigation cannot undermine that restructuring.

36. As the Applicants submitted in support of the Initial Order, a CCAA Court has on more than one occasion extended a stay of proceedings in favour of a co-defendant of the debtor in order to facilitate the restructuring of the debtor and to ensure that inter-related proceedings are resolved consistently within the CCAA proceeding.¹⁷

E. Professional Fees Should Not be Taxed Every 90 Days

37. There is no legal authority requiring the professional fees of a CCAA debtor to be taxed every 90 days in a CCAA proceeding.¹⁸ A requirement to return to this Court every 90 days to tax the professional fees, subject to prior notice to the Service List,¹⁹ would require the Applicants to devote significant time and effort to this task at a critical time for the restructuring, raise concerns regarding the protection of privilege while these proceedings are underway, as well as needless occupying this Court's already crowded docket.

¹⁷ *Re Grace Canada Inc.*, 2005 CarswellOnt 6648 (Sup Ct) at para. 12; *Campeau v. Olympia & York Developments Ltd.*, 1992 CarswellOnt 185 (Ct J (Gen. Div.)) at paras. 23 – 25.

¹⁸ The only authority relied upon by the Quebec Plaintiffs is an article in an academic journal by Janis P. Sarra entitled "Imhotep's Ingenuity, Developing Canada's Capacity to Address Corporate Group Insolvency", *Annual Review of Insolvency Law 2013* (Carswell) at 230-231, Book of Authorities of the Quebec Plaintiffs, Tab 24. This article cites no legal authority for requiring taxation of professional fees in a CCAA proceeding and points to a number of possible measures to enhance transparency and accountability in relation to professional fees in a corporate insolvency.

¹⁹ Factum of the Quebec Plaintiffs, para. 63.

38. Such an order is not necessary in order to protect stakeholder interests. In the interests of transparency, the Monitor is able to provide any stakeholder, upon request, and this Court with an update as to the amount of professional fees incurred at any given time.

F. No Basis to Lift Stay to File Application for Bankruptcy Order

39. The Applicants oppose the Quebec Plaintiffs' request to lift the stay to file an application for a bankruptcy order. A CCAA stay should only be lifted in extraordinary circumstances, including to protect rights that may be lost or jeopardized as a result of the Stay or to address "severe prejudice".²⁰ The Quebec Plaintiffs do not put forward any such basis for lifting the Stay to file a bankruptcy application at this stage.

40. The Quebec Plaintiffs rely on their general desire to ensure a "smooth transition" into bankruptcy if the CCAA fails. The only case they cite in support of this request – *Grant Forest* – is a case in which the CCAA proceeding had run its course and the Court was being asked to transition the proceeding into a bankruptcy in order to reverse priorities in relation to a pension deemed trust over sale proceeds held by the debtor.²¹ No such facts exist here.

41. Filing a bankruptcy application at this stage is unnecessary to ensure a smooth transition. The Court of Appeal affirmed in *Grant Forest* that, where a CCAA proceeding is transitioned into a bankruptcy at the conclusion of the restructuring under the CCAA, there is no "gap"

²⁰ See *Canadian Airlines*, above, at para. 20.

²¹ *Re Grant Forest Products Inc.*, 2013 ONSC 5933 at para. 106, Book of Authorities of the Quebec Plaintiffs, Tab 21, aff'd 2015 ONCA 570 [*Grant Forest Appeal*].

between the CCAA and the BIA. The CCAA Stay is simply lifted at that stage to allow the bankruptcy application to be filed.²²

42. The Applicants and the Monitor have been working together to address questions from employees, suppliers and other stakeholders regarding the CCAA proceedings. In this context, the Applicants have advised stakeholders that the CCAA proceeding is not a bankruptcy and provides for business to continue in the ordinary course, subject to the Initial Order. If a bankruptcy proceeding were initiated now, even if it remains subject to the CCAA Stay, this would create confusion and uncertainty, thereby undermining the efforts to continue business in the ordinary course for the benefit of all stakeholders.

43. An eventual bankruptcy would not be in the interests of any stakeholder, including the Quebec Plaintiffs, as it would result in the cessation of going concern operations and of the resulting value from those operations, including the ongoing participation of the BAT Group. At a minimum, the Quebec Plaintiffs should be required to articulate a specific rationale for allowing the bankruptcy application to be filed despite the potential confusion that will be created and the impact on other stakeholders and those other stakeholders should have a meaningful opportunity to make submissions. There is no urgency to addressing this issue now.

G. Payments for Shared Services Should Continue

44. The Quebec Plaintiffs seek to prevent all intercompany payments to the Applicants' ultimate parent, British American Tobacco p.l.c. ("**BAT**") or the BAT Affiliates (collectively, the "**BAT Group**"), including dividends, interest, royalties and payments for shared services,

²² *Grant Forest Appeal*, para. 112, citing the decision of the Supreme Court of Canada in *Re Ted Leroy* at paras. 78 and 80.

except for “limited transactions related to the provision of physical inventory at fair market value”.²³ This request for relief is redundant, factually ill-founded or contrary to the CCAA.

(a) Dividends, Principal and Interest Payments

45. In the case of dividends, no declaration or payment of dividends by the Applicants in favour of the BAT Group has occurred since 2014.²⁴ Legal constraints apply to the declaration and payment of dividends where a company is insolvent.²⁵ There is no need for this Court make an order addressing this.

46. There is no evidence whatsoever of any other distribution of profits by the Applicants to affiliates outside Canada.²⁶

47. With respect to payments of principal and interest, the Applicants do not currently owe any outstanding indebtedness to BAT or to the BAT Affiliates, including the BAT Affiliate (BATIF) that has, in the past, provided financing for the Applicants’ operations. Although the Applicants have an outstanding revolving credit facility with BATIF in the amount of \$30 million, there is no indebtedness outstanding under this facility and the Applicants do not anticipate a need to draw on this facility during the CCAA proceeding.²⁷ Moreover, the Applicants are precluded under the Initial Order from incurring new indebtedness to any person, or from paying principal or interest on any indebtedness, without further Order of this Court.²⁸

²³ Factum of the Quebec Plaintiffs, para. 43.

²⁴ Responding Thauvette Affidavit, para. 32.

²⁵ *Canada Business Corporations Act*, RSC 1985, c. C-44, s. 42.

²⁶ Responding Thauvette Affidavit, paras. 31 to 32.

²⁷ First Thauvette Affidavit, para. 99; Responding Thauvette Affidavit, para. 25(b)(i).

²⁸ Initial Order, clause 14.

(b) Shared Services

48. With respect to shared services that are provided by one or more members of the BAT Group, the performance of these services by other members of the BAT Group is a direct product of the highly integrated nature of the global business engaged in by the BAT Group. This integration occurred in the early 2000s and is described in greater detail in the Responding Thauvette Affidavit.²⁹ This transition has benefited the Applicants by enhancing the Applicants' profitability, in part due to the ability to capitalize on the economies of scale, increased buying power, and other efficiencies and expertise associated with centralized, standardized business functions.³⁰

49. It is common in the case of CCAA debtors that are part of a larger corporate group to permit the continuance of shared service arrangements provided by corporate affiliates, particularly where the continued provision of those services is critical to the debtor's ability to remain in business during the restructuring. There are numerous examples of such orders.³¹

50. The services provided by the BAT Group to the Applicants are critical to their ongoing businesses. The Applicants have provided detailed evidence of the nature of the critical shared services that must continue to be provided by the BAT Group and be paid for by the Applicants in the ordinary course during this CCAA proceeding. In particular:

²⁹ Responding Thauvette Affidavit, paras. 3, 6 to 10.

³⁰ Responding Thauvette Affidavit, para. 11.

³¹ See, for example, *Arrangement Relatif a Boamber Inc.*, 2018 QCCS 3170 at para. 20; *Arrangement Relatif a Bloom Lake, g.p.l.*, 2015 QCCS 169 at para. 12; *Re Canwest Publishing Inc.*, 2010 CarswellOnt 18852 (Sup Ct) at para. 8; *Re Cinram International Inc.*, 2012 ONSC 3767 at para. 23.

- (a) As set out in detail in the Responding Thauvette Affidavit, ITCAN purchases most of its finished tobacco products, as well as the PRRPs, from BAT Group members.³²
- (b) BAT provides ITCAN with access to innovations and technology (including patents, know-how, rights in design, copyright, database rights and plant variety rights) and communications packages, in exchange for royalty payments from ITCAN. Innovation is key to the ability of the Applicants to maintain and increase market share, particularly given restrictions on traditional marketing methods for tobacco products. The Applicants have benefitted in tangible ways from innovations developed by the BAT Group that have allowed them to distinguish themselves from their competitors in the Canadian marketplace.³³
- (c) ITCAN's computer systems are fully integrated with those of the BAT Group on a global SAP computer platform. This systems integration involves hosting of all digital data and programs on a global server located in Europe. A Brazilian BAT affiliate (Souza Cruz) provides ITCAN with a full range of IT services.³⁴
- (d) The BAT Group provides support to the Applicants, among others, for the development of new products, the maintenance of existing products, ensuring

³² Responding Thauvette Affidavit, paras. 13 to 14.

³³ Responding Thauvette Affidavit, paras. 15 to 18. There are no royalty payments payable by the Applicants to BAT Group members for the use of any trademarks as all of the Applicants' trademarks are held by their Canadian subsidiaries.

³⁴ Responding Thauvette Affidavit, paras. 19 and 20.

compliance with legal and regulatory requirements and delivering productivity savings.³⁵

- (e) The BAT Group's Finance Shared Service Centre provides transaction processing services for accounting functions to the Applicants, among other services, as set out more fully in the Responding Thauvette Affidavit.³⁶

- (f) The BAT Group provides important back-office, support and leadership functions at the centre or regional level. These include operations (e.g. supply chain planning); finance (e.g. centralized financial services, including accounting, tax and audit activities, treasury functions, and insurance services); marketing; human resources; strategy and planning; directors; mergers and acquisitions; legal and external affairs; and research and development. The specific services in these areas that are performed by the BAT Group for the Applicants are set out in greater detail in the Responding Thauvette Affidavit.³⁷

51. The services provided by the BAT Group are collectively vital for preserving the value of the underlying business and are necessary for any modern-day large business. The Applicants are completely reliant on the services provided by the BAT Group and the cessation or interruption of such services would bring the Applicants' operations to a virtual standstill.³⁸

52. For example, without access to its IT systems and the BAT Group's Global SAP system, the Applicants would not be able to order any inventory to sell to their customers. In addition,

³⁵ Responding Thauvette Affidavit, para. 21.

³⁶ Responding Thauvette Affidavit, paras. 22 and 23.

³⁷ Responding Thauvette Affidavit, para. 25.

³⁸ Responding Thauvette Affidavit, para. 27.

without the accounts receivable services provided by a BAT affiliate, the Applicants would be unable to collect payment for products sold.³⁹

53. In the longer term, if the Applicants ceased paying the Innovation Royalties to the BAT Group, the Applicants would lose the ability to leverage innovations that are critical to attracting customers. This would place the Applicants at serious risk of losing market share to their competitors or to the illegal tobacco market.⁴⁰

54. If the Applicants could not rely upon the shared services provided by the BAT Group, the Applicants would either have to develop the internal capabilities to fill those needs or obtain those services from third party providers. It is far from certain that some or all of the shared services could be replicated either internally or with third-party suppliers. Even if such a course of action were possible, it could only happen at the risk of significant disruption and potential cost, to the detriment of the Applicants' business and profitability and the ability to focus on achieving a viable restructuring solution.⁴¹

55. There is no legal basis for requiring the BAT Group to continue providing the above shared services in the post-filing period without payment. Section 11.01 of the CCAA states that no order made under section 11 or section 11.02 has the effect of "prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made" or "requiring the further advance of money or credit."⁴²

³⁹ Responding Thauvette Affidavit, para. 28.

⁴⁰ Responding Thauvette Affidavit, para. 29.

⁴¹ Responding Thauvette Affidavit, para. 30.

⁴² CCAA, s. 11.02.

56. By virtue of this provision, the BAT Affiliates cannot be legally required to continue providing these shared services during the post-filing period on credit. There is no basis for the Quebec Plaintiffs' argument that this Court can require the BAT Group to continue to provide such services without payment simply because these companies are "related parties" to the Applicants.⁴³ The decision of this Court in *Essar Steel Algoma*, relied upon by the Quebec Plaintiffs for this submission, is entirely distinguishable on its facts.⁴⁴

57. In *Essar Steel Algoma*, section 11.02 of the CCAA was held not to apply to certain inter-company arrangements which arose from the sale of critical assets of the debtor to an affiliate in exchange for cash. However, the basis for this Court's conclusion was that these were not genuine arm's length transactions for the supply of goods or services to the CCAA debtor. Instead, these arrangements were, in essence, a financing transaction orchestrated by the debtor's ultimate parent to finance the already over-leveraged business of the debtor. The services allegedly provided by the affiliate were in fact provided by the CCAA debtor's employees. This arrangement was subsequently found by this Court to be oppressive.⁴⁵

58. There is no similar evidence in relation to the essential services provided by the BAT Group to allow the Applicants to operate critical functions of their business. The evidence before this Court on the filing date – which is the only evidence in the record on this point – was that the Applicants have processes in place to ensure that all of their shared services and other intercompany arrangements are on "arm's length terms".⁴⁶ The Quebec Plaintiffs do not present

⁴³ Factum of the Quebec Plaintiffs, para. 52.

⁴⁴ *Re Essar Steel Algoma Inc.*, 2016 ONSC 6459, Book of Authorities of the Quebec Plaintiffs, Tab 20.

⁴⁵ See *Algoma*, above at paras. 19 and 20.

⁴⁶ First Thauvette Affidavit, para. 114.

any evidence to suggest otherwise. Nor do the payments to the members of the BAT Group for the shared services constitute a transfer of profits.⁴⁷

59. By virtue of the Initial Order, any amounts out of the ordinary course that the Applicants propose to make in any Intercompany Transactions (as defined in the Initial Order) are now subject to approval by the Monitor, in its capacity as court officer.⁴⁸

60. In the meantime, there is no basis for prohibiting payments to the BAT Group for shared services, as the Quebec Plaintiffs request, and the *status quo* should be maintained.

H. Ontario's Motion Should Be Denied

61. Ontario seeks to have the CCAA Stay lifted to allow it to proceed with the HCCR Litigation against all defendants, including the Applicants, JTI and RBH. Ontario proposes that the CCAA Stay will remain in effect in relation to any future proceeding to enforce a judgment or to collect any amount owing by the Applicants, JTI and/or RBH.⁴⁹

62. Ontario's submissions are misguided. It is well-established that the CCAA Stay may only be lifted in extraordinary circumstances and only where this Court is satisfied that the "balance of prejudices" justifies this step.⁵⁰ However this test is articulated – and Ontario cites a number of cases on this issue – Ontario cannot satisfy it.

63. While Ontario may be able to establish prejudice as a result of the imposition of the CCAA Stay, this prejudice is no greater or of any different quality than the prejudice experienced

⁴⁷ Responding Thauvette Affidavit, paras. 31 to 32.

⁴⁸ Initial Order, clauses 7(d) and 9.

⁴⁹ Factum of Ontario, para. 2.

⁵⁰ *Re Canadian Airlines*, above, para. 20.

by all other plaintiffs in Pending Litigation who have invested time, effort and money in pursuing their claims and whose claims are stayed. If the relief requested by Ontario is granted, all other similarly situated claimants would be entitled to the same relief and the purpose of this CCAA Proceeding – namely, to achieve a global resolution of all of the Pending Litigation and the Tobacco Claims within the CCAA – would be defeated. Among other things, the resolution of the Pending Litigation outside the CCAA would substantially delay the outcome of these Proceedings.

64. Moreover, Ontario cannot satisfy the requirement to demonstrate that the “balance of prejudices” favours its position. Granting the requested relief would create severe prejudice for the Applicants, who would be required to resume devoting resources to defending this specific litigation – and the litigation of all other plaintiffs who subsequently claim entitlement to the same relief – on a timetable outside the CCAA, at the expense of efforts to achieve a global restructuring for all stakeholders. If the same relief were not extended to other similarly situated litigants, the Applicants’ other litigation creditors would view Ontario as having secured an unfair advantage over them, contrary to the “level playing field” principle. This prejudice is not mitigated by Ontario’s concession that the enforcement of any judgment against the Applicants would be subject to the Stay.

65. This Proceeding will only be successful if all of the Pending Litigation and the Tobacco Claims are resolved under the umbrella of the CCAA, in a co-ordinated and expedited fashion that avoids inconsistent results. The manner in which this can occur must be resolved in due course under the protection of the CCAA Stay, under the supervision of this Court and the Monitor and with the advice and assistance of (among others) the Interim Tobacco Claimant Coordinator.

66. The Applicants are entitled to a reasonable opportunity to determine whether they can achieve this result and to be protected from the manoeuvres of creditors such as Ontario while they seek to do so.

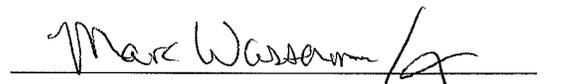
PART IV -NATURE OF THE ORDER SOUGHT

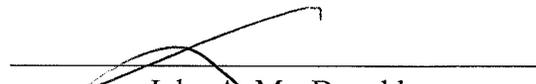
67. The Applicants therefore request that the CCAA Stay be extended until June 28, 2019 and that the Stay be extended to the Other Defendants, as provided in the Applicants' Notice of Motion.

68. The Applicants further submit that the relief requested by the Quebec Plaintiffs be denied, with the exception of their request to lift the CCAA Stay to seek approval of the Insurance Settlements.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:


Deborah Glendinning


Marc Wasserman


John A. MacDonald


Michael De Lellis

Schedule “A”

LIST OF AUTHORITIES

Case Law

1. *Always Travel v. Air Canada*, 2003 FCT 707
2. *Arrangement Relatif a Bloom Lake, g.p.l.*, 2015 QCCS 169
3. *Arrangement Relatif a Boamber Inc.*, 2018 QCCS 3170
4. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 CarswellOnt 2652 (Sup Ct)
5. *Campeau v. Olympia & York Developments Ltd.*, 1992 CarswellOnt 185 (Ct J (Gen Div))
6. *Re Canadian Airlines Corp.*, 2000 CarswellAlta 622 (QB)
7. *Re Canwest Publishing Inc.*, 2010 CarswellOnt 18852 (Sup Ct)
8. *Re Cinram International Inc.*, 2012 ONSC 3767
9. *Re Essar Steel Algoma Inc.*, 2016 ONSC 6459
10. *Re Grace Canada Inc.*, 2005 CarswellOnt 6648 (Sup Ct)
11. *Re Grant Forest Products Inc.*, 2013 ONSC 5933, aff'd, 2015 ONCA 570
12. *Re Imperial Tobacco Canada Limited*, 2019 ONSC 1684
13. *Re Muscletech Research & Development Inc.*, 2006 CarwellOnt 3632 (Sup Ct)
14. *Re Nortel Networks Corp.*, 2009 CarswellOnt 4806 (Sup Ct)
15. *Re Open Hydro Technology Canada Ltd.*, 2018 NSSC 283
16. *Re Pacific National Lease Holding Corp.* (1992), 15 CBR (3d) 265 (BC CA)
17. *Re Scaffold Connection Corp.*, 2000 ABQB 35
18. *Re ScoZinc Ltd.*, 2009 NSSC 162 (Claims Officer)
19. *Re Ted LeRoy Trucking [Century Services] Ltd.*, 2010 SCC 60
20. *Re TOYS "R" US (Canada) Ltd.*, 2017 ONSC 5571

Other Authorities

21. Janis P. Sarra, “Imhotep’s Ingenuity, Developing Canada’s Capacity to Address Corporate Group Insolvency”, *Annual Review of Insolvency Law 2013* (Carswell)

Schedule “B”

CANADA BUSINESS CORPORATIONS ACT

R.S.C. 1985, c. C-34, as amended

Dividends

42. A corporation shall not declare or pay a dividend if there are reasonable grounds for believing that

(a) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation’s assets would thereby be less than the aggregate of its liabilities and stated capital of all classes.

COMPANIES’ CREDITORS ARRANGEMENT ACT

R.S.C. 1985, c. C-36, as amended

General power of court

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

Stays, etc. — other than 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 30 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

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