

**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

**MOTION RECORD OF THE MOVING PARTY,
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**

MOTIONS TO LIFT STAYS IN

**Court File No. CV-19-615862-00CL, *JTI-Macdonald Corp., Re*
Court File No. CV-19-616077-00CL, *Imperial Tobacco Canada Limited et al., Re*
Court File No. CV-19-616779-00CL, *Rothmans, Benson & Hedges Inc., Re*
RETURNABLE APRIL 4 - 5, 2019**

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**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

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| 1. | Notice of Motion dated March 29, 2019 |
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TAB 1

**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

NOTICE OF MOTION

Her Majesty the Queen in right of Ontario ("**Ontario**"), will make a motion to a judge presiding over the Commercial List on Thursday April 4, 2019 at 10:00 a.m. or as soon after that time as the motion can be heard at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard:

- in writing under subrule 37.12.1(1) because it is (*insert on of on consent, unopposed or made without notice*);
- in writing as an opposed motion under subrule 37.12.1 (4);
- orally.

THE MOTION IS FOR:

1. An Order lifting the stay, effected by paragraphs 18 and 19 of the Initial Order (the "**ITCAN Stay**") of the Honourable Justice McEwen dated March 12, 2019 (the "**ITCAN Initial Order**"), only of the Ontario HCCR Action, as against the following five defendants to that action: Imperial Tobacco Canada Limited ("**ITCAN**"), British American Tobacco p.l.c., British

American Tobacco (Investments) Limited; B.A.T. Industries p.l.c. and Carreras Rothmans Limited.

2. An Order varying the ITCAN Initial Order by adding the following paragraph as Paragraph 19A of the ITCAN Initial Order:

THIS COURT ORDERS that nothing in this Order shall have the effect of staying, suspending or otherwise delaying the conduct of Action No. CV-09-387984 bearing the title of proceedings *Her Majesty the Queen in right of Ontario v. Rothmans Inc. et al.* commenced in the Ontario Superior Court of Justice (the “**Ontario HCCR Action**”), and Her Majesty the Queen in right of Ontario is authorized to and shall have the right in its discretion to continue the Ontario HCCR Action against the following defendants: Imperial Tobacco Canada Limited, British American Tobacco p.l.c., British American Tobacco (Investments) Limited; B.A.T. Industries p.l.c. and Carreras Rothmans Limited. Notwithstanding anything to the contrary in this Order, the taking of any proceedings to enforce any judgment and/or collect any amount owing or found to be owing by Imperial Tobacco Canada Limited in the Ontario HCCR Action shall be stayed pending further Order of this Court.

3. An Order lifting the ITCAN Stay to authorize and permit:

- (a) the Ontario Superior Court of Justice to take whatever steps are necessary and proper to formally effect the amendments to Ontario’s Amended Fresh as Amended Statement of Claim as ordered by Master Short on March 8, 2019; and
- (b) Ontario to serve the Second Amended Fresh as Amended Statement of Claim on all of the defendants to the Ontario HCCR Action.

4. If necessary, an order abridging the time for service and filing of Ontario's Notice of Motion, Motion Record and Factum, dispensing with service on any person other than those served, and declaring that the motion is properly returnable on April 4, 2019; and

5. Such further and other relief as counsel for Ontario may advise and this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. The Ontario HCCR Action was commenced by Ontario on September 29, 2009, pursuant to section 2 of the *Tobacco Damages and Health Care Costs Recovery Act, 2009*, S.O. 2009, c. 13 (the "**Ontario HCCR Act**"), against thirteen tobacco companies, including JTI-Macdonald Corp. ("**JTIM**"), ITCAN and Rothmans, Benson & Hedges Inc. ("**RBH**"), and the Canadian Tobacco Manufacturers' Council ("**CTMC**").

2. Ontario seeks to recover from all fourteen defendants in the Ontario HCCR Action the costs it incurred in regard to the provision of health care benefits caused or contributed to by a "tobacco related wrong" which is defined in section 1(1) of the Ontario HCCR Act to be "a tort committed in Ontario by a manufacturer [of a tobacco product] which causes or contributes to tobacco related disease", or "a breach of a common law, equitable or statutory duty or obligation owed by a manufacturer to persons in Ontario who have been exposed or might become exposed to a tobacco product".

3. Of the fourteen defendants in the Ontario HCCR Action only three defendants, JTIM, ITCAN and RBH, are defendants and judgment debtors in *Imperial Tobacco Canada ltée c. Conseil Québécois sur le tabac et la santé*, [2019] J.Q. No. 1387 which involves two Quebec

Class Actions. The first class action (the Blais action) sought damages on behalf of persons in Québec who developed lung cancer, throat cancer or emphysema as a result of smoking cigarettes manufactured by the defendants. The second class action (the Létourneau action) sought damages on behalf of persons in Québec who, as a result of smoking cigarettes manufactured by the defendants, developed a dependence on nicotine.

4. Justice Riordan of the Quebec Superior Court rendered a trial judgment dated June 9, 2015, against JTIM, ITCAN and RBH, which have their principal places of business in Canada. The Court of Appeal of Quebec released its decision on March 1, 2019, in which it affirmed the trial judgment in its entirety other than by reducing the damages award by \$1,009,920 from the amount of \$6,858,864,000 awarded by the trial judge to a damages award of \$6,857,854,080 plus interest and additional indemnity. The Court of Appeal of Quebec awarded legal costs to the plaintiffs.

5. On March 8, 2019, JTIM brought an *ex parte* application under the CCAA before Justice Hainey who granted the JTIM Initial Order.

6. The JTIM Initial Order effected a stay of, *inter alia*, the Ontario HCCR Action until April 5, 2019 as against all fourteen defendants, including JTIM, ITCAN and RBH, four defendant corporations with their principal place of business in the United Kingdom, five defendant corporations with their principal place of business in the United States, and two other Canadian corporations.

7. On March 12, 2019, ITCAN and Imperial Tobacco Company Limited (which is not a defendant in the Ontario HCCR Action), brought an *ex parte* application under the CCAA before Justice McEwen who granted the ITCAN Initial Order.

8. The ITCAN Initial Order effected a stay (the “**ITCAN Stay**”) of, *inter alia*, the Ontario HCCR Action until April 11, 2019 as against the following five defendants: ITCAN, British American Tobacco p.l.c. (UK), British American Tobacco (Investments) Limited (UK); B.A.T. Industries p.l.c. (UK) and Carreras Rothmans Limited (UK).

9. On March 22, 2019, RBH brought an *ex parte* application under the CCAA before Justice Pattillo who granted the RBH Initial Order.

10. The RBH Initial order effected a stay (the “**RBH Stay**”) of, *inter alia*, the Ontario HCCR Action until April 19, 2019, as against the following two defendants: RBH and Philip Morris International, Inc. (US).

11. There is no evidence that the two Quebec Class Action Judgments, have or will have any financial or other impact whatsoever on any of the eleven defendants other than JTIM, ITCAN and RBH.

12. In particular, JTIM, ITCAN and RBH did not tender any evidence that, if the JTIM Stay, the ITCAN Stay and the RBH Stay were not granted in favour of the other eleven defendants in the Ontario HCCR Action who have not filed under the CCAA, any of those eleven defendants would be rendered insolvent, put out of business and/or have their values destroyed for their employees, suppliers and customers.

13. Over the past decade, Ontario has invested a tremendous amount of time, money and effort to prosecute the Ontario HCCR Action in order to hold the thirteen defendant tobacco companies and the CTMC accountable for their conduct over the period from 1950 to the present. By obtaining *ex parte* the stays of the Ontario HCCR Action, JTIM, ITCAN and RBH have used the CCAA as a sword to cut down Ontario's efforts and cause delay for an indefinite period of time of likely several years and cause serious prejudice to Ontario.

14. The JTIM Stay, the ITCAN Stay and the RBH Stay have the effect of removing the Ontario HCCR Action from the nine year long effective case management by Master Short and Justice Conway and the ongoing oversight of the action's progress toward trial by Regional Senior Justice Morawetz. If the JTIM Stay, the ITCAN Stay and the RBH Stay are continued past April 4, 2019, they will act to undo the work that Ontario, all of the defendants, Master Short, Justice Conway and Justice Morawetz have done to move the Ontario HCCR Action forward and prepare it for the projected trial commencement date of late 2020/early 2021. Moreover, Ontario will be barred from proceeding forward with its claims against eleven defendant corporations who have not filed under the CCAA. This state of affairs is highly prejudicial to Ontario.

15. In the hearing of an *ex parte* initial application under the CCAA, it is incumbent on the applicant to be scrupulously fair and transparent with respect to the disclosure to the Court of all facts material to the Court's decision whether to grant the Initial Order in the form requested by the applicant. Such full and frank disclosure was not provided by JTIM, ITCAN and RBH to any of the three judges presiding at the initial applications in regard to the Ontario HCCR Action.

16. The balance of convenience, the assessment of the relative prejudice to Ontario versus JTIM, ITCAN and RBH, and the merits of the Ontario HCCR Action favour the granting of the Orders requested by Ontario. Just as JTIM, ITCAN and RBH seek to maintain their *status quo* and carry on business as usual without disruption, Ontario similarly seeks to maintain the *status quo* of continuing to prosecute and prove its claim against all fourteen defendants in the Ontario HCCR Action.

17. The approach proposed by Ontario is not novel or unreasonable. In fact, this is precisely the approach followed for six years during JTIM's prior CCAA proceeding from 2004 – 2010, and while JTIM, ITCAN and RBH pursued their appeals in the Quebec Class Actions before the Court of Appeal of Quebec from June, 2015 – March, 2019.

18. Sections 11.02(1) and 11.02(3)(a) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended.

19. Rules 2.03, 3.02, 37.14(1)(a), 37.14(2), 37.14(4) and 39.01(6) of the *Rules of Civil Procedure*.

20. Such further and other grounds as counsel for Ontario may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The affidavit of Peter Entecott, sworn March 28, 2019, and the exhibits attached thereto filed in support of Ontario's motion in Court File No. CV-19-615862-00CL, *JTI-Macdonald Corp., Re*;

2. The Motion Record, Factum and Book of Authorities filed in support of Ontario's motion in Court File No. CV-19-615862-00CL, *JTI-Macdonald Corp., Re*;

3. Such further and other evidence as counsel for Ontario may advise and this Honourable Court may permit.

Date: March 29, 2019

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TO: ATTACHED SERVICE 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**

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

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

Proceeding commenced at Toronto

NOTICE OF MOTION

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