Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

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 **JTI-MACDONALD CORP.**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED** AND **IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Applicants

FACTUM OF THE QUEBEC CLASS ACTION PLAINTIFFS (RE: EXTENSION MOTIONS)

June 21, 2019

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TO: JTIM Service List

AND TO: ITCAN Service List

AND TO: RBH Service List

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FACTUM OF THE QUEBEC CLASS ACTION PLAINTIFFS[1]

PART I - OVERVIEW

1. The QCAPs are prepared, at this time, to continue to engage in a hopefully constructive CCAA process (including in the Court-ordered mediation) with a view to resolving the claims of the Quebec Class Members.

2. However, it is respectfully submitted that this Court should ensure that any extension of the stay of proceedings is made on terms that are fair to all parties involved and that the process moves forward diligently and in good faith. While the Court-ordered mediation is intended to assist all stakeholders in arriving at a resolution of their claims, mediation does

[1] To avoid duplication in the three concurrent CCAA proceedings, a single factum is filed by the QCAPs in connection with the ITCAN Notice of Motion, the RBH Notice of Motion and the JTIM Notice of Motion. Capitalized terms used herein are defined in the glossary attached as Annex 1.

not supplant the CCAA process and should not serve as a pretext for delay by the Applicants.

3. The QCAPs submit that the length of the extension of the stay requested by the Applicants is excessive and that, if granted, should be limited to September 27, 2019, rather than December 16, 2019, as Applicants propose. The QCAPs also submit that there is no reason why the Applicants cannot propose a *bona fide* Plan by September 27, 2019 if they truly intend to seek a resolution of the outstanding claims. It is noteworthy that even though they have asked for such a lengthy extension, the Applicants have indicated that the process is "*unlikely to be complete before year end and could take more time beyond that.*"[2]

4. The shorter extension period advocated by the QCAPs would enable the Court to more closely supervise the process and to assess if meaningful progress is being made. This would assist the Court in determining whether any further continuation of the stay of proceedings is thereafter justified and would assist all stakeholders in determining whether an acceptable "global settlement" is even possible. The shorter extension would also create a meaningful milestone that would assist the mediation process and promote its timely progress.

5. In order to facilitate the current CCAA process, the QCAPs also request that the court-to-court protocol, which the Monitors referenced in their joint letter of June 11, 2019, be implemented forthwith.

6. Considering that the Applicant JTIM has admitted that it was advised of, and permitted, its related-company, TM to contravene the March 19, 2019 Order, it is further requested that the Court order that any amount that the TM Receiver has applied from funds of JTIM that it was holding (apparently an amount in excess of $1.33 million), be repaid to JTIM, as well as any other relief or sanction that the Court considers appropriate in the circumstances.

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[2] Luongo Affidavit, para. 26.

7. Finally, the QCAPs wish to point out that they have prepared their Response to the Applicants' Motions without the benefit of having received (as at noon on June 21, 2019) the Monitors' Reports that were relied on in support of the Applicants' extension Motions. This places all creditors in the untenable disadvantage that they are forced to consistently respond, at the last moment, to the Applicants' and their Monitors' last-minute filings.

PART II - BACKGROUND AND FACTS

8. As each of the Applicants has asserted in its materials, the genesis of these proceedings was the Appeal Judgment issued on March 1, 2019. The Applicants are not typical debtors in "*crisis-mode due to [their] failure to meet creditor obligations*", nor do any of them require any "*breathing room to enable it to get its affairs in order without creditors knocking at the door*."[3] Prior to the commencement of these proceedings, the QCAPs were the only creditors knocking at the door. The other plaintiffs in tobacco-related litigation were all very far from obtaining any judgments against the Applicants (or even having trials commence on the merits).

9. The Applicants' stated desire to settle the tobacco-related litigation claims through this Court-supervised process is not based on any altruistic desire to take responsibility for their past conduct but is simply a strategic preference by them to use the CCAA to gain leverage vis-à-vis their creditors, including primarily the QCAPs, rather than simply satisfying the Judgment Debt due by them to the QCAPs.

10. A further 6-month extension of the stay of proceedings would be highly prejudicial to the Quebec Class Members and impose no urgency on the Applicants to submit a *bona fide* Plan in a timely manner.

11. As described more fully in the Desjardins Affidavit, further delay has significant repercussions for the Quebec Class Members:

> *29. Based on my discussions with several patients during their routine appointments and without any questions on my part, they have spontaneously told*

[3] *Industrial Properties Regina Limited* v *Copper Sands Land Corp*., 2018 SKCA 36 at para. 20.

> *me that they are anxious and frustrated that they have not received any monetary compensation after 21 years of proceedings and despite two consecutive victories before the Quebec Superior Court and the Quebec Court of Appeal. They are afraid that they will die before they receive the compensation awarded to them in those judgments.*
>
> *33. Since the last diagnosis date for eligibility in the Quebec Class Actions was March 12, 2012, or more than seven years ago, the passage of time is increasingly critical to the remaining living Class members, whose conditions are deteriorating significantly, and often rapidly.*
>
> *34. This concern has become all the more acute since March 1, 2019 when the Quebec Court of Appeal rendered its judgment, since the remaining living members of the Quebec Class are becoming increasingly frail and infirm, based on my personal observation.*
>
> *35. Furthermore, based on the statistics accepted in the Riordan Judgment as well as my own experience, several Quebec Class members have died since March 1, 2019 and several more are expected to die during the last six months of 2019.*
>
> *36. Consequently, further delays in the payment of compensation by the Tobacco Companies to the Quebec Class members will result in an ever decreasingly small proportion of the Class still alive to receive any recovery from the Quebec Class Actions, which could provide them with the financial assistance that many of them require to help them live with their debilitating conditions.*

12. It is important to reiterate that no Plan can be approved without the support of the QCAPs. In addition to the fact that the QCAPs are creditors unlike any other in these proceedings, they represent tens of thousands of separate creditors and the Judgment Debt due to the Quebec Class Members is an award of damages by a court in civil proceedings in respect of bodily harm intentionally inflicted.

13. To date, the Applicants have <u>never</u> engaged in any discussions or negotiations with the QCAPs with a view to resolving their claims. On the contrary, the Applicants have, throughout this CCAA process, continued to exhibit the obstructionist *modus operandi* that has characterized their conduct for decades.

14. Within these CCAA proceedings, by way of illustration, the Applicants wasted time, energy and money needlessly fighting with the QCAPs in respect of matters that have no possible effect on them. This is best exemplified by the unacceptable conduct of ITCAN

and RBH relating to the approval by Justice Riordan of the Insurance Settlements, even though such Applicants have absolutely no interest in same and ultimately recognized that they had no possible interest in the settlement proceeds.

15. In the case of the Applicant JTIM, notwithstanding the clear Order issued by this Court to suspend the payment of all royalties to TM, it has allowed the TM Receiver to enforce security in order to circumvent the March 19, 2019 Order and to effect a prohibited royalty payment in a different way.

16. The QCAPs have fully participated in the Court-authorized mediation process managed by the Honourable Warren Winkler. The QCAPs are hopeful that the recent imposition by him of a deadline to file mediation briefs before August 1, 2019 is a step in the right direction towards moving this process forward in a diligent manner.

17. However, it is respectfully submitted that this Court should not be satisfied with the Applicants' hope to simply "*make meaningful progress*" over the next six months of the mediation process. Meaningful progress should have already been made over the past four months. Unfortunately, that is not the case.

18. The Applicants have not provided any indication as to the potential contents of a Plan; in particular, of its potential structure or economics, including the expected contributions to be made by their parent companies. Without any information as to what the Applicants intend to propose to their creditors, it is impossible for other stakeholders to know whether any such Plan has a reasonable chance of success. In order for any Plan to have such a chance of success, the Applicants' parents must make it crystal clear that they are fully committed to making meaningful financial contributions. As Justice Schrager stated in his judgment ordering the Applicants ITL and RBH to post security for their appeal of the Riordan Judgment:

> *... Given my conclusions based on the facts in the record, it is not acceptable that Appellants merely say that they have no funds to satisfy the judgment or an order to furnish security and continue to distribute earnings because that is "business as usual". **A strategic decision is required by Appellants in caucus with their parent***

> ***companies and related entities who have received the benefit of the profitable operations over the years and who continue to do so. Are they willing to do the necessary to help fund security to allow Appellants to continue their appeal?*** *I do not question Appellants' right to appeal but neither can I stand idly by while Appellants pursue an appeal which will benefit them if they win but which will not operate to their detriment if they lose. …*[4]
>
> [emphasis added]

19. The same strategic decision must be made today in the context of the Applicants' stated attempt to arrive at a comprehensive settlement. Will the parent companies, who have profited substantially, and will continue to profit substantially, from the Applicants' businesses, make the necessary financial commitment to enable a settlement to occur? The creditors require an answer to this critical question in order to assess whether there is any chance of a successful Plan.

20. The Applicants engaged their respective Monitors years ago and have had ample time to determine, along with their parent companies, how much money they are prepared to commit for the purposes of achieving their desired "global resolution." Nothing changed on March 1, 2019 with respect to the Applicants' knowledge of the scope and extent of claims against them in tobacco-related litigation across Canada.

21. By imposing a shorter extension (to September 27, 2019), this Court would succeed in creating an impetus and some pressure to force the Applicants (and their parents) to move forward to propose a Plan in a timely fashion. It would also impose on the Applicants an appropriate obligation to satisfy the Court on regular intervals that any further extension is warranted.

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[4] *Imperial Tobacco Canada Ltd. c. Conseil québécois sur le tabac et la santé*, 2015 QCCA 1737 at para. 52.

PART III - THE LAW AND ANALYSIS

A. Criteria for an extension of a stay

A-1. The Applicants do not satisfy the criteria for an extension

22. An initial stay under Section 11.02(1) CCAA may be imposed for a maximum period of 30 days. On a subsequent application under Section 11.02(2) CCAA, the applicant must satisfy the court that the three-prong test set out in Section 11.02(3) CCAA to justify a continuation of the stay has been met. In particular, the court considers:

(a) whether circumstances exist that make the order appropriate;

(b) whether the applicant has acted, and is acting, in good faith; and

(c) whether the applicant has acted, and is acting, with due diligence.[5]

23. While the QCAPs are not currently taking the position that no stay should be granted on June 26, 2019, the fact that these criteria are not met, should militate in favor of the Court granting a shorter extension, during which time it is the QCAPs expectation that the Applicants would put forward a *bona fide* Plan.

24. With respect to the criterion of appropriateness, ameliorating the "*existential threat*"[6] to the Applicants' caused by tobacco-related litigation is not a valid purpose for the CCAA.[7] A process whose goal is to continue businesses promoting a dangerous and useless product, at the expense of the victims of the Applicants' intentionally harmful conduct, does not satisfy that test.

25. Moreover, to date, there has been no indication that a viable Plan is even possible.

26. Nearly four months into this CCAA process, no tangible progress has been made by any of the Applicants. In the words of JTIM's CRO, JTIM purports to still be having "*continued*

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[5] Dr. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, (Carswell, 2013) at p. 76; *Skeena Cellulose Inc. (Re)*, 2001 BCSC 1423 at paras. 13-14.

[6] ITCAN Notice of Motion at para. 1.

[7] *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 at paras. 26-29.

discussion…in an attempt to ***commence*** *resolution discussion…*"[8] ITCAN is looking for an extension of the stay, *inter alia*, to "***start finalizing the terms on which information will be shared with other stakeholders***," and "*engage in substantive discussions with the Tobacco Litigation stakeholders."*[9] RBH is only hoping to make "***meaningful progress***" during the six-month additional stay period being requested.[10] [emphasis added]

27. In *North American Tungsten Corporation Ltd. (Re)*[11], the British Columbia Superior Court stated:

> *[26] When granting an extension, it is a* ***prerequisite for the petitioner to provide evidence of what it intends to do*** *in order to demonstrate to the court and stakeholders that extending the proceedings will advance the purpose of the CCAA.* ***The debtor company must show that it has at least "a kernel of a plan"****: Azure Dynamics Corporation (Re), 2012 BCSC 781 (CanLII).*
>
> [emphasis added]

28. The Applicants' assertion that they will continue to participate in the mediation process before former Chief Justice Winkler is not the kernel of a Plan.

29. In determining the appropriateness of the continuation of the stay, the Court also considers the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension.[12]

30. As referenced above, since the Initial Orders, Quebec Class Members have died and are continuing to die and the remaining living members are anxiously awaiting payment of their awards. With each passing day, these individuals are in a materially worse situation.

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[8] Aziz Affidavit at p. 4.

[9] Thauvette Affidavit at p. 9.

[10] RBH Notice of Motion at para. 5.

[11] 2015 BCSC 1376.

[12] *Worldspan Marine Inc. (Re),* 2011 BCSC 1758 at para. 22; *Hunters Trailer & Marine Ltd., Re* 2000 ABQB 952 at paras 15-19.

31. As it relates to the good faith criterion[13], since the commencement of these CCAA proceedings, the Applicants have not changed course from the conduct that was so severely criticized by the Quebec courts.

32. Finally, the Applicants have not acted with any diligence. Notwithstanding that the potential liability resulting from the outstanding litigation has been known to them for more than two decades, none of the Applicants has even hinted at the potential contents of a proposed Plan to satisfy its creditors.

A-2. The proposed extension of the stay of proceedings

33. It is submitted that, if granted, the extension of the stay should be limited to a period of three months ending September 27, 2019. This is a reasonable amount of time by which the Applicants must come back to this Court to explain their progress, if any, and for the Court to then determine whether the CCAA process should be terminated or not.

34. The previous stay extension granted by this Court was for approximately two months and there is no justification at this time for the granting of a subsequent extension that is three times as long.

B. <u>A Court-to-Court protocol is indicated</u>

35. As raised by the Court, the QCAPs support the implementation of a court-to-court protocol. In particular, the QCAPs believe that communication between Justice McEwen and Justice Riordan will benefit this process; in particular, since Justice Riordan must give his approval before the QCAPs could even consent to any Plan or settlement (assuming an acceptable one is made in a timely manner).

C. <u>JTIM should be sanctioned for contravening the March 19, 2019 Order</u>

36. In an affidavit in support of its Notice of Motion, the Applicant JTIM recognizes that the March 19, 2019 Order, which suspended its payment of royalties to TM, as well as principal

[13] *Alberta Treasury Branches* v. *Tallgrass Energy Corp*., 2013 ABQB 432 at para. 13.

and interest payments, is in force and that, consequently, it is stayed from making any royalty payments to its subsidiary, TM. [14]

37. However, despite the March 19, 2019 Order, and despite the stay of proceedings ordered by this Court, the Applicant JTIM has nevertheless permitted its subsidiary, TM, through its privately appointed receiver, to exercise a purported right to effect a payment from funds of JTIM held by TM. TM has purported to apply such amount on account of alleged unpaid royalties that pre-date the filing of the CCAA proceedings by JTIM.[15]

38. This payment to TM was only disclosed to the Court after it was made. It is distressing that the Applicant JTIM and its Monitor did not take any action to prevent this breach of the March 19, 2019 Order or, at a bare minimum, seek directions from the Court before the payment was made.

39. It is submitted that the Court should order that the amount received be forthwith paid by TM to JTIM and impose such other sanction as it sees fit.

PART IV - RELIEF REQUESTED

40. For these reasons, the QCAPs request the orders sought by them in their Notice of Motion for the hearing dated June 26, 2019 in court files CV-19-615862-00CL, CV-19-616077-00CL and CV-19-616779-00CL, namely that:

(i) to the extent that the Court grants an extension of the stay period, the extension be limited to September 27, 2019;

(ii) a court-to-court protocol that would, *inter alia*, permit communication between Justice McEwen and Justice Riordan, be implemented forthwith; and

[14] Aziz Affidavit at para. 16.

[15] *Ibid* at para. 21.

(iii) TM be ordered to forthwith remit to the Applicant JTIM, the amount paid from the said Applicant's funds held by TM as well as any other relief or sanction that this Court sees fit to impose.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

June 21, 2019

(s) Fishman Flanz Meland Paquin

_____

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(s) Chaitons

_____

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ANNEX I

GLOSSARY OF DEFINED TERMS

"**Appeal Judgment**" means the decision of the Quebec Court of Appeal (*Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358) rendered on March 1, 2019, upholding, with very minor exceptions, the Riordan Judgment.

"**Applicants**" means ITCAN, JTIM and RBH.

"**Aziz Affidavit**" means the Affidavit of William E. Aziz sworn June 26, 2019

"**CCAA**" means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

"**CRO**" means chief restructuring officer.

"**Desjardins Affidavit**" means the Affidavit of Dr. Alain Desjardins sworn on June 20, 2019.

"**Insurance Settlements**" means, collectively, the settlement agreements entered into by the QCAPs with Kansa General International Insurance Company Ltd. on July 4, 2017 and Northumberland General Insurance Company on February 16, 2017, respectively.

"**ITCAN**" means, collectively, Imperial Tobacco Company Limited and Imperial Tobacco Canada Limited.

"**ITCAN Notice of Motion**" means ITCAN's notice of motion dated June 17, 2019.

"**JTIM**" means JTI-MacDonald Corp.

"**JTIM Notice of Motion**" means JTIM's notice of motion dated June 14, 2019.

"**Judgment Debt**" means the amounts due to the Quebec Class Members pursuant to the Riordan Judgment and Appeal Judgment.

"Luongo Affidavit" Affidavit of Peter Luongo, sworn June 14, 2019

"**March 19, 2019 Order**" means the March 19, 2019 Order in Court file number CV-19-615862-00CL

"**Plan**" means a plan of compromise or arrangement

"**QCAPs**" means the class representatives Jean-Yves Blais, Conseil Québécois sur le tabac et la santé and Cécilia Létourneau.

"**Quebec Class Actions**" means both actions instituted in the Quebec Superior Court by the Class Action Plaintiffs in September and November 1998, bearing numbers 500-06-000076-980 and 500-06-000070-983.

"**Quebec Class Members**" means approximately 1 million class action members of the Quebec Class Actions.

"**RBH**" means Rothmans, Benson & Hedges Inc.

"**RBH's Notion of Motion**" means RBH's notice of motion dated June 14, 2019.

"**Riordan Judgment**" means the decision of the Honourable Justice Brian Riordan of the Quebec Superior Court (*Létourneau c. JTI-MacDonald Corp.*, 2015 QCCS 2382) rendered on May 27, 2015 which condemned the Tobacco Companies to pay damages that, with interest and the additional indemnity provided by law, exceed $13.5 billion in the aggregate.

"Thauvette Affidavit" means the Affidavit of Eric Thauvette, sworn June 17, 2019

"**Tobacco Companies**" means, collectively, Imperial, JTIM and RBH.

"**TM**" means JTI-Macdonald TM Corp.

ANNEX II

AUTHORITIES

Tab 1.	*Industrial Properties Regina Limited* v *Copper Sands Land Corp*., 2018 SKCA 36
Tab 2.	*Imperial Tobacco Canada Ltd.* c. *Conseil québécois sur le tabac et la santé*, 2015 QCCA 173
Tab 3.	Dr. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, (Carswell, 2013) at p. 76 (**extract**)
Tab 4.	*Skeena Cellulose Inc. (Re)*, 2001 BCSC 1423
Tab 5.	*Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327
Tab 6.	*North American Tungsten Corporation Ltd. (Re*), 2015 BCSC 1376
Tab 7.	*Worldspan Marine Inc. (Re),* 2011 BCSC 1758
Tab 8.	*Hunters Trailer & Marine Ltd., Re* 2000 ABQB 952
Tab 9.	*Alberta Treasury Branches* v. *Tallgrass Energy Corp*., 2013 ABQB 432

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Proceeding commenced at Toronto

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