

**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 FACTUM)**

January 22, 2025

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TO: THE COMMON SERVICE LIST

FACTUM OF THE APPLICANTS

PART I - OVERVIEW

1. The Applicants were granted CCAA protection by an order of the Ontario Superior Court of Justice (Commercial List) dated March 12, 2019 (as amended from time to time, the “**Initial Order**”). The Initial Order appointed FTI as the Monitor and granted a stay of proceedings (the “**Stay**”) in favour of the Applicants and certain related parties until and including April 11, 2019 or such later date as the Court may order (as extended by further court orders, the “**Stay Period**”).
2. At the most recent hearing in these proceedings held on October 31, 2024, this Court extended the Stay Period until and including January 31, 2025 and granted the Meeting Order (defined below), which accepted the filing of the First Amended and Restated Court-Appointed Mediator’s and Monitor’s CCAA Plan dated December 5, 2024 (the “**Plan**”) and authorized and directed the Court-appointed Monitor to hold and conduct a meeting of Affected Creditors (as defined in the Plan).
3. The Applicants submit that the requested Stay Period extension to the Effective Time (as defined in the Plan) should be granted. The Applicants have been acting in good faith and with due diligence and intend to continue doing so. Moreover, the requested order is appropriate and necessary in the circumstances. Consistent with the objectives of the CCAA, the requested order furthers the objective of providing a reasonable time period to allow for the successful implementation of the Plan, in the event that it is approved at the Sanction Hearing (as defined in the Plan).

PART II - FACTS

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

A. Background to the Filing

5. 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.²

6. Although the Applicants dispute both the legal and factual foundation of the claims asserted in the Tobacco Litigation, as well as the corresponding quantification of damages, they ultimately determined that it is in the best interests of the Applicants’ stakeholders to engage in a restructuring process with the overriding objective of preserving the value of their business and resolving all Tobacco Claims (as defined in the Initial Order) in an orderly process under Court supervision.³

7. 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

¹ Affidavit of Eric Thauvette, sworn January 15, 2025 [“**Thauvette Affidavit**”]. Capitalized terms not otherwise defined have the same meaning as in the Thauvette Affidavit.

² Thauvette Affidavit, para. 5.

³ Thauvette Affidavit, para. 6.

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.⁴

B. The Mediation

8. 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.⁵

9. 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.⁶

C. Status of the CCAA Proceedings

10. On October 31, 2024, in addition to extending the Stay Period to January 31, 2025, this Court heard the Monitor’s motions for and granted (i) an order (the “**Meeting Order**”), among other things, accepting the filing of the Plan and authorizing and directing the Monitor to hold and conduct a meeting of Affected Creditors to vote on the resolution to approve the Plan and the transactions contemplated thereby (the “**Meeting**”); and (ii) an order (the “**Claims Procedure Order**”), among other things, establishing a claims procedure for the identification of Affected

⁴ Thauvette Affidavit, para. 7.

⁵ Thauvette Affidavit, para. 8.

⁶ Thauvette Affidavit, para. 9.

Claims (as defined in the Claims Procedure Order) against the Applicants. The Honourable Chief Justice Morawetz released his related Endorsement on November 4, 2024.⁷

11. On December 12, 2024, the Monitor held the Meeting of Affected Creditors for the purpose of voting on the Plan, in accordance with the terms of the Meeting Order. On December 13, 2024, the Monitor reported that the Plan was approved by the Required Majority (as defined in the Plan). The Monitor also reported the steps undertaken in accordance with the terms of the Claims Procedure Order.⁸

12. During the most recent Stay Period, the Applicants have continued to engage with the Mediation parties, including participating in numerous meetings with the Court-Appointed Mediator and others to address the outstanding issues related to the Plan, in advance of the Sanction Hearing.⁹

PART III - ISSUES AND THE LAW

A. Issue

13. The only issue on this motion is whether the requested extension of the Stay Period to the Effective Time should be granted.

B. 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

⁷ Thauvette Affidavit, para. 10.

⁸ Thauvette Affidavit, para. 11.

⁹ Thauvette Affidavit, para. 12.

period that the court considers necessary, if the applicant satisfies the Court (a) the circumstances exist that make the order appropriate, and (b) that the applicant has acted, and is acting, in good faith and with due diligence.¹⁰

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.”¹¹

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

¹⁰ CCAA, s. 11.02(2). See also s. 11.02(3).

¹¹ *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.¹²

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.¹³ What is reasonable necessarily depends on the circumstances of the restructuring.

C. 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.¹⁴ There can be no question that the Applicants have acted and are acting in good faith in these proceedings. If the requested stay extension is granted, the Applicants intend to continue doing so with a view to implementing the Plan.

20. During the most recent Stay Period, the Applicants have continued to act in good faith, including in their negotiations with the Mediation parties related to the Plan since the Meeting Order was granted.¹⁵ ITCAN has also engaged with various other third parties in an effort to resolve outstanding issues within the framework of the CCAA process.¹⁶

¹² *Federal Gypsum Co. (Re)*, [2007 NSSC 347](#) [*Federal Gypsum*] at paras. [24-29](#).

¹³ *Federal Gypsum* at para. [16](#).

¹⁴ *Muscletech Research & Development Inc. (Re)*, [2006 CanLII 3282 \(Ont. Sup. Ct. \[Comm. List\]\)](#) at para. [4](#).

¹⁵ Thauvette Affidavit, para. 19.

¹⁶ Thauvette Affidavit, para. 13.

21. As further set out in the Thauvette Affidavit, a number of other matters involving the business of the Applicants have been appropriately addressed as they have arisen.¹⁷ Consistent with the purposes of the CCAA, the Stay has allowed the Applicants to maintain operational stability and to foster stakeholder discussions, while preserving their going-concern businesses.¹⁸

(b) Stay Extension to the Effective Time is Appropriate and Necessary

22. The current Stay Period expires on January 31, 2025. The Applicants are seeking to extend the Stay Period to the Effective Time. This request is based on the Applicants' understanding of the time required to implement the Plan, in the event it is approved at the Sanction Hearing.¹⁹ The Applicants also request an interim order extending the Stay Period pending the release of the order extending the Stay Period to the Effective Time, if necessary.

23. A number of Stay Period extensions have been granted in the course of these proceedings. In certain cases, where particular stakeholders sought to impose a shorter Stay Period extension, McEwen J. provided reasons for his determination that the proposed longer six-month time periods were necessary and appropriate. Among other things, McEwen J. noted that a "shorter extension period would distract the stakeholders from the court-ordered mediation process" and could "tilt the playing field" in favour of the particular stakeholders in the process.²⁰ For this reason, His Honour previously concluded that longer extensions were "fair and reasonable in the difficult circumstances of this case", and that a shorter Stay Period extension could in fact "backfire and

¹⁷ Thauvette Affidavit, paras. 15 and 16.

¹⁸ Thauvette Affidavit, para. 17.

¹⁹ Thauvette Affidavit, para. 18.

²⁰ [Endorsement of Justice McEwen](#), dated October 18, 2019.

have the exact opposite effect” of enhancing the prospects of settlement.²¹ The Applicants submit that this same logic applies with equal force to the stay extension request at issue on this motion.

24. Further, the Applicants, with the assistance of the Monitor, have prepared an updated Cash Flow Forecast for the 30-week period commencing the week of January 6, 2025, through the week ending on August 1, 2025, which reflects that the Applicants are projected to have sufficient funding to continue to operate in the normal course during this extended period.²²

25. The Monitor has expressed its support for the extension of the Stay Period to the Effective Time.²³

PART IV - NATURE OF THE ORDER SOUGHT

26. The Applicants therefore request that the Order extending the Stay Period until the Effective Time be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of January, 2025.



Osler, Hoskin & Harcourt LLP

²¹ [Endorsement of Justice McEwen](#), dated March 30, 2023.

²² Thauvette Affidavit, para. 20.

²³ Thauvette Affidavit, para. 21.

SCHEDULE “A”

LIST OF AUTHORITIES

1. [Endorsement of Justice McEwen](#), dated October 18, 2019
2. [Endorsement of Justice McEwen](#), dated March 30, 2023
3. *Federal Gypsum Co. (Re)*, [2007 NSSC 347](#)
4. *Muscletech Research & Development Inc. (Re)*, [2006 CanLII 3282 \(Ont. Sup. Ct. \[Comm. List\]\)](#)
5. *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

**IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36,
as amended**

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

**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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Proceeding commenced at Toronto

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