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)

September 30, 2019

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TO: JTIM Service List

AND TO: ITCAN Service List

AND TO: RBH Service List

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Applicants

RESPONDING FACTUM OF THE QUEBEC CLASS ACTION PLAINTIFFS[1]

PART I - OVERVIEW

1. Although the QCAPs are extremely disappointed that no offer was submitted by the Applicants prior to the expiry of the current Stay Period, the QCAPs remain prepared, at this time, to continue to engage in a hopefully constructive CCAA process, including in the Mediation Process, with a view to resolving the claims of the Quebec Class Members. However, this continued support is predicated on the QCAPs receiving concrete evidence that the Applicants, and their parent companies, are committed to making a serious and viable offer of settlement to their creditors during the next stay extension period.

[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 I.

2. The more than five-month extension of the Stay Period requested by the Applicants would bring us to the first anniversary of the Initial Orders without any commitment having been made by the Applicants to present an offer to their creditors. This request is not reasonable and is not supported by any evidence as to why such a long extension is required. It is also counter-productive to the Applicants' stated goal of achieving a global settlement.

3. The QCAPs submit that the extension to the Stay Period should be limited to January 15, 2020. This tighter delay is essential to incentivize the Applicants to act diligently, to provide more transparency to the creditors, to give comfort to the Quebec victims that the Court recognizes the severe hardship that delay is imposing upon them, and to send the clear message that the time has now come for the Applicants and their parents to put their cards on the table or, if not, to suffer the consequences of their failure to do so.

4. Finally, while the QCAPs and all creditors are stayed, ITCAN should not be permitted to make any of the indemnity payments it claims to owe to BAT Mexico, as are referenced in the Thauvette Affidavit and in the cash flow statements contained in the ITCAN Monitor's Report.

PART II - BACKGROUND AND FACTS

5. We are now seven months into this CCAA process, which began exclusively as a result of the strategic decisions made by the Applicants to attempt to settle with all of the Tobacco Claimants after the Appeal Judgment was rendered in favour of the QCAPs on March 1, 2019.

6. The Applicants are not debtors in "*crisis-mode due to [their] failure to meet creditor obligations*", nor do any one of them require any "*breathing room to enable it to get its affairs in order without creditors knocking at the door*."[2]

7. The Applicants do not need any time to restructure their businesses in order to enable them to be able to put forward a viable Plan. In fact, the Applicants engaged their respective

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[2] *Industrial Properties Regina Limited* v. *Copper Sands Land Corp.*, 2018 SKCA 36 at para. 20 [**Tab 1**].

Monitors more than four 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 purported goal of a "*global resolution*."

8. Nothing has changed since March 8, 2019 that would justify why they haven't yet presented the parameters of a Plan, other than their apparent attempt to use the passage of time as leverage and to try to pit creditor against creditor before the Applicants even reveal what amount of money they and their parents are prepared to put on the table.

9. It must be remembered that the ability of the Applicants to present an offer to their creditors is not dependent on the Mediation Process; this is the Applicants' responsibility. The Mediation Process will be helpful in assisting the parties with negotiations to an implementable Plan, once such a *bona fide* offer is made.

10. In their current request to extend the Stay Period to March 6, 2020, the Applicants are asking for the status quo to continue for another five months, but they have given no explanation as to why this length of extension is appropriate (when previous extensions were limited to two or three months), and, most importantly, have made no commitment as to what they intend to accomplish during this period of time.

11. To date, absolutely no information has been provided by the Applicants or the Monitors as to the contents of a potential Plan, and the QCAPs are not aware of any progress having been made in that connection. Self-serving and unsubstantiated statements that "*meaningful progress has already been made*"[3] are not a substitute for evidence of actual progress, which is a prerequisite to establish that continuing the stay against their creditors will advance any of the objectives of the CCAA.

12. The creditors are also entitled to the greater transparency that comes with the Applicants' obligation to justify stay extensions that are limited to short intervals. Were it not for the current stay extension hearing, the creditors would not have known that ITCAN was

[3] Luongo Affidavit, at para. 23.

intending to pay the equivalent of $55 million to its related party in Mexico, as early as December 2019.

13. It must be emphasized again that while the Applicants are benefiting from an all-encompassing stay of proceedings, and continuing with "*business as usual*", the Quebec Class Members' suffering is exacerbated with each passing day. Tragically, these victims' conditions are deteriorating, and many of them are dying, as they anxiously await payment from the Applicants that they so desperately need[4] and deserve. The Court should weigh this prejudice against the Applicants' demand for a five-month '*get out of jail free card*' without conditions or any commitment on their part to make the offer that they could have made over the past seven months.

14. It is respectfully submitted that the Court should exercise tight control over this process and incentivize progress by granting the shorter extension delay of January 15, 2020 proposed by the QCAPs. If an offer is not made by the Applicants to their creditors by December 20, 2019, they will run the risk that no further extensions will be granted.

PART III - THE LAW AND ANALYSIS

A. The length of the extension to the Stay Period is not reasonable

15. The Applicants are each requesting their third extension to the Stay Period. On such an application pursuant to Section 11.02(2) CCAA, the applicant must show the court that the test set out in Section 11.02(3) CCAA is satisfied in order to justify a continuation of the stay. Specifically, the applicant must show that (a) circumstances exist that make the order appropriate; and (b) that the applicant has acted, and is acting, in good faith and with due diligence.[5]

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[4] Desjardins Affidavit, at paras. 29-36.

[5] Dr. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, (Carswell, 2013) [**Sarra**] at p. 76. [**Tab 2**]

16. The onus is on the applicant to prove that these criteria are met, and not on any party opposing an extension to prove that a plan is doomed to fail.[6]

17. On the criteria of appropriateness, the applicant **must demonstrate** that the extension of proceedings is justified and consistent with the underlying objectives of the CCAA, in that it has at the very least, a "*kernel of a plan*" worth pursuing:

> *[25] A number of decisions have considered whether "circumstances exist that make the order appropriate". In Century Services Inc. v. Canada (Attorney General), 2010 SCC 60 (CanLII), the Court emphasized that the underlying purpose of the legislation must be considered when construing the provisions in the CCAA. Justice Deschamps stated at para. 70:*
>
> > *… Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs.*
>
> *[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] [7]

18. In the case of *Re 843504 Alberta Ltd. (Bankruptcy and Insolvency Act)*,[8] the Court explained that the mere assertion by the creditor that the criteria in Section 11.02(3) CCAA were met provided no assistance to the Court in determining whether a continuation of the stay of proceedings was appropriate:

> *[16] As noted previously, EdgeStone's affidavit is based upon the deponent's review of the Monitor's reports and merely asserts that the Monitor is acting diligently and in good faith, and that circumstances exist to warrant the extension. **This offers nothing more than a conclusion about the very determinations that the court is required to make in deciding whether the test has been satisfied.** It is of very little assistance, and this form of conclusory affidavit is not acceptable: Alberta (Human*

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[6] *Re Redekop Properties Inc.,* 2001 BCSC 1892 at para. 38. [**Tab 3**]

[7] *North American Tungsten Corporation Ltd. (Re)*, 2015 BCSC 1376. [**Tab 4**]

[8] 2003 ABQB 1015. [**Tab 5**]

> *Rights Commission) v. Alberta Blue Cross Plan (1983), 1983 ABCA 207 (CanLII), 48 A.R. 192 (C.A.) at para. 8; Allen v. Alberta, [2001] A.J. No. 863, 2001 ABCA 171 (CanLII) at para. 8; Hovsepian v. Westfair Foods Ltd., [2003] A.J. No. 1133, 2003 ABQB 641 (CanLII). I note that the Monitor's report is filed with the court for information purposes and is available to me.* [emphasis added]

19. In that case, based on actual evidence presented by other parties, the Court concluded that the stay should continue for only another month, and subjected the continuation to an order that a "*further stay extension should be supported by evidence demonstrating significant progress towards a plan of arrangement.*"[9] Respectfully, this Court should do the same in this case, and impose a much shorter delay on the Applicants than that which they have requested, and insist that any subsequent request to extend the Stay Period be supported by concrete evidence of tangible progress having been made.

20. While a stay of proceedings is meant to provide an applicant with sufficient time to propose a plan, it is also essential that the creditors' rights and remedies not be sacrificed any longer than necessary.

21. The appropriateness of extending the stay in furtherance of the Applicants' purported desire to settle its claims (more than 20 years after such claims were instituted, and only after the QCAPs finally prevailed before two courts in establishing significant liability of the Applicants for intentionally committed faults), must be balanced against the continued harm being suffered by the Quebec Class Members, and the prejudice experienced by them as a result of these CCAA proceedings. [10]

22. It would be highly prejudicial to all of the creditors for the Applicants to be provided with five more months simply to "*engage in the mediation process*" and "***explore*** *a negotiated*

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[9] *Ibid.*, at Order 5.

[10] Sarra *supra* note 5 at p. 78 [**Tab 2**]; See also *Hunters Trailer & Marine Ltd., (Re)*, 2000 ABQB 952 at paras. 15-19. [**Tab 6**]

resolution with the Tobacco Litigation stakeholders."[11] Respectfully, the Court should require more from them.

23. It has been emphasized that the *"[t]he extension period should be short enough to keep the pressure on the debtor company and prevent complacency.*"[12]

24. In determining that the approximately four-month extension requested by the applicant be granted for only two months, the Supreme Court of British Columbia explained in the case of *Walter Energy Canada Holdings, Inc. (Re)*[13] that a shorter delay would aid in focusing the parties and resolving the matter more quickly:

> *[8] At the hearing, I expressed some concern about the length of the proposed stay, even with the possible July hearing in mind. I suggested to petitioners' counsel that the extension might be for a shorter period of time so as to make clear that the court's oversight continues even during this interim period of time. In addition,* ***I considered that an earlier deadline would, of necessity, require that the parties focus on getting the matter resolved as soon as possible*** *to avoid any further erosion of the cash resources.*
>
> *[...]*
>
> *[10] Accordingly, I am satisfied that an extension of the stay is appropriate at this time.* ***However, in my view, a long extension is not appropriate; again, the extension of the stay to an earlier date is more appropriate and will aid in focussing the parties toward bringing a court application for an overall resolution as quickly as possible****. Accordingly, there will be an order extending the stay of proceedings to August 19, 2016.* [emphasis added]

25. By limiting the stay extension to January 15, 2020, and by requiring that evidence of real and meaningful progress be made before such date in order to grant any further extensions, the Court would assist the parties by discouraging complacency, and by helping the parties focus on finally moving this process forward to what will hopefully be a satisfactory global settlement for all.

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[11] Thauvette Affidavit, at para. 11.

[12] David E. Baird, *Bairds practical guide to the Companies Creditors Arrangement Act* , (Carswell, 2009), at p. 155. [**Tab 7**]

[13] 2016 BCSC 1413. [**Tab 8**]

B. <u>ITCAN should be prohibited from making payments for purported indemnities to BAT Mexico during the Stay Period</u>

26. In the Thauvette Affidavit, Mr. Thauvette refers to certain payments that ITCAN purportedly will owe, and intends to make, to BAT Mexico during the upcoming stay extension. These payments are described as indemnities due pursuant to a July 2015 Finished Products Supply manufacturing agreement with BAT Mexico, and apparently will be owed as a result of the Plain Packaging Regulations, which will come into force on November 9, 2019.[14]

27. Any claim pursuant to a contract entered into by the Applicants before the CCAA filing, including but not limited to, any claim resulting from indemnities referred to by Mr. Thauvette which may be owing to BAT Mexico, constitute claims provable pursuant to Section 19(1)(b) CCAA, and there is absolutely no justification for ITCAN to be permitted to pay such claims, while its other creditors are stayed. As appears from Section 19(1)(b) CCAA:

> *19 (1) Subject to subsection (2), the only* ***<u>claims that may be dealt with by a compromise or arrangement in respect of a debtor company are</u>***
>
> *[…]*
>
> *(b)* ***<u>claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii)</u>****.*

28. Referring to Section 19(1)(b) CCAA, Justice Schrager explained in the case of *Aveos Fleet Performance Inc./Aveos Fleet performance aéronautique inc. (Arrangement relatif à)*[15] that a cancellation penalty in a contract entered into before the commencement of a CCAA proceeding was a claim provable in such proceedings:

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[14] Thauvette Affidavit, at paras. 15-17.

[15] 2012 QCCS 6796 [**Tab 9**]; **see also** *Pine Valley Mining Corporation (Re)*, 2008 BCSC 368 [**Tab 10**], where the Court states, at para. 41, that "*[w]hat is determinative, in my view, is that the 2006 Take or Pay Obligation arose out of a contract that was in effect prior to the Initial Order and was as such subject to compromise.*"

> *[57] […] This is precisely the situation with the cancellation indemnity claimed by N.G.A. in this case.* ***Though Aveos may have triggered the cancellation penalty after the C.C.A.A. filing, the obligation stems from a contract to which it was bound pre-C.C.A.A. filing.***
>
> *[58] The claim for the cancellation penalty would also be a claim provable in a bankruptcy (see Section 2 and Section 121 of the B.I.A. which are substantially similar to Section 19 C.C.A.A.).*
>
> *[59]* ***Accordingly, in any and all scenarios, the $501,381.00 claimed by N.G.A. for the cancellation indemnity would be a claim provable and would not have the status of a "post-filing claim" payable immediately, i.e. prior to the claims of other creditors****.*
>
> *[60]* ***The Courts have said on numerous occasions that pre-filing creditors cannot under the guise of making a post-filing claim, obtain a preference over other creditors.*** *[8] This applies even to employees for severance claims arising from termination of employment after the C.C.A.A. filing [9].* ***The equitable treatment of creditors' demands that claims for contractual damages arising from the termination of contracts after filing under the C.C.A.A. be treated on a par with other provable claims*** *[10].* [emphasis added]

29. Furthermore, the Applicants have all been aware that the Plain Packaging Regulations would be coming into force,[16] such that these purported obligations would have been well-known at the time of the filing.

30. Any attempt by ITCAN to pay any amount to BAT Mexico constitutes an obvious effort to unjustifiably prefer its related party creditors, over its litigation creditors, and should be prohibited.

[16] By way of example, in each of Mr. Thauvette's previous affidavits, the Plain Packaging Regulations are mentioned: See the March 12, 2019 affidavit, at paras. 14 and 29, as well as the June 17, 2019 affidavit, at para. 21.

PART IV - RELIEF REQUESTED

31. For these reasons, the QCAPs request the orders sought by them in their Notice of Motion returnable on October 2, 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 January 15, 2020; and

    (ii) all payments to BAT Mexico referred to in the Thauvette Affidavit be prohibited during the Stay Period.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

September 30, 2019

(s) Fishman Flanz Meland Paquin

____

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(s) Chaitons

____

CHAITONS LLP
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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.

"**BAT Mexico**" means British American Tobacco Mexico, S.A. de C.V.

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

"**Court-Appointed Mediator**" means the Honourable Warren K. Winkler, Q.C.

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

"**Initial Orders**" means the initial orders obtained by each of the Applicants in the present Court files.

"**ITCAN**" means Imperial Tobacco Canada Limited.

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

"**Luongo Affidavit**" means the Affidavit of Peter Luongo, sworn September 24, 2019.

"**Mediation Process**" means the court-ordered mediation process directed by the Court-Appointed Mediator.

"**Monitors**" means each of the monitors appointed pursuant to each of the Initial Orders.

"**Plain Packaging Regulations**" means the *Tobacco Products Regulations (Plain and Standardized Appearance)*, SOR/2019-107.

"**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 QCAPs 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.

“**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.

“**Stay Period**” means the stay of proceedings initially made in each of the Initial Orders, extended most recently by the Honourable Justice McEwen on June 26, 2019, until October 4, 2019.

“**Thauvette Affidavit**” means the Affidavit of Eric Thauvette, sworn September 23, 2019

“**Tobacco Claimants**” means all claimants with Tobacco Claims, as defined in each of the Initial Orders.

“**Tobacco Companies**” means, collectively, ITCAN, JTIM and RBH.

ANNEX II

AUTHORITIES

Tab 1. *Industrial Properties Regina Limited* v. *Copper Sands Land Corp.*, 2018 SKCA 36

Tab 2. Dr. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, (Carswell, 2013), p. 76-85 (**extract**)

Tab 3. *Re Redekop Properties Inc.,* 2001 BCSC 1892

Tab 4. *North American Tungsten Corporation Ltd. (Re*), 2015 BCSC 1376

Tab 5. *Re 843504 Alberta Ltd. (Bankruptcy and Insolvency Act)*, 2003 ABQB 1015

Tab 6. *Hunters Trailer & Marine Ltd., (Re)*, 2000 ABQB 952

Tab 7. David E. Baird, *Baird's practical guide to the Companies' Creditors Arrangement Act*, (Carswell, 2009), p. 151-156 (**extract**)

Tab 8. *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 1413

Tab 9. *Aveos Fleet Performance Inc./Aveos Fleet performance aéronautique inc. (Arrangement relatif à)*, 2012 QCCS 6796

Tab 10. *Pine Valley Mining Corporation (Re)*, 2008 BCSC 368

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Proceeding commenced at Toronto

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