CITATION: Imperial Tobacco Limited, 2024 ONSC 6061
COURT FILE NOS.: CV-19-615862-00CL, CV-19-616077-00CL and CV-19-616779-00CL
DATE: 2024-11-04

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **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**

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.

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Robert Thornton, Mitch Grossell, Rachel Nicholson and Scott McGrath*, for JTI-Macdonald Corp.

Deborah Glendinning, Marc Wasserman, Marleigh Dick and Martino Calvaruso, for Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

Paul Steep, Trevor Courtis, Jamey Gage, Heather Meredith and Meena Alnajar, for Rothmans, Benson & Hedges Inc.

Natasha MacParland, Chanakya Sethi and Anisha Visvanatha, for FTI Consulting Canada Inc., in its capacity as court-appointed Monitor of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

R. Shayne Kukulowicz and Joseph Bellissimo, for Ernst & Young Inc., in its capacity as court-appointed Monitor of Rothmans, Benson & Hedges Inc.

Linc Rogers, Pamela Huff and Jake Harris, for Deloitte Restructuring Inc., in its capacity as Monitor of JTI-Macdonald Corp.

Maria Konyukhova, for British American Tobacco p.l.c., B.A.T. Industries, p.l.c. and British American

Robert Cunningham, for the Canadian Cancer Society

Scott Bomhof, Adam Slavens, Jeremy Opolsky and Alec Angle, for JT Canada LLC Inc., and PricewaterhouseCooopers Inc., in its capacity as Receiver of JTI-Macdonald TM Corp.

Avram Fishman, Mark E. Meland, André Lespérance, Harvey Chaiton and Gordon Kugler, Conseil québécois sur le tabac et la santé, Jean-Yves Blais and Cécilia Létourneau (Quebec Class Action Plaintiffs)

James Bunting, for the Heart and Stroke Foundation

Jacqueline Wall, for the Province of Ontario

Glenda Best, for the Province of Newfoundland

David Ullmann, and Alexandra Teodorescu, for Northbridge General

Amanda McInnis, for La Nordique Compagnie D'Assurance du Canada

Joseph Pasquariello, for PricewaterhouseCoopers Inc. as Liquidator of Northumberland General Insurance Company

Sabri Shawa, for the Province of Alberta

Jeffrey Leon, Mike Eizenga and Jesse Mighton, for the Province of British Columbia, Province of Manitoba, Province of New Brunswick, Province of Nova Scotia, Province of Prince Edward Island, Province of Saskatchewan, Government of Northwest Territories, Government of Nunavut and Government of Yukon in their capacities as Plaintiffs in the HCCR Legislation Claims.

André Michael, for the Consortium of Provinces and Territories

Raymond Wagner and Kate Boyle, Representative Counsel for the Pan-Canadian Claimants

Brett Harrison, for the Province of Quebec

Patrick Flaherty and Claire Wortsman, for R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International Inc.

Douglas Lennox, for Representative Plaintiff, Kenneth Knight, in the Certified British Columbia Class Action

Harvey T. Strosberg, K.C., for the Ontario Flue-Cured Tobacco Growers' Marketing Board

James Doris, U.S. Department of Justice

Ari Kaplan, for Representative Counsel for Former Genstar U.S. Retiree Group Committee

Matthew Gottlieb and Andrew Winton, for Court-Appointed Mediator, The Honourable Warren K. Winkler

HEARD and DETERMINED: October 31, 2024

REASONS: November 4, 2024

ENDORSEMENT

[1] This Endorsement relates to all three Applicants, JTI-Macdonald Corp., "("JTI"), Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited (collectively "Imperial") and Rothmans, Benson and Hedges Inc. ("RBH").

[2] A number of motions were heard on October 31, 2024. At the conclusion of the hearing, a Stay Extension was granted to each Applicant up to and including January 31, 2025. In addition, a Meeting Order and a Claims Procedure Order was granted in the *Companies' Creditors Arrangement Act* ("CCAA") proceeding of each Applicant, with reasons to follow. A preliminary motion brought by JTI to strike certain paragraphs in the affidavit of André Lespérance was deferred. A cross-motion brought by JTI proposing certain amendments in respect of the status of representative counsel, Ray Wagner, was adjourned with an expectation that it be dealt with in writing.

[3] These are the reasons with respect to the Stay Extension, the Meeting Orders and Claims Procedure Orders.

[4] The evidence to support a request for a Stay Extension for each Applicant is set out in the Seventeenth Report of Deloitte Restructuring Inc. ("Deloitte"), Monitor of JTI, the Nineteenth Report of FTI Consulting Canada Inc. ("FTI"), Monitor of Imperial and the Seventeenth Report of Ernst & Young Inc. ("E&Y"), Monitor of RBH.

[5] The evidence to support the Meeting Orders is set out in the Eighteenth Report of Deloitte, the Twentieth Report of FTI and the Nineteenth Report of E&Y.

[6] The evidence to support the Claims Procedure Orders is set out in the Eighteenth Report of Deloitte and the Twenty-first Report of FTI in the Eighteenth Report of E&Y.

[7] An affidavit of Mr. William Aziz, Chief Restructuring Officer of JTI, was filed by JTI and an affidavit of Mr. André Lespérance, one of the attorneys representing the Québec class-action plaintiffs ("QCAP") was also filed.

[8] The CCAA proceedings for each Applicant were commenced in March 2019.

[9] Since the commencement of the CCAA proceedings, JTI, Imperial and RBH ("collectively, the "Tobacco Companies"), the Claimants (defined below), Deloitte, FTI and E&Y (collectively, the "Monitors"), and The Honourable Warren K. Winkler, K.C., the Court-appointed Mediator (the "Mediator") have spent thousands of hours in hundreds of court-ordered mediation sessions.

[10] Following court directions issued on October 5, 2023, the Mediator and Monitors – with the input of the Tobacco Companies and the Claimants – have developed consolidated, comprehensive Plans of Arrangement that provide for a Pan-Canadian global settlement of tobacco claims.

[11] The Monitors, acting in concert with the Mediator, brought this motion to approve, for filing, each of these three substantially identical individual plans proposed for each of the Tobacco Companies (the "CCAA Plans"), to schedule meetings of creditors for December 12, 2024 and to establish a claims procedure as a predicate to those meetings.

[12] The CCAA Plans are structured to permit the Tobacco Companies to exit the CCAA proceedings as going concerns while facilitating a Pan-Canadian global settlement of tobacco claims for the benefit of all stakeholders in the CCAA proceedings. If approved by the requisite double majority of Affected Creditors, sanctioned by this court, and ultimately implemented, the CCAA Plans will, among other things, provide for a global settlement amount of $32.5 billion and provide a full and final release to the Tobacco Companies.

[13] At this stage of the proceedings it is clear that not all issues have been resolved. Notably, there are outstanding issues as between the Tobacco Companies concerning the financial allocation of the settlement amount as between them. There is also an outstanding issue concerning the creditor status of JTI-Macdonald TM Corp ("JTI-TM"), specifically whether JTI-TM has a secured or unsecured claim.

[14] As this court has observed, these CCAA proceedings are among the most complex insolvency proceedings in Canadian history (2023 ONSC 2347, at paras. 4, 7 and 14).

[15] The CCAA proceedings were precipitated by a $13.5 billion-plus judgement against the Tobacco Companies rendered in the Québec Superior Court in 2015 and affirmed by the Court of Appeal of Québec in 2019 (the "Québec Judgement"). The Québec Judgement concerned class actions brought on behalf of individual tobacco smokers. The Tobacco Companies' inability to satisfy the Québec Judgement led to their decision to seek protection from this court under the CCAA.

[16] Beyond the Québec Judgement, multiple other claims have been brought against the Tobacco Companies across Canada, totaling more than $1 trillion (inclusive of the Québec Judgement). These claims include:

(a) health care costs recovery sought by the provincial and territorial governments;

(b) putative class actions for tobacco-related harms;

(c) a deceptive trade practice class action related to marketing practices;

(d) claims by Ontario tobacco farmers and growers related to the historical pricing of tobacco leaves; and

(e) actions by individuals seeking damages for a variety of claims.

[17] These claims have been brought by the following stakeholders, (which collectively are referred to as the "Claimants"):

(a) the Québec class-action plaintiffs ("QCAP"): individuals who meet the criteria of the certified class definitions in the Québec class-action;

(b) the Pan-Canadian Claimants ("PCC"): individuals, excluding the QCAP plaintiffs in relation to QCAP claims, who have asserted or may be entitled to assert a PCC claim (a claim related to, among other things, the development, design, manufacture, production, marketing, advertising, distribution, purchase or sale of tobacco products);

(c) The Knight class-action plaintiffs: with respect to Imperial only, individuals asserting a product liability claim who meet the criteria of the certified class definition in the Knight class-action started in British Columbia;

(d) the Provinces and Territories: all of the Provinces and Territories of Canada, each of which seek recovery of tobacco-related health care costs; and

(e) Tobacco Producers: persons who have advanced uncertified class actions asserting a failure by the Tobacco Companies to make certain payments pursuant to agreements between the Ontario Flue-Cured Tobacco Growers' Marketing Board and the Tobacco Companies.

[18] In consideration for the full and final settlement of the Affected Claims, the CCAA Plans contemplate that the Tobacco Companies will pay an aggregate global settlement amount of $32.5 billion into three separate global settlement trust accounts over multiple years. The global settlement will consist of upfront contributions, annual contributions determined by a prescribed metric (based on the Tobacco Companies' net after-tax income) and any tax refunds. Based on current projections, the Monitors report that it will take roughly 20 years for the global settlement amount to be paid in full.

[19] If the CCAA Plans are sanctioned and implemented, distributions from the global settlement trust accounts will be made to the QCAP; the PCC; the provinces and territories; a public charitable foundation (the "*Cy-près* foundation"); the tobacco producers: and, in the case of Imperial only, the Knight class-action plaintiffs. Payments from the global settlement trust accounts to eligible QCAP and PCC will be made via a Québec class-action administration plan and Pan-Canadian Claimants compensation plan, respectively.

[20] Each of the Monitors will be appointed as a CCAA Plan Administrator to administer and oversee the implementation of the respective Tobacco Company' CCAA Plan. The CCAA Plan Administrators will be court-appointed officers that are neutral and independent of the Tobacco Companies and the Claimants.

[21] The motions seek the issuance of separate, but substantially identical Meeting Orders for each of the Tobacco Companies: (i) accepting the filing of the CCAA Plans; and (ii) authorizing and directing the Monitors to convene the meetings of a single class of the Claimants to consider

and vote on a resolution to approve the CCAA Plans and the transactions contemplated therein. The meetings are to be held sequentially and virtually by videoconference on December 12, 2024.

[22] The meeting materials will be published on each of the Monitor's websites no later than November 29, 2024.

[23] Following the meetings, the Monitors will report to the court on: (i) the voting results of the meetings; and (ii) any other matter that the Monitors consider relevant for the Sanction Hearing.

[24] The Mediator and the Monitors are of the view that: (i) the meeting materials, the processes for providing notice of the meetings, and the procedure for the meetings, including the voting procedures, each as stated in the proposed Meeting Orders, are reasonable and appropriate in the circumstances; and (ii) the timelines contained in the Meeting Orders are necessary to allow the CCAA Plans to move forward in a timely manner for the benefit of all stakeholders.

[25] The motions also seek the issuance of separate, but substantially identical, Claims Procedure Orders for each of the Tobacco Companies.

[26] The Claims Procedure Orders also establish the omnibus notice program, under which the omnibus notice will be disseminated to the Claimants, putative miscellaneous Claimants, and the public generally, to explain the CCAA Plans, the claims procedure, and the meetings.

[27] It is noted that the Claims Procedures Orders create a negative notice procedure for the determination and quantification of certain claims.

[28] The amount of the voting claim that may be voted (or is deemed to be voted) will be governed under the Claims Procedure Orders.

[29] Each of the Monitors is in favour of the requested relief. It is noted, however, that Deloitte's support was somewhat muted and reflected certain concerns of JTI, as noted below.

[30] Counsel on behalf of the QCAP, the PCC, and a majority of the Provinces supported the requested relief.

[31] Imperial and RBH supported the requested relief, albeit with certain reservations with respect to unresolved issues relating to allocation.

[32] JTI supported the granting of the Claims Procedure Order but took the position that it was not appropriate or necessary to issue the Meeting Order at this time. JTI took the position that issues relating to allocation and the status of the claim of JTI-TM had to be addressed prior to the granting of the Meeting Order. They contend that if these issues are not solved, the CCAA Plans were unworkable and could never be sanctioned.

[33] In the joint factum submitted by the Mediator and Monitors, the three principal issues on these motions were set out as follows:

(1) whether the court has the discretion to grant the Claims Procedure Orders and the Meeting Orders on motions brought by the Monitors;

(2) whether the court should accept the CCAA Plans for filing, approve the classification of the Affected Creditors as a single class for voting purposes, and grant the Meeting Orders; and

(3) whether the court should approve the claims procedure and grant the Claims Procedure Orders.

[34] In a typical CCAA proceeding, it is the debtor company or one of its creditors that, pursuant to s. 4 or s. 5 of the CCAA, brings a motion before the court for approval to schedule a meeting of creditors. These cases, however, are not a typical CCAA proceeding.

[35] As I noted in the October 5, 2023 endorsement, after five years of mediation without any clear prospect of a plan emerging, I determined that it was "necessary and appropriate" in the circumstances to direct the Monitor and the Mediator to "develop" the CCAA Plans. Empowering the Mediator and Monitors in this way was likely to offer the "best chance" of developing the CCAA Plans.

[36] No party objected to, sought to vary, or sought to appeal the October 2023 direction.

[37] In my view, the decision to empower the Monitors and Mediator was an exercise of the discretion conferred to the court under sections 11 and 23(1)(k) of the CCAA.

<u>The Test for a Meeting Order</u>

[38] Section 4 of the CCAA provides that the court may order a meeting of unsecured creditors, or a class of creditors, to vote on a compromise or arrangement.

[39] Counsel on behalf of the Monitor submits that the threshold for granting a Meeting Order is rather low (*Just Energy Group Inc. et al. v. Morgan Stanley Capital Group Inc. et al.* 2022 ONSC 3698, at para. 7; see also *Arrangement relatif à Bloom Lake*, 2018 QCCS 1657, at para. 19 ("Bloom Lake"). The applicable test is simply whether the "plan is doomed" to fail at either the creditor or court approval stage; if the plan is not doomed to fail at either stage, it may be presented at a creditors meeting (*U.S. Steel Canada Inc., Re.*, 2017 ONSC 1967, at para. 12; *Bloom Lake*, at para. 19; *<u>Quest University Canada (Re)</u>*, 2020 BCSC 1845) Further, it is a "matter of judgment" for the supervising judge to determine whether a plan is doomed to fail (*Stelco Inc., Re*, [2005] 78 O.R. (3d) 254 (C.A), at para. 24).

[40] Counsel on behalf of the Monitor submits that there is no evidence to suggest that the CCAA Plans are doomed to fail.

[41] The QCAP, the PCC, and the Tobacco Growers are unanimous in their support of the CCAA Plans. Amongst the Provinces and Territories, 10 of the 13 jurisdictions support the CCAA Plans.

[42] While JTI insisted the issues that were of concern to JTI had not been solved, its counsel acknowledged that the issues were solvable.

[43] The Mediator and Monitors propose that all Affected Creditors will be classified into one class – the Unsecured Creditors Class – for purposes of voting on the CCAA Plans.

[44] Subsection 22(2) of the CCAA provides that creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" having regard to:

> (a) the nature of the debts, liabilities, or obligations giving rise to the claim;
>
> (b) the nature and rank of any security in respect of their claims;
>
> (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
>
> (d) any further criteria, consistent with those set out above.

[45] In the joint factum of the Mediator and Monitors, counsel submit that including the Affected Creditors in a single class is appropriate, having regard to the factors enumerated by section 22(2) of the CCAA in that:

> (a) the claims of the Affected Creditors share a common characteristic: they are all tobacco claims against the Applicant;
>
> (b) all Affected Creditors are unsecured creditors;
>
> (c) the grouping of the Affected Creditors into a single class was carried out with the main goals of the CCAA in mind, specifically to aid in the reorganization of the Applicants through the CCAA Plans (see: *Canadian Airlines Corp. (Re)* 19 C.B.R. (4th) 12 (Alta. Q.B.) at para. 31); and
>
> (d) if the Affected Creditors were fragmented into separate classes, it would be difficult, if not impossible, to obtain approval of the CCAA Plans (*Norcen Energy Resources Limited v. Oakwood Petroleums Limited*, [1989] 2 W.W.R. 566 (Alta. Q.B.) at para. 27).

[46] Counsel on behalf of both JTI and JTI-TM expressed the view that it was inappropriate to classify JTI-TM as an Unaffected Creditor.

[47] At this time, the status of the claim of JTI-TM is unresolved. The CCAA Plans call for the claim of JTI-TM to be treated like an unaffected claim and reference is also made in the CCAA Plans to a full and final release of JTI-TM.

[48] JTI and JTI-TM submit that the Plan is doomed to fail. JTI-TM drew an analogy to *Re, Doman Industries Ltd. (Trustee of)*, 41 C.B.R. (4th) 29, stating that the Plan purports to bind JTI-TM without giving it an opportunity to vote on the plan. Such a plan, they submit, cannot be approved.

[49] It seems to me that this issue falls into the category of those that are solvable. As noted by JTI-TM, the Plan is premised on JTI-TM agreeing to subordinate its claim. It is open to the parties to negotiate such a subordination. This issue does not necessarily result in a plan that is doomed to fail, nor does the legal status of this claim need to be determined at this stage. It can be determined as part of the Sanction Hearing.

[50] JTI-TM also referenced *Target Canada Co. (Re)*, 2016 ONSC 316 ("*Target*"), in support of its position. In *Target*, the proposed CCAA Plan was not accepted for filing. However, at para. 79 it was made clear that the proposal in *Target* contravened previous court orders made in CCAA proceedings and that the Plan could not withstand the scrutiny of the test to sanction a plan (para. 84). In these proceedings, no party has suggested that the CCAA Plans contravene previous court orders.

[51] At this stage, I am unable to conclude that the plans are doomed to fail.

[52] With respect to the Claims Procedure Orders, no party expressed opposition to these orders being granted.

[53] With respect to the request for a Stay Extension, I am satisfied that significant progress has been made since the last extension was granted earlier this year. This reflects good faith negotiations. There are a number of outstanding issues as between the parties, but there are no issues that, in my view, cannot be solved.

[54] The required Cash Flow Forecasts are set out in the Reports of the Monitors and I am satisfied that each of the Applicants has sufficient resources to maintain operations over the coming months.

[55] The requested Stay Extension is to March 31, 2025. It seems to me that an extension to March 31, 2025 could create a degree of uncertainty. The creditor meetings are to be held on December 12, 2024, which could possibly lead to a sanction hearing in January 2025. Such a hearing would provide the court with the opportunity to consider any further extensions of the Stay. Accordingly, it seems to me that a more appropriate date for a Stay Extension is to January 31, 2025.

[56] For greater certainty, the directions provided on October 5, 2023 outlined a process for the development of the CCAA Plans through the auspices of the Monitors and the Mediator. These directions remain in force and can provide the basis to resolve the outstanding issues.

[57] In addition, the directions provided with respect to the Mediator in the Amended and Restated Initial Order remain in effect, as do the directions referred to in the Endorsement of McEwen J. (Court-Appointed Mediator Communication and Confidentiality Protocol) dated May 24, 2019.

[58] I also note that certain representations were made by counsel on behalf of the former Genstar U.S. Retiree Group Committee. The substance of those representations can be considered at a future hearing. Similarly, submissions from the Canadian Cancer Society, in their capacity as social stakeholder, can also be considered at a future hearing.

[59] In summary, I am satisfied that it is both necessary and appropriate to grant the requested relief. The stay is extended to January 31, 2025. The Meeting Orders and the Claims Procedure Orders are granted and have been signed in the form submitted.

Chief Justice Geoffrey B. Morawetz

Date: November 4, 2024