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

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 IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

Applicants

FACTUM OF THE APPLICANTS IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED (Response to Motion of Her Majesty the Queen in Right of Ontario)

April 23, 2019

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TO: THE SERVICE LIST

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APPLICANTS

FACTUM OF THE APPLICANTS

PART I - OVERVIEW

1. Imperial Tobacco Canada Limited ("**ITCAN**") and its subsidiary Imperial Tobacco Company Limited ("**ITCO**") (together, the "**Applicants**") obtained an Initial Order and related relief under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**") on March 12, 2019. The Applicants obtained a stay of proceedings under section 11.02(1) of the CCAA (the "**CCAA Stay**") for the primary purpose of effecting a global resolution of multiple claims in Canada that have been brought or could be brought against them in relation to the development, production, marketing, advertising of, any representations made in respect of, the purchase, sale and use of or exposure to Tobacco Products[1] (the "**Tobacco Claims**"). FTI Consulting Canada Inc. was appointed as monitor (the "**Monitor**") in this proceeding.

2. This factum is filed by the Applicants in response to a motion by Her Majesty the Queen in Right of Ontario ("**Ontario**") seeking to lift the CCAA Stay to permit Ontario to continue its

[1] As defined in the Initial Order.

health care cost recovery action (the "**Ontario HCCR Action**") against all fourteen defendants, including ITCAN, notwithstanding the CCAA proceeding. Ontario's only nod to the CCAA Stay is to suggest that the taking of any future proceedings to enforce any judgment and/or to collect any amount owing or found to be owing by ITCAN, JTI MacDonald Corp. ("**JTI**") and/or Rothman, Benson & Hedges Inc. ("**RBH**") will be stayed pending further order of the Court.

3. The Applicants submit that this relief is antithetical to the very purpose of this CCAA proceeding, which is to create a "level playing field" for all Tobacco Claimants, regardless of (a) whether they have already commenced litigation proceedings against the Applicants; and (b) if such proceedings have been commenced, the stage of those proceedings. The CCAA Stay must treat all such claimants equitably, particularly at this stage of the CCAA proceeding where the mechanism for valuing claims of claimants such as Ontario for voting and distribution purposes has yet to be established. Ontario has provided no evidence of any prejudice that is different in scope or in nature to the prejudice experienced by other participants in the Pending Litigation (as defined in the Initial Order) whose proceedings are now stayed.

4. If Ontario's relief is granted, the Applicants will be inundated with similar requests from other claimants who would prefer to resolve their claims through ordinary litigation instead of within this CCAA proceeding. If each such proceeding were permitted to go forward in the courts in accordance with its own non-CCAA timetable, the purpose of this CCAA proceeding to treat all Tobacco Claimants equitably and to achieve a timely global resolution of Tobacco Claims would be seriously undermined. Even if the Ontario HCCR Action is the only such action permitted to proceed, requiring the Applicants to continue devoting significant time and resources to the Ontario HCCR Action, while all other similar proceedings are stayed, would be

unfair to other stakeholders and detrimental to the Applicants' ability to achieve a global resolution of the Tobacco Claims.

5. It does not avail Ontario to suggest that the Ontario HCCR Action could proceed against "other defendants" because they are solvent. As a practical matter, the Ontario HCCR Action is directed primarily at the Canadian tobacco companies, who manufactured, marketed and sold the tobacco products at issue in the proceedings. The only sustainable claims against the other named defendants are, by necessity, derivative of Ontario's primary claims against the Canadian tobacco companies for alleged "tobacco-related wrongs". The other members of the BAT Group, for example, are included in the proceeding solely by virtue of their alleged conspiracy with ITCAN in furtherance of alleged wrongs committed by ITCAN. To suggest that the Ontario HCCR Action can simply proceed against the other members of the BAT Group without extensive involvement by ITCAN wholly misconstrues the very structure of the Ontario HCCR Action.

6. Moreover, precluding the Ontario HCCR Action from continuing against any defendant, including by means of the extension of the CCAA Stay to the members of the BAT Group that are co-defendants in the Ontario HCCR Action, is a condition of the willingness of these defendants to be involved in discussions of a global resolution of the Tobacco Claims contemplated in this proceeding.

7. Ontario's requested relief is fundamentally inconsistent with the purpose of these proceedings and cannot be granted without undermining the ability of the Applicants to successfully restructure. The "balance of prejudices" favours leaving the CCAA Stay in place for all of the Pending Litigation, including the Ontario HCCR Action. For this reason and those reasons set out below, the Applicants submit that it should be denied.

PART II - FACTS

8. 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. It was commenced against thirteen tobacco companies, including JTI, ITCAN and RBH, as well as the Canadian Tobacco Manufacturers' Council ("**CMTC**").[2]

9. On March 12, 2019, the Applicants obtained CCAA protection. This Court found that it was appropriate to grant the CCAA Stay because it "creates a level playing field amongst the litigation claimants."[3]

10. Only JTI, ITCAN and RBH have sought protection under the CCAA. However, under the Initial Order granted in favour of ITCAN, the CCAA Stay was extended to any member of the BAT Group against which a Proceeding has been commenced in relation to a Tobacco Claim, the Applicants, the Business or the Property.[4]

11. Similar "third party" stays of proceedings were obtained by the other Canadian tobacco company defendants when they filed for protection under the CCAA.[5]

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2 Affidavit of Peter Entecott sworn March 28, 2019, paras. 13, 20, 23, Motion Record of Her Majesty the Queen in right of Ontario, dated March 29, 2019 ("Motion Record of Ontario"), Tab 2.

3 *Re Imperial Tobacco Canada Limited et al.*, 2019 ONSC 1684 at para. 9, Book of Authorities of the Applicants, Tab 7.

4 Amended and Restated Initial Order, clause 19. Capitalized terms have the same meaning as in the Initial Order.

5 *JTI-Macdonald Corp* (Court File No. CV-19-615862-00CL), Initial Order of McEwen J. dated March 8, 2019; *Rothmans, Benson & Hedges Inc* (Court File No. CV-19-616779-00CL), Initial Order of Pattillo J. dated March 22, 2019.

PART III - ISSUES AND THE LAW

A. Issues

12. The Ontario HCCR Action should not be allowed to proceed outside the CCAA proceeding and the CCAA Stay should not be lifted for this purpose.

B. Ontario's Motion Should Be Denied

(a) The Test for Lifting the CCAA Stay is Not Met

13. It is well-established that the CCAA Stay may only be lifted in extraordinary circumstances, including where this Court is satisfied that the "balance of prejudices" justifies this step.[6] To satisfy this Court that prejudice to Ontario justifies lifting the CCAA Stay, Ontario must demonstrate that it will suffer "severe" or "material" prejudice if the requested relief is not granted.[7]

14. The "balance of convenience" test requires the prejudice to the creditor to "substantially outweigh" the prejudice to the CCAA debtor.[8] Moreover, a CCAA Stay will not be lifted where the proposed relief will seriously impair the debtor's ability to restructure.[9]

15. Regardless of the manner in which the test is framed, Ontario cannot meet it.

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6 *Re Canwest Global Communications Corp.*, [2009] O.J. No. 5379 at paras. 32-33 (Sup Ct [Comm List]), Book of Authorities of Ontario, Tab 19; *Re Canwest Global Communications Corp.*, 2010 ONSC 3530 at para. 41, Book of Authorities of Ontario, Tab 25.

7 *Re Canadian Airlines Corp.*, 2000 CarswellAlta 622 at para. 20 (QB), Book of Authorities of the Applicants, Tab 4; *Re Humber Valley Resort Corp.*, 2008 NLTD 174 at para. 18 [*Humber Valley*], Book of Authorities of Ontario, Tab 18.

8 *Humber Valley*, above at para. 20.

9 *Re Hawkair Aviation Services Ltd*, 2006 BCSC 669 at paras. 19-20, 34, Book of Authorities of the Applicants, Tab 6.

(i) Stay in Favour of the Applicants

16. In relation to the Applicants, Ontario seeks to justify its request for a lift of the CCAA Stay to allow the Ontario HCCR Action to proceed by reference to the "tremendous amount of time, money and effort" invested to prosecute the Ontario HCCR Action.[10] Ontario alleges no other prejudice.

17. This alleged prejudice is no greater or of any different quality than the prejudice experienced by all other plaintiffs in Pending Litigation who have invested time, effort and money in pursuing their claims and whose claims are stayed. By contrast, the prejudice to the Applicants if Ontario's requested relief is granted would be severe.

18. If the relief requested by Ontario is granted, all other similarly situated claimants would argue that they are entitled to the same relief. Ontario does not even mention, let alone attempt to address this. If such relief were granted, the purpose of this CCAA Proceeding – namely, to achieve a global resolution of all the Pending Litigation and the Tobacco Claims within the CCAA – would be defeated. At a minimum, it would substantially delay the outcome of this Proceeding, tilt the playing field in favour of those Tobacco Claimants who had commenced litigation as of the filing date, and require the Applicants to devote significant time, resources and cost to defending the Pending Litigation, rather than to a global restructuring.

19. If the relief were granted only to Ontario and not to others, this would be unfair to other stakeholders, including other governments pursuing similar health care cost recovery litigation. The Applicants would be required to devote significant time, resources and energy to defending

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[10] Factum of Her Majesty the Queen in Right of Ontario, dated March 29, 2019, para. 8 ["Factum of Ontario"].

the Ontario HCCR Action for the benefit of one stakeholder, to the detriment of their ability to focus on a global restructuring for the benefit of all stakeholders.

20. Ontario seeks to establish its entitlement to preferential treatment by contending that it has been deprived of its right to a trial that is projected to be held in late 2020 or early 2021. If this factor were relevant at all to Ontario's entitlement to be relieved of the effects of the CCAA Stay – which it is not – Ontario's own evidence establishes that no trial date has been set in the Ontario HCCR Action. Its assertions of a projected trial date in late 2020 or early 2021 are at best, wishful thinking, unsupported by any evidence that Ontario has put in the record.[11]

21. Moreover, the equivalent HCCR proceeding commenced by the Province of British Columbia has been underway for much longer than the Ontario HCCR Action and is at a similar stage to the Ontario HCCR Action. The New Brunswick HCCR proceeding is much further advanced and, until recently, was scheduled for trial in November of 2019.[12]

22. Nor are the Applicants using the CCAA improperly as a "sword".[13] Ontario's argument misapplies a 2005 statement by the Court in the former JTI-MacDonald CCAA proceeding. In that case, as the passage reproduced by Ontario makes clear, the Court admonished the debtor company against using the CCAA stay to preclude a litigation counter-party from taking steps, while at the same time itself taking steps in that litigation to advance the debtor's interests. This

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[11] See Case Management Endorsement of Master Short for June 8, 2018, expressly declining to set a trial date: Motion Record of Ontario, Exhibit R. See also the Case Management Endorsement for August 10, 2018, during which, the defendants continued to maintain that it was premature to set a trial date and no trial date was set: Motion Record of Ontario, Exhibit S. See also Motion Record of Ontario, Exhibit V, which contains the agenda for the most recent case management conference on March 8, 2019, which demonstrates the number of very significant issues that remain to be addressed between the parties before a trial date can be set.

[12] See Affidavit of Eric Thauvette, sworn April 2, 2019, para. 37 (Comeback Hearing).

[13] Factum of Ontario, paras. 8, 39, 51.

passage emphasizes the CCAA court's oversight role with regard to litigation that could result in claims against the debtor company.[14]

23. In this CCAA proceeding, neither ITCAN nor Ontario is permitted to take any further steps in the Ontario HCCR Action. The CCAA Stay is being used as "shield" for the well-accepted purpose of freezing the *status quo* in all litigation proceedings underway as of the date of the CCAA filing. The Applicants are not hiding behind the CCAA Stay in order to further their interests in the Ontario HCCR Action. Any resolution in this proceeding will be part of a co-ordinated plan negotiated by the Applicants and all of its creditors.

24. Ontario's concern that JTI and RBH may be distracted from settlement discussions in relation to the Ontario HCCR Action because they will be pursuing an application for leave to appeal to the Supreme Court of Canada in the Quebec Class Actions[15] is now moot by reason of this Court's endorsement of April 17, 2019.[16] This Court has confirmed that ability of the Applicants and of JTI and RBH to commence applications for leave to appeal are subject to the CCAA Stay.

25. Ontario further complains that the Initial Order removed the Ontario HCCR Action from the ongoing case management of Master Short and Justice Conway.[17] However, similar effects inevitably result for all ongoing litigation proceedings, particularly class actions, that are caught by a CCAA Stay.

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[14] *Re JTI-MacDonald Corp*, 2005 CarswellOnt 1201 at para. 6 (Sup Ct [Comm List]), Book of Authorities of Ontario, Tab 5; Factum of Ontario, para 51.

[15] Factum of Ontario, para. 12(f) and (g).

[16] *Imperial Tobacco Canada Limited et al* (Court File No. CV-19-616077-00CL), Endorsement of McEwen J. dated April 17, 2019, Book of Authorities of the Applicants, Tab 2.

[17] Factum of Ontario, paras. 9, 39.

26. Finally, Ontario states that there is no evidence that the defendants to the Ontario HCCR Action, including ITCAN, JTI and RBH are seriously prepared to participate in meaningful settlement discussions regarding the Ontario HCCR Action or any other actions pending against them in Canada.[18] This is effectively an argument that this CCAA proceeding is "doomed to fail" or that the Applicants and the other tobacco companies have no intention of seeking genuinely to reach a compromise with Tobacco Claimant stakeholders. Ontario does not specify the basis on which it advances this contention, nor does it provide any supporting evidence.

27. It would be premature for this Court to reach such a conclusion. A self-serving statement of one stakeholder that they will not support a proposed plan at the outset of a proceeding should be accorded little weight. Moreover, whether the Applicants and the other co-defendants have previously been willing to engage in settlement discussions with Ontario outside a CCAA proceeding has no bearing on their willingness to do so within a CCAA proceeding, where the Applicants seek to achieve a global resolution of Tobacco Claims.

28. There is also no basis for Ontario's statement that ITCAN, JTI and RBH have no intention to "restructure their affairs".[19] A restructuring under the CCAA can take many forms.[20] As the Applicants submitted to this Court in supporting the Initial Order, it is well-recognized that one such form is a global resolution of litigation claims.[21] The prior JTI proceeding, which is cited by Ontario repeatedly and at length, was just such a CCAA proceeding. The fact that the

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18 Factum of Ontario, para. 12(e).

19 Factum of Ontario, para. 38.

20 See *Re 843504 Alberta Ltd*., 2003 ABQB 1015 at para. 14, Book of Authorities of the Applicants, Tab 3, in which Tarnopolosky J. stated that "… reorganization of a company's affairs under the CCAA may take many forms. There is no one solution that will apply for every company. Solutions may vary from organization and management restructuring, downsizing, refinancing, or debt to equity conversion – the solutions are generally limited only by the creativity of those structuring the plan of arrangement."

21 Initial Order Factum of the Applicants, paras. 60 – 64.

Applicants' business is to continue in the ordinary course and to generate revenues during these this CCAA proceeding is to the benefit, not the detriment, of the Tobacco Claimants and the ultimate resolution of this CCAA proceeding.

29. Ontario puts forward various arguments regarding the difficulty of resolving the Ontario HCCR Action within the CCAA, its *sui generis* nature, and of the more general challenges of fashioning a claims process within the CCAA to fairly and efficiently adjudicate all of the provincial HCCR claims.[22] These concerns are ill-founded and in any event, premature at this stage. The manner in which the Applicants' proposed global resolution is to be negotiated and the claims of all of the Tobacco Claimants are to be valued for voting and distribution purposes will be resolved in due course, under the protective umbrella of the CCAA Stay.

(ii) Stay in Favour of BAT Group Defendants

30. In relation to the Members of the BAT Group who are named as defendants to the Ontario HCCR Action, the CCAA Stay was extended to these third parties on the basis of their status as co-defendants in the Pending Litigation and the need to facilitate a co-ordinated global resolution of the Tobacco Claims.

31. The case law supporting this relief was fully canvassed by the Applicants in their factum supporting the Initial Order.[23] In particular, a number of authorities support the extension of the CCAA Stay to co-defendants of the CCAA debtor in order to ensure a co-ordinated resolution of

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22 Factum of Ontario, para. 87.

23 Initial Order Factum of the Applicants, paras. 65 – 68.

litigation involving the debtor company and protect the debtor company from the potential derivative claims against it that can arise from such litigation.[24]

32. In relation to these co-defendants, it is therefore not relevant that the Quebec Class Action judgment is not owed by them and does not have any direct financial impact on them, as Ontario alleges. There was no legal requirement for the Applicants to demonstrate that these co-defendants were rendered insolvent by the issuance of the Quebec Class Action Judgments.[25] The extension of the CCAA Stay to the co-defendants in the Ontario HCCR Action recognizes that the liability of all of the co-defendants in this proceeding is significantly intertwined.

33. The Ontario HCCR Action cannot proceed against these co-defendants without impairing the ability of the Applicants to restructure. If the requested relief is granted, it is not clear whether Ontario is suggesting that the Ontario HCCR Action would proceed without any involvement of ITCAN, JTI or RBH, or whether Ontario contemplates that ITCAN, RBH and JTI would participate, but any monetary award obtained by Ontario would not be enforced against them. At times, Ontario seems to be advancing both positions.

34. Neither scenario is tenable. As is evident from the face of the pleadings, the Ontario HCCR Action is directed primarily at the Applicants, who manufactured, marketed and sold the tobacco products at issue in the proceedings. The claims against the other named defendants are necessarily derivative of Ontario's claims against the Applicants for alleged "tobacco-related

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[24] See *Re Grace Canada Inc*., 2005 CarswellOnt 6648 at para. 12 (Sup Ct [Comm List]), Book of Authorities of the Applicants, Tab 5. See also *Campeau v. Olympia & York Developments Ltd.*, 1992 CarswellOnt 185 at paras. 23–25 (Ct J (Gen Div)), Book of Authorities of the Applicants, Tab 1 (extending a CCAA stay to a third-party defendant in litigation arising out of the same facts as litigation involving the debtor); *Re Muscletech Research & Development Inc*, 2006 CarswellOnt 264 at para. 3 (Sup Ct [Comm List]), Book of Authorities of the Applicants, Tab 8; *Re Muscletech Research & Development Inc*, 2006 CarswellOnt 3632 at para. 2 (Sup Ct [Comm List]), Book of Authorities of the Applicant, Tab 9 (extending the CCAA stay to a number of non-applicants where the claims against the non-applicants were derivative of claims against the debtor and where the stay would facilitate a global resolution of the litigation).

[25] Factum of Ontario, para. 6.

wrongs" committed in respect of Ontario consumers. The other members of the BAT Group – who did not manufacture, market or sell products in Ontario – are included in the Ontario HCCR Action solely by virtue of their alleged conspiracy with ITCAN in furtherance of the latter's alleged wrongs.

35. In the circumstances, it would be completely unreasonable to expect that ITCAN, JTI and RBH would not defend the Ontario HCCR Action if it were to continue during this CCAA proceeding. Assuming Ontario accepts that they must do so, allowing the Ontario HCCR Action to proceed would require ITCAN, JTI and RBH to continue to devote enormous time, energy and resources to defending this litigation for the benefit of one stakeholder alone, at the expense of their focus on achieving a global resolution of claims in the interests of all stakeholders.

36. This CCAA Proceeding will only be successful if all of the Pending Litigation and the Tobacco Claims are resolved under the supervision of the CCAA Court in a co-ordinated and expedited fashion that avoids inconsistent results. The manner in which this can occur must be resolved in due course under the protection of the CCAA Stay, under the supervision of this Court and the Monitor and with the advice and assistance of (among others) the Court-Appointed Mediator.

37. The Applicants are entitled to a reasonable opportunity to determine whether they can achieve this result and to be protected from the manoeuvres of creditors such as Ontario while they seek to do so.

(b) Reliance on Former JTI CCAA Proceeding is Misplaced

38. Ontario is incorrect in stating that its proposed approach was followed in JTI's prior CCAA proceeding.[26] Ontario relies heavily on the former JTI proceeding to support its request for relief in this proceeding. However, in doing so, Ontario ignores several material distinguishing factors between this proceeding and the prior JTI proceeding.

39. Chief among these distinguishing factors is the simple fact that the Monitor and the debtor company in the prior JTI proceeding consented to lifting the stay of proceedings to allow certain statements of claim to be filed. This included the health care costs recovery litigation, which at the time was in its infancy as many of the health care costs recovery statutes had yet to be enacted when the JTI CCAA proceeding was initiated. This fact is apparent from the portion of the relevant endorsement that Ontario cites in its Factum: "The Company and Monitor have consented to a lifting of the stay of proceedings … in respect of the HCCR claims commenced after the commencement of the CCAA proceeding."[27] (emphasis added)

40. The prior JTI proceeding also proposed a compromise only of certain government claims (tax claims involving tobacco smuggling, referred to by Ontario as the Contraband Claims) but not others. Among the claims that the debtor chose not to compromise were those arising from the health care cost recovery proceedings and the Quebec Class Actions. This is obviously completely different from what is proposed in the current CCAA proceeding.

41. The description of the former JTI proceeding as a "litigation scheme", which Ontario cites on several occasions as if it represented a finding by the Courts that this approach was

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[26] Factum of Ontario, para. 14.

[27] *Re JTI-MacDonald Corp.* (2009), 61 CBR (5th) 117 at para. 17 (Sup Ct [Comm List]) [*Re JTI*], Book of Authorities of Ontario, Tab 4, cited in Factum of Ontario at para. 50(b).

somehow improper,[28] refers to the manner in which CCAA debtors had determined that the CCAA restructuring in the JTI proceeding should take place.[29] As a 2005 decision cited by Ontario makes clear, in the particular circumstances of that proceeding, various claims were to be litigated in the courts before the plan of arrangement could be developed.[30] This approach was sanctioned and endorsed by the overseeing CCAA court.

42. It would be inappropriate for Ontario or for this Court to dictate to the Applicants and to JTI and RBH that this same approach to their restructuring must be taken in this proceeding. The Applicants are entitled to an opportunity to develop and propose the restructuring solution that they believe, in their business judgment, is appropriate, achievable, and has a reasonable prospect of acceptance by their stakeholders.

43. Ontario further relies on statements that were made in a different context to support allowing the Ontario HCCR Action to proceed. In the JTI proceeding, despite the fact that the debtor did not propose to compromise the nascent HCCR claims, the Government of British Columbia (supported by Ontario) sought to compel the debtors to address these claims within the CCAA proceeding. It was not, as Ontario repeatedly asserts, "the *status quo* throughout JTIM's 2004 CCAA Proceeding… to have the case-managed Ontario HCCR Action proceed."[31]

44. In denying British Columbia's request to compel JTI to address the HCCR claims within its CCAA proceeding, the Court referred to the fact that certain (foreign) defendants to the

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28 Factum of Ontario, paras. 50(c), 85.

29 *Re JTI*, above at para. 21, Book of Authorities of Ontario, Tab 4, cited in Factum of Ontario at para. 50(c).

30 *Re JTI-MacDonald Corp*, [2005] O.J. No 1202 at para. 10 (Sup Ct [Comm List]), Book of Authorities of Ontario, Tab 5.

31 Factum of Ontario, para. 86.

HCCR actions objected to being brought within the CCAA proceeding.[32] By contrast, in this current CCAA proceeding, those same foreign defendants (the majority of which are affiliates of the Canadian tobacco company defendants to the Ontario HCCR Action) are not objecting to the proceeding. Moreover, the members of the BAT Group's willingness to be involved in discussions of a global resolution of all Tobacco Claims (including the Ontario HCCR Action) is recognized by – and conditional upon – the extension of the CCAA Stay to those defendants. In other words, the reasons the Court in JTI relied on to remove the HCCR claims from JTI's CCAA proceeding are not present here. The 2009 JTI decision cited by Ontario thus provides no support for the relief sought by Ontario on this motion.

45. Whether the health care cost recovery claims and the Quebec Class Actions were permitted to continue during the prior JTI proceeding is therefore completely irrelevant in this CCAA proceeding. This proceeding proposes to compromise all of the Tobacco Claims, including the Ontario HCCR Action and the other health care cost recovery actions, as well as the liabilities of the Applicants to the Quebec Class Action plaintiffs.

(c) Allegations of Non-Disclosure Are Unfounded

46. Ontario's allegations of non-disclosure to this Court of material facts at the time of the filing under the CCAA are entirely unfounded. The material facts alleged to have been undisclosed are set out in paragraphs 22 to 34 of Ontario's Factum. Ontario's accusation appears to be primarily directed at JTI and its Monitor.

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[32] *Re JTI*, above at para. 36, Book of Authorities of Ontario, Tab 4, cited in Factum of Ontario at para. 50(e).

47. Nonetheless, Ontario lists certain information about ITCAN and the BAT Group without stating why this information is "material".[33] All of this information was accurately disclosed by ITCAN in the affidavit filed in support of the application for an Initial Order.[34]

48. Ontario further alleges that ITCAN, JTI and RBH failed to disclose the status of the Ontario HCCR Action in seeking and obtaining the Initial Order. In particular, Ontario alleges that ITCAN failed to disclose that the Ontario HCCR Action is case managed by Master Short and Justice Conway and overseen by Justice Morawetz or that the trial of the Ontario HCCR Action is projected for late 2020 or early 2021.[35]

49. None of these facts are material to the entitlement of the Applicants to the protection of the CCAA Stay. Even if the proposed trial of the Ontario HCCR Action had been set for late 2020 or early 2021 (which is not the case), this would be irrelevant to the jurisdiction of this Court to grant the Initial Order. The case management status of the Ontario HCCR Action is equally irrelevant. Ontario does not provide any basis for concluding that these alleged facts are or should have been "material" to this Court's decision to grant the Initial Order.

50. In any event, the Applicants provided full and fair disclosure regarding the Ontario HCCR Action in their materials supporting the Initial Order. Given the number of significant issues that remain to be resolved before the Ontario HCCR Action can proceed to trial, it was entirely accurate to describe this proceeding as at a "preliminary stage".[36]

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33 Factum of Ontario, paras. 29 to 32.

34 Affidavit of Eric Thauvette, sworn March 12, 2019 [First Thauvette Affidavit].

35 Factum of Ontario, para. 61.

36 First Thauvette Affidavit, para. 148.

PART IV -NATURE OF THE ORDER SOUGHT

51. The Applicants therefore request that the relief requested by Ontario be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

Deborah Glendinning

Marc Wasserman

John A. MacDonald

Craig Lockwood

Schedule "A"

LIST OF AUTHORITIES

Case Law

1. *Campeau v. Olympia & York Developments Ltd*., 1992 CarswellOnt 185 (Ct J (Gen Div))
2. *Imperial Tobacco Canada Limited et al* (Court File No. CV-19-616077-00CL), Endorsement of McEwen J. dated April 17, 2019 (Sup Ct [Comm List])
3. *Re 843504 Alberta Ltd*., 2003 ABQB 1015
4. *Re Canadian Airlines Corp*., 2000 CarswellAlta 622 (QB)
5. *Re Canwest Global Communications Corp*., [2009] O.J. No. 5379 (Sup Ct [Comm List])
6. *Re Canwest Global Communications Corp*., 2010 ONSC 3530
7. *Re Grace Canada Inc*., 2005 CarswellOnt 6648 (Sup Ct [Comm List])
8. *Re Hawkair Aviation Services Ltd*, 2006 BCSC 669
9. *Re Humber Valley Resort Corp*., 2008 NLTD 174
10. *Re Imperial Tobacco Canada Limited*, 2019 ONSC 1684
11. *Re JTI-MacDonald Corp*, 2005 CarswellOnt 1201 (Sup Ct [Comm List])
12. *Re JTI-MacDonald Corp*, [2005] O.J. No 1202 (Sup Ct [Comm List])
13. *Re JTI-MacDonald Corp*., (2009), 61 CBR (5th) 117 (Sup Ct [Comm List])
14. *Re Muscletech Research & Development Inc*, 2006 CarswellOnt 264 (Sup Ct [Comm List])
15. *Re Muscletech Research & Development Inc*., 2006 CarwellOnt 3632 (Sup Ct [Comm List])

Schedule "B"

COMPANIES' CREDITORS ARRANGEMENT ACT

R.S.C. 1985, c. C-36, as amended

Stays, etc. — other than 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 30 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.

TOBACCO DAMAGES AND HEALTH CARE COSTS RECOVERY ACT, 2009

S.0 2009, c. 13, as amended

Direct action by Crown

2 (1) The Crown in right of Ontario has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong.

Action not subrogated

(2) An action under subsection (1) is brought by the Crown in right of Ontario in its own right and not on the basis of a subrogated claim.

Action independent of recovery by others

(3) In an action under subsection (1), the Crown in right of Ontario may recover the cost of health care benefits whether or not there has been any recovery by other persons who have suffered damage caused or contributed to by the tobacco related wrong committed by the defendant.

Recovery for individuals or on aggregate basis

(4) In an action under subsection (1), the Crown in right of Ontario may recover the cost of health care benefits,

(a) for particular individual insured persons; or
(b) on an aggregate basis, for a population of insured persons as a result of exposure to a type of tobacco product.

Evidence and procedure in action brought on aggregate basis

(5) If the Crown in right of Ontario seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis, the following apply:

1. It is not necessary,
   i. to identify particular individual insured persons,
   ii. to prove the cause of tobacco related disease in any particular individual insured person, or
   iii. to prove the cost of health care benefits for any particular individual insured person.

2. The health care records and documents of particular individual insured persons and the documents relating to the provision of health care benefits for particular individual insured persons are not compellable, except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness.

3. A person is not compellable to answer questions with respect to the health of, or the provision of health care benefits for, particular individual insured persons.

4. Despite paragraphs 2 and 3, on motion by a defendant, the court may order discovery of a statistically meaningful sample of the documents referred to in paragraph 2 and the order shall include directions concerning the nature, level of detail and type of information to be disclosed.

5. If an order is made under paragraph 4,
   i. the identity of particular individual insured persons shall not be disclosed, and
   ii. all identifiers that disclose or may be used to trace the names or identities of any particular individual insured persons shall be deleted from any documents before the documents are disclosed. 2009, c. 13, s. 2 (5).

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., *et al.*

Applicants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

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