

CITATION: 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, 2019 ONSC 2611

COURT FILE NO.: CV-19-615862-00CL, CV-19-616077-00CL, and CV-19-616779-00CL
DATE: 20190501

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
In The Matter of the *Companies' Creditors) Robert I. Thornton, Leanne M. Williams, and*
Arrangement Act, R.S.C. 1985, c. C-36, As) Rebecca L. Kennedy, for the Applicant, JTI-
Amended) Macdonald Corp.
)
And In The Matter of a Plan of Compromise) *Deborah Glendinning, Marc Wasserman,*
or Arrangement of JTI-Macdonald Corp.) and *John MacDonald*, for Imperial Tobacco
)
And In The Matter of a Plan of Compromise) *Paul Steep, James Gage, and Heather*
or Arrangement of Imperial Tobacco Canada) *Meredith*, for Rothmans, Benson & Hedges
Limited and Imperial Tobacco Company)
Limited) *Avram Fishman, Mark E. Meland, Harvey*
) *Chaiton*, and *George Benchetrit*, Lawyers
And In The Matter of a Plan of Compromise) for Conseil Québécois sur la tabac et la santé
or Arrangement of Rothmans, Benson &) and *Jean-Yves Blais* and *Cécilia Létourneau*,
Hedges Inc.) Quebec Class Action Plaintiffs
)
) *Jacqueline Wall, Shahana Kar, and Edmund*
) *Huang*, for Her Majesty The Queen in right
) of Ontario
)
) *Massimo Starnino* and *Lily Harmer*, for Her
) Majesty The Queen in right of Alberta and
) Newfoundland & Labrador
)
) *Jeffrey Leon, Michael Eizenga, and Sean*
) *Zweig*, for the Consortium Provinces
)
) *Sheila Block, Scott Bommof* and *Adam*
) *Slavens*, for the Receiver of JTIM-
) MacDonal Corp. and JTIM Canada LCC
)
) *Patrick Flaherty, Bryan Mcleese, Justin*
) *Safayeni* and *Brian Gover*, for RJ Reynolds
) Tobacco Co. and RJ Reynolds Tobacco
) International
)

-) *David Byers and Maria Konyukhova*, for
-) British American Tobacco p.l.c., B.A.T.
-) Industries p.l.c. and British American
-) Tobacco (Investments) Limited
-)
-) *Clifton Prophet*, for Philip Morris
-) International Inc.
-)
-) *Steven Weisz and Amanda McInnis*, for
-) Grand River Enterprises Six Nations Ltd.
-)
-) *Ari Kaplan*, for former Genstar US Retiree
-) Group Committee
-)
-) *Wael Rostom*, for the Bank of Nova Scotia
-)
-) *Jay Swartz and Natasha MacParland*, for the
-) Monitor (FTI)
-)
-) *Pam Huff, Linc Rogers, and Chris Burr*, for
-) Deloitte Restructuring Inc., Monitor of JTIM
-) MacDonald Inc.
-)
-) *Shayne Kukulowicz and Jane Dietrich*, for
-) Monitor of Rothmans, Benson & Hedges
-)
-) *Jonathan Lisus, Matthew P. Gottlieb, and*
-) *Andrew Winton* for the Hon. Warren K.
-) Winkler, in his capacity as Interim Tobacco
-) Claimant Coordinator
-)
-) *Evatt Merchant, Q.C.*, for certain class
-) action proceedings
-)
-) *Eduard Popov*, counsel for AIG Insurance
-)
-) *Vern DaRe and Robert Cunningham*, counsel
-) for Canadian Cancer Society
-)
-) **HEARD:** April 25, 2019

REASONS FOR DECISION

MCEWEN J.

[1] On April 26, 2019, I released a handwritten endorsement, with reasons to follow, dismissing the motion brought by Her Majesty the Queen in right of Ontario (“Ontario”) which sought an order lifting the stay of its action (the “Ontario Action”) against the three applicants, JTI-MacDonald Corp. (“JTIM”), Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited (“Imperial”), and Rothmans, Benson & Hedges Inc. (“RBH”) (collectively “the Applicants”) and eleven other defendants¹. The Ontario Action seeks to recover expended health care costs.

[2] I am now providing those reasons.

[3] Ontario submits that it should be allowed to proceed with the Ontario Action on the condition that it would agree to, at least temporarily, stay the effects of any judgment that it might receive at the conclusion of trial.

[4] Ontario is supported in its position by the Quebec Class Action Plaintiffs (the “Quebec Plaintiffs”) along with the provinces of Alberta and Newfoundland & Labrador. The Canadian Cancer Society, which is not a party in any litigation, attended at the motion to express its support for Ontario’s position.

[5] The Applicants oppose the motion. They are supported by the provinces of British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan (“the Consortium”).

[6] On April 23, 2019, I released Reasons for Decision (the “Previous Reasons”) in which I stayed any and all current proceedings by or against the Applicants and related entities and further stayed any prescription, time or limitation periods. Many of the views I expressed in the Previous Reasons resonate in this motion.

[7] The Ontario Action has been on-going for approximately ten years. Ontario has recently obtained court approval to amend its statement of claim to seek damages of \$330 billion.

[8] By anyone’s estimate it is an extremely significant lawsuit. It will take approximately one year or more of trial time. It raises the issue as to whether provinces can recover damages for health care costs expended with respect to smoking-related diseases. The other provinces also have litigation pending seeking the same relief, all of which are currently stayed.

¹ Rothmans Inc., British American Tobacco (Investments) Limited, B.A.T. Industries p.l.c, Carreras Rothmans Limited, R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International Inc., Altria Group, Inc., Philip Morris U.S.A. Inc., Philip Morris International, Inc., Canadian Tobacco Manufacturers’ Council.

[9] Ontario primarily submits that the stay ought to be lifted from the Ontario Action, subject to the above condition, for the following reasons:

- The balance of convenience favours Ontario.
- The balancing of relative prejudice to Ontario versus the Applicants tips the scale in Ontario's favour.
- Ontario has a meritorious claim.
- The dynamics of the Ontario Action are such that the eleven co-defendants cannot be compelled to participate in the CCAA proceedings and, specifically, any settlement discussions with the court appointed mediator The Hon. Mr. Warren Winkler, Q.C. As such, settlement of the Ontario Action is unlikely.

[10] I disagree.

[11] First, as I set out in the Previous Reasons, it is critical to preserve the status quo as it existed at the time of the filings for CCAA protection to provide a level playing field needed to attempt to resolve the several, significant claims.

[12] The proposal put forward by Ontario would alter the status quo in its favour. Ontario would be allowed to advance its action while the other proceedings, including the other claims by the provinces seeking the same or similar relief, were stayed.

[13] Further, once again, as in the case of the Quebec Plaintiffs whose action I previously stayed, this would not only affect the status quo but add an enormous impediment to resolution.

[14] If Ontario was allowed to proceed to trial with an anticipated trial date, perhaps as early as 2021, it would significantly distract Ontario and the Applicants from the CCAA proceedings. There is no doubt that the pre-trial and trial processes would be very expensive exercises which would divert significant time and resources away from settlement discussions.

[15] This CCAA process is at its very early stages. It must be given an opportunity to evolve and succeed without multiple, significant, expensive distractions.

[16] Certainly the balance of convenience as between all stakeholders favours keeping the status quo in place. I reject Ontario's submissions that none of the Applicants have disclosed any meaningful or proposed restructuring plan that will be put at risk if Ontario is permitted to continue. Such a submission is entirely premature in light of the stated goal of the Applicants to use their best efforts to resolve the claims against them. While one can argue that the *bona fides* of this intention remains to be seen, it is entirely premature to dismiss it at this time.

[17] Furthermore, at this stage at least, the balancing of relative prejudice tips the scales against Ontario. The relative prejudice that may be suffered by all stakeholders far exceeds the relative prejudice to Ontario. It would be inappropriate to favour the interests of Ontario above all others.

[18] It may be that Ontario ultimately has a meritorious claim against the Applicants and the other eleven defendants. While it is premature to review the merits of any pending claim, it is fair to say at this time that Ontario's claim is seemingly no more or less meritorious than the other outstanding actions.

[19] In this regard it bears repeating that six of the provinces oppose Ontario's position on this motion and wish to give the CCAA process an opportunity to succeed. Overall, there is simply no principled basis to distinguish the Ontario Action from any of the other outstanding actions, all of which have been stayed.

[20] I also do not accept Ontario's position that this court has no authority to compel the other eleven defendants to participate in the CCAA proceedings and in settlement discussions. I do not propose to decide this issue at this time, however, since the other defendants are not before me. It may well be, in any event, that they are entirely motivated to attend and participate in the mediation process. It is difficult to see why they would not be interested. This is particularly so where many of the co-defendants are companies related to the Applicants.

[21] I repeat, again, the sentiments set out in the Previous Reasons wherein I stated that the CCAA case law clearly establishes a significant need to preserve the status quo between all stakeholders and preserve a level playing field to maximize the chances of obtaining a resolution. This read rings particularly true with respect to the Ontario Action where Ontario seeks to pursue a highly complex lawsuit against multiple defendants seeking \$330 billion in damages while the other lawsuits remain stayed.

[22] For the reasons above, I dismiss Ontario's motions to lift the stays, as proposed, in all three Applications.

A handwritten signature in black ink, appearing to read 'McEwen J.', is written above a horizontal line.

McEwen J.

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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.

REASONS FOR DECISION

McEwen J.

Released: May 1, 2019