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

MEMORANDUM OF ARGUMENT OF HER MAJESTY IN RIGHT OF ALBERTA and NEWFOUNDLAND AND LABRADOR

June 25, 2019

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TO: THE SERVICE LISTS

1. The provinces of Alberta and Newfoundland & Labrador, together with the Consortium Provinces[1] and Quebec (collectively, the "Provinces"), oppose the proposed extension of the stay of proceedings herein to December 16, 2019. It is too long. The Provinces propose an extension to October 16, 2019.

2. The court's jurisdiction to extend the stay of proceedings is governed by s. 11.02 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended (the "CCAA"), which provides as follows (emphasis ours):

> 11.02…(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.
>
> (4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

[1] The "Consortium Provinces" include British Columbia, Saskatchewan, Manitoba, New Brunswick, Nova Scotia and Prince Edward Island.

In keeping with the foregoing, the burden of justifying the extension sought falls squarely on the debtor company, which, among other things, must satisfy the court that the period of the requested extension is (a) necessary, and (b) appropriate.[2]

3. The CCAA is an open-ended, flexible statute that confers considerable discretion on the supervising CCAA judge. Accordingly, the CCAA does not limit the period of the extension that may be granted by the court. Other things being equal, however, it bears considering that the corresponding restructuring provisions of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 limit the extension of the stay under that statute to a maximum of 45 days.[3] In the Provinces' experience, although there are exceptions, CCAA stay extensions are generally limited to approximately 3 months in duration.

4. Of particular importance in these cases is the fact that the stay of proceedings covers not only the debtor companies but the debtor's solvent third-party affiliates who are also defendants to the actions commenced by the Provinces. The commitment of those affiliates to contribute to a restructuring plan will be essential to achieving a consensual restructuring, but their commitment has yet to be tested.

5. As previously submitted to this court, the Provinces are prepared to "give peace a chance". However, the Provinces are also mindful of the fact that the history of tobacco litigation is a study in tactics and delay[4], and that the importance of case managing court proceedings involving these debtors cannot be overstated.

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[2] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 11.02, as amended.

[3] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 50.4(9), as amended.

[4] *E.g.*, see *Létourneau* c. *JTI-MacDonald Corp*., 2015 QCCS 2382 at paras. 365-378 and 1196-1198, ITCAN Initial Application Record Tab 2J.

6. The importance of timely supervision of these proceedings is also demonstrated by the independent action of JTI-Macdonald TM Corp ("TM"), through its privately appointed receiver. As a result of the stay extension application, it has been disclosed that TM has apparently exercised a purported right to effect a payment from funds of JTI-MacDonald Corp. ("JTIM") held by TM, without recourse to this court, in the face of the CCAA stay and notwithstanding the issues raised in these proceedings in respect of the underlying transactions.[5] One cannot help but wonder whether or when this activity would have been disclosed to creditors and the court, but for the stay extension application.

7. Additionally, an extension to mid-December is particularly problematic given the practical challenges associated with implementing fundamental change to these proceedings on the eve of the holiday period. For example, if a debtor or a creditor were to seek to suspend operations or the making of certain payments by the debtor at that time, the professional and societal resources needed to manage that change might not be available, thereby unfairly advantaging one stakeholder or another and/or creating undue hardship.

8. Lastly, the typical argument in favour of longer stay extensions – to avoid the costs associated with additional court attendances – cannot be given any weight in these circumstances. The incremental costs of an additional court attendance are simply not material in the context of the professional costs that the debtors are incurring in any event.

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[5] Second Amended and Restated Initial Order in respect of JTIM, para. 18, 21; see also, *Air Canada (Re)*, 2003 CanLII 64234 (ON SC), para. 1-7, 25-26.

9. An extension of just over three months, to October 16, 2019:

(a) is coordinated and consistent with the ongoing effort at mediation, and that which is “necessary” for that purpose;

(b) facilitates transparency and allows the court to maintain reasonable supervision of the restructuring, thereby incenting progress on the part of the debtors and other entities that are benefitting from the CCAA stay of proceedings; and

(c) provides all stakeholders with reasonable flexibility in the event that satisfactory progress is not being made.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25th DAY OF JUNE 2019

Of counsel to Alberta and Newfoundland

SCHEDULE "A"

1. *Létourneau* c. *JTI-MacDonald Corp*., 2015 QCCS 2382

2. *Air Canada (Re)*, 2003 CanLII 64234 (ON SC)

3. Second Amended and Restated Initial Order in respect of JTIM

SCHEDULE "B"

Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended

General power of court

…

Stays, etc. — initial application

- **11.02 (1)** A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 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.
- **Marginal note: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.
- **Marginal note: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.

- **Marginal note:Restriction**

  (4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

- 2005, c. 47, s. 128, 2007, c. 36, s. 62(F)

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 as amended

Extension of time for filing proposal

50.4 (9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

- **(a)** the insolvent person has acted, and is acting, in good faith and with due diligence;
- **(b)** the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- **(c)** no creditor would be materially prejudiced if the extension being applied for were granted.

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