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 2222

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

DATE: 20190423

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
In The Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, As Amended	*Robert I. Thornton, Leanne M. Williams*, and *Rebecca L. Kennedy*, for the Applicant, JTI-Macdonald Corp.
And In The Matter of a Plan of Compromise or Arrangement of JTI-Macdonald Corp.	*Deborah Glendinning, Marc Wasserman*, and *John MacDonald*, for Imperial Tobacco
And In The Matter of a Plan of Compromise or Arrangement of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited	*Paul Steep, James Gage*, and *Heather Meredith*, for Rothmans, Benson & Hedges
And In The Matter of a Plan of Compromise or Arrangement of Rothmans, Benson & Hedges Inc.	*Avram Fishman, Mark E. Meland, Harvey Chaiton*, and *George Benchetrit*, Lawyers for Conseil Québécois sur la tabac et la santé and Jean-Yves Blais and Cécilia Létourneau, 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-MacDonald 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
)
) **HEARD:** April 4, 2019

REASONS FOR DECISION

MCEWEN J.

OVERVIEW

[1] JTI-Macdonald Corp. ("JTIM"), Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited ("Imperial"), and Rothmans, Benson & Hedges Inc. ("RBH") (collectively "the Applicants") have filed for protection pursuant to the provisions of the *Companies' Creditors*

Arrangement Act, R.S.C. 1985, c. C-36 (the "CCAA") seeking a resolution of the multiple, significant litigation claims that have been made against them.

[2] The timing of the CCAA Applications was triggered as a result of the judgment of the Quebec Court of Appeal (the "QCCA") released March 1, 2019. That decision largely upheld the earlier trial decision and awarded approximately $13.5 billion to the Quebec Class Action Plaintiffs (the "Quebec Plaintiffs"). In addition to this action there are a significant number of on-going proceedings against the three Applicants including government-initiated litigation and other class actions.

[3] The three Initial Orders obtained by the Applicants in March 2019 granted the Applicants protection from their creditors on an interim basis and allowed for any interested party to apply to this court to vary or amend the Initial Order.

[4] The parties attended before me on April 4 and 5, 2019 at the come-back hearing to deal with several issues. The parties were able to agree on certain orders and deferred other issues to be dealt with on a later date, if necessary.

[5] These reasons deal solely with the terms of the Initial Orders that affect ongoing or new proceedings by or against the Applicants. In particular, these reasons also deal with any leave applications that the Applicants might make to the Supreme Court of Canada (the "SCC Leave Applications").

POSITIONS OF THE APPLICANTS

[6] JTIM and RBH seek to obtain orders permitting them to file SCC Leave Applications but suspending all further proceedings before the SCC. JTIM and RBH essentially submit that it is in the best interests of all stakeholders, including the Applicants and the Quebec Plaintiffs, to preserve the status quo by allowing them to file their SCC Leave Applications but allow for no further steps. They claim this would afford all stakeholders an opportunity to try to resolve all of the outstanding litigation as against the Applicants.

[7] Imperial does not seek leave to file an SCC Leave Application. Imperial states that it does not intend to pursue a SCC Leave Application unless it must do so to preserve its rights against the possibility that the CCAA proceeding fails. It seeks a stay of all proceedings by and against the Applicants along with a stay of any applicable limitation periods. Imperial submits that its proposal effects the best balance between all stakeholders and would entirely preserve the status quo without giving any particular stakeholder an advantage. This would allow all stakeholders to attempt to globally resolve all of the litigation claims. Imperial submits that a blanket stay has the best opportunity of achieving that goal.

[8] Imperial's position is supported by the provinces of British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan (the "Consortium"), as well as the provinces of Alberta and Newfoundland. These provinces currently have actions underway to recover expended health care costs. Imperial is further supported by the law firm Merchant LLP, which has commenced a number of class action proceedings against the Applicants and others.

[9] The relevant wording set out in the Initial Orders that the Applicants urge upon me to adopt is as follows:

- The JTIM Initial Order, at para. 20, states:

> [20] This court orders that, notwithstanding anything to the contrary in this Order, [JTIM] is authorized to continue, and the applicable Other Defendants are not stayed from continuing, to contest the Quebec Class Actions during the Stay Period (the "Further Quebec Class Action proceedings"), including without limitation by way of an application for leave to appeal to the Supreme Court of Canada and an appeal on the merits to the Supreme Court of Canada if leave is granted. Nothing in this Order shall prevent any Person from responding to the Further Quebec Class Action Proceedings, provided that during the Stay Period this paragraph does not, without further order of this Court, permit the Applicant to post security or grant any security interest, or permit any Person to seek security from the Applicant in relation to the Further Quebec Class Action Proceedings.

- The RBH Initial Order, at para. 20, states:

> [20] This court orders that, notwithstanding anything to the contrary in this Order, [Rothmans] is authorized to serve and file an application for leave to appeal the Quebec Appellate Decision to the Supreme Court of Canada, but no further step or proceeding shall be taken by the Applicant or any other Person in respect of such application without further order of this Court.

- The Imperial Initial Order, at paras. 18-20, states:

> [18] This court orders that until and including April 11, 2019, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), including but not limited to any Pending Litigation and any other Proceeding in relation to any other Tobacco Claim, shall be commenced, continued or take place against or in respect of the Applicants ... except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way or directed to take place against or in respect of any of the Applicants ... are hereby stayed and suspended pending further Order of this Court....
>
> [19] This court orders that, during the Stay Period, no Proceeding in Canada that relates in any way to a Tobacco Claim or to the Applicants ... including the Pending Litigation, shall be commenced, continued or take place ... except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all such Proceedings currently underway or directed to take place ... are hereby stayed and suspended pending further Order of this Court.
>
> [20] This court orders that, to the extent any prescription, time or limitation period relating to any Proceeding against or in respect of the Applicants, the ITCAN Subsidiaries or any member of the BAT Group that is stayed pursuant to this Order may expire, the term of such prescription, time or limitation period shall hereby be deemed to be extended by a period equal to the Stay Period.

THE QUEBEC PLAINTIFFS' POSITION

[10] The Quebec Plaintiffs firstly submit that this court does not have jurisdiction to amend the relevant provisions of the *Supreme Court Act*, R.S.C. 1985, c. S-26 or the *Code of Civil Procedure*, CQLR c. C-25.01. The Quebec Plaintiffs therefore argue that I specifically do not have jurisdiction to determine what steps are to be taken in an SCC Leave Application nor do I have jurisdiction to stay the effect of the QCCA decision. The Quebec Plaintiffs further state that the inherent power of the CCAA court granted pursuant to s. 11, as per its wording, only supersedes the provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 or the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11.

[11] The Quebec Plaintiffs therefore submit that if the Applicants wish to commence an SCC Leave Application they are free to do so but they must abide by whatever conditions that are imposed upon them by the QCCA or the SCC. The Quebec Plaintiffs seek an order that if any of the Applicants seek to file an SCC Leave Application that the CCAA proceedings ought to be immediately and automatically terminated. Alternatively, the stay of proceedings provided for in the JTIM Initial Order and the RBH Initial Order be partially lifted to allow the Quebec Plaintiffs to participate in any SCC Leave Application and seek the imposition of any conditions that the QCCA or the SCC deem appropriate.

[12] The Quebec Plaintiffs seek the same relief against Imperial notwithstanding the different relief sought by Imperial.

[13] The position of the Quebec Plaintiffs is supported by Her Majesty the Queen in Right of Ontario ("Ontario"), which also has a claim to recover expended health care costs.

ANALYSIS

[14] For the reasons below I am satisfied that I have jurisdiction to deal with the QCCA proceeding. I am further persuaded that the proposal put forth by Imperial, as generally set out in paras. 18-20 of its Initial Order noted above, is the most sensible at this time and should be incorporated into all three Initial Orders.

Jurisdiction

[15] The parties agree that there are no cases directly on point with respect to the issue of whether s. 11 of the CCAA provides this court with jurisdiction to stay the effect of the QCCA decision and subsequently any SCC Leave Application. The parties provided the court, however, with case law that they submit is analogous and relevant. This will be reviewed below.

[16] A good starting point concerning the issue of jurisdiction involves the wording of s. 11 and s. 11.02(2)(b) of the CCAA. These sections provide this court with broad jurisdiction. They read as follows:

> **General power of court**
>
> 11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may,

> subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, **make any order that it considers appropriate in the circumstances.** [Emphasis added.]
>
> 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.** [Emphasis added.]

[17] As can be seen from the above, the broad jurisdiction of this court to "make any order that it considers appropriate in the circumstances" includes restraining further proceedings in "any action, suit or proceeding" against the Applicants.

[18] This is consistent with the purpose of the CCAA, which is well set out in the decision in *U.S. Steel Canada Inc. (Re)*, 2016 ONCA 662, 402 D.L.R. (4th) 450, wherein the Court of Appeal noted that:

> [47] There is no dispute about the purpose of the *CCAA*. It describes itself as "An Act to facilitate compromises and arrangements between companies and their creditors". Its purpose is to avoid the devastating social and economic effects of commercial bankruptcies. It permits the debtor to continue to carry on business and allows the court to preserve the status quo while "attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all": *Century Services*, at para. 77....
>
> [49] The *CCAA* achieves its goals through a summary procedure for the compromise or arrangement of creditors' claims against the company. It was described in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), at para. 36, as:
>
> > a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders.

[19] The above-noted purpose, in my respectful view, provides this court with jurisdiction to deal with proceedings other than those that simply arise before the Ontario Superior Court of Justice. The CCAA legislation is remedial in nature. In order to allow for the proper restructuring of debtor companies, or in this case settlement of multiple significant lawsuits, it would be undesirable to restrict the discretion of this court to matters at the Superior Court level. It would lead to a chaotic situation where only proceedings before the Superior Court and/or other

provincial trial courts were stayed but proceedings that had reached the appeal courts were allowed to proceed. This would significantly hamper the stated purpose of the CCAA, which is to attempt to negotiate a compromised plan of arrangement.

[20] A similar conclusion was reached by Farley J. in the decision *Air Canada (Re)* (2003), 28 C.B.R. (5th) 52 (Ont. S.C.). Although he was dealing with motions brought by Federal Regulators, who argued that this court did not have inherent jurisdiction to impose a stay upon them, I believe his words are instructive wherein he held [at para. 12]:

> Indeed there are no such restrictive words on proceedings nor are there any words which denote that the jurisdiction to grant a stay is only to deal with economic, financial, business or commercial matters. I would note that Parliament has had ample opportunity over the past two decades to amend section 11(3)(b) and (c) in the way urged on me by the Regulators if it felt that desirable; that could have been done in the 1992 and 1997 amendments pursuant to the five year review procedure. Amendments were made at those times in various areas; however, **it appears that Parliament recognized that, with respect to the types of applicants which could apply for restructuring protection under the CCAA, it was undesirable to restrict the direction of the court to deal with matters which involve delicate balancing of various interests with a view to ensuring that productive resources were utilized to the maximum degree for the overall benefit to Canada's social and economic values. Of course that discretion is not without restraint – rather that discretion is to be judicially exercised according to the circumstances applicable in any particular case.** [Emphasis added.]

[21] Farley J., in the above passage, recognized the broad jurisdiction of this court in any particular case, subject to the proper exercise of judicial discretion. Once again, this recognizes the useful purposes of the CCAA in attempting to allow stakeholders to negotiate a compromise. It bears noting that one of the aspects of proper judicial discretion includes the fact that any stay of proceedings in these Applications would be without prejudice to any party's right to bring a motion to lift the stay. This focuses the stakeholders on bona fide negotiations and allows this court the discretion to terminate the stay if need be.

[22] I acknowledge that I have adopted the view that the aforementioned provisions of s. 11 provide me jurisdiction to stay any and all actions including those before the QCCA and any future SCC Leave Application. I respectfully conclude that such an outcome is contemplated by the CCAA to allow for a successful global resolution without benefiting one stakeholder over the other. Otherwise, as noted, chaotic situations could develop.

[23] Accordingly, the approach proposed by Imperial is fair, reasonable and sensible and one that this court has jurisdiction to make. It provides for a temporary pause that does not amend or usurp the provisions of the *Supreme Court Act* or the *Code of Civil Procedure*. Further, para. 61 of Imperial's Initial Order also supports the concept of deference that this court must have to the appeal courts by stipulating that the Ontario Superior Court requests the aid and recognition of those courts with respect to the Initial Order.

[24] Last, I believe that such an outcome is contemplated by s. 58(1) of the *Supreme Court Act*, which provides as follows:

> **Time periods for appeals**
>
> 58(1) Subject to this Act or **any other Act of Parliament**, the following provisions with respect to time periods apply to proceedings in appeals:
>
> (a) in the case of an appeal for which leave to appeal is required, the notice of application for leave to appeal and all materials necessary for the application shall be served on all other parties to the case and filed with the Registrar of the Court within sixty days after the date of the judgment appealed from; [Emphasis added.]

[25] Section 58(1) appears to be broad enough to include the jurisdiction of the CCAA to stay the QCCA proceeding and any further SCC Leave Applications at this time. Given the above and the broad jurisdiction conferred upon this court by s. 11, it is my view that the *Supreme Court Act* does not oust this court's jurisdiction that is conferred upon it by the CCAA.

[26] I should note that the Quebec Plaintiffs rely on a number of decisions to support its position that I do not have jurisdiction. Primarily, they rely upon the decision of the Ontario Court of Appeal in *Mujagic v. Kamps*, 2015 ONCA 360, 125 O.R. (3d) 715 and the decision of the Supreme Court of Nova Scotia in *OpenHydro Technology Canada Ltd. (Re)*, 2018 NSSC 283, 65 C.B.R. (6th) 133. In my view, however, these cases are distinguishable given the broad nature of the authority conferred upon this court by the CCAA and the significant nature of the undertaking that is being pursued by all stakeholders to attempt a global resolution of the multiple, significant claims against the Applicants. Also, *OpenHydro* deals with existing *in rem* proceedings solely within the jurisdiction of the Federal Court.

[27] I also accept Imperial's submission that I have jurisdiction to extend any prescription, time or limitation period relating to any proceeding for or against the Applicants or related entities that may expire. Such provisions are common in CCAA proceedings and have been granted in Initial Orders in a number of decisions: *Muscletech Research and Development Inc. (Re)*, 2006 CanLII 20084 (Ont. S.C.), at para. 5; *ScoZinc Ltd. (Re)*, 2009 NSSC 162, 277 N.S.R. (2d) 246 (Claims Officer), at para. 5; and *Scaffold Connection Corp. (Re)*, 2000 ABQB 35, 79 Alta. L.R. (3d) 144, at para. 26. In my view, this result is sensible and desirable. Since all proceedings and future proceedings, including those brought by or against the Applicants, are stayed, the interests of all stakeholders are protected.

[28] No party took the position at the motion that I did not have the jurisdiction to stay an existing or pending action and accordingly extend the limitation period. Specifically, neither JTIM nor RBH took issue with Imperial's submissions in this regard. In any event, if I was to grant the relief they sought, I would be in a similar position where I would have to stay the limitation period concerning the Quebec Plaintiffs' ability to respond to the SCC Leave Application.

Implementing the Stay

[29] In accepting that the orders proposed by Imperial ought to go in all three Applications I am convinced that this would best preserve the status quo as it existed at the time of the filings and provide for the level playing field needed to attempt a resolution of all claims.

[30] The proposal put forth by JTIM and RBH would alter the status quo in their favour. If they were allowed to file SCC Leave Applications and then obtain a stay it would be to the prejudice of the Quebec Plaintiffs. These Applicants would be allowed to formally present all of their grounds for appeal, including the alleged flaws in the reasoning of the QCCA, without permitting the Quebec Plaintiffs to reply. This not only would affect the status quo but add an impediment to resolution. It would distract these Applicants from the resolution process they claim is so important by focusing their attention on the merits of their appeal from a five-member decision of the QCCA.

[31] Further, it is not only the relationship between the Applicants and the Quebec Plaintiffs that must be taken into consideration. If I was to partially lift the stay to allow the Quebec Plaintiffs to respond and therefore allow the SCC Leave Application to proceed in earnest, as requested by the Quebec Plaintiffs in their alternative relief, this would tilt the playing field in favour of the Quebec Plaintiffs as against the other stakeholders who have had their actions stayed. Not only would this allow the Quebec Plaintiffs to move further ahead and closer to resolution when the other actions are stayed, but it would further allow the Quebec Plaintiffs to seek further conditions from the QCCA or SCC concerning the SCC Leave Application.

[32] Approximately $1 billion has already been deposited in Quebec subsequent to the trial decision in order that the Applicants could pursue appeals to the QCCA. Any further, similar orders would be detrimental to other stakeholders who seek a fair process with the CCAA proceedings. These other stakeholders include the provinces who have significant actions concerning the health recovery costs and the other class actions. In fact, two of the provinces' claims – Ontario and New Brunswick – are edging towards trial. This does not seem fair as it would allow the Quebec Plaintiffs a benefit not available to other plaintiffs.

[33] Furthermore, if I was to partially lift the stay as requested by the Quebec Plaintiffs so that the SCC Leave Application and a subsequent potential appeal could proceed it would undermine the CCAA proceeding. It would allow for a significant parallel proceeding to commence. Not only would this create a shift in the level playing field as noted above, it would no doubt greatly distract the Applicants and the Quebec Plaintiffs from the important purposes of the CCAA. Enormous resources would be diverted to the litigation. This would cause delay and lessen the chances of achieving a global resolution.

[34] The CCAA case law clearly establishes the significant need to preserve the status quo between all stakeholders to preserve a level playing field and maximize the chances of obtaining resolution.

[35] Last, I note that the Quebec Plaintiffs also submitted that the "well-documented reprehensible behaviour" set out in the trial decision and QCCA decision should also be taken into consideration on this motion. I reviewed the relevant portions of the aforementioned decisions. No doubt significant criticism was leveled in various portions of the judgments. In my view, however,

insofar as the CCAA process is concerned, the past behaviour of the Applicants should not be allowed to undermine attempts to reach a global resolution to the benefit of all stakeholders.

DISPOSITION

[36] The motions of JTIM, RBH and the Quebec Plaintiffs with respect to the SCC Leave Application are dismissed.

[37] An order shall go staying any and all current proceedings by or against the Applicants and related entities and prohibiting the commencement of any further proceedings by or against them except with the leave of this court. It is further ordered that, to the extent of any prescription, time or limitation period relating to any proceeding against the Applicants that is stayed pursuant to this order may expire, the term of such prescription, time or limitation period shall thereby be deemed to be extended by a period equal to the Stay Period.

McEwen J.

Released: April 23, 2019

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 2222
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REASONS FOR DECISION

McEwen J.

Released: April 23, 2019