

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

**SUBMISSIONS OF THE ONTARIO FLUE-CURED TOBACCO GROWERS'
MARKETING BOARD**

(opposition to the stay extension motion returnable on March 30, 2021)

March 25, 2021

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TO: **COMMON SERVICE LIST**

1. The Ontario Flue-Cured Tobacco Growers' Marketing Board ("**Tobacco Board**") opposes the extension of the stay of its legal proceedings (the "**Actions**") brought on behalf of the 1986-1996 tobacco growers and producers (collectively, the "**Producers**") against Rothmans, Benson & Hedges Inc. ("**Rothmans**"), Imperial Tobacco Canada Limited ("**Itcan**"), and JTI-Macdonald Corp. ("**JTIM**") (collectively, the "**Tobacco Manufacturers**") for the reasons outlined below.

2. The Initial Orders were sought in March 2019 in the Tobacco CCAA Proceedings because of the threat posed to the Tobacco Manufacturers by defined "**Tobacco Claims**". The Tobacco Board does not make a "**Tobacco Claim**".

3. The Tobacco Board's Actions have now been stayed for more than two years for the stated purpose of permitting the Tobacco Manufacturers the opportunity to globally resolve their disputes with the Tobacco Claimants and a further six-month extension of the stay is now sought for this same purpose.

4. **Tobacco Claim** is defined in identical terms (other than the identity of the Applicants) in the Initial Orders in the Tobacco CCAA Proceedings. Paragraph 4(f) of the Rothmans' Second Amended and Restated Initial Order, dated April 25, 2019, which remains in effect at present, reads as follows:

(f) "**Tobacco Claim**" means any right or claim (including, without limitation, a claim for contribution or indemnity) of any Person against or in respect of the Applicant or any member of the PMI Group that has been advanced (including, without limitation, in the Pending Litigation), that could have been advanced or that could be advanced, and whether such right or claim is on such Person's own account, on behalf of another Person, as a dependent of another Person or on behalf of a certified or proposed class or made or advanced as a government body or agency, insurer, employer or otherwise under or in connection with:

- (i) applicable law, to recover damages in respect of the development, manufacture, production, marketing, advertising, distribution, purchase or sale of Tobacco Products, the use of or exposure to Tobacco Products or any representation in respect of Tobacco Products, in Canada or, in the case of the Applicant, anywhere else in the world; or
- (ii) the HCCR Legislation (as defined in the Luongo Affidavit),

excluding any right or claim of a supplier relating to goods or services supplied to, or the use of leased or licensed property by, the Applicant or any member of the PMI Group; and... (emphasis added)¹

5. The Tobacco Board was the exclusive supplier to the Tobacco Manufacturers of Ontario flue-cured tobacco during the period relevant to the Actions. The Tobacco Board's claims in the Actions against the Tobacco Manufacturers is a "right or claim of a supplier relating to goods or services supplied to" the Tobacco Manufacturers, which claims are expressly excluded from the definition of Tobacco Claim.

6. In the April 5, 2019 amended and restated Initial Order, the Court ordered that "the Hon. Warren K. Winkler, Q.C. is "appointed, as an officer of the Court and shall act as a neutral third party (the "**Court-Appointed Mediator**") to mediate a global settlement of the Tobacco Claims". The Court-Appointed Mediator is directed in carrying out his mandate to consult with all Persons with Tobacco Claims ("**Tobacco Claimants**") among others.

7. The Tobacco Claimants in the Court-directed Mediation are: (i) the Provinces and Territories that claim under their health care costs recovery ("**HCCR**") legislation the costs, including the future costs, of health care services provided to those with tobacco-related diseases in their respective Provinces and Territories caused or contributed to by exposure to a tobacco

¹ Initial Order dated March 22, 2019, Amended and Restated Initial Order dated April 25, 2019 ("**Initial Order**"), para. 4(f), pp. 3-4 (pp. [6-7 pdf](#)).

product (the “**HCCR Claims**”) and (ii) the remaining Claimants seeking damages for defined “tobacco related wrongs” (the “**TRW Claims**”) relating to the use of or exposure to cigarettes and other tobacco products. As quoted above, the HCCR Claims and the TRW Claims are defined collectively as the Tobacco Claims in the Tobacco CCAA Proceedings.

8. The Tobacco Board appears to be the only pre-filing or post-filing supplier of goods or services to the Tobacco Manufacturers that has either (i) not been paid and/or is not receiving payment of its ongoing accounts in the Tobacco CCAA Proceedings, and/or (ii) whose issues with the Tobacco Manufacturers are not being resolved separate and apart from the Tobacco Claims.

9. The Actions bear no relationship to the Tobacco Claims, as evidenced by the reasons of the Court in pre-Initial Order decisions, including:

- (a) *Ontario v. Imperial Tobacco Company Limited*, [2011 ONCA 525](#) (Goudge, Gillese and Jurianz, JJ.A., July 20, 2011);
- (b) *R. v. Imperial Tobacco Canada*, [2012 ONSC 6027](#) (Rady J., January 2, 2013);
- (c) *Ontario v. Imperial Tobacco Canada Limited*, [2013 ONCA 481](#) (Hoy A.C.J.O., Feldman and Simmons JJ.A., July 16, 2013);
- (d) *The Ontario Flue-Cured Tobacco Growers’ Marketing Board v. Rothmans, Benson & Hedges Inc.*, [2014 ONSC 3469](#) (Rady J., June 30, 2014);
- (e) *Ontario Flue-Cured Tobacco Growers’ Marketing Board v. Rothmans, Benson & Hedges*, [2016 ONSC 3939](#) (Divisional Court – Sachs, Horkins and Patillo JJ., July 4, 2016);
- (f) The application for leave to appeal the Divisional Court decision 2016 ONSC 3939 was dismissed by the Court of Appeal (Blair, Epstein and Huscroft JJ.A.) on November 4, 2016.

10. In contrast to the Tobacco Claimants, the Tobacco Board was the exclusive supplier of Ontario flue-cured tobacco to the Tobacco Manufacturers under supply management regulations during the period January 1, 1986 to December 31, 1996. The Tobacco Board and the Producers

were an integral part of the tobacco industry. The Tobacco Board is not a Claimant seeking damages for the use of the product, tobacco, that the Producers were growing and the Tobacco Board was selling to the Tobacco Manufacturers.

11. The Tobacco Board's commonality of interest in the Tobacco CCAA Proceedings is with the other suppliers of goods or services to the Tobacco Manufacturers rather than the Tobacco Claimants.

12. Under the "business as usual" directions mandated by the Court throughout the Tobacco CCAA Proceedings, as reported by the Monitors, the other pre- and post-Initial Orders supplier of goods or services to the Tobacco Manufacturers have been paid or are being paid on an ongoing basis for goods or services while the Tobacco Manufacturers operate under Court protection.

13. The Tobacco Board has not received any proposal from the Tobacco Manufacturers for the resolution of its non-Tobacco Claims on behalf of the Producers since the granting of the Initial Orders in the Tobacco CCAA Proceedings. The Tobacco Board has no role whatsoever to play in whatever efforts are being made through the Court-Appointed Mediation process toward the resolution by compromise or arrangement of the Tobacco Claims.

14. It is now approximately 30 years since the Tobacco Board's contracts with the Tobacco Manufacturers at issue in the Actions. The Producers that the Tobacco Board represents are also approximately 30 years older. Some have died and some others are aged and living on pensions while the claims made on their behalf for the payment of the money owed to them by the Tobacco Manufacturers remain held in abeyance by the Court to permit the other Persons advancing Tobacco Claims to continue to attempt to resolve their disputes with the Tobacco Manufacturers.

15. As stated above, because the Tobacco Board does not make a Tobacco Claim it has no proper place in any compromise or arrangement for the resolution of Tobacco Claims. Whatever progress may or may not be made toward the global resolution of the Tobacco Claims is unknown to the Tobacco Board and should not affect the Tobacco Board's rights to pursue the Actions to a final resolution.

16. In the more than two years since the Initial Orders in the Tobacco CCAA Proceedings, there has been no proposal by the Tobacco Manufacturers to settle the non-Tobacco Claim made by the Tobacco Board as a trade supplier to the Tobacco Manufacturers.

17. In monetary terms, the Tobacco Board's claims in the Actions as a supplier is insignificant in relation to the Tobacco Claims, the contractual claims made by the Tobacco Board representing in the order of a fraction of a single percentage point of the damages sought by the Tobacco Claimants.

18. The lifting of the stay to permit the separate resolution of the Tobacco Board's claims for the benefit of the Producers will not affect the prospects of settlement of the Tobacco Claims or the capacity of the Tobacco Manufacturers to meet their obligations under a compromise or arrangement in respect of the Tobacco Claims.

19. The Tobacco Board makes no submissions on the motion to extend the stay requested by the Tobacco Manufacturers in respect of the Tobacco Claimants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 25, 2021

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