

October 2019 Update

Canada' Tobacco Companies and their use of Insolvency Protection

When and where is the next hearing related to the tobacco companies' insolvency proceedings?

Before Justice Thomas McEwen, Ontario Superior Court
October 2nd, 10:00 a.m.
330 University Avenue, Toronto

What issues are scheduled for decision at that hearing?

1. The three major tobacco companies will be asking Justice Thomas McEwen of the Ontario Superior Court to give them a 5 month extension to their protection under the federal *Companies' Creditors Arrangement Act* (CCAA).
2. Lawyers for the Quebec class action will be asking for the extension to be no longer than 3 months.
3. The Canadian Cancer Society will be asking for permission to participate in the mediation of a settlement between the parties.

How many of these hearings have taken place already?

The October hearing will be the fourth time that the companies are seeking court protection.

In March 2019, they asked and received an initial order to protect them from their creditors for 30 days.^{1 2 3} These were granted without a public hearing.

On April 5, the orders were aligned, amended and extended for 2 months (until June 28th).^{4 5 6}

On June 26th, the orders were extended to October 4, 2019.^{7 8 9}

Why are the tobacco companies seeking protection under the CCAA?

The companies sought protection under the CCAA in order to avoid having to pay court-ordered compensation to Quebec smokers.¹⁰

On March 1st, the Quebec Court of Appeal upheld a lower-court judgment against the 3 companies, and ordered them to begin paying \$6.8 billion (equal to \$13+ billion when interest was included) in damages arising from decades of wrongful behaviour.¹¹ The companies were told to pay punitive damages as well as moral damages to 100,000 Quebec smokers whose smoking-related lung cancer, throat cancer and emphysema were ruled to be the result of the companies' failure to be truthful about the harm caused by their products.

The CCAA protective order prevents any creditors of the companies from being able to demand payment, including the Quebec smokers who were part of the class action.

How has this process affected the many lawsuits filed against Canadian tobacco companies?

No litigation against the 3 main companies is allowed to proceed during the stay period. All the lawsuits facing the company are suspended.

The companies told the court that they wanted the stay of litigation in order to be able to negotiate a "global settlement" between themselves and those who are suing them. They successfully asked for Ontario's former chief justice, Warren Winkler, to be appointed as a mediator in the negotiations.

How are the settlement negotiations going?

The only information which has been made public about these negotiations is provided in the materials submitted to the court by the companies to support their request for an extension of the stay period.

The companies report that Mr. Winkler requested that all parties exchange “mediation briefs” on August 1, 2019 and that some provinces submitted a response to the companies’ positions on September 12. They also report that a “plenary session” with all parties has been scheduled, although the date has not been made public.¹²

Very little information has been made public about the negotiating positions taken by the companies, the provinces, or other parties. Lawyers for the Quebec Class Action say that the information exchanged did not contain “a plan, nor even the bare economics of a potential settlement”.¹³

Can people who are harmed by vaping products file lawsuits during the CCAA process?

Not if the product was made by one of these 3 tobacco companies. The litigation stay extends covers all products “containing nicotine that is intended for human consumption, including ... electronic cigarettes, vaping liquids and devices.”¹⁴

Can the CCAA process be stopped?

The court can refuse to extend the stay period.

Lawyers for the Quebec class action have indicated that they will ask the court to do so. “[U]nless a serious and viable offer is made by each of the Applicants, which must include a significant financial contribution on the part of each of their parent companies, by December 20, 2019, it is the QCAP’s intention, on or prior to January 15, 2020, to contest any further extension of the Stay Period.”¹⁵

How much money is being claimed against the companies?

The companies are facing **\$500 billion or more** in lawsuits from 10 provincial governments (who want to recover the costs of treating tobacco-related diseases), as well as an unquantified sum from other class actions by smokers (1 of which has been certified), from farmers and from individual smokers. A list of government and class action lawsuits facing the company is shown in **Table 1** below.

Are the companies really insolvent? How much can they afford to pay?

The CCAA process has resulted in the ongoing income of the Canadian companies being made public. From these reports, there was about \$2.4 billion in cash available in March 2019. The amount expected to be available by next March will be available when all of the reports have been filed with court (Imperial Tobacco’s 5th Monitor’s report has not yet been made public.^{16 17 18}

The CCAA process also required the Canadian companies to submit their financial statements for 2018, information which is not usually made public. The 3 companies collectively declared assets of about \$10 billion.

Can the multinational owners of the companies be asked to contribute?

There is an expectation that the multinational owners will contribute to any Canadian settlement, and they are defendants in the provincial government lawsuits.

The three multinational parent companies reported operational earnings (before income taxes) of about \$32.8 billion in 2018. Their reported assets were about \$350 billion and their total equity had a book value of about \$170 billion.^{19 20 21}

Legal observers have identified challenges in forcing companies outside of Canada to contribute damage awards of their subsidiaries.²²

Can the companies continue to pay their suppliers or employees?

Yes. They are allowed to continue doing business as usual. They are not authorized to send dividends (profits) to their multinational owners.

How much has it cost governments to manage these suits?

The litigation costs to any of the parties have not been made public.

The costs of for the government of Ontario and Quebec are part of the operating costs of the attorneys general departments which are managing the case. The same was true for British Columbia between 200 and 2012.

For the other provinces, and for British Columbia after 2012, the lawsuits have been managed on a contingency fee arrangement. The lawyers representing governments pay for the costs of managing the suits, in return for a percentage of any final award.

There are details on only two of the contingency fee arrangements. New Brunswick agreed to pay the lawfirm 18% of a settlement before trial,²³ and Newfoundland and Labrador agreed to pay 30%.²⁴ The government of Alberta has challenged the release of the contingency fee arrangement.²⁵

Is this the first time the companies have used the CCAA to negotiate with governments?

No.

JTI filed for CCAA protection in 2004 when the Quebec government demanded payment for taxes that had been evaded when the companies funnelled cigarettes through contraband channels during the 1990s. There were no lawsuits filed against the companies, but the CCAA process precipitated negotiations with federal and provincial governments reached to resolve any claims about the \$10 billion tax evasion. Settlements were reached in 2008 and 2010.²⁶

The approach taken to these settlements - the secrecy of these negotiations, the lack of health-oriented measures and the 'pennies on the dollar' agreement - was criticized by several in the health community.²⁷

Where can I follow developments on this case?

Information on each of the tobacco companies' case is available on the web-sites of their respective monitors:

- FTI Consulting for Imperial Tobacco Canada:
<http://cfcanada.fticonsulting.com/ImperialTobacco/default.htm>
- Deloitte for JTI Macdonald
<https://www.insolvencies.deloitte.ca/en-ca/Pages/JTIMacdonaldCorp.aspx?>
- EY for Rothmans, Benson and Hedges
<https://documentcentre.eycan.com/Pages/Main.aspx?SID=1452>

Updates are posted on the Eye on the Trial blog. <http://tobaccotrial.blogspot.com>

TABLE 1

Government cost recovery and class action suits affected by the CCAA stay of proceedings.^{28 29 30}

Lawsuits which have gone to trial

Filed by	Trial history	Amount claimed	Represented by
Cécilia Létourneau Conseil Québécois sur le tabac et la santé / Jean-Yves Blais	Filed 1998; Trial 2012-2014; Quebec Superior Court ruling 2015; Quebec Court of Appeal ruling 2019. 2005	Judgment of approx. \$13 billion	Trudel Johnson Lespérance; Kugler Kandestin; De Grandpré Chait; Chaitons; Fishman Flanz Meland Paquin

Government lawsuits which have not gone to trial

Filed by	Date / amended	Amount claimed	Represented by
Alberta	2012	\$10 billion	Paliare Roland Rosenberg Rothstein; Jensen, Shawa, Solomon, Duguid, Hawkes
British Columbia	2001 / 2011	\$118 billion	Bennet Jones; Siskinds
Manitoba	2012	unquantified	Bennet Jones; Siskinds
New Brunswick	2008	\$11.1 - \$23.2 billion	Bennet Jones; Siskinds
Newfoundland and Labrador	2011	unquantified	Paliare Roland Rosenberg Rothstein; Roebothan McKay Marshall subcontracted to Humphrey Farrington McClain
Nova Scotia	2015	unquantified	Bennet Jones; Siskinds
Ontario	2009 / 2014 / 2016 / 2019	\$330 billion	Attorney General Ontario
Prince Edward Island	2012	unquantified	Bennet Jones; Siskinds
Quebec	2012	\$60 billion	Attorney General Quebec
Saskatchewan	2012	unquantified	Bennet Jones; Siskinds

Class action lawsuits which have not gone to trial³¹

Representative plaintiff	Date filed	Certified	Amount claimed	Jurisdiction	Represented by
John Smith (Kenneth Knight)	2003	Yes	unquantified	British Columbia	Klein Lyons
Suzanne Jacklin	2012	No	unquantified	Ontario	Merchant Law
Barbara Bourassa	2010	No	unquantified	British Columbia	Merchant Law
Roderick Denis McDermid	2010	No	unquantified	British Columbia	Merchant Law
Linda Dorion	2009	No	unquantified	Alberta	Merchant Law
Thelma Adams	2009	No	unquantified	Saskatchewan	Merchant Law
Ben Semple	2009	No	unquantified	Nova Scotia	Merchant Law
Deborah Kunta	2009	No	unquantified	Manitoba	Merchant Law
Ontario Flue Cured Tobacco Marketing Board	2009	No	\$200 million	Ontario	Sutts Strosberg

Individual actions lawsuits

Plaintiff	Date filed	Jurisdiction	Note
Peter Stright	2002	Nova Scotia	Related to Buerger's disease
Mirjana Spasic	2004	Ontario	
Ragooninan et al.	2011	Ontario	Class action denied, continued as individual action.
Scott Landry	2003	Ontario	Small claims court related to addiction
Roland Bergeron		Quebec	Small claims related to emphysema, stayed in response to Blais.
Joseph Battaglia	1997	Ontario	Appeal filed in 2001 was never heard

ENDNOTES (LINKED TO SOURCE FILES)

- 1 Imperial Tobacco. Court file CV-19-616077-00CL. Initial Order. March 12th, 2019.
- 2 JTI-Macdonald. Court file 19-CV-615862-00CL. Initial Order, . March 8, 2019
- 3 Rothmans, Benson and Hedges. Court file CV-19-616779-00CL. March 22, 2019
- 4 Imperial Tobacco. Court file CV-19-616077-00CL. Stay Extension Order. April 5, 2019.
- 5 JTI-Macdonald. Court file 19-CV-615862-00CL. Stay Extension Order. April 5, 2019.
- 6 Rothmans, Benson and Hedges. Court file CV-19-616779-00CL. Order. April 5, 2019
- 7 Imperial Tobacco. Court file CV-19-616077-00CL. Stay Extension Order. June 26, 2019.
- 8 JTI-Macdonald. Court file 19-CV-615862-00CL. Endorsement. June 26, 2019.
- 9 Rothmans, Benson and Hedges. Court file CV-19-616779-00CL. Stay Extension Order. June 26, 2019.
- 10 CQTS/Blais and Letourneau class actions. Court file 500—09-025385-154; 500-09- 025386-152, 500-09-025387-150. English translation of the orders.
- 11 Imperial Tobacco Canada Ltee v. Conseil Québécois sur le tabac et la santé. Court file 500-09-025385-154, 500-09-025386-152 et 500-09-025387-150. 2019 QCCA 358.
- 12 Imperial Tobacco. Court file CV-19-616077-00CL Motion for stay extension returnable October 2, 2019. September 23, 2019.
- 13 Imperial Tobacco. Court file CV-19-616077-00CL. Quebec Class Action Plaintiffs Responding Motion Record. September 25, 2019.
- 14 Imperial Tobacco. Court file CV-19-616077-00CL. Second amended and restated initial order.
- 15 Imperial Tobacco. Court file CV-19-616077-00CL. Quebec Class Action Plaintiffs Responding Motion Record. September 25, 2019.
- 16 **Imperial Tobacco:**
 - * Pre-filing Report. March 2019
 - * First Monitor’s Report. April 3, 2019
 - * Fourth Monitor’s Report. June 2019.
- 17 **JTI-Macdonald:**
 - * Pre-filing report. March 8, 2019
 - * Fourth report of the Monitor. June 21, 2019
 - * Fifth report of the Monitor. September 25, 2019
- 18 **Rothmans, Benson & Hedges:**
 - * Pre-filing report. March 22, 2019
 - * Second Report. June 24. 2019.
 - * Third Report. September 25, 2019
- 19 British American Tobacco. Annual Report. 2018.
- 20 Japan Tobacco. Annual Report 2018.
- 21 Philip Morris International. Annual Report. 2018.
- 22 Peter S. Shapiro. The Challenge of Recovering \$15 billion in the Quebec Tobacco Class Action. March 3, 2019. Canlii connects.
- 23 The fee arrangement with New Brunswick was reported as a payment of 18% of any settlement reached after the issuance of a statement of claim but before a trial. The NB contract also involved U.S. law firms Richardson, Patrick, Westbrook & Brickman and Martin and Jones. The U.S. law firms are acting as legal consultants in all 6 provinces presented by Bennett Jones/Siskinds
New Brunswick Press release. Lawyers retained for tobacco lawsuit (07/09/12)
Richardson, Patrick, Westbrook & Brickman web-site - <https://www.rpwb.com/foreign-legal-consultants/>
- 24 The fee arrangement with Humphrey Farrington McClain was reported as a payment of 30 per cent of any settlement reached in the case. CBC Mews Law firm tobacco control under fire. April 12, 2011.
- 25 The contingency fee arrangement was the subject of an order for disclosure by the Alberta Privacy Commissioner . ORDER F2019-26. August 21, 2019.
- 26 Canada Revenue Agency. Comprehensive Settlement agreements with tobacco companies.
- 27 Non Smokers Rights Association. What were they smoking? 2013.
- 28 Imperial Tobacco. Court file CV-19-616077-00CL Application Record, Vol. 1. March 2019.
- 29 JTI-Macdonald. Status of outstanding class actions against the three CCAA applicants (other than the Quebec Class actions
- 30 Imperial Tobacco Canada. Amended and Restated Initial Order. Schedule “A” Pending Litigation.
- 31 Status of Outstanding class actions against the three CCAA applicants