

## October 2020 Update

# Canada' Tobacco Companies and their use of Insolvency Protection

### When does the court-ordered suspension on all tobacco litigation in Canada end?

All lawsuits against Canada's 3 large tobacco companies are suspended until March 31, 2021.

On or before that date, the companies can ask for a further extension.

### How long have these lawsuits been suspended?

All litigation has been suspended since March 2019.

In March 2019, each company asked and received an initial order to protect them from their creditors for 30 days.<sup>1 2 3</sup> These were granted without a public hearing.

On April 5, the orders were aligned, amended and extended for 2 months (until June 28<sup>th</sup>).<sup>4 5 6</sup>

On June 26<sup>th</sup>, the orders were extended to October 4, 2019.<sup>7 8 9</sup>

On October 3, the orders were extended to March 12, 2020.<sup>10</sup>

On February 20, the orders were extended to September 30, 2020.<sup>11</sup>

On September 29, the orders were extended to March 31, 2021.<sup>12</sup>

### How did the lawsuits become suspended?

The suits are suspended because the companies asked for and received protection under the federal insolvency law, the Companies Creditors' Arrangement Act (CCAA). This did this in response to an order for them to pay compensation to Quebec smokers.<sup>13</sup>

On March 1<sup>st</sup>, 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.<sup>14</sup> 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.

### What is the impact of the CCAA protective orders?

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

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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.

### How are the settlement discussions being managed?

At the request of the tobacco companies, the Ontario Court appointed Ontario’s former chief justice, Warren Winkler, as mediator in the negotiations.

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.<sup>15</sup> A news report in January 2020 said that mediation talks were taking place in that month.<sup>16</sup>

Very little information has been made public about the negotiating positions taken by the companies, the provinces, or other parties.”

### 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.”<sup>17</sup>

### Can the CCAA process be stopped?

The court can refuse to extend the stay period.

### 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. According to the reports filed in February 2020, at the end of September the companies will have a total in cash of about \$5 billion (\$1.4 billion (ITL),<sup>18</sup> \$3 billion (RBH)<sup>19</sup> and \$486 million (JTIMI))<sup>20</sup>.

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.

### **Didn't the Quebec courts order that the companies put \$1 billion aside for injured Quebec smokers?**

Yes. In 2015 the Quebec Court of Appeal noted the companies' practice of sending all of its profits to their multinational owners and not putting any aside to pay damages to Quebec class action members. It ordered 2 of the companies to put almost \$1 billion in security.<sup>21</sup>

The companies declared that money as part of their assets. Their position is that it should be available to all litigants, not only Quebec smokers. Some of the provinces have said in court that they think they are entitled to a share of that money. Lawyers for the Quebec class action say that the money ordered to be set aside for their clients should be reserved for that purpose.

### **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.<sup>22 23 24</sup>

Legal observers have identified challenges in forcing companies outside of Canada to contribute damage awards of their subsidiaries.<sup>25</sup>

### **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 2000 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 its law firm 18% of a settlement before trial,<sup>26</sup> and Newfoundland and Labrador agreed to pay 30%.<sup>27</sup> The government of Alberta has challenged the release of the contingency fee arrangement.<sup>28</sup>

### **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.<sup>29</sup>

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.<sup>30</sup>

### **Will these negotiations lead to a change in the way tobacco is managed in Canada? Are governments asking for measures that will reduce smoking?**

We don’t know. Over the past two decades, all of the provinces have filed lawsuits but only one (Quebec) has formally met with health organizations to discuss the relationship of these suits to public health objectives.

In October 2019, the Canadian Cancer Society requested permission to be recognized as a “social stakeholder” in the mediation, and to be allowed to advocate for the inclusion of public health measures in the mediation talks.<sup>31</sup> This request was refused.<sup>32</sup>

### **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.<sup>33 34 35</sup>

### Lawsuits which have gone to trial

| Filed by   | Trial history  | Amount claimed                      | Represented by   |
|--|--|-------------------------------------|--|
| Cécilia Létourneau<br>Conseil Québécois sur le<br>tabac et la santé / Jean-Yves<br>Blais | Filed 1998; Trial 2012-2014;<br>Quebec Superior Court<br>ruling 2015; Quebec Court<br>of Appeal ruling 2019. | Judgment of approx. \$13<br>billion | Trudel Johnson Lespérance;<br>Kugler Kandestin; De Grandpré<br>Chait; Chaitons; Fishman Flanz<br>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<br>Rothstein; Jensen, Shawa,<br>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<br>Rothstein; Roebathan McKay<br>Marshall subcontracted to<br>Humphrey Farrington McClain |
| Nova Scotia               | 2015                      | unquantified            | Bennet Jones; Siskinds   |
| Ontario                   | 2009 / 2014 / 2016 / 2019 | \$330 billionn          | 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 trial<sup>36</sup>

| 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<br>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 (hyperlinked)

- 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 Rothmans, Benson and Hedges. Court file CV-19-616077-00CL. Stay Extension Order. October 2, 2019
- 11 JTI Macdonald, Court file 19-CV-615862-00CL. Endorsement February 20, 2020
- 12 Imperial Tobacco Court file CV-19-616077-00CL. Stay Extension. September 29, 2020
- 13 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.
- 14 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.
- 15 Imperial Tobacco. Court file CV-19-616077-00CL Motion for stay extension returnable October 2, 2019.September 23, 2019.
- 16 MacLeod, A. Health Advocates Fear Big Tobacco Will Get Off Easy in Lawsuit Talks. The Tyee. January 17, 2020.
- 17 Imperial Tobacco. Court file CV-19-616077-00CL. Second amended and restated initial order.
- 18 ITL. Seventh Monitor’s Report.
- 19 RBH Fifth Monitor’s Report.
- 20 JTIM. Seventh Monitor’s report.
- 21 Imperial Tobacco Canada Ltd. C. Conseil Québécois sur le tabc et la santé. 2015 QCCA 1737
- 22 British American Tobacco. Annual Report. 2018.
- 23 Japan Tobacco. Annual Report 2018.
- 24 Philip Morris International. Annual Report. 2018.
- 25 Peter S. Shapiro. The Challenge of Recovering \$15 billion in the Quebec Tobacco Class Action. March 3, 2019. Canlii connects.
- 26 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/>
- 27 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.
- 28 The contingency fee arrangement was the subject of an order for disclosure by the Alberta Privacy Commissioner . ORDER F2019-26. August 21, 2019.
- 29 Canada Revenue Agency. Comprehensive Settlement agreements with tobacco companies.
- 30 Non Smokers Rights Association. What were they smoking? 2013.

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- 31 Court File No. CV-19-615862-OOCL; Court File No. CV-19-616077-OOCL; Court File No. CV-19-616779-OOCL Responding motion record of the Canadian Cancer Society. September 24, 2019.
  - 32 Court File No. CV-19-615862-00CL, Court File No. CV-19-616077-00CL, Court File No. CV-19-616779-00CL. Endorsement of Justice McEwen, October 18, 2019.
  - 33 Imperial Tobacco. Court file CV-19-616077-00CL Application Record, Vol. 1. March 2019.
  - 34 JTI-Macdonald. Status of outstanding class actions against the three CCAA applicants (other than the Quebec Class actions
  - 35 Imperial Tobacco Canada. Amended and Restated Initial Order. Schedule "A" Pending Litigation.
  - 36 Status of Outstanding class actions against the three CCAA applicants