
Action on Smoking & Health (Alberta)
Campaign for Justice on Tobacco Fraud
Coalition québécoise pour le contrôle du tabac
Ontario Campaign for Action on Tobacco
Physicians for a Smoke-Free Canada

June 25, 2019

Adrian Dix, Minister of Health
David Eby, Attorney General
Government of British Columbia

Tyler Shandro, Minister of Health
Doug Schweitzer, Minister of Justice and Solicitor
General
Government of Alberta

Jim Reiter, Minister of Health
Don Morgan, Minister of Justice and Attorney General
Government of Saskatchewan

Cameron Friesen, Minister of Health, Seniors and
Active Living
Cliff Cullen, Minister of Justice and Attorney General
Government of Manitoba

Doug Downey, Attorney General
Christine Elliott, Minister of Health
Government of Ontario

Danielle McCann, Minister for Health and Social
Services
Sonia LeBel, Minister of Justice
Government of Quebec

Hugh J.A. Fleming, Minister of Health
Andrew Anderson-Mason, Minister of Justice and
Office of the Attorney General
Government of New Brunswick

Randy Delorey, Minister of Health and Wellness
Mark Furey, Attorney General and Minister of Justice
Government of Nova Scotia

James Aylward, Minister of Health and Wellness
Bloyce Thompson, Minister of Justice and Public Safety
Government of Prince Edward Island

John Haggie, Minister of Health and Community
Services
Andrew Parsons, Minister of Justice and Public Safety
Government of Newfoundland and Labrador

Dear Ministers:

We are writing today to request your review of your provinces' position and actions during the tobacco industry's use of the *Companies' Creditors Arrangement Act* to suspend legal proceedings against them while continuing to maintain business operations that seek to maintain tobacco use.

For over 20 years, Canadian provinces and injured smokers have been seeking justice against tobacco companies for wrongful actions spanning decades. In March this year, soon after the Quebec Court of Appeal upheld the first decision against them in the joint Quebec *Blais-Létourneau* class actions, the companies filed for protection in Ontario under the provision of the federal *Companies' Creditors Arrangement Act (CCAA)*. As part of the CCAA order, the companies were granted a stay of all legal proceedings against them, a request which was supported by some provinces. This week, the companies are again before the court, this time asking for a further six-month extension of the litigation stay.

As organizations with a mandate to promote public health and the reduction of tobacco-caused disease, we have been closely following these proceedings. It is now clear to us that the CCAA process is being abused by the companies in their attempt to avoid accountability to their Quebec victims. The CCAA process has become an

impediment to provincial governments meeting their responsibilities to protect health and an unnecessary step towards the objectives of recovering tobacco damages and health care costs.

As litigants against the companies, you are major stakeholders in the CCAA process. As you prepare instructions to your representatives in this case, we ask you to consider the following:

- **The CCAA process should be considered as another abuse of process used by the tobacco companies to avoid having to pay compensation to Quebec victims.**
 - Justice Riordan was provided with a detailed accounting of the companies execution of “abuse of process as a strategy” during the Blais-Létourneau case.¹ He deferred the hearing on this behaviour until after he had issued his ruling on the main issues.² The CCAA proceeding has allowed the companies to further delay Quebec smokers’ access to justice.
- **There is no financial reason for the companies to seek creditor protection as a result of the Quebec judgment.**
 - There is nothing urgent – or new – about the “existential threat” claimed by the companies. Their situation is very little different than it was a year ago – or than it will be three years hence. They have one affordable judgment against them (issued in 2015), and any further judgments are several years away.
 - Meeting their obligations in the Quebec class action will not impede the companies’ ability to remain solvent. In assessing damages against them, Justice Riordan was required to consider their ‘patrimonial situation’ (capacity to pay). He structured their repayment schedule in stages, phased in such a way that the lump sum payments were within their capacity to pay.
 - There is evidence that the companies can meet their obligations to Quebec smokers while remaining solvent. Health Canada reported that their annual earnings increased by \$1 billion a year following their requirement to post a \$850 million security deposit in 2015.³ In their CCAA filings, the companies reported weekly sales in excess of \$175 million per week (\$9 billion per year).⁴
 - The \$13.5 billion Quebec judgment reflects about 2% of the \$600 billion in claims the industry says it is facing. Allowing injured Quebec smokers to receive the compensation owed to them and granted by the province’s highest tribunal will not materially diminish the capacity of provincial governments to recover the health care costs they are seeking.
- **The CCAA process is not necessary for mediation or negotiation to resolve the provincial lawsuits against the companies.**
 - If the provinces consider it to be in their interest to work through a mediator to explore a potential settlement with the companies, this can be done without the CCAA process being in place. The Master Settlement reached between United States Attorneys General and the same industry was reached while the companies maintained operations as normal and lawsuits continued to proceed.
- **The CCAA is the wrong process to address tobacco industry wrongdoing or public health issues**
 - The foundation of this CCAA proceeding, as expressed by Imperial Tobacco, is “the overriding objective of **preserving the value of the Applicants’ business** and facilitating a global resolution of all Tobacco Claims (as defined in the Initial Order) in an orderly process under Court supervision.”⁵ [emphasis added]. Tethering this process to the preservation of a tobacco enterprise is inconsistent with public health objectives. It is contrary to the requirements in the *Framework Convention on Tobacco Control* for governments to protect such processes from the commercial and vested interests of the tobacco industry (Article 5.3).
 - The federal CCAA process is designed to allow companies to address business failures without necessarily being put into receivership or bankruptcy. Allowing it to be used to protect investors from

the financial consequences of corporate malfeasance is inconsistent with provincial government responsibilities to public health and access to justice.

- The resolution of your governments' claims against this industry has profound implications for public health. Developing the architecture for any settlement under the secretive process of the CCAA runs contrary to Canadians' expectations for openness and transparency in public policy development.
- The absence of any meaningful communication between your offices and the public health community regarding health outcomes for this historic litigation, despite our efforts to make contact⁶) illustrate the risks a CCAA process imposes to the democratic public policy process. **The CCAA process gives the companies immunity for any current wrongdoing.**
- In addition to being shielded from progress on provincial lawsuits and other class actions, the tobacco companies have also received protection from new lawsuits being filed. These include legal claims related to any failure to warn, misrepresentation or targeting of youth by the companies related to their sale of vaping products.

In light of the above, we ask provincial governments which have supported the tobacco industry's request for CCAA protection to step back from this position and to work instead with their provincial colleagues to collapse this process. In its place, the provinces can work collaboratively to:

- Accelerate their lawsuits against the companies
- Entertain discussions with the companies or the mediator, should this be considered in the public interest
- Initiate consultations with the federal government, experts, health organizations and others about ways in which this litigation can reduce the future toll from the tobacco epidemic.
- Prevent the companies from sending their profits off-shore or otherwise attempting to become 'judgment proof'.

Sincerely yours



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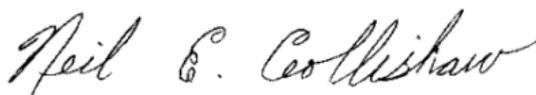
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References

- 1 *Létourneau v. Imperial Tobacco et al and Conseil Québécois sur le tabac et la santé and Jean-Yves Blais v. JTI-Macdonald et al.* Case number 500-06-000070-983 and 500-06-000076-980. Plaintiffs Notes and Authorities, s. XI – Cost-Abuse-Provisional Execution.
- 2 *Létourneau v. Imperial Tobacco et al and Conseil Québécois sur le tabac et la santé and Jean-Yves Blais v. JTI-Macdonald et al.* Case number 500-06-000070-983 and 500-06-000076-980. Transcription, September 29, 2014, p. 4-5.
- 3 Health Canada. *Wholesale cigarette prices in Canada: industry revenue vs. excise tax 2003-2016.* http://www.smoke-free.ca/eng_home/2017/HC%20poster_price-Eng.pdf
- 4 Summarized at Eye on the Trial. March 27, 2019: <http://tobaccotrial.blogspot.com/2019/03/some-numbers.html>
- 5 *Motion record of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited. (Motion for Stay Extension returnable June 26, 2019.* June 17, 2019. [http://cfcanada.fticonsulting.com/ImperialTobacco/docs/Motion%20Record%20of%20ITCAN%20and%20ITCO%20\(Stay%20Extension\)%20dated%20June%202017,%202019.pdf](http://cfcanada.fticonsulting.com/ImperialTobacco/docs/Motion%20Record%20of%20ITCAN%20and%20ITCO%20(Stay%20Extension)%20dated%20June%202017,%202019.pdf)
- 6 See, for example, letter from the Coalition Québécoise pour le contrôle du tabac: http://cqct.qc.ca/Documents_docs/DOCU_2019/MAIL_19_04_03_PoursuiteQc_CoutsSoinsSante_Tabagisme.pdf