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

FACTUM OF THE QUEBEC CLASS ACTION PLAINTIFFS

March 29, 2019

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TO: JTIM Service List

AND TO: ITCAN Service List

AND TO: RBH Service List

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Applicants

FACTUM OF THE QUEBEC CLASS ACTION PLAINTIFFS[1]

PART I - OVERVIEW

1. The publicly-listed parent of each of the Tobacco Companies issued a press release on the day that its subsidiary filed an *ex parte* application for an Initial Order. They must all be using the same public relations consultants because they all had the same message - "business as usual"!

2. The Initial Orders sought and obtained permit each of the Tobacco Companies to carry on business as usual. All arm's length parties and even related parties would continue to be paid as in the past. This includes all intercompany payments, as well as payments of interest

[1] To avoid duplication in the three concurrent CCAA proceedings, a single factum is filed by the Quebec Class Action Plaintiffs in connection with each Notice of Motion for Comeback Hearing dated March 28, 2019 filed by them in court files CV-19-615862-00CL, CV-19-616077-00CL and CV-19-616779-00CL. Issues common to all Applicants are addressed first, followed by issues specific to a particular Applicant. Capitalized terms used herein are defined in the glossary attached as Annex 1.

and royalties which, in the case of JTIM, had already been characterized by the Quebec Courts as artificial creditor-proofing schemes.

3. Although not mentioned in any of the press releases, the Tobacco Companies also intended to conduct their version of business as usual vis-à-vis the Quebec Class Action Plaintiffs, meaning paying no debt arising from the Riordan Judgment and Appeal Judgment and continuing their two-decade long war of attrition. However, because of their striking lack of success before seven judges of the Quebec Courts, this time the Tobacco Companies sought the vehicle of CCAA proceedings in Ontario to continue their business as usual. Consistent with the manner in which they had conducted themselves in the Quebec Class Actions, the Tobacco Companies did not see fit to make full and fair disclosure to this Court in *ex parte* applications invoking contrived claims of urgency.

4. The egregious conduct of the Tobacco Companies has resulted in an award of billions of dollars of moral damages to the Quebec Class Members who were the victims of that conduct, and a significant condemnation for punitive damages that was confirmed in the Appeal Judgment. The misconduct of the Tobacco Companies occurred over many decades. The first phase was during the 48-year class period preceding the date of institution of legal proceedings in 1998 by the Quebec Class Action Plaintiffs. The second phase comprises the legal proceedings in Quebec until the Appeal Judgment was rendered. The third phase commenced on March 1, 2019, with the release of the Appeal Judgment.

5. The conduct of the Tobacco Companies during the first phase is described in Exhibit 1 to the Johnston JTIM Affidavit. They showed callous disregard for the health of the consumers of their products in a relentless pursuit of profit maximization and colluded with each other to mislead and misinform the public about the dangers of smoking. They cynically disputed clear scientific evidence of the dangers of smoking by publicly questioning the accuracy of scientific research to generate many billions of dollars in profits. Justice Riordan described their faults as "*particularly reprehensible*", "*intentionally negligent*", "*so far outside the standards of acceptable behavior*",

"*egregious*", "*immoral*" and in "*bad faith*".[2] The Quebec CA agreed and held that the Applicants "*intentionally violated the right to life, security and integrity*" of the Quebec Class Members and engaged in "*vexatious and malicious commercial conduct*".[3]

6. During the second phase, the Tobacco Companies waged an unparalleled war of attrition against the Quebec Class Action Plaintiffs, consistently employing abusive and dilatory tactics. Their conduct in the legal process was so beyond acceptable practice that Justice Riordan determined that he would adjudicate upon this procedural abuse when all appeals had been exhausted.[4] Imperial's conduct was so extreme that it even engaged outside counsel to destroy evidence regarding scientific research.[5]

7. The Tobacco Companies concurrently embarked on an obvious and, at least in the case of JTIM, admitted, strategy of making themselves judgment-proof. They took no provisions for a possible future condemnation against them, and instead used various techniques to distribute funds to their parents or related entities, outside of the jurisdiction. Justice Mark Schrager J.A. remarked that "*it would be far too cynical to adopt the position that* [they] *were so foresightful and efficient in ordering* [their] *affairs so as not to have the liquidity to satisfy the judgment*".[6] He held that **"**[c]*ontinuing the practice of distributing earnings out-of-jurisdiction is at best disingenuous and at worst, bad faith*".[7]

8. On March 1st, both Imperial and RBH commenced the third phase by immediately serving urgent motions to seek a stay of execution of the Appeal Judgment, returnable before the Quebec CA on March 4th. The Quebec Class Action Plaintiffs served a Motion to Withdraw Security, returnable on March 7th. On March 4th, counsel for Imperial and RBH agreed that their motions as well as the motion of the Quebec Class Action Plaintiffs would be heard on March 25th by the Quebec CA. They were given until March 15th to amend their

[2] Riordan Judgment at paras. 239, 269, 288, 339, 369, 378 [ITCAN Application Record, Tab 2J].
[3] Appeal Judgment at pars. 98 and 1149 [ITCAN Application Record, Tab 2A].
[4] Riordan Judgment at para. 1196 [ITCAN Application Record, Tab 2J].
[5] Riordan Judgment at paras. 365-366, 1010-1011 [ITCAN Application Record, Tab 2J].
[6] Security Judgment at para. 1101 [ITCAN Application Record, Tab 2M].
[7] Security Judgment at para. 52 [ITCAN Application Record, Tab 2M].

motions seeking a stay of execution and JTIM had until that date to file its own motion. None of the Tobacco Companies informed the Quebec CA or counsel for the Quebec Class Action Plaintiffs of their intention to seek an Initial Order *ex parte* under the CCAA.

9. In their respective CCAA applications, neither JTIM nor ITCAN advised the Court of the pending March 25th hearing before the Quebec CA. JTIM even went so far as to seek a stay of proceedings in favor of Imperial and RBH, without advising the Court that Imperial and RBH had already agreed to the March 25th hearing.

10. The Tobacco Companies' attempts to game the system were unconscionable. They have shown reckless disregard for the Court in their applications and have presented false and inaccurate reasons for claiming the urgent need for an *ex parte* hearing on their applications for an Initial Order. There was absolutely no legitimate excuse for the Applicants failing to respect the usual practice of giving prior notice to at least some major creditors and then absolutely no possible excuse for failing to make full and fair disclosure to the Court. In the case of JTIM, for example, it purposely omitted to file the Riordan Judgment, which made specific factual findings about its "*creditor-proofing*" scheme, which Justice Riordan described as a "*sham*", did not disclose to the Court that when it filed for CCAA protection in 2004, it did not ask for the right to continue making payments of interest and royalties to related parties, or that during the six-year period of its prior CCAA proceeding and thereafter, interest and royalty payments were suspended, reduced or amended without consequence to JTIM, "*whenever it suits* [it]".[8]

11. The filings by the Applicants were all made for an improper purpose, including as a transparent collateral attack upon the Quebec CA and its processes. Clearly, the purpose of the CCAA cannot be intended as a shield for unrepentant abusers of the legal system and of the public, against a single group of judgment creditors in class action litigation.

12. All three Tobacco Companies sought Court permission to continue to make intercompany payments as in the past, except for dividends. They consider that it is appropriate for them

[8] Schedule J to the Riordan Judgment at para. 2141(g) [ITCAN Application Record, Tab 2J].

to conduct business as usual while tens of thousands of Quebec Class Members, who are the victims of the faults of the Tobacco Companies, have not received any compensation in the past 21 years for the serious damages they intentionally and fraudulently caused.

13. All three Tobacco Companies provided spurious pretexts for filing under the CCAA. None of them is insolvent today. The only reason for filing was to frustrate the Quebec Class Action Plaintiffs' efforts to obtain justice and to seek leverage to use improperly against them. By way of example:

a. they purportedly seek a global settlement of all tobacco claims, despite having never before made the slightest attempt to negotiate a settlement with the Quebec Class Action Plaintiffs, let alone make an offer;

b. they claim to want to treat all tobacco claimants fairly and equitably, but dragged out the litigation for decades and engaged in illegal, abusive and dilatory tactics that gave rise to punitive damages; and

c. they refer to the amount of excise and sales taxes that they pay every year, but that did not stop them from colluding to illegally smuggle cigarettes into Canada prior to 2004 to avoid these taxes, for which they faced criminal charges and paid fines in excess of 1 billion dollars.

14. RBH obtained an exceptional order that would permit it to make a leave application to the SCC but then would freeze all steps in relation thereto. Aside from brazenly seeking to override the CCP, the *SCC Act*, the *SCC Rules* and the fundamental rights of the Quebec Class Action Plaintiffs, RBH appears intent on trying to "park" a leave application to the SCC as an insurance policy in the event its CCAA proceeding fails. JTIM considered that this is such a good idea that it is now seeking the same relief. This may be among the more disingenuous devices yet attempted by them in their war of attrition strategy.

15. After using the Appeal Judgment as the pretext for the CCAA filing, they appear to suggest that they want to only "commence" an appeal process of that very judgment, presumably so that it could be revived later if they can't wear down the Quebec Class Action Plaintiffs enough in the present insolvency process. That is such a blatant abuse of both the insolvency process and the appeal process (and so clearly improper and contrary to law) that it must be rejected out of hand. If that were not enough, the Tobacco Companies

clearly have no intention of ever satisfying the Judgment Debt if and when the leave application or appeal to the SCC is ultimately dismissed.

16. Justice Riordan decided that "*it is high time that the* [Tobacco] *Companies started to pay for their sins*"[9] but they have done everything possible to avoid doing so. This is not a case of an honest and unfortunate debtor that requires CCAA protection to restructure and become profitable. These extremely profitable companies have inflicted grievous and sometimes fatal harm on their victims and have refused to pay anything for their misdeeds. These exceptional circumstances dictate that the Court's broad discretion be used to severely restrict the Tobacco Companies and achieve justice and fairness for their victims.

17. As stated by Justice Schrager, J.A. in the Security Judgment, "*a strategic decision is required by* [Applicants] *in caucus with their parent companies and related entities who received the benefit of the profitable operations over the years*"[10], as to whether they intend to resolve the Judgment Debt. If they do not, the Tobacco Companies should be adjudicated bankrupt to avoid wasting tens of millions of dollars in CCAA expenses.

PART II - FACTS

18. The Quebec Class Action Plaintiffs incorporate herein the facts set out in the Johnston JTIM Affidavit, the Johnston ITCAN Affidavit, the Johnston RBH Affidavit and the Silverstein Affidavit, so as to avoid duplication.

PART III - THE LAW AND ANALYSIS – COMMON ISSUES

A. <u>Onus at a comeback hearing</u>

19. The comeback hearing is a hearing *de novo*, at which the Applicants have the onus to demonstrate that the terms of the Initial Orders are appropriate and should be upheld.[11]

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[9] Riordan Judgment at para. 1200 [ITCAN Application Record, Tab 2J]

[10] Security Judgment at para. 52 [ITCAN Application Record, Tab 2M].

[11] Dr. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, (Carswell, 2013) at p. 58-60 [BOA Tab 1]; *Stelco Inc., Re*, 2004 CanLII 24849 at para. 1 (ON SC) [BOA Tab 2].

20. The SCC in *Century Services Inc. v. Canada (Attorney General)*[12] stated that appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority.

B. Using CCAA protection for an improper purpose

B-1. Improper use of the CCAA to avoid posting security

21. The Applicants abusively seek to use the CCAA as a shield to avoid having to post additional security as a condition of appealing the Appeal Judgment to the SCC.[13]

22. The Applicants' Initial Orders all contain general stays of proceedings and exempt them from having to post security pursuant to court orders without further order of the Court.[14] The JTIM Initial Order specifically provides that it may seek leave to appeal the Appeal Judgment to the SCC, but prohibits any person from requesting that JTIM post security, without further order of the Court.[15]

23. The RBH Initial Order authorizes RBH to file an application for leave to the SCC, but orders that no further steps be taken by any person in connection therewith[16], which would inexplicably deprive the Quebec Class Action Plaintiffs of their rights:

    a. to oppose the application for leave to appeal;[17] and

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[12] [2010] 3 SCR 379, 2010 SCC 60 at paras. 69-70 [***Century Services***] [BOA Tab 3].

[13] *Timminco Limited (Re)*, 2014 ONSC 3393 at paras. 16-18 [BOA Tab 4].

[14] JTIM Initial Order, ITCAN Initial Order and RBH Initial Order, each at paras. 14, 18.

[15] JTIM Initial Order at para. 20.

[16] RBH Initial Order at para. 20.

[17] *Rules of the Supreme Court of Canada*, SOR/2002-156 [**SCC Rules**], at Rule 27: "*(1) Within 30 days…a* ***respondent or an intervener may respond to the application for leave to appeal****…*"; *SCC Rules* at Rule 32(1)(a)(ii): "*The Registrar shall submit to the Court for consideration (a) an application for leave to appeal, …(ii)* ***if no response is filed****, at the end of the 30-day period referred to in Rule 27*"; *Supreme Court Act*, RSC 1985, c. S-26 [***SCC Act***], s. 43(1): "*Notwithstanding any other Act of Parliament but subject to subsection (1.2), an application to the Supreme Court for leave to appeal shall be made to the Court* ***in writing*** *and the Court shall (a) grant the application if…it* ***does not warrant an oral hearing****…; (b) dismiss the application if…it* ***does not warrant an oral hearing****…; and (c) order an oral hearing…*"; *SCC Act*, s. 58(1)(a): "*…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*"; *SCC Rules*, *supra* note 17, at Rule 64(1)(a):

b. to ask that conditions be imposed on such appeal;

thereby purporting to give this Court the extraordinary right to interfere with the SCC leave proceedings and/or subjecting the Quebec Class Action Plaintiffs to the loss of their fundamental procedural rights and irremediable prejudice. JTIM now seeks the same order.

B-2. Usurping the jurisdiction of the SCC and the Quebec CA

24. The Applicants cannot ask this Court to amend the provisions of the *SCC Act*, the *SCC Rules* and the CCP to determine what steps are taken in a leave application. The *SCC Act* stipulates that the SCC and the court appealed from (the Quebec CA) have exclusive jurisdiction to grant stays of execution and impose conditions in the context of an appeal[18] and leave to appeal.[19] The CCP also grants that jurisdiction to the Quebec CA.[20]

"*If…**applicant has not served and filed all the documents** required…a **respondent may make a motion to the Registrar for dismissal of the application for leave to appeal as abandoned**…*".

[18] *SCC Act*, *supra* note 17, s. 65(1): "*On filing and serving the notice of appeal and depositing security as required by section 60, execution shall be stayed in the original cause, except that… (d) where the judgment appealed from directs the payment of money, either as a debt or for damages or costs, the execution of the judgment shall not be stayed until the appellant has given **security to the satisfaction of the court appealed from, or of a judge thereof**, that, if the judgment or any part thereof is affirmed, the appellant will pay the amount thereby directed to be paid, or the part thereof with respect to which the judgment is affirmed, if it is affirmed only with respect to part, and all damages awarded against the appellant on the appeal*".

[19] *SCC Act*, *supra* note 17, s. 65.1(1): "***The Court, the court appealed from or a judge of either of those courts may**, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, **on the terms deemed appropriate***". The SCC enjoys considerable discretion when in managing the cases that come before it. See *R. v. Chaulk (Application)*, [1989] 1 SCR 369 at 375-376 [BOA Tab 5] See also *SCC Rules*, *supra* note 17, at Rule 3(1): "*Whenever these Rules contain no provision for exercising a right or procedure, the **Court, a judge or the Registrar may adopt any procedure** that is not inconsistent with these Rules or the Act*" and 4(1): "*Whenever these Rules provide that the Court, a judge or the Registrar may make an order or give a direction, the Court, the judge or the Registrar, as the case may be, may impose any terms and conditions in the order or direction **that they consider appropriate***".

[20] *Code of Civil Procedure*, CQLR c C-25.01, art. 390: "*A decision of the Court of Appeal is **enforceable immediately** and bears interest from the date it is rendered, unless it specifies otherwise. Its execution, as regards both the principal and any legal costs, is carried out by the court of first instance. However, the **Court of Appeal or one of its judges**, on an application, **may order execution stayed, on appropriate conditions**, if the party shows that it intends to bring an **application for leave to appeal to the Supreme Court of Canada**.*"

25. Although the CCAA contains specific provisions that apply notwithstanding all other federal and provincial laws,[21] the inherent power of the CCAA court granted pursuant to s. 11 only supersedes "*anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act*". Inherent jurisdiction is not unfettered, and does not operate absent a legislative gap.[22] Absent any legislated authority, the CCAA court has no jurisdiction to override the provisions of the *SCC Act* or to control proceedings before the SCC. As stated in *OpenHydro Technology Canada Ltd. (Re)*[23]:

> *It seems to me to be quite clear from the statutory provisions that Parliament did not intend that orders made by the superior courts of the provinces in the exercise of their CCAA jurisdiction should extend so as to oblige this Court to suspend its proceedings in any matter properly belonging to its jurisdiction…*
>
> *Superior courts do not order each other about or make orders interfering with each other's process. Rather, it is essential that they should cooperate. Conflicts between courts, or other bodies having ultimate judicial power, may well have serious results, including perhaps even loss of liberty. In Canada, superior courts do not compete with one another…*

26. The above principles apply even more so in the case of the processes of appellate courts.

27. The Applicants have not established any reason to disregard the jurisdiction of the SCC or Quebec CA to impose on an appeal any conditions that those courts may deem appropriate.

28. Imperial and RBH acknowledged the jurisdiction of the Quebec CA on March 1, 2019, by making urgent motions to stay execution of the Appeal Judgment, and on March 4, 2019 when the Quebec CA scheduled the motions to be heard on March 25, 2019. The fact that they abandoned those motions in favour of CCAA protection speaks volumes as to their perceived chances of success.

29. Being under CCAA protection does not exempt a litigant from having to post security in civil litigation, and courts making such an order have considered whether funds to post as

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[21] CCAA, s. 11.8 (personal liability of monitor and priority of crown environmental claims), s. 36(1) (no requirement for shareholder approval), and s. 37(1) (deemed trusts).

[22] *Stelco Inc. (Bankruptcy), Re*, 2005 CanLII 8671 at paras. 35-36, 42-44 and 47-51 (ON CA) [BOA Tab 7].

[23] 2018 NSSC 283 at paras. 11-19 [BOA Tab 6].

security can be made available to the litigant by shareholders and principals.[24] In the Security Judgment, Justice Schrager, J.A. recognized that the right of appeal was inextricably linked to an appellant's obligation to post security as a condition of the appeal.

30. Alternatively, even if the Court had the discretion to stay a party's right to request that a CCAA applicant post security as a condition of filing an application for leave to appeal to the SCC, the Applicants' well-documented misconduct is grounds for refusal to exercise such discretion.[25]

31. If the Applicants wish to pursue an appeal to the SCC, they must abide by whatever conditions are imposed upon them by the Quebec CA and the SCC. If they consider those conditions unacceptable, they can then choose to abandon the appeal and subsequently seek to avail themselves of insolvency protection. They should not be permitted to resort once again to a "*heads I win, tails you lose*"[26] litigation strategy.

32. The Initial Orders should therefore be amended to clarify that nothing therein shall exempt the Applicants or the Quebec Class Action Plaintiffs from the jurisdiction of the SCC or the Quebec CA or their obligations pursuant to any orders made relating to any motions seeking leave to appeal or relating to the appeal of the Appeal Judgment.

B-3. Termination of CCAA proceedings upon appeal to the SCC

33. If the Applicants seek leave to appeal to the SCC, their CCAA proceedings would cease to have any purpose and should be terminated immediately, and "*appropriate conditions*" for any stay of execution should be determined by the Quebec CA. Imperial and RBH have the right to present their pending motions for a stay of execution to the Quebec CA or to

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[24] *1511419 Ontario Inc. v. Canaccord Genuity Corp.*, 2017 ONSC 3448 at paras. 8-10 and 13-14 [BOA Tab 8] in which the court rejected the proposition that a CCAA applicant intentionally underfunded could escape the obligation to post security for costs; *Livent. Inc. (Special Receiver) v. Deloitte & Touche*, 2011 ONSC 648 at paras. 3, 6, 43, 58 and 75 [BOA Tab 9] in which CCAA applicant Livent Inc. was ordered to post security for costs in its action against Deloitte & Touche LLP, citing *Crudo Creative Inc. v. Marin*, 2007 CanLII 60834 at paras. 31 and 32 (ON SCDC) [BOA Tab 10].

[25] *Doncaster v. Field*, 2015 NSCA 83 at paras. 11, 15-17, 21-22 and 29-31 [BOA Tab 11].

[26] Security Judgment at para. 43 [ITCAN Application Record, Tab 2M].

amend same, and JTIM has the right to file its own motion, all in accordance with the agreement of counsel and the decision of the Quebec CA on March 4. The Quebec CA would then determine the conditions to be imposed upon the Tobacco Companies, if any, for their applications for leave. If any of the Tobacco Companies are unwilling or unable to satisfy the conditions imposed by the Quebec CA, it could then abandon its application for leave and file for CCAA protection. Otherwise, they would await judgment of the SCC on their leave application and, if successful, their appeals. They could then file for CCAA protection upon receiving an adverse judgment from the SCC.

34. The Applicants should not be entitled to base their CCAA proceedings on the Appeal Judgment, which RBH and JTIM continue to contest. The Applicants are extremely profitable companies[27], and have been the subject of litigation for decades, during which time they clearly did not consider those claims to be sufficiently certain to justify seeking insolvency protection.[28] They sought CCAA protection only after the Appeal Judgment was rendered and solely because of that judgment, even though they do not admit their liability in connection therewith and RBH and JTIM reserve their rights to appeal same to the SCC.

C. Negotiation with the Quebec Class Action Plaintiffs and the role of Justice Winkler

35. The Applicants' CCAA proceedings cannot be successful without the support of the Quebec Class Action Plaintiffs, considering that:

a. they have the only liquidated tobacco claims against the Applicants;

b. their judgment is the very reason, and only reason, that the Applicants filed under

[27] McMaster Affidavit at para. 6 [JTIM Application Record, Tab 2]; JTIM Factum at para. 75; Thauvette Affidavit at para. 128 [ITCAN Application Record, Tab 2].

[28] *Newfoundland and Labrador v. AbitibiBowater Inc.*, [2012] 3 SCR 443 at 445, 448, 463, 468, 473 and 480 [BOA Tab 12] [RBH BOA at Tab 3]; *Re Les Oblats de Marie Immaculee du Manitoba*, 2004 MBQB 71 at paras. 35-38, 44, 51 and 72 [BOA Tab 13]; *Industries Cover inc. (Syndic des)*, 2015 QCCS 136 at paras. 388-391, 395, 400-402, 409-428, 460-466 and 470-473 [BOA Tab 14], appeal settled, in which the Quebec Superior Court annulled a bankruptcy that had been orchestrated by a majority shareholder based on $42 million of presumed contingent claims. That decision was cited by the Ontario Superior Court in *Royal Bank of Canada v. Oxford Medical Imaging Inc.*, 2019 ONSC 1020 at paras. 33-40 and 48 [BOA Tab 15].

the CCAA;

c. they represent tens of thousands of individual creditors with liquidated claims; and

d. compromising claims for damages in respect of intentionally inflicted bodily harm and wrongful death, and interest relating thereto, requires their specific approval.[29]

36. ITCAN originally requested that the Court appoint Justice Winkler as "Tobacco Claimant Representative" to represent every person having a potential tobacco claim and negotiate a settlement with it and others.

37. In the ITCAN Initial Order, the Court appointed Justice Winkler instead as a "Tobacco Claimant Coordinator" for an Interim Period as an independent officer of the Court to assist and to coordinate the interests of all parties having claims. Even that modified appointment, suggestive of a CCAA claims process, is premature, as any costs incurred in these CCAA proceedings will be wasted unless a settlement can first be made with the Quebec Class Action Plaintiffs. The Quebec Class Action Plaintiffs have therefore proposed modified language for the mandate of Justice Winkler, which focuses on facilitating a global negotiation.

D. Stays of proceedings

D-1. Stays in respect of competitor third parties with independent CCAA files

38. The JTIM Initial Order appears to stay proceedings in respect of competitors Imperial and RBH as Other Defendants.[30] JTIM subsequently stated that the stay was "*never intended*

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[29] S. 19(2)(b) CCAA: "*(2) **A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to** any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement: (b) **any award of damages by a court in civil proceedings in respect of** (i) **bodily harm intentionally inflicted**, or sexual assault, or (ii) **wrongful death** resulting from an act referred to in subparagraph (i);…(d) any debt or liability resulting from **obtaining property or services by false pretences or fraudulent misrepresentation**, other than a debt or liability of the company that arises from an equity claim; or (e) any debt for **interest owed in relation to an amount referred to in any of paragraphs (a) to (d)***".

[30] JTIM Initial Order at paras. 4(b), 19 and 21. In JTIM's authorities (*Pacific Exploration*, *Re Tamerlane Ventures Inc.* and *Cinram*, JTIM BOA at Tabs 5, 6 and 7), the third parties benefiting from the stay were related and/or their ongoing operations were significantly intertwined and integrated with those of the applicants. See JTIM Factum at paras. 30-32.

to affect matters that do not, in the interim before the Comeback Hearing, affect the JTI Defendants".[31] That stay should be terminated insofar as it relates to ITCAN and RBH.

39. The ITCAN Initial Order appears to extend to its competitor RBH, and the RBH Initial Order appears to extend to its competitor Imperial, each by broadly staying proceedings against the "*funds deposited pursuant to the Deposit Posting Order*"[32], even though funds were contributed separately by Imperial and by RBH.[33]

40. The Applicants in these proceedings are competitors of each other and separately filed for CCAA protection, with different monitors. Each Applicant has already obtained a stay of proceedings in its own CCAA file and it is therefore inappropriate and unnecessary for any Applicant to benefit from a stay of proceedings ordered in a different file.

41. The Applicants appear to be seeking the benefits of a substantive consolidation of all three CCAA files while pursuing separate proceedings with the inherent massive duplication of costs associated therewith – they cannot have it both ways.

D-2. Prohibiting Distribution of funds by the Applicants to Related Parties

42. There are numerous reasons for varying the Initial Orders which permit the continuation of intercompany payments by the Applicants. Payments of interest on debt (even secured debt) are not provided for under the Model Order; rather, the default provision is that such payments cease during the pendency of the CCAA proceedings. The Model Order also

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[31] Johnston JTIM Affidavit at para. 53.

[32] ITCAN Initial Order at paras. 4(d), 4(h), 18 and 21; RBH Initial Order at paras. 4(a), 18 and 19.

[33] RBH relies on the cases involving uncertified class actions that remained to be adjudicated against various defendants (*Grace Canada*, RBH BOA at Tab 14; *Sino-Forest*, RBH BOA at Tab 22) and where claims against non-applicant defendants were derivative of the claims against applicant defendants (*Muscletech*, RBH BOA at Tab 12). Conversely, the respective liability of each Applicant has already been confirmed on appeal, and is independent of the liability of the other Applicants. There is no evidence that the extension of one Applicant's CCAA stay of proceedings to the other unrelated Applicants would facilitate a successful reorganization, the development of a successful CCAA plan or a global settlement.

provides a warning regarding payments that can be made outside of the jurisdiction by the use of centralized cash management processes.[34]

43. Furthermore, the exceptional circumstances of these CCAA filings by the Applicants, as summarized in the Overview and detailed at length in the Affidavits of Bruce Johnston, do not justify the Court permitting the continuation of intercompany payments by the Applicants, save for limited transactions related to the provision of physical inventory at fair market value.

44. It is obvious that if the Applicants are serious about seeking a global resolution of all disputes with the tobacco claimants at this time, they would not insist upon appealing to the SCC which will only result in unnecessary delay and significant expense. A global resolution will necessarily require a commitment by the parent and related parties of each of the Applicants in the billions of dollars. Such a commitment is certainly understandable since the parent companies would be the major beneficiaries of a successful plan. If the parent companies are not prepared to accept the postponement of intercompany payments during the CCAA proceedings, this hardly augers well for a successful resolution. It is only reasonable that while the Quebec Class Members suffer additional delay in obtaining the compensation that they have been awaiting for so long, the parent and related parties defer receipt of intercompany payments during the CCAA proceedings.

D-3. Preventing distribution of assets by the Applicants to related parties

(i) Defining "ordinary course of business"

45. Transactions performed for the purpose of creditor-proofing, even if they span years, do not form part of a company's ordinary course of business.[35]

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[34] The notes to the model initial order utilized by the Commercial List specifically caution against such risks, particularly where applicants request that they be allowed to continue to utilize a central cash management system.

[35] Johnston JTIM Affidavit at paras. 82-93; Johnston ITCAN Affidavit at paras. 50-54; Johnston RBH Affidavit at paras. 43-48.

46. The SCC has held that there is no one definition of "ordinary course of business", and that one must consider the circumstances of each case.[36] Factors considered in assessing if a transaction constitutes "ordinary course of business" include whether the transaction is distinguishable from the normal course of operations because of its complexity or far-reaching or unusual nature, arose out of some special or peculiar situation, required approval from shareholders or directors, was given special notice by the company, was an unusual or isolated undertaking as opposed to a routine one or is reflective of standard practice in the relevant industry.[37]

47. For this analysis, it is instructive to review how the Applicants' related-party transactions have already been characterized and viewed by the courts in Quebec.

(ii) Imperial and RBH

48. In the Security Judgment, the Quebec CA was critical of the purported "business as usual" practice by Imperial and RBH of distributing earnings out of jurisdiction in order to have no funds to satisfy a judgment against them:

> *[44]* ***Both Appellants have structured their affairs in a manner that drastically, if not completely, reduces their exposure to satisfy any substantial condemnation that might be made against them in this litigation****. Of course, the companies are not empty shells because it is in their obvious interest and that of their parent companies that they continue to operate so as to continue to generate profits.* ***The structure and modus operandi was put in place years ago because no doubt Appellants could observe the seriousness of the case*** *and resolve of the Respondents to conclude that a substantial award was possible, even perhaps likely. In these circumstances, now that there is a judgment condemning them to pay $8 billion ($15.5 billion at today's value) and nothing to suggest that the practice (of distributing virtually all earnings) will not continue and notwithstanding that the transfer and encumbrance of trademarks may have occurred long ago, I am faced with a situation where on balance I conclude that the Respondents are in jeopardy of not obtaining satisfaction of any substantial amount confirmed in appeal. I am mindful that Appellants stated clearly that they could not pay the provisional execution award as ordered. Positive action is necessary to convince me that the reaction to a final judgment would not be the same. These circumstances taken together are a "special reason". I will order that security be furnished. …*

[36] *Robitaille v. American Biltrite (Canada)*, [1985] 1 SCR 290 [BOA Tab 16].

[37] *Stelco Inc. (Re)*, 2007 ONCA 483 at paras. 101-103 and 108-112 [BOA Tab 17].

> *[52] I see the current situation as somewhat different. The Appellants chose not to reserve funds to satisfy an eventual condemnation as was their right. However, now that there is a judgment, which I have stated, benefits from a presumption of validity, the situation is changed.* ***Given my conclusions based on the facts in the record, it is not acceptable that Appellants merely say that they have no funds to satisfy the judgment or an order to furnish security and continue to distribute earnings because that is "business as usual"****. A strategic decision is required by Appellants in caucus with their parent companies and related entities who have received the benefit of the profitable operations over the years and who continue to do so. Are they willing to do the necessary to help fund security to allow Appellants to continue their appeal? I do not question Appellants' right to appeal but neither can I stand idly by while Appellants pursue an appeal which will benefit them if they win but which will not operate to their detriment if they lose.* ***Continuing the practice of distributing earnings out-of-jurisdiction at this point is at best disingenuous and at worst, bad faith***.[38] [Emphasis added]

49. By way of one example only, even though Imperial borrowed $500 million from an affiliate to settle the Flintkote litigation and declared a loss of $351 million in 2014, it nevertheless declared and paid dividends of $334 million to BAT in that year.[39]

(iii) JTIM

50. In the Riordan Judgment, JTIM's related-party expenses were described as "*artificial*", "*creditor proofing*", a "*sham*" and "*a cynical, bad-faith effort*":

> *[1095] For example, the Japan Tobacco group caused JTM to transfer its trade marks valued at $1.2 billion to a new, previously-empty subsidiary, JTI-TM, in return for the latter's shares. This "Newco" charges JTM an annual royalty of some $10 million for the use of those trade marks.* ***It is hard to conceive of a more artificial expense****.*
>
> *[1096] There is also a loan of $1.2 billion from JTI-TM to JTM for which JTM is charged $92 million a year in interest. One of the curious aspects of this loan is that* ***JTM appears never to have received any funds*** *as a result of it, although we must admit that Mr. Poirier's clear answer in this regard at page 115 of the transcript became less clear later in his testimony.*
>
> *[1097] Our analysis of this matter leads us to agree with Mr. Poirier who, when reviewing some of the planning behind the Interco Contracts, was asked* ***if "that sounds like creditor proofing to you". He candidly replied: "Yes"***.[40]
>
> *[1101] In the first, we cannot but conclude that this whole tangled web of interconnecting contracts is* ***principally a creditor-proofing exercise undertaken after the institution of***

[38] Security Judgment at paras. 44 and 52 [ITCAN Application Record, Tab 2M].

[39] Johnston ITCAN Affidavit at para. 37.

[40] Riordan Judgment at paras. 1095-1097 [ITCAN Application Record, Tab 2J].

> ***the present actions by a sophisticated parent company****, Japan Tobacco Inc., operating in an industry that was deeply embroiled in product liability litigation. Even Mr. Poirier could not deny that. And on paper, the* ***sham*** *may well succeed.*
>
> *[1102] Unless the Interco Contracts are overturned, something that is not the subject of the present files, JTM appears to be nothing more than a break-even operation. So be it, but that is an* ***artificial state of affairs*** *that does not reflect the company's true patrimonial situation.* ***Absent these artifices, JTM is earning an average of $103,000,000 a year before taxes*** *and that is the patrimonial situation that we will adopt for the purpose of assessing punitive damages.*
>
> *[1103] Then there is the qualitative side.* ***The Interco Contracts represent a cynical, bad-faith effort by JTM to avoid paying proper compensation to its customers whose health and well-being were ruined, and the word is not too strong, by its wilful conduct. This deserves to be sanctioned*** *and we shall do so by setting the condemnation for punitive damages above the base amount.*[41] [Emphasis added]

51. It is apparent from the existing judicial findings that the transactions implemented by the Applicants are unusual, distinguishable from the normal course of operations by their creditor-proofing purpose, were not routine in nature, and were put in place with shareholder involvement. The Court should not permit such transactions to continue while the Applicants are under CCAA protection.

52. Even if this Court should find that any such transactions form part of the Applicants' "*status quo*", it need not maintain every detail of the status quo in a CCAA proceeding. Section 11 CCAA allows the Court to stay past debts and require the continuance of present obligations to the debtor, and section 11.01 CCAA[42] is an exception that is to be narrowly construed,[43] and does not guarantee payment. A CCAA court may refuse payments to related parties and deny them the ability to harm the applicant's operations.[44]

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[41] *Ibid.* at paras. 1101-1103 [ITCAN Application Record, Tab 2J], upheld in the Appeal Judgment at paras. 1093, 1156 and 1161 [ITCAN Application Record, Tab 2A].

[42] S. 11.01 CCAA: "*No order made under section 11 or 11.02 has the effect of (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or (b) requiring the further advance of money or credit*".

[43] *Nortel Networks Corporation (Re)*, 2009 CanLII 31600 at paras. 48, 66 and 67 (ON SC), aff'd, *Sproule v. Nortel Networks Corporation*, 2009 ONCA 833 [BOA Tab 19]. In the case cited by JTIM on this point, *Montreal Trust Co. of Canada Ltd. v. Smoky River Coal Ltd.*, 2001 ABCA 209 [JTIM BOA Tab 15], the royalty was payable by the debtor to the unrelated Alberta Department of Resource Development.

[44] *Re Essar Steel Algoma Inc. et al*, 2016 ONSC 6459 at paras. 19-20, 25 and 26 [BOA Tab 20].

D-4. Lifting stays to file applications for bankruptcy orders

53. The Quebec Class Action Plaintiffs seek a partial lift of the stays of proceedings provided for in the Initial Orders for the sole purpose of allowing them to file an application for a bankruptcy order against the Applicants, to ensure an orderly transition to bankruptcy in the event that any of the CCAA Proceedings fail.[45]

54. Filing of applications for bankruptcy orders, without adjudication, would not affect the rights of the Applicants or the status quo, but would ensure timely protection of the Applicants' assets if any of the CCAA Proceedings are unsuccessful.

55. In the absence of such applications, there is a risk that a temporal gap between the end of the CCAA Proceedings and the institution of bankruptcy proceedings could serve as an opportunity for maneuvering by the Applicants or other parties, to the detriment of the interests of all creditors.

D-5. Lifting stays to seek approval of settlement transactions

56. The Quebec Class Action Plaintiffs seek the lifting of the stays of proceedings in order to seek court approval of settlement agreements that they entered into:

a. on February 16, 2017 with Northumberland, in liquidation, through its liquidator PricewaterhouseCoopers Inc., in respect of insurance policies issued by Northumberland to Imperial and/or its predecessor entities; and

b. on July 4, 2017 with Kansa, in liquidation[46], and its liquidator, in respect of insurance policies issued by Kansa to ITCAN and/or its predecessor entities, and to RBH and/or related entities;

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[45] *Grant Forest Products Inc. (Re),* 2013 ONSC 5933 at para. 106 [BOA Tab 21], aff'd in *Grant Forest Products Inc. v. GE Canada Leasing Services Co.*, 2015 ONCA 570.

[46] The liquidation is pursuant to the *Winding-up and Restructuring Act* in court file 500-05-002760-955.

57. The Settlement Agreements are subject to obtaining the approval of the Quebec SC having carriage of the Quebec Class Actions, within 90 days of the Appeal Judgment.[47]

58. Courts have lifted CCAA stays of proceedings to approve settlements.[48] In the CCAA file of Sino-Forest Corporation, the stay of proceedings was lifted to allow partial settlements to occur in the context of a class action.[49]

59. Courts have also lifted CCAA stays of proceedings to allow claims to be made against insurers of CCAA applicants, as the entitlement to insurance proceeds has no impact on CCAA proceedings.[50] In the present case, the settlements between the Quebec Class Action Plaintiffs and the insurers have absolutely no effect on the CCAA proceedings; especially since ITCAN and RBH have already settled all claims they may have against such insurers. The request to lift the stay of proceedings is made only on a *de bene esse* basis to avoid any possible misunderstanding as to the scope of the order.

60. The Settlement Agreements should remain under seal, and the amounts payable not be disclosed, to respect the confidentiality provisions therein stipulated and to avoid the disclosure of information that could affect claims against other insurers of ITCAN and RBH, the vast majority of which are neither insolvent nor in liquidation.[51]

D-6. The Court should closely supervise the costs of this CCAA process

61. As appears from the cash flow statements filed by the Applicants in support of their applications, CCAA fees and costs of $29 million are forecast to be spent by the Tobacco Companies during the initial 13-week period alone.

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[47] Using reasonable efforts to meet the 90-day deadline in the case of the Northumberland Settlement and except where the parties both agree to another date in the case of the Kansa Settlement.

[48] By way of example, see the settlement of claims against the Canadian Red Cross Society by class action plaintiffs.

[49] *Sino-Forest Corporation (Re)*, Ontario Superior Court of Justice (Commercial List), Court File No. CV-12-9667-00CL, Order of Morawetz J. issued May 8, 2012, at para. 2 [RBH BOA at Tab 22].

[50] *Timminco Limited (Re)*, 2014 ONSC 3393 at paras. 8, 16-18 and 58 [BOA Tab 4].

[51] *Elleway Acquisitions Limited v. 4358376 Canada Inc.*, 2013 ONSC 7009 at para. 48 [BOA Tab 23]; *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 [JTIM BOA Tab 19]

62. The CCAA proceedings should not be regarded as typical filings by commercial debtors in financial distress but rather as an exceptional situation where bad corporate actors are seeking the Court's assistance to avoid paying a judgment debt to the victims of their malicious misconduct.

63. In the particular circumstances of this case, where tens of thousands of Quebec victims have not received any compensation whatsoever from the Tobacco Companies for more than 20 years and where those same Tobacco Companies have already spent hundreds of millions of dollars of defense costs to delay and defeat their meritorious claims, it is more than appropriate that all fees and disbursements of professionals and consultants paid by the Applicants in these proceedings be closely supervised and approved by the Court at regular intervals of no more than 90 days, with prior notice to the Service List.[52]

64. The Quebec Class Action Plaintiffs are entitled to a fully transparent process where the Applicants will have to justify the costs they are incurring; rather than having unfettered ability to dissipate their assets in a process that they embarked upon for an improper purpose.

PART IV - JTIM SPECIFIC ISSUES

A. Onus on JTIM at the *Ex Parte* Hearing for the Initial Order

71. At the *ex parte* hearing before Justice Hainey on March 8, 2019, JTIM had a duty to make full and fair disclosure to the Court of all material facts[53], including those facts which did

[52] Janis P. Sarra, "Imhotep's Ingenuity, Developing Canada's Capacity to Address Corporate Group Insolvency" in *Annual Review of Insolvency Law 2013* (Carswell) at 230-231 [BOA Tab 24].

[53] *Rules of Civil Procedure*, RRO 1990, Reg 194, at Rule 39.01(6): "*Where a motion or application is made without notice, the moving party or applicant shall make* ***full and fair disclosure of all material facts****, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application*".

not support its position or that favour an absent party,[54] failing which the Quebec Class Action Plaintiffs are entitled to have the *ex parte* CCAA initial order varied or set aside.[55]

72. The materials filed by JTIM were one-sided and failed to make full and fair disclosure of all relevant facts to the Court, having omitted to include highly relevant information.[56]

73. JTIM only saw fit to produce the conclusions of the Riordan Judgment. Had the entire judgment been filed, the Court would have known:

a. the history of egregious misconduct on the part of JTIM, which led to a condemnation of punitive damages against it;

b. the factual findings made by Justice Riordan at paragraphs 1092 to 1112 and paragraph 2141 of Schedule J that the interest and royalty payments requested by JTIM were part of a long-standing creditor-proofing structure put into place in the year following the institution of the Quebec Class Actions;

c. that the CEO of JTI testified that these transactions were creditor-proofing transactions, described by Justice Riordan as a "*sham*" and a cynical bad faith effort to avoid compensating the Quebec Class Action Plaintiffs; and

d. that JTIM had previously interrupted or modified interest and royalty payments without any consequence.

74. Although JTIM did file the Security Judgment, there is no indication that it brought to the Court's attention paragraphs 42 and 52 regarding the Applicants making themselves judgment-proof with impunity.

75. In oral argument before Justice McEwen on March 18, 2019, counsel for JTIM stated that the decision was made not to file the judgments of Justices Riordan and Mongeon as they

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[54] *Marciano (Séquestre de),* 2012 QCCA 1881 at paras. 40, 42, 47 and 51 [BOA Tab 25]; Dr. Janis P. Sarra, *supra*, note 1, at p. 108 and 109 [BOA Tab 1].

[55] See *CanaSea PetroGas Group Holdings Ltd., Re*, 2014 ONSC 6116, leave to appeal denied, 2014 ONCA 824 [BOA Tab 26], in which the CCAA judge terminated the initial order that he had granted in a prior *ex parte* hearing, after being presented with evidence that the applicants had presented a misleading picture of their financial status and did not satisfy the statutory requirements of insolvency. *Re Hester Creek Estate Winery Ltd*., 2004 BCSC 345 at para. 30 [BOA Tab 27].

[56] ITCAN and RBH also did not make full and fair disclosure to Justice McEwen and Justice Pattillo, respectively, regarding their proceedings already before the Quebec CA seeking a stay of execution.

cancelled each other out, notwithstanding that the judgment of Justice Mongeon was rendered on an interlocutory request for a safeguard order while the judgment of Justice Riordan on the merits was based upon a detailed review of the relevant evidence made during the trial lasting more than 250 days.

76. Paragraph 89 of the McMaster Affidavit states "*There would be potential adverse tax consequences to its senior secured creditor if such payments were suspended for a significant period of time*", whereas during oral arguments before Justice McEwen on March 18, 2019, counsel for JTIM stated that adverse tax consequences could result if interest payments are suspended for two years. The McMaster Affidavit is not sufficiently specific, as it did not state that the period of suspension of interest payments was two years.

77. Paragraph 43 of the McMaster Affidavit states that the structure of the acquisition of the Canadian assets of JTIM was a leveraged buyout for tax planning purposes, without stating that the real reason was creditor-proofing.

78. Paragraph 31 of the McMaster Affidavit refers to the possibility of termination of the right to use trademarks which would likely cause the cessation of JTIM's business, without informing the Court that JTIM had frequently in the past not made royalty payments to TM, without any consequence, as appears from Schedule J to the Riordan Judgment.

79. JTIM also failed to disclose the decision of Justice Farley rendered in 2006 requiring that letters of credit be provided to address creditors' concerns as to leakage of funds/assets from JTIM to related parties.[57]

80. The failure of JTIM to provide full and fair disclosure to the Court is an additional reason for prohibiting it from making any payments or distributions to related parties for interest, principal, royalties or for any other purpose whatsoever, other than for the direct purchase of physical inventory at fair market value.

[57] *JTI-MacDonald Corp., Re*, 2006 CanLII 4505 (ON SC) [BOA Tab 18].

B. Removal of the CRO

B-1. JTIM has no need for a CRO

81. Paragraph 31 of the JTIM Initial Order approves the engagement by the JTIM Applicant of BlueTree, to provide the services of William E. Aziz to act as its CRO.

82. A CRO will often identify causes of a distressed company's financial difficulties, identify solutions and business opportunities, and execute a restructuring plan. JTIM, by contrast, is "*cash flow positive and has successful business operations*",[58] is a profitable and not a distressed company, is able to meet its ordinary course obligations as they become due, and needs no operational restructuring.[59]

83. JTIM asserts that BlueTree will minimize, *inter alia*, the distraction of senior executives from the task of managing the business and maintaining positive cash flow,[60] but the Engagement Letter[61] clearly states that BlueTree's services are "*subject to ongoing supervision and direction from the JTI-M* [JTIM's] *Board of Directors (the "**Board**")*". The Board members, all officers and employees of JTIM, would be directly involved in issues relating to the settlement of litigation.

84. JTIM has not alleged any circumstances that would differentiate it from RBH or ITCAN, which did not seek the appointment of a CRO in their Initial Orders.

B-2. Fees of the CRO and the Administration Charge

85. Paragraphs 31(a) and 40 of the JTIM Initial Order approve the payment of BlueTree's fees and expenses, to be secured by the Administration Charge.

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[58] JTIM Factum at para. 75.

[59] McMaster Affidavit at para. 6 [JTIM Application Record, Tab 2].

[60] McMaster Affidavit at para. 103 [JTIM Application Record, Tab 2].

[61] See paragraph 1 of the redacted Engagement Letter [JTIM Application Record Tab 5II].

86. There is unwarranted duplication between BlueTree's proposed role and that of Justice Winkler regarding the negotiation of a settlement with stakeholders.[62] If this Court finds that BlueTree should remain as JTIM's CRO, it is submitted that BlueTree's fees and expenses should not be assumed by JTIM; rather, it can arrange for payment by a related party, if it so wishes.

C. Replacement of Deloitte as Monitor to avoid appearance of conflict

87. The JTIM Initial Order appoints Deloitte Restructuring Inc. to act as monitor.

88. This Court may replace the monitor, if appropriate in the circumstances.[63] CCAA courts have done so for reasons of independence and appearance of a lack of impartiality.[64]

89. As set out in paragraphs 94 and following of the Johnston JTIM Affidavit, the Deloitte Group is involved in the activities of JTIM and JTI as auditor and valuator. Deloitte also played a critical role at the time the intercompany transactions were implemented and made representations to the taxing authorities as to the creditor-proofing purpose thereof. As proposed monitor, Deloitte considered JTIM's "*intercompany arrangements*" and rubber stamped the continued payments thereunder without mention of the Riordan Judgment or other critical court decisions, and failed to disclose knowledge of creditor-proofing transactions, relationships with Imperial and RBH and other tobacco industry activities.

90. The long-standing involvement of the Deloitte Group in the activities of the JTI Group, the possibility of representatives of the Deloitte Group being called as material witnesses with respect to JTIM's intercompany transactions, and the failure to disclose same in the JTIM

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[62] *Canwest Publishing Inc.*, 2010 ONSC 222 at para. 54 [JTIM BOA at Tab 8]; *Timminco Limited (Re)*, 2012 ONSC 106 at para. 26 [RBH BOA at Tab 29].

[63] S. 11.7(3) CCAA: "*On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the Bankruptcy and Insolvency Act, to monitor the business and financial affairs of the company*".

[64] *Nelson Education Limited (Re)*, 2015 ONSC 3580, at paras. 32-37 [BOA Tab 28]; *GuestLogix Inc. (Re)*, 2016 ONSC 1047, at para. 33 [BOA Tab 29]; *General Motors v. Trillium Motor World Ltd.*, 2019 ONSC 520 at para. 32 [BOA Tab 30].

application creates an appearance of conflict that can only be resolved by the replacement of Deloitte Restructuring Inc. as monitor.

PART V - RELIEF REQUESTED

91. For these reasons, the Quebec Class Action Plaintiffs request the orders sought by them in each Notice of Motion for Comeback Hearing dated March 28, 2019 in court file CV-19-615862-00CL, CV-19-616077-00CL and CV-19-616779-00CL.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 29, 2019

Fishman Flanz Meland Paquin LLP

FISHMAN FLANZ MELAND PAQUIN LLP

Avram Fishman **Mark E. Meland**

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ANNEX I

GLOSSARY OF DEFINED TERMS

"**Administration Charge**" means the administration charge on the property of JTIM in the amount of $3 million.

"**Appeal Judgment**" means the decision of the Quebec CA (*Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358) rendered on March 1, 2019, upholding, with very minor exceptions, the Riordan Judgment.

"**Applicant**" means any of ITCAN, JTIM and RBH.

"**Application Record**" means the application record filed in support of each of the Applicants' Application for an Initial Order.

"**BlueTree**" means BlueTree Advisors Inc.

"**BOA**" means Book of Authorities.

"**CCAA**" means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

"**CCP**" means the *Code of Civil Procedure*, CQLR c C-25.01 (Quebec).

"**CRO**" means chief restructuring officer.

"**Deloitte**" means Deloitte Restructuring Inc.

"**Deloitte Group**" means, collectively, Deloitte and its affiliates.

"**Deloitte Report**" means Deloitte's Report of the Proposed Monitor dated March 8, 2019.

"**Engagement Letter**" means the engagement letter dated April 23, 2018 between BlueTree and JTIM, provided in JTIM's Application Record at Tab 5, Exhibit II.

"**ITCAN**" means, collectively, ITCO and Imperial.

"**ITCO**" means Imperial Tobacco Company Limited.

"**Imperial**" means Imperial Tobacco Canada Limited.

"**ITCAN Initial Order**" means the Initial Order granted by the Honourable Justice McEwen on March 12, 2019, after hearing, on an *ex parte* basis, ITCAN's Application for an Initial Order.

"**Johnston ITCAN Affidavit**" means the affidavit Bruce Johnston sworn on March 27, 2019 in support of the Quebec Class Action Plaintiffs' *Notice of Motion for Comeback Hearing* filed on March 27, 2019 in Court File No. CV-19-616077-00CL.

"**Johnston JTIM Affidavit**" means the affidavit Bruce Johnston sworn on March 27, 2019 in support of the Quebec Class Action Plaintiffs' *Notice of Motion for Comeback Hearing* filed on March 27, 2019 in Court File No. CV-19-615862-00CL.

"**Johnston RBH Affidavit**" means the affidavit Bruce Johnston sworn on March 27, 2019 in support of the Quebec Class Action Plaintiffs' *Notice of Motion for Comeback Hearing* filed on March 27, 2019 in Court File No. CV-19-616779-00CL.

"**JTI**" means Japan Tobacco Inc., the ultimate parent company of JTIM.

"**JTI Group**" means JTI and entities related to or affiliated therewith.

"**JTIM**" means JTI-MacDonald Corp.

"**JTIM Initial Order**" means the Initial Order granted by the Honourable Justice Hainey on March 8, 2019, after hearing, on an *ex parte* basis, JTIM's Application for an Initial Order.

"**Judgment Debt**" means the amounts due to the Quebec Class Members pursuant to the Riordan Judgment and Appeal Judgment.

"**Justice Winkler**" means the Honourable Warren K. Winkler Q.C.

"**Kansa**" means Kansa General International Insurance Company Ltd., formerly Kansa General Insurance Company.

"**Kansa Settlement**" means the settlement agreement entered into on July 4, 2017 by the Quebec Class Action Plaintiffs with Kansa and its liquidator.

"**Luongo Affidavit**" means the affidavit of Peter Luongo sworn on March 22, 2019 in support of the Application made by RBH for an Initial Order.

"**McMaster Affidavit**" means the affidavit of Robert McMaster sworn on March 8, 2019 in support of the Application made by JTIM for an Initial Order.

"**Northumberland**" means Northumberland General Insurance Company.

"**Northumberland Settlement**" means the settlement agreement entered into on February 16, 2017 by the Quebec Class Action Plaintiffs with Northumberland, through its liquidator PricewaterhouseCoopers Inc.

"**PMI Group**" means RBH's parent company and other related companies, as defined in the RBH Initial Order.

"**Quebec CA**" means the Court of Appeal of Quebec.

"**Quebec Class Action Plaintiffs**" means the class representatives Jean-Yves Blais, Conseil Québécois sur le tabac et la santé and Cécilia Létourneau.

"**Quebec Class Actions**" means both actions instituted in the Quebec SC by the Class Action Plaintiffs in September and November 1998, bearing numbers 500-06-000076-980 and 500-06-000070-983.

"**Quebec Class Members**" means approximately 1.1 class action members of the Quebec Class Actions.

"**Quebec SC**" means the Superior Court of Quebec.

"**RBH**" means Rothmans, Benson & Hedges Inc.

"**RBH Initial Order**" means the Initial Order granted by the Honourable Justice Patillo on March 22, 2019, after hearing, on an *ex parte* basis, RBH's Application for an Initial Order.

"**Riordan Judgment**" means the decision of the Honourable Justice Brian Riordan of the Quebec SC (*Létourneau c. JTI-MacDonald Corp.*, 2015 QCCS 2382) rendered on May 27, 2015 which condemned the Tobacco Companies to pay damages that, with interest and the additional indemnity provided by law, exceed $13.5 billion in the aggregate.

"**SCC**" means the Supreme Court of Canada.

"**SCC Act**" means the *Supreme Court Act*, RSC 1985, c. S-26.

"**SCC Rules**" means the *Rules of the Supreme Court of Canada*, SOR/2002-156.

"**Security Judgment**" means the decision of Justice Schrager, J.A. of the Quebec CA (*Imperial Tobacco Canada Ltd. c. Conseil québécois sur le tabac et la santé*, 2015 QCCA 1737) rendered on October 27, 2015 that required Imperial and RBH to furnish security in the aggregate amount of $984 million to guarantee payment in part of the Appeal Judgment amount.

"**Settlement Agreements**" means, collectively, the Kansa Settlement and the Northumberland Settlement.

"**Silverstein Affidavit**" means the affidavit of Tina Silverstein sworn on March 27, 2019 in support of the Quebec Class Action Plaintiffs' *Notice of Motion for Comeback Hearing* filed on March 27, 2019 in Court File No. CV-19-615862-00CL.

"**Thauvette Affidavit**" means the affidavit of Eric Thauvette sworn on March 12, 2019 in support of the Application made by ITCAN for an Initial Order.

"**Tobacco Companies**" means, collectively, Imperial, JTIM and RBH.

"**TM**" means JTI-Macdonald TM Corp.

ANNEX II

AUTHORITIES

Tab 1.	Dr. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, (Carswell, 2013) (**extracts**)
Tab 2.	*Stelco Inc., Re*, 2004 CanLII 24849 (ON SC)
Tab 3.	*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
Tab 4.	*Timminco Limited (Re)*, 2014 ONSC 3393
Tab 5.	*R. v. Chaulk (Application)*, [1989] 1 SCR 369
Tab 6.	*OpenHydro Technology Canada Ltd. (Re)*, 2018 NSSC 283
Tab 7.	*Stelco Inc. (Bankruptcy), Re*, 2005 CanLII 8671 (ON CA)
Tab 8.	*1511419 Ontario Inc. v. Canaccord Genuity Corp.*, 2017 ONSC 3448
Tab 9.	*Livent. Inc. (Special Receiver) v. Deloitte & Touche*, 2011 ONSC 648
Tab 10.	*Crudo Creative Inc. v. Marin*, 2007 CanLII 60834 (ON SCDC)
Tab 11.	*Doncaster v. Field*, 2015 NSCA 83
Tab 12.	*Newfoundland and Labrador v. AbitibiBowater Inc.*, [2012] 3 SCR 443 (**extracts**)
Tab 13.	*Re Les Oblats de Marie Immaculee du Manitoba*, 2004 MBQB 71
Tab 14.	*Industries Cover inc. (Syndic des)*, 2015 QCCS 136
Tab 15.	*Royal Bank of Canada v. Oxford Medical Imaging Inc.*, 2019 ONSC 1020
Tab 16.	*Robitaille v. American Biltrite (Canada)*, [1985] 1 SCR 290
Tab 17.	*Stelco Inc. (Re)*, 2007 ONCA 483
Tab 18.	*JTI-MacDonald Corp., Re*, 2006 CanLII 4505 (ON SC)
Tab 19.	*Nortel Networks Corporation (Re)*, 2009 CanLII 31600 (ON SC), aff'd, *Sproule v. Nortel Networks Corporation*, 2009 ONCA 833
Tab 20.	*Re Essar Steel Algoma Inc. et al*, 2016 ONSC 6459
Tab 21.	*Grant Forest Products Inc. (Re)*, 2013 ONSC 5933, aff'd in *Grant Forest Products Inc. v. GE Canada Leasing Services Co.*, 2015 ONCA 570
Tab 22.	*Sino-Forest Corporation (Re)*, Ontario Superior Court of Justice (Commercial List), Court File No. CV-12-9667-00CL, Order of Morawetz J. issued May 8, 2012 (**extracts**)
Tab 23.	*Elleway Acquisitions Limited v. 4358376 Canada Inc.*, 2013 ONSC 7009
Tab 24.	Janis P. SARRA, "Imhotep's Ingenuity, Developing Canada's Capacity to Address Corporate Group Insolvency" in Annual Review of Insolvency Law 2013 (Carswell) at 230-231.
Tab 25.	*Marciano (Séquestre de*), 2012 QCCA 1881

Tab 26. *CanaSea PetroGas Group Holdings Ltd., Re*, 2014 ONSC 6116, leave to appeal denied, 2014 ONCA 824;

Tab 27. *Re Hester Creek Estate Winery Ltd.*, 2004 BCSC 345

Tab 28. *Nelson Education Limited (Re)*, 2015 ONSC 3580

Tab 29. *GuestLogix Inc. (Re)*, 2016 ONSC 1047

Tab 30. *General Motors v. Trillium Motor World Ltd.*, 2019 ONSC 520

ANNEX III

STATUTES

Supreme Court Act, RSC 1985, c. S-26 (**extracts**)

Applications for leave to appeal

43 (1) Notwithstanding any other Act of Parliament but subject to subsection (1.2), an application to the Supreme Court for leave to appeal shall be made to the Court in writing and the Court shall

> **(a)** grant the application if it is clear from the written material that it does not warrant an oral hearing and that any question involved is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in the question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it;
>
> **(b)** dismiss the application if it is clear from the written material that it does not warrant an oral hearing and that there is no question involved as described in paragraph (a); and
>
> **(c)** order an oral hearing to determine the application, in any other case.

(1.1) Notwithstanding subsection (1), the Court may, in its discretion, remand the whole or any part of the case to the court appealed from or the court of original jurisdiction and order any further proceedings that would be just in the circumstances.

(1.2) On the request of the applicant, an oral hearing shall be ordered to determine an application for leave to appeal to the Court from a judgment of a court of appeal setting aside an acquittal of an indictable offence and ordering a new trial if there is no right of appeal on a question of law on which a judge of the court of appeal dissents.

(2) Where the court makes an order for an oral hearing, the oral hearing shall be held within thirty days after the date of the order or such further time as the Court determines.

(3) Any three judges of the Court constitute a quorum for the consideration and determination of an application for leave to appeal, whether or not an oral hearing is ordered.

(4) Notwithstanding subsection (3), five judges of the Court constitute a quorum in the case of an application for leave to appeal from a judgment of a court

> **(a)** quashing a conviction of an offence punishable by death; or
>
> **(b)** dismissing an appeal against an acquittal of an offence punishable by death, including an acquittal in respect of a principal offence where the accused has been convicted of an offence included in the principal offence.

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; and
>
> **(b)** in the case of an appeal for which leave to appeal is not required or in the case of an appeal for which leave to appeal is required and has been granted, a notice of appeal shall be served on

all other parties to the case and filed with the Registrar of the Court within thirty days after the date of the judgment appealed from or the date of the judgment granting leave, as the case may be.

(2) The month of July shall be excluded in the computation of a time period referred to in subsection (1).

Stay of execution

65 (1) On filing and serving the notice of appeal and depositing security as required by section 60, execution shall be stayed in the original cause, except that

(a) where the judgment appealed from directs an assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed until the things directed to be assigned or delivered have been brought into court, or placed in the custody of such officer or receiver as the court appoints, or until security has been given to the satisfaction of the court appealed from, or of a judge thereof, in such sum as that court or judge directs, that the appellant will obey the judgment of the Supreme Court;

(b) where the judgment appealed from directs the execution of a conveyance or any other instrument, the execution of the judgment shall not be stayed until the instrument has been executed and deposited with the proper officer of the court appealed from, to abide the judgment of the Supreme Court;

(c) where the judgment appealed from directs the sale or delivery of possession of real property or chattels real, the execution of the judgment shall not be stayed until security has been given to the satisfaction of the court appealed from, or a judge thereof, in such amount as that court or judge directs, that during the possession of the property by the appellant the appellant will not commit, or suffer to be committed, any waste on the property, and that if the judgment is affirmed, the appellant will pay the value of the use and occupation of the property from the time the appeal is brought until delivery of possession thereof, and also, if the judgment is for the sale of property and the payment of a deficiency arising on the sale, that the appellant will pay the deficiency; and

(d) where the judgment appealed from directs the payment of money, either as a debt or for damages or costs, the execution of the judgment shall not be stayed until the appellant has given security to the satisfaction of the court appealed from, or of a judge thereof, that, if the judgment or any part thereof is affirmed, the appellant will pay the amount thereby directed to be paid, or the part thereof with respect to which the judgment is affirmed, if it is affirmed only with respect to part, and all damages awarded against the appellant on the appeal.

(2) Where the court appealed from is a court of appeal, and the assignment or conveyance, document, instrument, property or thing referred to in subsection (1) has been deposited in the custody of the proper officer of the court in which the cause originated, the consent of the party desiring to appeal to the Supreme Court, that it shall so remain to abide the judgment of the Court, is binding on that party and shall be deemed a compliance with the requirements in that behalf of this section.

(3) In any case in which execution may be stayed on the giving of security under this section, the security may be given by the same instrument whereby the security prescribed in section 60 is given.

(4) The Court, the court appealed from or a judge of either of those courts may modify, vary or vacate a stay of execution imposed by subsection (1).

Stay of execution — application for leave to appeal

65.1 (1) The Court, the court appealed from or a judge of either of those courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.

(2) The court appealed from or a judge of that court may exercise the power conferred by subsection (1) before the serving and filing of the notice of application for leave to appeal if satisfied that the party seeking the stay intends to apply for leave to appeal and that delay would result in a miscarriage of justice.

(3) The Court, the court appealed from or a judge of either of those courts may modify, vary or vacate a stay order made under this section.

Rules of the Supreme Court of Canada, SOR/2002-156 (**extracts**)

A-2. Where No Provisions

3 (1) Whenever these Rules contain no provision for exercising a right or procedure, the Court, a judge or the Registrar may adopt any procedure that is not inconsistent with these Rules or the Act.

(2) A party may, on motion to a judge or the Registrar, request directions as to the procedure referred to in subrule (1).

Conditions and Proportionality

[SOR/2016-271, s. 1]

4 (1) Whenever these Rules provide that the Court, a judge or the Registrar may make an order or give a direction, the Court, the judge or the Registrar, as the case may be, may impose any terms and conditions in the order or direction that they consider appropriate.

(2) In applying these Rules, the Court, a judge or the Registrar shall make orders and give directions that are proportionate to the complexity of the proceeding and the importance of the issues in dispute.

Response

27 (1) Within 30 days after the day on which a file is opened by the Court following the filing of an application for leave to appeal or, if a file has already been opened, within 30 days after the service of an application for leave to appeal, a respondent or an intervener may respond to the application for leave to appeal by

> **(a)** serving a copy of the response on all other parties;
>
> **(b)** filing with the Registrar the original and five copies of the printed version of the response;
>
> **(c)** filing with the Registrar a copy of the electronic version of each of the memorandum of argument referred to in paragraph (2)(a), if any, and any response to any motion related to the application for leave to appeal; and
>
> **(d)** sending to all other parties a copy of the electronic version of each of the memorandum of argument referred to in paragraph (2)(a), if any, and any response to any motion related to the application for leave to appeal by email to the last known email address.

(2) Unless it is served and filed in the form of correspondence of no longer than two pages, the response shall be bound and consist of the following, in the following order:

> **(a)** a memorandum of argument in accordance with paragraph 25(1)(c), with Parts I to V not exceeding 20 pages in the case of a respondent and five pages in the case of an intervener; and

(b) the documents that the respondent or intervener intends to rely on, in chronological order, in accordance with subrules 25(3) and (4).

A-3. Submission of Applications

32 (1) The Registrar shall submit to the Court for consideration

(a) an application for leave to appeal, either

(i) after the reply is filed or at the end of the 10-day period referred to in Rule 28, as the case may be, or

(ii) if no response is filed, at the end of the 30-day period referred to in Rule 27; and

(b) an application for leave to cross-appeal, either

(i) after the reply is filed or at the end of the 10-day period referred to in Rule 31, as the case may be, or

(ii) if no response is filed, at the end of the 30-day period referred to in Rule 30.

(2) Documents shall not be filed after the application for leave to appeal or leave to cross-appeal, as the case may be, has been submitted to the Court unless the Registrar otherwise directs.

(3) The Registrar shall set down for hearing any application for leave to appeal for which an oral hearing has been ordered pursuant to paragraph 43(1)(c) of the Act.

A-4. Dismissal for Delay — Application for Leave to Appeal

64 (1) If, after the filing of a notice of application for leave to appeal, an applicant has not served and filed all the documents required under Rule 25 within the time set out in paragraph 58(1)(a) of the Act or the time extended under subsection 59(1) of the Act,

(a) a respondent may make a motion to the Registrar for dismissal of the application for leave to appeal as abandoned; or

(b) the Registrar may send a notice of intention in Form 64 to the applicant and copies of it to all other parties.

(2) The Registrar may dismiss the application for leave to appeal as abandoned if the time for serving and filing the materials is not extended by a judge on motion.

(3) The motion for an extension of time referred to in subrule (2) must be served and filed within 20 days after the service of the respondent's motion for dismissal or the receipt of the Registrar's notice of intention, as the case may be.

Code of Civil Procedure, CQLR c C-25.01 (**extracts**)

390. A decision of the Court of Appeal is enforceable immediately and bears interest from the date it is rendered, unless it specifies otherwise. Its execution, as regards both the principal and any legal costs, is carried out by the court of first instance.

However, the Court of Appeal or one of its judges, on an application, may order execution stayed, on appropriate conditions, if the party shows that it intends to bring an application for leave to appeal to the Supreme Court of Canada.

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.	**Court File No. CV-19-615862-00CL**
IMPERIAL TOBACCO CANADA LIMITED AND **IMPERIAL TOBACCO COMPANY LIMITED**	**Court File No. CV-19-616077-00CL**
ROTHMANS, BENSON & HEDGES INC.	**Court File No. CV-19-616779-00CL**

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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