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

BOOK OF AUTHORITIES OF HER MAJESTY IN RIGHT OF ALBERTA and NEWFOUNDLAND AND LABRADOR

June 25, 2019

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
Barristers
155 Wellington Street West
35th Floor
Toronto, ON M5V 3H1

Kenneth T. Rosenberg (LSO# 21102H)
Lily Harmer (LSO# 31880T)
Massimo (Max) Starnino (LSO# 41048G)
Danielle Glatt (LSO#65517N)
Elizabeth Rathbone (LSO# 70331U)

Tel: 416.646.4300
Fax: 416.646.4301

ken.rosenberg@paliareroland.com
lily.harmer@paliareroland.com
max.starnino@paliareroland.com
danielle.glatt@paliareroland.com
elizabeth.rathbone@paliareroland.com

Lawyers for Her Majesty in Right of Alberta and Newfoundland and Labrador

TO: THE SERVICE LISTS

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Tab 1

SUPERIOR COURT
(Class Action Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

N° : 500-06-000076-980
500-06-000070-983

DATE : June 9, 2015

PRESIDING: THE HONORABLE BRIAN RIORDAN, J.S.C.

N° 500-06-000070-983

CÉCILIA LÉTOURNEAU
Plaintiff

v.

JTI-MACDONALD CORP. ("**JTM**")
and
IMPERIAL TOBACCO CANADA LIMITED. ("**ITL**")
and
ROTHMANS, BENSON & HEDGES INC. ("**RBH**")
Defendants (collectively: the "**Companies**")

AND

N° 500-06-000076-980

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
and
JEAN-YVES BLAIS
Plaintiffs

v.

JTI-MACDONALD CORP.
and
IMPERIAL TOBACCO CANADA LIMITED.
and
ROTHMANS, BENSON & HEDGES INC.
Defendants

JUDGMENT CORRECTING CLERICAL ERRORS IN PARAGRAPHS 1114 and 1209 through 1213

JR1353

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[362] Mr. Wells went on to express concern over documents from Canada and remarks that "the Canadian case is in an especially disadvantageous posture for document production. The government is likely to go directly to the heart of the Canadian and BATCo research documents most difficult to explain".

[363] About that time, BAT was attempting to repatriate to Southampton, England all copies of all research documents emanating from its laboratories there. They seemed to have concerns similar to those expressed by Brown & Williamson, in that, as explained by its former external counsel, John Meltzer, "(BAT) was concerned that those documents may be produced in litigation, or in other situations, where there wouldn't be an opportunity to put those documents in their proper context or to explain the language that was used in them by the authors of the documents"[194].

[364] To BAT's consternation, and that does not appear to be an exaggeration, ITL was not cooperating with the repatriation. ITL's head of research and development, Dr. Patrick Dunn, was furious with the command to send all BAT-generated research reports back to England, particularly since ITL had contributed to the cost of most of those and had contractual rights to them. Negotiations ensued between the two companies.

[365] Enter Ogilvy Renault. ITL's in-house attorney, Roger Ackman, testified that he hired the Montreal law firm of Ogilvy Renault to assist him in the matter. After negotiation, it was agreed that, following the repatriation to Southampton, BAT would fax back to ITL any research report that ITL scientists wished to consult. That decided, in the summer of 1992 lawyers at Ogilvy Renault supervised the destruction of some 100 research reports in ITL's possession[195].

[366] Mtre. Ackman, whose memory was either hot or cold depending on the question's potential to harm ITL[196], made the following statements concerning his engagement of an outside law firm in this context:

> 396Q-Can you give us any reason why Imperial would involve outside counsel, or counsel of any kind, to destroy research documents in its possession?
>
> A- I hired the Ogilvy Renault firm, Simon Potter, to help me in this exercise.
>
> 397Q-Which exercise?
>
> A- The destruction of the documents. And he did most of the negotiations for us.
>
> 398Q-But what negotiations?
>
> A- With BAT.

---

194 Transcript of the examination by rogatory commission of John Meltzer filed as Exhibit 510, at page 16.

195 See the series of documents in Exhibits 58 and 59. Though the documents had been destroyed, plaintiffs in other cases managed to obtain copies of all of them and they were deposited into court-created public archives, including the Legacy Tobacco Documents Library at the University of California at San Francisco used by the Plaintiffs here.

196 The Court rejected Mtre. Ackman's motion to quash his subpoena based on medical reasons. In cross examination, it came out that ITL was paying all his expenses related to that motion.

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399Q-Negotiations for what?

A- You just said, the destruction of documents.

400Q-There was a negotiation of an agreement between...

A- I have no idea whether there was a negotiation; I wasn't part of that discussion. It was a long time ago, sir.

401Q-So you hired Simon Potter?

A- Yes, sir.

402Q-To destroy the documents?

A- I did not hire him... to meet with BAT and settle a matter.

403Q-Settling a matter implies that there is a matter; what was the matter?

A- I have no idea other than what I just said.

404Q-Did Simon Potter ever give you reason to believe that he had expertise in research documents, did he have any science background?

A- I don't know that, sir.[197]

[367] Much time was spent on this issue in the trial, but it interests us principally in relation to its possible effect on punitive damages. As such, its essence is contained in two questions:

- Was it ITL's intention to use the destruction of the documents as a means to avoid filing them in trials?
- Was it ITL's intention in engaging outside counsel for that exercise to use that as a means to object to filing the documents based on professional secrecy[198]?

[368] On the first point, it appears that this clearly was the intention, since that is exactly what ITL did in a damage action before an Ontario court. Lyndon Barnes, a partner in the law firm of Osler in Toronto who worked on ITL matters for many years, testified before us as follows:

A- I would think... probably the first case that we did an affidavit was in a case called *Spasic* in Ontario.

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197 Transcript of April 2, 2012, at pages 138-139.

198 This is the Quebec term for attorney-client privilege.

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> 83Q- So did you produce the documents in that case that were destroyed in this letter? That were destroyed as identified in this letter of Simon Potter's (sic) of June nineteen fifty-two (1952)... h'm, nineteen ninety-two (1992)?[199]
>
> A- I think it would have been hard to produce documents that had been destroyed.
>
> 84Q- It would have been very hard.
>
> A- Yes.
>
> 85Q- So that's when you found out that the documents didn't exist?
>
> A- Well, no. The original documents did exist, they were at BAT.
>
> 86Q- So did you produce the original BAT documents in that case?
>
> A- No, they weren't in our control and possession.
>
> 87Q- They weren't in your control or in your possession.
>
> A- No.
>
> 88Q- And therefore, they were not produced?
>
> A- No, they weren't.[200]

[369] There is thus no doubt that ITL used the destruction as a way to avoid producing the documents, based on the assertion that they were not in its control or possession. One could query as to whether, under Ontario law, the arrangement with BAT to provide copies by fax meant that the documents were, in fact, in ITL's control, but that is not necessary. There is enough for us to conclude that ITL's actions in this regard constitute an unacceptable, bad-faith and possibly illegal act designed to frustrate the legal process.

[370] As for the second question, there is no evidence that ITL has ever raised the objection based on professional secrecy. That, however, does not speak to ITL's intentions when Mtre. Ackman decided to hire lawyers to shred the research reports. That is what is relevant here.

[371] In addition to his testimony cited above on this topic at question 396 in the transcript, Mtre. Ackman, who, we remind the reader, was ITL's top person in the matter of the destruction of these research reports and who personally engaged Ogilvy Renault, provided the following "clarification":

> 391Q-Which leads me to my next question; can you give us any reason why lawyers were involved in the destruction of research documents?

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199 Exhibit 58 in these files.

200 Transcript of June 18, 2012, at page 33.

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> A- I don't have an answer for that, sir. I can't give you the specific reason, or any reason. Unless the companies agreed between themselves ... that agreement between the companies was done, that's the way it was done. [201]

[372] It is more than surprising that his recollection was so, let us say, "vague" on such a major issue, one on which he recalled many other much less important details. Later in that transcript, at page 203, he states that he hired Ogilvy Renault because "I wanted the best legal advice I could get". That was crystal clear to him, but as to why he needed such good legal advice in order to destroy research documents, he could not give specific reasons, or any reason.

[373] Mtre. Ackman's testimony cannot but leave one suspicious about ITL's motives in hiring outside attorneys to destroy documents from its research archives. Mtre. Barnes testified that Mtre. Meltzer came from England shortly before with three lists ranking the documents to be returned or destroyed. Although Mtre. Meltzer refused to answer many questions about the lists on the grounds of professional secrecy, all agreed that these lists existed.

[374] Given that, what special expertise of any sort was required to pack up the documents on the lists and ship them to BAT, much less legal expertise? Yet, instead of shipping them across the Atlantic, ITL shipped them across town. There they were held, and later destroyed, by lawyers.

[375] The litigation-based objectives of ITL in ridding itself of these documents lead inexorably to a litigation-based conclusion as to the motive for using outside lawyers to carry out the deed: ITL was attempting to shield this activity behind professional secrecy.

[376] If there could have been another plausible reason, none come to mind and, more importantly, none were offered by ITL. In fact, Mtre. Ackman, the person in charge of the exercise, and who was "concerned with the potential impact that those documents would have were they produced (in court)", as Mr. Metzer stated[202], could not suggest any other explanation.

[377] As a result, the Court is compelled to draw an adverse inference with respect to ITL's motives behind this incident. It was up to ITL to rebut this inference, yet the evidence it adduced had nothing but the opposite effect. We therefore find that it was ITL's intention to use the lawyers' involvement in order to hide its actions behind a false veil of professional secrecy.

[378] This constitutes an unacceptable, bad-faith and possibly illegal act designed to frustrate the legal process. This finding will play its part in our assessment of punitive damages.

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201 Transcript of April 2, 2012, at page 137.

202 See Exhibit 510, Mtre. Meltzer's testimony, at pages 44 and 45.

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Contracts. They are for the most part quite technical and go into much greater detail than is necessary for the Plaintiffs to tell the story that they feel needs to be told.

[1190] They are the masters of their evidence, subject to any proper intervention the Court feels is required. Here, they confirm that all that they wish to say about the Interco Contracts is found in paragraphs 2138 through 2145 of their Notes, and that there is no need to refer to the underlying exhibits or to render them public[518]. That is confirmed by the fact that the only reference to them in the pleadings that the Court could find is in those eight paragraphs.

[1191] We see no justification for forcing the Plaintiffs to adduce any further proof than that which they choose to make. It is their decision and they will live or die by it. For our part, we see no need to state any other facts than those set out there, or to examine in detail any other documents. These exhibits are unnecessary for the adjudication of this matter.

[1192] We shall therefore ratify the Entente and render a confidentiality order with respect to the documents listed in Annexe B and the testimony of Mr. Poirier of May 23, 2014 and order that they remain under seal unless and until a further order changes their status. Exhibit 1747.1, on the other hand, becomes public, including Annexe A, JTM's earning from operations.

XII. INDIVIDUAL CLAIMS

[1193] The Plaintiffs displayed an impressive sense of clairvoyance in their Notes when they opted to renounce to making individual claims, declaring that "Outside of collective recovery, recourses of the members against the defendants are just impossible".[519] The Court agrees.

[1194] The Companies are of two minds about this. While no doubt rejoicing in the knowledge that there will be no need to adjudicate individual claims in the present files, they wish to avoid the possibility of any new actions being taken by current Class Members, a highly unlikely event, to be sure. That is why they insisted that the Plaintiffs not be allowed to remove the request for an order permitting individual claims and that the Court rule on it. The Plaintiffs do not object.

[1195] Consequently, we shall dismiss the request for an order permitting individual claims of the Members against the Companies in both files.

XIII. PROVISIONAL EXECUTION NOTWITHSTANDING APPEAL

[1196] The Plaintiffs seek a judgment declaring that the Companies were guilty of "improper use of procedure", one result of which would be the possibility of an order for provisional execution notwithstanding appeal under article 547(j) of the Code of Civil Procedure. The Court put over the question of procedural abuse until after judgment on the merits, but this did not stop the Plaintiffs in their quite understandable quest for some immediate payment of damages.

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518 Transcript of November 21, 2014, at page 104.

519 Plaintiffs' Notes, at paragraph 2329.

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[1197] They changed strategy and requested provisional execution on the basis of the penultimate paragraph of article 547, which reads:

> In addition, the court may, upon application, order provisional execution in case of exceptional urgency or for any other reason deemed sufficient in particular where the fact of bringing the case to appeal is likely to cause serious or irreparable injury, for the whole or for part only of a judgment. (The Court's emphasis)

[1198] In light of the delays in these cases, it takes no great effort to sympathize with the plight of the Members, particularly in the Blais file. Initiated some 17 years ago, these cases are far from being over. The Plaintiffs estimate that the appeals process will likely take another six years. The Court finds that optimistic, but possible.

[1199] In the meantime, Class Members are dying, in many cases as a direct result of the faults of the Companies. In our opinion, this represents serious and irreparable injury in light of the time required for the appeals. And there are other reasons sufficient to require an order of provisional execution.

[1200] Besides the simple, common-sense notion that it is high time that the Companies started to pay for their sins, it is also high time that the Plaintiffs, and their lawyers, receive some relief from the gargantuan financial burden of bringing them to justice after so many years.

[1201] There is also the appeal phase, a process that will be far from economical both in terms of time and of money. It is critical in the interest of justice that the Plaintiffs have the financial wherewithal to see this case to the end. Finally, the Fonds d'aide aux recours collectifs, which has been carrying part of that financial burden over these many years, also deserves consideration at this point.

[1202] Thus, it is fair and proper to approve provisional execution for at least part of the damages awarded, and we shall so order, limiting the immediate-term execution to the initial deposits and punitive damages. We do this in full knowledge of the Court of Appeal's statement to the effect that provisional execution for moral and punitive damages is very exceptional[520]. There is very little in these files that is not very exceptional, and this is no exception.

[1203] In this regard, there is precedent for a type of *sui generis* provisional execution in a class action. In the case of *Comartin v. Bodet*[521], the defendants were required to deposit a portion of damages on a provisional basis. The money was held by the prothonotary pending appeal and not distributed to the members until the judgment was final. We are inclined to follow similar lines here, although not identical. We are open to the possibility of distributing certain amounts immediately.

[1204] We shall, therefore, order each Company to deposit into its respective attorney's trust account, within sixty (60) days of the date of the present judgment, an amount equal to its initial deposit of moral damages plus both condemnations for punitive damages. In their proposal concerning the distribution process, the Plaintiffs should

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520 *Hollinger v. Hollinger* [2007] CA 1051, at paragraph 3.

521 [1984] Q.J. No. 644 (Superior Court), at paragraphs 154 and following.

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Tab 2

Ontario Superior Court of Justice
Air Canada (Re)
Date: 2003-06-18
Docket: 03-CL-4932

David R. Byers, Ashley John Taylor for Air Canada

K. Aalto, M. Starnino for Bell Canada

Greg Azeff, Robert Thornton for GECAS

Steven Golick, Jeremy Dacks for GE Capital

Jeff Carhart for Airport Authorities

Kevin McElcheran for CIBC

Alex MacFarlane, Mario Kravetsky for R/T Syndicate

Dan MacDonald for BNS

Peter Osborne for Monitor

Ken Rosenberg for ALPA

Elizabeth Shilton for IAMAW

Stephen Wahl for CUPE

A. Kauffman for Ad Hoc Committee of Senior Bondholders

Ian Dick for Department of Justice and AG Canada

Farley J.:

[1] Bell Canada, Certain Airport Authorities (the Calgary Airport Authority et al) and the Bank of Nova Scotia in its capacity as Agent for the R/T Syndicate (collectively "Moving Creditors") brought motions to vary the Initial Order obtained by Air Canada ("AC") on April 1, 2003 by striking out the last seven words of the first sentence of paragraph 9 and the whole of the second sentence of paragraph 9.

[2] At the present time the wording of paragraph 9 is as follows:

> 9. THIS COURT ORDERS that persons may exercise only such rights of set off as are permitted under Section 18.1 of the CCAA as of the date of this order. For greater certainty, no person may set off any obligations of an Applicant to such person which arose prior to such date.

[3] If the relief requested by the Moving Creditors were granted, then paragraph 9 would be revised to:

> 9. THIS COURT ORDERS that persons may exercise only such rights of set-off as are permitted under Section 18.1 of the CCAA.

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[4] Paragraph 9A of the Initial Order (as added on April 25, 2003) provides:

> 9A. THIS COURT ORDERS that nothing in this Order shall be construed as overriding any provision of the CCAA.

[5] There are three different types of set-off recognized under Canadian law:

(a) legal set-off;

(b) equitable set-off;

(c) set-off by contract or statute.

It does not appear that contractual or statutory set-off is at issue in these AC CCAA proceedings.

[6] Section 18.1 of the CCAA, which was incorporated in the 1997 amendments provides:

> Section 18.1 The law of set-off applies to all claims made against a debtor company and to all actions instituted by it for recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

[7] As argued, AC accepted that the provisions of paragraph 9 of the Initial Order should be interpreted as not affecting equitable set-off as being available but merely that the ability of any party to invoke a right of set-off should be stayed on a temporal basis so that it not be invoked until a later time once the CCAA proceedings had been stabilized.

[8] AC at paragraphs 19 and 20 of its factum stated:

> 19. The right of set-off is available as a defence to a proceeding and may arise in contract, in law, or in equity; however, in the context of the CCAA, it is the Applicants' position that post-filing claims can be set off against pre-filing claims only where there is a valid claim for equitable set-off such that the relationship between the two amounts are so closely related that it would be inequitable to sever the debts from one another by a CCAA Order.
>
> 20. The Applicants submit that paragraph 9 of the Initial Order is consistent with existing law. It is respectfully submitted that contractual and legal setoff are not available to a creditor in relation to post-filing as against pre-filing claims as the required mutuality is severed by the CCAA filing. pre-filing claims may be set off against each other and post-filing claims may be set off against each other but post-filing and pre-filing claims may only be set off against each other pursuant to the principles of equitable set-off in the appropriate case.

[9] AC went on at paragraphs 53 - 55 of its factum to conclude:

> 53. The law of set-off applies to obligations owed by, and claims owed to, a debtor company operating under the protection of a CCAA proceeding. However, pursuant

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to the law of set-off neither the requirements for legal set-off nor the requirements for contractual set-off are satisfied when dealing with pre-filing obligations owed by, and post-filing claims owed to, a debtor company operating under the protection of the CCAA. These types of set-off require, among other things, mutuality of parties in the same right. The fundamentally changed character of the debtor company and its obligations, which accrue post-CCAA filing, severs the requisite mutuality.

54. Pursuant to the law of set-off, equitable set-off does not require the mutuality of obligations. Equitable set-off is therefore available in appropriate cases between pre- and post-filing obligations. Other requirements, such as the existence of a close connection between the obligations, limit the application of equitable set-off. Paragraph 9 of the Initial Order is consistent with section 18.1 of the CCAA as it necessitates a court-supervised application process to deal with creditors' claims for equitable set-off which may arise during the CCAA proceeding.

55. For all the reasons stated above, the Applicants respectfully submit that the only amounts which are potentially susceptible to set-off are as follows:

1. Pre-filing liabilities that exist between a creditor and the Applicants can be set off against each other;
2. Post-filing liabilities between a creditor and the Applicants can be set off against each other; and
3. Set-off across the April 1, 2003 date in favour of a creditor will only be permitted where the Court determines pursuant to the principles of equitable set-off that pre- and post- filing debts are so closely connected that it would be inequitable to sever the two debts.

[10] I take the foregoing to be a concession by AC that aside from the element of the impact of a temporal stay (as opposed to an absolute stay), it does not dispute that the right of a creditor to invoke set-off on an equitable basis is not affected by the Initial Order. Further, AC does not contest that legal set-off can be invoked by a creditor as to (a) debts existing between AC and a creditor before the CCAA filing or (b) debts arising post-filing between AC and a creditor. What AC contends, however is that, as to legal set-off, the law of set-off as applied in any CCAA proceeding does not permit a pre-filing debt to be set-off against a post-filing debt. However, as to equitable set-off, AC does not draw that distinction between pre-filing and post-filing debts; rather AC asserts that in applying equity, the Court must only be concerned with the debts being "so closely connected that it would be inequitable to sever the two debts".

[11] It appears to me that AC's position as to legal set-off is that in a CCAA proceeding, the Court should view the situation as equivalent to that prevailing in a bankruptcy with the end result being that in essence there is a new party post CCAA filing.

[12] It also seems to me that AC's position is that the substantive law of set-off is not affected by the terms of the Initial Order but rather that the substantive law of set-off, both legal and equitable, would govern and be applied in the particular fact circumstances.

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However, as noted immediately above, AC contends that application of the law of legal set-off would take into account that there was not a mutuality of parties once a CCAA filing had been made, no matter what the terms of the CCAA stated.

[13] The requirements for legal set-off were stated in *Citibank Canada v. Confederation Life Insurance Co.* (1996), 42 C.B.R. (3d) 288 (Ont. Gen. Div.) at p. 298, affirmed (1998), 37 O.R. (3d) 226 (Ont. C.A.).

> For set-off at law to occur, the following circumstances must arise:
>
> 1. The obligations existing between the two parties must be debts, and they must be debts which are for liquidated sums or money demands which can be ascertained with certainty; and,
> 2. Both debts must be mutual cross-obligations, i.e. cross-claims between the same parties and in the same right.
>
> (emphasis added).

[14] *In a bankruptcy,* the trustee is inserted into the proceedings. Post-bankruptcy dealings of a creditor with the trustee in bankruptcy do not involve the same party, namely the debtor before the condition of bankruptcy. When a bankruptcy occurs, there is a new estate created: there is the estate of the debtor under the direction and control of the debtor before the bankruptcy which is a different estate than the one post-bankruptcy where there is an estate of the bankrupt under the direction and control of the trustee in bankruptcy. Thus, creditors who incur post-bankruptcy obligations to trustees in bankruptcy cannot claim legal set-off to avoid paying such obligations by setting-off such obligations against their proven (pre-bankruptcy) claims against the bankrupt. The same parties are not involved so there cannot be mutual cross-obligations. See *S. Piscione & Sons Ltd., Re,* [1965] 1 O.R. 515 (Ont. S.C.); *Reid, Re* (1964), 7 C.B.R. (N.S.) 54 (Ont. Bktcy.); *First Canadian Land Corp. (Trustee of) v. First Canadian Plaza Ltd.* (1991), 6 C.B.R. (3d) 308 (B.C. S.C.).

[15] In *Husky Oil Operations Ltd. v. Minister of National Revenue* (1995), 128 D.L.R. (4th) 1 (S.C.C.), at pp. 24-5, Gonthier, J. for the majority observed:

> ...for a particularly thorough and helpful discussion of the issues relating to set-off in bankruptcy and insolvency, see Kelly Ross Palmer, *The Law of Setoff in Canada* (Aurora, Ont. - Canada Law Book, 1993), at pp. 157-223.

At p. 186, Palmer notes:

> This case, as in receivership is fairly straight forward. The assignment of the bankrupt's property to the trustee results in a change of mutuality. Accordingly, any claim which arises after the assignment will be between the claimant and the trustee

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and not the claimant and the bankrupt. Mutual debts will not be present and set-off not allowed.

[16] AC relies on what it asserts is the similarity of s. 73(1) of the *Winding-up and Restructuring Act,* R.S.C. 1985, c. W-11 ("WURA") to s. 18.1 of the CCAA. It provides:

> 73.(1) The law of set-off, as administered by the courts, whether of law or equity, applies to all claims on the estate of a company, and to all proceedings for the recovery of debts due or accruing due to a company at the commencement of the winding-up of the company, in the same manner and to the same extent as if the business of the company was not being wound up under this Act.
>
> (emphasis added).

[17] AC then goes on to argue that the reasoning of *P. Lyall & Sons Construction Co. v. Baker,* [1933] O.R. 286 (Ont. C.A.) should be applied to this CCAA proceeding. *Lyall* was a case involving the predecessor to the WURA, namely the *Winding-up Act,* R.S.C. 1927, ch. 213 ("Old WUA"). It appears that s. 73 of the older legislation has been carried through unchanged into s. 73(1) of WURA. Masten J.A. for the Court stated at pp. 291-2 of *Lyall:*

> As I understand the decided cases the rule in winding up proceedings prescribing mutuality as essential to set off is the same in Canada as in England and the decisions of the English Courts are applicable though (except in the House of Lords) not binding on this Court. Though the same person is both debtor and creditor, yet, if the debt and the credit attach to him in different capacities mutuality cannot exist.
>
> As I shall indicate more fully hereafter the Winding-up Order establishes a quasi-trust of which the creditors are the beneficiaries and which for the purpose of set-off, is an entity essentially distinct from the original corporation when carrying on business for the benefit of its shareholders. The Winding-Up Order puts an end to the living company and establish a quasi-trust for liquidation. If no debt became due or accruing due until after the making of the winding-up order, then the $1,250 balance is a debt to the liquidation trust and set-off fails for lack of mutuality, the $1,400 being a debt of the company as a going concern, while the $1,250 is a debt to the company in liquidation as the result of the company's contract adopted by the liquidator and the appellant.

[18] Notwithstanding that the Old WUA also provided for compromising debts so that there was a possible alternative to actually winding up a company under its provisions, it seems to me that the main thrust of the Old WUA was that the company be liquidated under its provisions. That thrust has been somewhat changed with the recent amendments to that legislation ending up with a greater acknowledgement to restructuring as is evident in the renaming of that statute. The amendments resulting in WURA are subsequent to the publication of the Palmer book.

[19] AC suggests that the CCAA is not exclusively a restructuring statute since judicial interpretation has allowed for a winding up or liquidation of a debtor applicant if in the particular fact circumstances that course of action best accomplishes the objective of

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maximization and equitable distribution of value to stakeholders of an insolvent entity. See *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Associated Investors of Canada Ltd., Re* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.), reversed on other grounds at (1988), 71 C.B.R. (N.S.) 71 (Alta. C.A.); *Amirault Fish Co., Re,* [1951] 4 D.L.R. 203 (N.S. T.D.); *Olympia & York Developments Ltd., Re* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]); *Anvil Range Mining Corp., Re* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.). However, it seems to me that the major thrust of the CCAA is restructuring.

[20] As should be noted from the words which I have emphasized in s. 73(1) of the WURA, that section must be judicially interpreted under the circumstances of a winding up and not as to a restructuring.

[21] Palmer explored the aspect of mutuality regarding the appointment of a liquidator under Old WUA at pp. 209-210 as follows:

> ***(ii) Mutuality***
>
> ***(a) Appointment of liquidator changes mutuality***
>
> One difference between bankruptcy and winding-up proceedings which, at first, would seem to be quite important is the lack of any vesting provisions in the *Winding-up Act.* Under the *Bankruptcy and Insolvency Act,* s. 71(2), the property of the bankrupt is assigned to the trustee upon an assignment into bankruptcy. A change in mutuality will therefore result. However, an equivalent section providing for an assignment of the assets of the insolvent corporation to the liquidator is not found in the *Winding-up Act,* with the initial result that mutuality would appear not to change upon the appointment of a liquidator. This is not the case, however, as the Canadian courts have devised several descriptions of this event which effectively result in a change of mutuality.
>
> *Different Interests.* The courts have noted that the liquidator is required to serve different interests than those served by the company and, accordingly, the appointment of the liquidator results in a change in the climate which debtors and creditors of the company faced prior to winding-up. "Prior to liquidation, the directors act in the interests of the shareholders but upon liquidation the liquidator represents the interests of the creditors and the shareholders." These different interests are sufficient to allow a court to effectively deal with mutuality as though it had changed, to the point of characterizing this change as being equivalent to an assignment.
>
> The leading case in this area is the *Maritime Bank of the Dominion of Canada v. J. Morris Robinson,* where the defendant owed funds to the insolvent bank. On March 8th the bank stopped making payments (with this fact known to the defendant), and on March 17th a petition for winding-up was filed. Between these dates, the defendant bought a claim against the bank, bought a further claim after the appointment of the liquidator, and still another claim after the order for winding-up. Set-off was allowed only for the debts bought prior to the filing of the petition. Speaking on the change in interests, the court said:

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> It is evident, therefore, that the new interests are created by the winding up proceedings; the affairs of the company in liquidation being managed for the benefit, not solely of those who were alone directly interested previous to the commencement of the winding up proceedings, but of the whole body of creditors, shareholders and contributories. There is no formal assignment from the company to the liquidator, and the company remains nominally as debtor or creditor as the case may be, but the company in liquidation represents different interests from those represented by it before; and the real as well as the nominal position of the company in liquidation is to be looked at in determining the rights of parties.
>
> The company still being the nominal creditors and the nominal debtor, and any debts which are virtually due by and between the company in liquidation and the defendant would be subject to set-off notwithstanding the change in the interest; but where the alleged debts are not virtually due by and between the same parties and where, consequently, it would not be such that they should be set off, there the nominal company in liquidation should be treated as being virtually the whole body of creditors, shareholders and contributories. In such a case it is to be treated as if there were an assignment by the company of the debts due to it, and so the assignee would be affected by such rights of setoff as existed at the time the debtor received notice of the assignment.

Quasi-trust. A second view imports the notion of the establishment of a trust. While the *Winding-up Act* does not create a trust of the company's assets, the courts have seen the liquidator as holding the assets on a "quasi-trust" for the benefit of the shareholders and creditors of the company. The imposition of the trust therefore brings about a change of mutuality. This approach was noted in *Lyall & Sons Construction Co. v. Baker.*

> the winding-up order establishes a *quasi-trust* of which the creditors are the beneficiaries and which for the purpose of set-off, is an entity essentially distinct from the original corporation when carrying on business for the benefit of its shareholders. The winding-up order puts an end to the living company and establishes a *quasi-trust* for liquidation. If no debt became due or accruing due until after the making of the winding-up order, then the $1,250 balance is a debt to the liquidation trust and set off fails for lack of mutuality, the [cross debt of] $1,400 being a debt of the company as a going concern, while the $1,250 is a debt to the company in liquidation...

This view has been carried slightly further by some courts, with the liquidator being described as a trustee, rather than a "quasi-trustee", with the same resulting change in mutuality.

Change Assumed. Some courts do not define the basis for the change in mutuality upon the liquidator's appointment, but assume that it has occurred. The mere appointment of the liquidator does not destroy mutuality, however, as s. 73 of the *Winding-up Act* will preserve set-off rights that the appointment of a liquidator would otherwise remove.

[22] In that analysis, Palmer discusses the three ways that Canadian courts have dealt with this question: (i) different interests; (ii) quasi-trust; and (iii) change assumed. No matter which way is taken as the approach, these cases have all dealt with situations where there is in fact a liquidation/true winding up. In the change assumed cases there is in fact no analysis, merely an assumption. The quasi-trust approach has been discussed in *Lyall, supra*. The different interests approach must also be viewed in the context of the

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circumstances of the *Maritime Bank* [1887 CarswellNB 10 (N.B. C.A.)]. As is obvious from the quote in Palmer, the bank there was in liquidation proceedings, not a restructuring mode.

[23] Again, I would emphasize that these three approaches analyzed by Palmer are all within a liquidation scenario. However while a liquidation scenario under the CCAA is possible, the CCAA proceedings in this AC case are not aimed at a liquidation, but at a restructuring. While it is quite conceivable in any restructuring that may be possible in these proceedings will either eliminate the present shares held by existing shareholders or vastly dilute the existing share capital in number and value by the issuance of a large number of new shares to compromised creditors or to new equity investors, it does not seem to me that given the difference in the wording between s. 18.1 if the CCAA and s. 73(1) of the WURA, especially as to the words which I have emphasized in the WURA, that I should apply the different interests approach to these present AC CCAA proceedings. That is particularly so when one appreciates that in the normal order under WURA, a liquidator as a Court officer is appointed to take charge of the liquidation (even though there is not a vesting of assets as in BIA with a trustee in bankruptcy). Here however the Court appointed Monitor does not have any similar powers to a liquidator. AC is in a restructuring mode, not a liquidation mode under the CCAA. It seems to me that it would take more explicit language in s. 18.1 of the CCAA where one is dealing with a restructuring situation to import the concepts of a section in the WURA which by the very wording of s. 73(1) requires that the company be in a liquidation mode. The draftsperson and Parliament had the advantage of reviewing the three insolvency statues and the set-off provisions (and specific wording thereof) in the first two statutes), the *Bankruptcy and Insolvency Act,* the Old WUA and the CCAA when s. 18.1 of the CCAA was drafted and enacted. Identical wording for set-off provisions was not adopted.

[24] I have therefore reached the conclusion that paragraph 9 of the Initial Order should be modified by striking out the complained of wording so that paragraph 9 should be read as:

> 9. THIS COURT ORDERS that persons may exercise only such rights of set-off as are permitted under Section 18.1 of the CCAA.

[25] With respect to the question of what I have described as a temporal stay, there does not appear to be any opposition by the Moving Creditors to the proposition that whatever their rights of set-off in substance are determined to be, that such determination

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and enforcement of such determined rights should await until a convenient time when AC has stabilized (or I suppose, alternatively cratered). It would seem to me that the likely time for this would be in conjunction with the formation of a reorganization plan of arrangement and compromise. However I leave that question open pending future submissions and further order of the court emanating as a result thereof.

[26] Order to issue accordingly to delete the complained of language in paragraph 9 of the Initial Order and to impose the temporal stay pending further order of the Court.

Motions granted.

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Tab 3

Court File No. CV-19-615862-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	FRIDAY, THE 8TH
	)	
JUSTICE MCEWEN	)	DAY OF MARCH, 2019
	)	

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.**

SECOND AMENDED AND RESTATED INITIAL ORDER

THIS APPLICATION, made by JTI-Macdonald Corp. (the "**Applicant**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING (i) the affidavit of Robert McMaster sworn March 8, 2019 and the exhibits thereto (the "**McMaster Affidavit**"); (ii) the affidavit of Robert McMaster sworn March 28, 2019 and the exhibits thereto; (iii) the affidavit of Robert McMaster sworn April 1, 2019 (the "**Comeback Affidavit**"); (iv) the affidavit of William E. Aziz sworn April 1, 2019; (v) the pre-filing report dated March 8, 2019 (the "**Pre-Filing Report**") of Deloitte Restructuring Inc. ("**Deloitte**") in its capacity as the proposed monitor of the Applicant; (vi) the first report of Deloitte, in its capacity as Monitor of the Applicant (the "**Monitor**") dated March 28, 2019; and (vii) the second report of the Monitor dated April 1, 2019, and on being advised that JTI-Macdonald TM Corp. and JT Canada LLC Inc., the secured creditors who are likely to be affected by the charges created herein (the "**Secured Creditors**") were given notice, and on

hearing the submissions of counsel for the Applicant, the Secured Creditors, Deloitte and on reading the consent of Deloitte to act as the Monitor,

SERVICE

1. **THIS COURT ORDERS** that the time for service and filing of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that the Applicant is a company to which the CCAA applies.

PLAN OF ARRANGEMENT

3. **THIS COURT ORDERS** that the Applicant shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

DEFINITIONS

4. **THIS COURT ORDERS** that for purposes of this Order:

(a) "**JTI Group**" means entities related to or affiliated with the Applicant;

(b) "**Pending Litigation**" means any and all actions, applications and other lawsuits existing at the time of this Order in which the Applicant is a named defendant or respondent (either individually or with other Persons (as defined below)), relating in any way whatsoever to a Tobacco Claim (as defined below), including, without limitation, the Quebec Class Actions (as defined below), the Additional Class Actions and the HCCR Actions (as each of those terms is defined in the McMaster Affidavit);

(c) **"Quebec Class Actions"** means the proceedings in the Quebec Superior Court and the Quebec Court of Appeal in (i) *Cécilia Létourneau et al. v. JTI-Macdonald Corp., Imperial Tobacco Canada Limited and Rothmans, Benson & Hedges Inc.* and (ii) *Conseil Québécois sur le Tabac et la Santé and Jean-Yves Blais v. JTI-Macdonald Corp., Imperial Tobacco Canada Limited and Rothmans, Benson & Hedges Inc.* and all decisions and orders in such proceedings;

(d) "**Sales & Excise Taxes**" means all goods and services, harmonized sales or other applicable federal, provincial or territorial sales taxes, and all federal excise taxes and customs and import duties and all federal, provincial and territorial tobacco taxes;

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

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

(ii) the HCCR Legislation (as defined in the McMaster Affidavit),

excluding any right or claim of a supplier relating to goods or services supplied to, or the use of leased or licensed property by, the Applicant or any member of the JTI Group; and

(f) "**Tobacco Products**" means tobacco or any product made or derived from tobacco or containing nicotine that is intended for human consumption, including any component, part, or accessory of or used in connection with a tobacco product, including cigarettes, cigarette tobacco, roll your own tobacco, smokeless tobacco, electronic cigarettes, vaping liquids and devices, heat-not-burn tobacco, and any other tobacco or nicotine delivery systems and shall include materials, products and by-products derived from or resulting from the use of any tobacco products.

POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Applicant shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicant shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Applicant is authorized and empowered to continue to retain and employ the employees, independent contractors, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business, to preserve the value of the Property or the Business, or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Applicant shall be entitled to continue to utilize the central cash management system currently in place as described in the McMaster Affidavit or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicant of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicant, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

7. **THIS COURT ORDERS** that the Applicant shall be entitled but not required to pay the following expenses whether incurred prior to, on or after the date of this Order:

(a) all outstanding and future wages, salaries, commissions, compensation, vacation pay, bonuses, incentive plan payments, employee and retiree pension and other benefits and related contributions and payments (including, without limitation, expenses related to employee and retiree medical, dental, disability, life insurance and similar benefit plans or arrangements, employee assistance programs and contributions to or any payments in respect of the Pension Plans (as defined in the McMaster Affidavit), reimbursement expenses (including, without limitation, amounts charged to corporate credit cards), termination pay, salary continuance

and severance pay, all of which is payable to or in respect of employees, independent contractors and other personnel, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements or with Monitor approval; and

(b) the fees and disbursements of any Assistants retained or employed by the Applicant at their standard rates and charges.

8. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicant shall be entitled but not required to pay all reasonable expenses incurred by the Applicant in carrying on the Business in the ordinary course prior to, on or after the making of this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services;

(b) capital expenditures other than as permitted in clause (a) above to replace or supplement the Property or that are otherwise of benefit to the Business, provided that Monitor approval is obtained for any single such expenditure in excess of $1 million or an aggregate of such expenditures in a calendar year in excess of $10 million;

(c) all interest due and payable on the Applicant's secured obligations; and

(d) payment for goods or services supplied or to be supplied to the Applicant (including the payment of any royalties or shared services).

9. **THIS COURT ORDERS** that the Applicant is authorized to complete outstanding transactions and engage in new transactions with the members of the JTI Group and to continue, on and after the date hereof, to buy and sell goods and services, and to allocate, collect and pay costs, expenses and other amounts from and to the members of the JTI Group, including without limitation in relation to finished, unfinished and semi-finished materials, personnel, administrative, technical and professional services, and royalties and fees in respect of trademark licences (collectively, all transactions and all inter-company policies and procedures between the Applicant and any member of the JTI Group, the "**Intercompany Transactions**") in the ordinary course of business or as otherwise approved by the Monitor. All Intercompany Transactions in the ordinary course of business between the Applicant and any member of the JTI Group, including the provision of goods and services from any member of the JTI Group to the Applicant, shall continue on terms consistent with existing arrangements or past practice or as otherwise approved by the Monitor.

10. **THIS COURT ORDERS** that the Applicant shall remit, in accordance with legal requirements, or pay (whether levied, accrued or collected before, on or after the date of this Order):

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all Sales & Excise Taxes required to be remitted by the Applicant in connection with the Business; and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicant.

11. **THIS COURT ORDERS** that the Applicant is authorized to post and to continue to have posted cash collateral, letters of credit, performance bonds, payment bonds, surety bonds, guarantees and other forms of security from time to time, in an aggregate amount not exceeding $18 million (the "**Bonding Collateral**"), to satisfy regulatory or administrative requirements to provide security that have been imposed on it in the ordinary course and consistent with past practice in relation to the collection and remittance of federal excise taxes and customs and import duties and federal, provincial and territorial tobacco taxes, whether the Bonding Collateral is provided directly or indirectly by the Applicant as such security, and the Applicant is authorized to post and to continue to have posted surety bonds with Chubb Insurance Company of Canada (f/k/a ACE INA Insurance) and any other issuers of Bonding Collateral as security therefor.

12. **THIS COURT ORDERS** that the Canadian federal, provincial and territorial authorities entitled to receive payments or collect monies from the Applicant in respect of Sales & Excise Taxes are hereby stayed during the Stay Period (as defined below) from requiring that any additional bonding or other security be posted by or on behalf of the Applicant in connection with Sales & Excise Taxes or any other matters for which such bonding or security may otherwise be required.

13. **THIS COURT ORDERS** that until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicant shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Applicant and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, at such intervals as such Rent is usually paid in the ordinary course of business. On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

14. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicant is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant or claims to which it is subject to any of its creditors as of this date and to post no security in respect of any such amounts or claims, including pursuant to any order or judgment; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

15. **THIS COURT ORDERS** that the Applicant shall, subject to such requirements as are imposed by the CCAA, have the right to:

(a) permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $5 million in any one transaction or $10 million in the aggregate;

(b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate;

(c) pursue all avenues of refinancing of the Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing; and

(d) pursue all avenues to resolve any of the Tobacco Claims, in whole or in part,

all of the foregoing to permit the Applicant to proceed with an orderly restructuring of the Business.

16. **THIS COURT ORDERS** that the Applicant shall provide each of the relevant landlords with notice of the Applicant's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Applicant's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicant, or by further Order of this Court upon application by the Applicant on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicant disclaims or resiliates the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer or resiliation of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.

17. **THIS COURT ORDERS** that if a notice of disclaimer or resiliation is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time

of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicant and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicant in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

STAY OF PROCEEDINGS

18. **THIS COURT ORDERS** that until and including April 5, 2019, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), including but not limited to an application for leave to appeal to the Supreme Court of Canada in the Quebec Class Action (a "**QCA Leave Application**"), the Pending Litigation and any other Proceeding in relation to a Tobacco Claim, shall be commenced, continued or take place by, against or in respect of the Applicant, the Monitor, or the Court-Appointed Mediator (defined below), or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way or directed to take place by, against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court. All counterclaims, cross-claims and third party claims of the Applicant in the Pending Litigation are likewise subject to this stay of Proceedings during the Stay Period.

19. **THIS COURT ORDERS** that during the Stay Period, (i) none of the Pending Litigation or any Proceeding in relation thereto shall be commenced, continued or take place against or in respect of any Person named as a defendant or respondent other than Imperial Tobacco Canada

Limited, Imperial Tobacco Company Limited or Rothmans, Benson and Hedges Inc. in any of the Pending Litigation (such Persons, the "**Other Defendants**"); and (ii) no Proceeding in Canada that relates in any way to a Tobacco Claim or to the Applicant, the Business or the Property shall be commenced, continued or take place against or in respect of any member of the JTI Group or R. J. Reynolds Tobacco Company or R. J. Reynolds Tobacco International, Inc., except with leave of this Court, and any and all such Proceedings currently underway or directed to take place against or in respect of any of the Other Defendants or any member of the JTI Group, or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

20. **THIS COURT ORDERS** that, to the extent any prescription, time or limitation period relating to any Proceeding against or in respect of the Applicant, any of the Other Defendants, or any member of the JTI Group that is stayed pursuant to this Order may expire, including but not limited to any prescription of time whereby the Applicant would be required to commence the QCAP Leave Application, the term of such prescription, time or limitation period shall hereby be deemed to be extended by a period equal to the Stay Period.

NO EXERCISE OF RIGHTS OR REMEDIES

21. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicant or the Monitor, or affecting the Business or the Property (including for greater certainty, any enforcement process or steps or other rights and remedies under or relating to the Quebec Class Actions or any enforcement process or other steps in respect of the Applicant or the JTI Group's trademarks or other intellectual property used by the Applicant), are hereby

stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicant to carry on any business which the Applicant is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

22. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicant, except with the written consent of the Applicant and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

23. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicant or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility, customs clearing, warehouse or logistical services, or other services to the Business or the Applicant, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicant, and that the Applicant shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicant in accordance with normal payment practices of the Applicant or

such other practices as may be agreed upon by the supplier or service provider and each of the Applicant and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

24. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicant. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

SALES AND EXCISE TAX CHARGE

25. **THIS COURT ORDERS** that the Canadian federal, provincial and territorial authorities that are entitled to receive payments or collect monies from the Applicant in respect of Sales & Excise Taxes shall be entitled to the benefit of and are hereby granted a charge (the "**Sales and Excise Tax Charge**") on the Property, which charge shall not exceed an aggregate amount of $127 million, as security for all amounts owing by the Applicant in respect of Sales & Excise Taxes. The Sales and Excise Tax Charge shall have the priority set out in paragraphs 46 and 48 herein.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

26. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicant with respect to any claim against the directors or officers that arose before the date hereof and that relates to any

obligations of the Applicant whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

27. **THIS COURT ORDERS** that the Applicant shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicant after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

28. **THIS COURT ORDERS** that the directors and officers of the Applicant shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $4.1 million, as security for the indemnity provided in paragraph 27 of this Order. The Directors' Charge shall have the priority set out in paragraphs 46 and 48 herein.

29. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicant's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 27 of this Order.

CRO APPOINTMENT

30. **THIS COURT ORDERS** that

(a) the agreement dated as of April 23, 2018 pursuant to which the Applicant has engaged BlueTree Advisors Inc. ("**BlueTree**") to provide the services of William E. Aziz to act as chief restructuring officer to the Applicant (the "**CRO**"), a copy of which is attached as Confidential Exhibit "1" to the McMaster Affidavit (the "**CRO Engagement Letter**"), and the appointment of the CRO pursuant to the terms thereof is hereby approved, including, without limitation, the payment of the fees and expenses contemplated thereby;

(b) the CRO shall not be or be deemed to be a director or employee of the Applicant;

(c) neither BlueTree nor the CRO shall, as a result of the performance of their respective obligations and services in accordance with the terms of the CRO Engagement Letter, be deemed to be in Possession (as defined below) of any of the Property within the meaning of any Environmental Legislation (as defined below);

(d) BlueTree and the CRO shall not have any liability with respect to any losses, claims, damages or liabilities, of any nature or kind, to any Person from and after the date of this Order except to the extent such losses, claims, damages or liabilities result from the negligence or wilful misconduct on the part of BlueTree or the CRO;

(e) no action or other proceeding shall be commenced directly, or by way of counterclaim, third party claim or otherwise, against or in respect of BlueTree and the CRO, and all rights and remedies of any Person against or in respect of them are hereby stayed and suspended, except with the written consent of the CRO or with leave of this Court on notice to the Applicant, the Monitor and the CRO. Notice of any such motion seeking leave of this Court shall be served upon the Applicant, the Monitor and the CRO at least seven (7) days prior to the return date of any such motion for leave; and

(f) the obligations of the Applicant to BlueTree and the CRO pursuant to the CRO Engagement Letter shall be treated as unaffected and may not be compromised in any Plan or proposal filed under the *Bankruptcy and Insolvency Act*, R.S.C, 1985, c. B-3, as amended (the "**BIA**") in respect of the Applicant.

APPOINTMENT OF MONITOR

31. **THIS COURT ORDERS** that Deloitte is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicant with the powers and obligations set out in the CCAA or set forth herein and that the Applicant and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicant pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

32. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicant's receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) advise the Applicant in its preparation of the Applicant's cash flow statements, which information shall be reviewed with the Monitor;

(d) advise the Applicant in its development of the Plan and any amendments to the Plan;

(e) assist the Applicant, to the extent required by the Applicant, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(f) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicant, to the extent that is necessary to adequately assess the Applicant's business and financial affairs or to perform its duties arising under this Order;

(g) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(h) assist the Applicant, to the extent required by the Applicant, in its efforts to explore the potential for a resolution of any of the Tobacco Claims;

(i) consult with the Court-Appointed Mediator in connection with the Court-Appointed Mediator's mandate, including in relation to any negotiations to settle any Tobacco Claims and the development of the Plan; and

(j) perform such other duties as are required by this Order or by this Court from time to time.

33. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

34. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or

collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, the Ontario *Occupational Health and Safety Act* the Quebec *Environment Quality Act*, the Quebec *Act Respecting Occupational Health and Safety* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

35. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Applicant with information provided by the Applicant in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicant is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicant may agree.

36. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or

obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

37. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Applicant shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicant as part of the costs of these proceedings and the CRO shall be paid its fees and expenses pursuant to the CRO Engagement Letter. The Applicant is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicant on a bi-weekly basis and the fees and expenses of the CRO pursuant to the CRO Engagement Letter.

38. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

39. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, the CRO and counsel to the Applicant shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $3 million, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings and the CRO, other than in respect of any success fee provided for in the CRO Engagement Letter. The Administration Charge shall have the priority set out in paragraphs 46 and 48 hereof.

COURT-APPOINTED MEDIATOR

40. **THIS COURT ORDERS** that the Hon. Warren K. Winkler, Q.C. is hereby appointed, as an officer of the Court and shall act as a neutral third party (the "**Court-Appointed Mediator**") to mediate a global settlement of the Tobacco Claims.

41. **THIS COURT ORDERS** that in carrying out his mandate, the Court-Appointed Mediator may, among other things:

(a) Adopt processes which, in his discretion, he considers appropriate to facilitate negotiation of a global settlement;

(b) Retain independent legal counsel and such other advisors and persons as the Court-Appointed Mediator considers necessary or desirable to assist him in carrying out his mandate;

(c) Consult with all Persons with Tobacco Claims ("**Tobacco Claimants**"), the Monitor, the Applicant, the CRO, the Co-Defendants (as defined in the Comeback Affidavit), other creditors and stakeholders of the Applicant and/or the Co-Defendants and any other persons the Court-Appointed Mediator considers appropriate;

(d) Accept a court appointment of similar nature in any proceedings under the CCAA commenced by a company that is a co-defendant or respondent with the Applicant or the Co-Defendants in any action brought by one or more Tobacco Claimants, including the Pending Litigation; and,

(e) Apply to this Court for advice and directions as, in his discretion, the Court-Appointed Mediator deems necessary.

42. **THIS COURT ORDERS** that, subject to an agreement between the Applicant and the Court-Appointed Mediator, all reasonable fees and disbursements of the Court-Appointed Mediator and his legal counsel and financial and other advisors as may have been incurred by them prior to the date of this Order or which shall be incurred by them in relation to carrying out his mandate shall be paid by the Applicant and the Co-Defendants on a monthly basis, forthwith upon the rendering of accounts to the Applicant and the Co-Defendants.

43. **THIS COURT ORDERS** that the Court-Appointed Mediator shall be entitled to the benefit of and is hereby granted a charge (the "**Court-Appointed Mediator Charge**") on the Property, which charge shall not exceed an aggregate amount of $1 million, as security for his fees and disbursements and for the fees and disbursements of his legal counsel and financial and other advisors, in each case incurred at their standard rates and charges, both before and after the making of this Order in respect of these proceedings. The Court-Appointed Mediator Charge shall have the priority set out in paragraphs 47 and 49 hereof.

44. **THIS COURT ORDERS** that the Court-Appointed Mediator is authorized to take all steps and to do all acts necessary or desirable to carry out the terms of this Order, including dealing with any Court, regulatory body or other government ministry, department or agency, and to take all such steps as are necessary or incidental thereto.

45. **THIS COURT ORDERS** that, in addition to the rights and protections afforded as an officer of this Court, the Court-Appointed Mediator shall incur no liability or obligation as a result of his appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on his part. Nothing in this Order shall derogate from the protections afforded a person pursuant to Section 142 of the *Courts of Justice Act* (Ontario).

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

46. **THIS COURT ORDERS** that the priorities of the Administration Charge, the Directors' Charge, the Sales and Excise Tax Charge and the Court-Appointed Mediator Charge (collectively, the "**Charges**" and each individually, a "**Charge**"), as among them, shall be as follows:

> First – Administration Charge (to the maximum amount of $3 million) and the Court-Appointed Mediator Charge (to the maximum amount of $1 million), *pari passu*;
>
> Second — Directors' Charge (to the maximum amount of $4.1 million); and
>
> Third – Sales and Excise Tax Charge (to the maximum amount of $127 million).

47. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

48. **THIS COURT ORDERS** that each of the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges, encumbrances and claims of secured creditors, statutory or otherwise (collectively, the "**Encumbrances**") in favour of any Person in respect of such Property, save and except for

(a) purchase-money security interests or the equivalent security interests under various provincial legislation and financing leases (that, for greater certainty, shall not include trade payables);

(b) statutory super-priority deemed trusts and liens for unpaid employee source deductions;

(c) deemed trusts and liens for any unpaid pension contribution or deficit with respect to the Pension Plans, but only to the extent that any such deemed trusts and liens are statutory super-priority deemed trusts and liens afforded priority by statute over all pre-existing Encumbrances granted or created by contract;

(d) liens for unpaid municipal property taxes or utilities that are given first priority over other liens by statute; and

(e) cash collateral (i) deposited with a financial institution as at the date of this Order, or (ii) deposited with a financial institution after the date of this Order with either the consent of the Monitor or pursuant to further order of the Court.

49. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any Encumbrances over any Property that ranks in priority to, or *pari passu* with, any of the Charges, unless the Applicant also obtains the prior written consent of the Monitor and the beneficiaries of the Charges affected thereby (collectively, the "**Chargees**"), or further Order of this Court.

50. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with

respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Charges shall not create or be deemed to constitute a breach by the Applicant of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and

(c) the payments made by the Applicant pursuant to this Order and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

51. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicant's interest in such real property leases.

SERVICE AND NOTICE

52. **THIS COURT ORDERS** that the Monitor shall (i) without delay, publish in The Globe and Mail (National Edition) and La Presse a notice containing the information prescribed under the CCAA as well as the date of the Comeback Motion (as defined below), (ii) within five days after the date of this Order or as soon as reasonably practicable thereafter, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice (which shall include the date of the Comeback Motion) to every known creditor, except employees, who has a claim (contingent, disputed or otherwise) against the Applicant of more

than $5,000, except with respect to (I) plaintiffs in the Pending Litigation, in which cases the Monitor shall only send a notice to counsel of record as applicable, and (II) beneficiaries of the Pension Plans in which case the Monitor shall only send a notice to the trustees of each of the Pension Plans and the Financial Services Commission of Ontario and the Régie Des Rentes Du Québec as applicable, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder. The list referenced at subparagraph (C) above shall not include the names, addresses, or estimated amounts of the claims of those creditors who are individuals or any personal information in respect of an individual.

53. **THIS COURT ORDERS** that the E-Service Guide of the Commercial List (the "**Guide**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Guide (which can be found on the Commercial List website at: www.ontariocourts.ca//scj/practice/practice-directions/toronto/eservice-commercial/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 13 of the Guide, service of documents in accordance with the Guide will be effective on transmission. This Court further orders that a Case Website (the "**Case Website**") shall be established by the Monitor in accordance with the Guide with the following URL ' www.insolvencies.deloitte.ca/en-ca/JTIM'.

54. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Guide is not practicable, the Applicant and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings and any notices or other

correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile or other electronic transmission to the Applicant's creditors or other interested parties at their respective addresses as last shown on the records of the Applicant and that any such service or notice by courier, personal delivery or facsimile or other electronic transmission shall be deemed to be received on the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

55. **THIS COURT ORDERS** that the Applicant is authorized to rely upon the notice provided in paragraph 52 to provide notice of the comeback motion to be heard on a date to be set by this Court upon the granting of this Order (the "**Comeback Motion**") and shall only be required to serve motion materials relating to the Comeback Motion, in accordance with the Guide, upon those parties who serve a Notice of Appearance in this proceeding prior to the date of the Comeback Motion.

56. **THIS COURT ORDERS** that the Monitor shall create, maintain and update as necessary a list of all Persons appearing in person or by counsel in this proceeding (the "**Service List**"). The Monitor shall post the Service List, as may be updated from time to time, on the case website as part of the public materials to be recorded thereon in relation to this proceeding. Notwithstanding the foregoing, the Monitor shall have no liability in respect of the accuracy of or the timeliness of making any changes to the Service List.

57. **THIS COURT ORDERS** that the Applicant and the Monitor and their counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Applicant's creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in

satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the Electronic Commerce Protection Regulations, Reg. 8100-2-175 (SOR/DORS).

58. **THIS COURT ORDERS** that, subject to paragraph 59, all motions in this proceeding are to be brought on not less than seven (7) calendar days' notice to all persons on the Service List. Each Notice of Motion shall specify a date (the "**Return Date**") and time for the hearing.

59. **THIS COURT ORDERS** that motions for relief on an urgent basis need not comply with the notice protocol described herein.

60. **THIS COURT ORDERS** that any interested Person wishing to object to the relief sought in a motion must serve responding motion material or, if they do not intend to file material, a notice in all cases stating the objection to the motion and the grounds for such objection in writing (the "**Responding Material**") to the moving party, the Applicant and the Monitor, with a copy to all Persons on the Service List, no later than 5 p.m. on the date that is four (4) calendar days prior to the Return Date (the "**Objection Deadline**").

61. **THIS COURT ORDERS** that, if no Responding Materials are served by the Objection Deadline, the judge having carriage of the motion (the "**Presiding Judge**") may determine:

(a) whether a hearing is necessary;

(b) whether such hearing will be in person, by telephone or by written submissions only; and

(c) the parties from whom submissions are required

(collectively, the "**Hearing Details**"). In the absence of any such determination, a hearing will be held in the ordinary course.

62. **THIS COURT ORDERS** that, if no Responding Materials are served by the Objection Deadline, the Monitor shall communicate with the Presiding Judge regarding whether a determination has been made by the Presiding Judge concerning the Hearing Details. The Monitor shall thereafter advise the Service List of the Hearing Details and the Monitor shall report upon its dissemination of the Hearing Details to the Court in a timely manner, which may be contained in the Monitor's next report in the proceeding.

63. **THIS COURT ORDERS** that if any party objects to the motion proceeding on the Return Date or believes that the Objection Deadline does not provide sufficient time to respond to the motion, such objecting party shall, promptly upon receipt of the Notice of Motion and in any event prior to the Objection Deadline, contact the moving party and the Monitor (together with the objecting party and any other party who has served Responding Materials, the "**Interested Parties**") to advise of such objection and the reasons therefor. If the Interested Parties are unable to resolve the objection to the timing and schedule for the motion following good faith consultations, the Interested Parties may seek a scheduling appointment before the Presiding Judge to be held prior to the Return Date or on such other date as may be mutually agreed by the Interested Parties or as directed by the Presiding Judge to establish a schedule for the motion. At the scheduling appointment, the Presiding Judge may provide directions including a schedule for the delivery of any further materials and the hearing of the contested motion, and may address such other matters, including interim relief, as the Court may see fit. Notwithstanding the foregoing, the Presiding Judge may require the Interested Parties to proceed with the contested motion on the Return Date or on any other date as may be directed by the Presiding Judge or as may be mutually agreed by the Interested Parties, if otherwise satisfactory to the Presiding Judge.

SEALING

64. **THIS COURT ORDERS** that the Confidential Exhibit "1" to the McMaster Affidavit be and is hereby sealed pending further Order of the Court and shall not form part of the public record.

GENERAL

65. **THIS COURT ORDERS** that the Applicant or the Monitor may from time to time apply to this Court to amend, vary, supplement or replace this Order or for advice and directions concerning the discharge of their respective powers and duties under this Order or the interpretation or application of this Order.

66. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicant, the Business or the Property.

67. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or outside of Canada, to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals and regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

68. **THIS COURT ORDERS** that each of the Applicant and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative

body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

69. **THIS COURT ORDERS** that any interested party (including the Applicant and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

70. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order (the "**Effective Time**") and that from the Effective Time to the time of the granting of this Order any action taken or notice given by any creditor of the Applicant or by any other Person to commence or continue any enforcement, realization, execution or other remedy of any kind whatsoever against the Applicant, the Property or the Business shall be deemed not to have been taken or given, as the case may be.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

APR 25 2019

PER / PAR: RW

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

AMENDED AND RESTATED INITIAL ORDER

Thornton Grout Finnigan LLP
100 Wellington Street West
Suite 3200
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

Robert I. Thornton (LSO# 24266B)
Email: rthornton@tgf.ca
Leanne M. Williams (LSO# 41877E)
Email: lwilliams@tgf.ca
Rebecca L. Kennedy (LSO# 61146S)
Email: rkennedy@tgf.ca

Tel: 416-304-1616
Fax: 416-304-1313

Lawyers for the Applicant

Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

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.**, **IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED, ROTHMANS, BENSON & HEDGES INC.**

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF ALBERTA AND NEWFOUNDLAND AND LABRADOR

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1

Kenneth T. Rosenberg (LSO# 21102H)
Lily Harmer (LSO# 31880T)
Massimo (Max) Starnino (LSO# 41048G)
Danielle Glatt (LSO# 65517N)
Elizabeth Rathbone (LSO# 70331U)

Tel: 416.646.4300
Fax: 416.646.4301

ken.rosenberg@paliareroland.com
lily.harmer@paliareroland.com
max.starnino@paliareroland.com
danielle.glatt@paliareroland.com
elizabeth.rathbone@paliareroland.com
karen.lam@paliareroland.com
sarita.sanasie@paliareroland.com
natalia.botelho@paliareroland.com

Lawyers for Her Majesty the Queen in Right of Alberta and Newfoundland