

**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.**

Applicant

FACTUM OF THE APPLICANT

April 1, 2019

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**FACTUM OF THE APPLICANT
(Stay Extension & Amendment to Initial Order)**

PART I - OVERVIEW

1. Pursuant to the Order of Mr. Justice Hainey dated March 8, 2019 (the “**Initial Order**”), JTI-Macdonald Corp. (the “**Applicant**” or “**JTIM**”) was granted relief pursuant to the *Companies' Creditors Arrangement Act* (“**CCAA**”) that, among other things: (i) authorized the Applicant to seek leave to the Supreme Court of Canada to appeal the judgment of the Quebec Court of Appeal rendered March 1, 2019 (the “**QCA Judgment**”), (ii) granted a stay of proceedings in respect of the Applicant and certain other parties up to and including April 5, 2019 (the “**Stay Period**”), (iii) authorized the payment of related party and third party payments in the ordinary course of business, and (iv) approved of certain super priority charges over the Applicant’s assets and undertakings.
2. This factum is filed in support of the Applicant’s motion for:
 - (a) an extension of the Stay Period up to and including June 28, 2019; and
 - (b) the amendment and restatement of the Initial Order to:
 - (i) amend the Stay of Proceedings to permit the Applicant to file leave to appeal to the Supreme Court of Canada in respect of the QCA Judgment, but not permit any other steps in those proceedings without further order of the

Court, on the same terms as those obtained by Rothmans, Benson & Hedges Inc. (“**RBH**”) in its initial order granted under the CCAA on March 22, 2019; and

- (ii) confirm that the Charges (as defined below) shall not rank in priority to (A) any cash collateral deposited with a financial institution as at the date of the Initial Order; or (B) deposited with a financial institution after the date of the Initial Order, with either the consent of the Monitor or further order of the Court.
3. On March 28, 2019, the Quebec Class Action Plaintiffs (the “**Class Action Plaintiffs**”) and the consortium of the Provinces of British Columbia, Saskatchewan, Manitoba, New Brunswick, Nova Scotia and Prince Edward Island (the “**Consortium**”) filed a motion record and a notice of objection, respectively, and on March 29, 2019, the Province of Ontario filed a motion record. The issues raised and the relief sought by the Class Action Plaintiffs, the Consortium and the Province of Ontario shall be addressed in a separate factum. This factum addresses the relief sought by the Applicant.
4. Capitalized terms used herein that are not otherwise defined shall have the meaning in the affidavit of Robert McMaster sworn March 28, 2019 or the Initial Order, as applicable.

PART II - FACTS

Activities since the Initial Order

5. Since the date of the Initial Order, the Applicant’s legal counsel has initiated communications with: (i) counsel to the Province of Ontario, (ii) counsel to the Provinces of Alberta and Newfoundland, (iii) counsel to the Consortium, and (iv) counsel to the Class

Action Plaintiffs, in an attempt to commence discussions in respect of the resolution of their various claims against the Applicant.¹

6. Most of these initial discussions, although preliminary in nature, have been productive. The exception is the discussions with the Class Action Plaintiffs.²
7. On March 12, 2019, the Applicant's counsel delivered a letter (the "**Service List Letter**") to the Service List that addressed the effect of the Stay of Proceedings granted in the Initial Order as against the Other Defendants. The Service List Letter advised that the Stay of Proceedings was not intended to affect matters that do not affect the Applicant or its affiliates (including Reynolds) and that, in respect of such matters, the Stay of Proceedings could be lifted pursuant to the Initial Order with the consent of the Applicant and the Monitor.³
8. As of today, no party has requested consent to lift the Stay of Proceedings.⁴
9. On March 12, 2019, Imperial filed for creditor protection under the CCAA. Imperial is also a defendant under both the QCA Judgment and the HCCR Actions.⁵
10. By letter dated March 22, 2019, the Class Action Plaintiffs wrote to the Quebec Court of Appeal and advised that, although any proceeding against Imperial had been stayed, the same was not the case in respect of RBH as the third defendant liable joint and severally under the QCA Judgment. The Class Action Plaintiffs took the position that RBH could not rely on the Stay of Proceedings as against the Other Defendants granted in the Applicant's Initial Order.⁶
11. However, the Class Action Plaintiffs ultimately sought an adjournment to their motion before the Quebec Court of Appeal returnable March 25, 2019. The Class Action Plaintiffs

¹ Affidavit of Rob McMaster sworn March 28, 2019 (the "**Stay Extension Affidavit**") at para. 11, Motion Record of the Applicant, Tab 2.

² *Ibid.*

³ Stay Extension Affidavit at para. 12, Motion Record of the Applicant, Tab 2.

⁴ Stay Extension Affidavit at para. 12, Motion Record of the Applicant, Tab 2.

⁵ Stay Extension Affidavit at para. 13, Motion Record of the Applicant, Tab 2.

⁶ Stay Extension Affidavit at para. 14, Motion Record of the Applicant, Tab 2.

motion was to withdraw the security bond previously paid by RBH as ordered by the Quebec Court of Appeal as a result of the Trial Judgment.⁷

12. On March 22, 2019, RBH filed for creditor protection under the CCAA. There is currently a stay of proceedings in favour of all three defendants to the QCA Judgment, their affiliates, and all of the defendants under the HCCR Actions.⁸

Amended and Restated Initial Order

Stay of Proceedings

13. The protections afforded under the CCAA are required to maintain the *status quo* of the Applicant's operations and preserve going concern value while it seeks a collective solution for the benefit of all of its stakeholders.⁹
14. In the Consortium's Notice of Objection dated March 28, 2019, the Consortium raised concerns in respect of JTIM's ability to continue with its application for leave to appeal the QCA Judgment to the Supreme Court of Canada while the HCCR Actions were stayed (which ability was afforded to JTIM under the Initial Order).¹⁰
15. As a result, the Applicant seeks to align its Stay of Proceedings to the relief granted to RBH in its initial order and seek the approval of this Court to allow JTIM to file its application for leave to appeal the QCA Judgment to the Supreme Court of Canada, but not take any further steps in such proceeding by the Applicant, nor require steps to be taken by any other person without further order of the Court.¹¹

Charges

16. Under the Initial Order, the Administration Charge, Directors' Charge and the Sales and Excise Tax Charge (collectively, the "**Charges**") rank in priority to all security interests,

⁷ *Ibid.*

⁸ Stay Extension Affidavit at para. 15, Motion Record of the Applicant, Tab 2.

⁹ Stay Extension Affidavit at para. 16, Motion Record of the Applicant, Tab 2.

¹⁰ Notice of Objection of the Provinces of British Columbia, Saskatchewan, Manitoba, New Brunswick, Nova Scotia and Prince Edward Island dated March 28, 2019 at para. 3.

¹¹ *Ibid.*

trusts, liens, charges, encumbrances and claims of secured creditors, statutory or otherwise, save and except for certain statutory encumbrances, including cash collateral deposited with a financial institution as security for letters of credit or bank guarantees issued by the financial institution at the request of the Applicant.¹²

17. JTIM pledged to Citibank \$0.9 million as cash collateral in respect of certain travel account card services and \$8 million as cash collateral in respect of certain cash management services that require the extension of credit by Citibank (together, the “**Citibank Cash Collateral**”).¹³
18. Citibank expressed concern that the Charges had priority over the Citibank Cash Collateral. As it was always the intention that the Citibank Cash Collateral would not be primed by the Charges, the Applicant agreed to seek the proposed amendments to the Initial Order clarifying that matter.¹⁴

Extension of the Stay of Proceedings

19. The Applicant seeks the extension of the Stay Period to June 28, 2019. Imperial and RBH are also seeking an extension to their respective stay periods to the same date. Coordinating the stay periods at this stage of the CCAA proceedings is efficient and cost-effective.¹⁵
20. JTIM, with the assistance of the Monitor, has prepared a forecast of the projected cash flows (the “**Cash Flow Statement**”), which demonstrates that JTIM has sufficient liquidity to operate its business and meet its obligations during the proposed extension to the Stay Period.¹⁶
21. The Applicant requires the extension of the Stay Period to allow the Applicant to continue to operate in the ordinary course while engaging in discussions to seek a collective resolution of the pending litigation claims against the Applicant.¹⁷

¹² Stay Extension Affidavit at para. 21, Motion Record of the Applicant, Tab 2.

¹³ Stay Extension Affidavit at para. 22, Motion Record of the Applicant, Tab 2.

¹⁴ Stay Extension Affidavit at para. 23, Motion Record of the Applicant, Tab 2.

¹⁵ Stay Extension Affidavit at para. 25, Motion Record of the Applicant, Tab 2.

¹⁶ Stay Extension Affidavit at para. 26, Motion Record of the Applicant, Tab 2.

¹⁷ Stay Extension Affidavit at para. 27, Motion Record of the Applicant, Tab 2.

PART III - ISSUES

22. The following issues should be considered by this Court:
- (a) Should this Court grant the stay extension?
 - (b) Should this Court grant the Amended and Restated Initial Order?

PART IV - THE LAW AND ANALYSIS

A. A Stay Extension Should be Granted

23. Pursuant to section 11.02(1) of the CCAA, the Court may grant an extension of a stay of proceedings where: (i) the applicant satisfies the Court that an extension to the stay of proceedings is appropriate, and (ii) the Court is satisfied that the applicant continues to act in good faith and with due diligence.¹⁸
24. When deciding whether to grant an extension to the stay of proceedings, the Court will focus on whether the above CCAA requirements have been met.¹⁹ The length of the stay of proceedings to be granted is discretionary. The extension date should be one that allows the parties flexibility.²⁰
25. When determining the appropriate length of time for the stay of proceedings to be extended, one important consideration is the significant cost of continuous applications for an extension of the stay, which will prejudice the applicant's stakeholders.²¹

¹⁸ *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended ("CCAA"), s. 11.02

¹⁹ *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4788 (Ont. S.C.J.) at para. 43, Book of Authorities of the Applicant ("BOA"), Tab 1.

²⁰ *Sunrise/Saskatoon Apartments Limited Partnership (Re)*, 2017 BCSC 808 ("Sunrise") at para. 21, BOA, Tab 2.

²¹ *Sunrise* at para. 23, BOA, Tab 2.

26. The Monitor's support for a stay extension is also a consideration for the Court in an application to extend the stay of proceedings.²²
27. In the present case, since the granting of the Initial Order, the Applicant's have, and continue to act, in good faith and with due diligence.²³
28. Since the Initial Order was granted, the Applicant:
- (a) commenced discussions with its stakeholders with the view to progress such preliminary discussions into meaningful negotiations;²⁴
 - (b) clarified, where possible, the Applicant's intent regarding the scope of the Stay of Proceedings;²⁵
 - (c) coordinated with its co-defendants, Imperial and RBH, regarding the Comeback Hearing and to the extent that interests aligned, the initial orders;²⁶
 - (d) deployed a communication plan with its employees (unionized and non-unionized), suppliers, retirees and customers;²⁷ and
 - (e) worked with the Monitor regarding monitoring duties, disbursement approval and the CCAA proceedings.²⁸
29. The Applicant believes that the proposed extension of the stay of proceedings to June 28, 2019, is reasonable in the circumstances. Given that discussions with the Applicant's

²² *Sunrise*, BOA, Tab 2.

²³ Stay Extension Affidavit at para. 27, Motion Record of the Applicant, Tab 2.

²⁴ Stay Extension Affidavit at para. 11, Motion Record of the Applicant, Tab 2.

²⁵ Stay Extension Affidavit at para. 12, Motion Record of the Applicant, Tab 2.

²⁶ Stay Extension Affidavit at para. 18, Motion Record of the Applicant, Tab 2.

²⁷ First Report of the Monitor dated March 28, 2019 ("**First Report**") at para. 12.

²⁸ First Report at para. 12.

stakeholders are preliminary in nature, this length of time will allow the Applicant to continue to advance those discussions and provide the Court with an update.

30. The Cash Flow Statement demonstrates that the Applicant will continue to have sufficient liquidity to continue its operations and meet its obligations to and beyond June 28, 2019. Further, the Monitor supports the extension of the Stay Period.²⁹
31. An extension of the Stay Period is in the best interests of the Applicant and all of its stakeholders.

B. The Amended and Restated Initial Order should be granted

Amendment to the SCC Leave Application

32. The proposed amended and restated Initial Order permits the Applicant to serve and file an application to the Supreme Court of Canada for leave to appeal the QCA Judgment, but does not permit the Applicant or any other party to take further steps without further leave of this Court.
33. The Applicant is concerned that notwithstanding the provisions of the Initial Order extending the term of any prescription, time or limitation period by a period equal to the stay period, there is a risk that the Supreme Court of Canada may deny the leave application on the grounds of a lack of timeliness. Due to the potential that this CCAA proceeding may take years to conclude, the Supreme Court of Canada may deny the application for leave on the basis that the Applicant did not file its materials within 60 days.

²⁹ First Report, Appendix “B”:

34. Preserving the Applicant's ability to pursue an appeal before the expiration of the applicable time period is in the best interests of the Applicant and the majority of its stakeholders, but arguably not the Class Action Plaintiffs.³⁰ In their factum, the Class Action Plaintiffs note their intention to impose conditions on the Applicant, including requiring the Applicant to post security to the satisfaction of the court.³¹
35. Posting such security for the exclusive benefit of the Class Action Plaintiffs would be a preference under section 95 of the *Bankruptcy and Insolvency Act* that would deprive other unsecured creditors ranking *pari passu* with the Class Action Plaintiffs access to certain assets of the Applicant.
36. JTIM seeks only to file its leave application to preserve its rights without seeking to take any further steps in the application out of an abundance of caution and recognizing a possible risk that the Supreme Court of Canada may not acknowledge the extension of time to file the application for leave. The preservation of JTIM's appeal right does not preclude a resolution within the context of the CCAA.

PART V - RELIEF REQUESTED

37. The Applicant respectfully submits that this Court should grant an extension to the Stay Period up to and including June 28, 2019, and the amendment and restatement of the Initial Order.

³⁰ Stay Extension Affidavit at para. 19, Motion Record of the Applicant, Tab 2.

³¹ Factum of the Class Action Plaintiffs dated March 29, 2019 at para. 29.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of April, 2019.

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SCHEDULE "A"

Authorities

TAB NO.	CASELAW
1	<i>Canwest Global Communications Corp. (Re)</i> , [2009] O.J. No. 4788 (Ont. S.C.J.)
2	<i>Sunrise/Saskatoon Apartments Limited Partnership (Re)</i> , 2017 BCSC 808

SCHEDULE “B”

Relevant Statutes

Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36

General power of court

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate;
and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

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Proceedings commenced at Toronto

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