

**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

**MOTION RECORD
(Returnable on October 31, 2024)**

October 29, 2024

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TAB 1

**ONTARIO
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Applicant

**NOTICE OF MOTION TO STRIKE
(Re: Motion to Strike Affidavit)
(Returnable on October 31, 2024)**

The Applicant will make a motion to Chief Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) on October 31, 2024 at 9:00 a.m. (Eastern), or as soon after that time as the motion can be heard, by judicial video conference via Zoom at Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard:

- In writing under subrule 37.12.1 (1) because it is (*insert one of* on consent, unopposed *or* made without notice);
- In writing as an opposed motion under subrule 37.12.1 (4);
- In person;
- By telephone conference;
- By video conference, via Zoom, the details of which will be made available by the Court in Case Center.

THE MOTION IS FOR:

1. An Order that declares paragraphs 13, 24, 28, 31, 32 and 35 in the Affidavit of André Lespérance sworn October 28, 2024 (the “**Lespérance Affidavit**”) inadmissible and striking them from the record; and
2. Such further and other relief as this Court deems just.

THE GROUNDS FOR THE MOTION ARE:

A. Confidentiality of Mediation Discussions

1. On March 8, 2019, the Applicant was granted protection from its creditors under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 pursuant to the Initial Order dated March 8, 2019 (as amended and restated from time to time, the “**Initial Order**”). Deloitte Restructuring Inc. was appointed as monitor of the Applicant (in such capacity, the “**Monitor**”).
2. On April 5, 2019, pursuant to the Initial Order, the Honourable Warren K. Winkler, K.C. (the “**Mediator**”) was appointed to mediate a global settlement of the Tobacco Claims against the Applicant and the other defendants (the “**Mediation**”).
3. On May 24, 2019, the Court granted the Court-Appointed Mediator Communication and Confidentiality Protocol Endorsement (the “**Confidentiality Order**”), which expressly provides that “all statements, discussions, offers made and documents produced by any of the parties in the course of the Mediation Process shall not be subject to disclosure ..., shall

be confidential; shall not be referred to in Court and shall not be admissible into evidence for any purpose...” [Emphasis added].

4. On October 17, 2024, the Monitor served a motion record returnable October 31, 2024, seeking, among other things, a Meeting Order to: (a) accept the filing of a Plan of Compromise and Arrangement dated October 17, 2024 (the “**M&M Plan**”), and (b) scheduling a creditors’ meeting for Affected Creditors to consider and vote on the M&M Plan (the “**Meeting Order Motion**”).
5. On October 24, 2024, the Applicant filed a responding motion record, which included the Responding Affidavit of William E. Aziz sworn October 24, 2024 (the “**Aziz Affidavit**”), in objection to the Meeting Order Motion and the filing of the M&M Plan.
6. On October 28, 2024, counsel for the Quebec Class Action Plaintiffs (as defined in the M&M Plan) served the Lespérance Affidavit in response to the Applicant’s responding motion record and the Aziz Affidavit. In numerous instances (and in particular, paragraphs 13, 24, 28, 31, 32 and 35 therein), the Lespérance Affidavit inappropriately refers to discussions in the context of the Mediation (the content of such statements are disputed by the Applicant).
7. This is in direct contravention of the Confidentiality Order. Accordingly, the Lespérance Affidavit is inadmissible.
8. On October 29, 2024, the Applicant’s counsel sent a letter to counsel to the Quebec Class Action Plaintiffs requesting that they immediately withdraw the inadmissible Lespérance Affidavit from the record and serve and file an amended and restated affidavit without the

offending paragraphs, failing which, the Applicant would be required to bring this matter to the Court's attention.

9. The Quebec Class Action Plaintiffs have failed to withdraw the inadmissible Lespérance Affidavit.
10. The Applicant seeks an order declaring that paragraphs 13, 24, 28, 31, 32 and 35 in the Lespérance Affidavit is inadmissible in accordance with the terms of the Confidentiality Order and striking them from the record.
11. The Applicant additionally relies on:
 - (a) the provisions of the CCAA and the statutory, inherent and equitable jurisdiction of this Court;
 - (b) Rules 1.04, 1.05, 2.03, 3.02, 16, 25.11, 37 and 39 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, as amended and the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended; and
 - (c) such further and other grounds as counsel may advise and this Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of this motion:

- (a) Court-Appointed Mediator Communication and Confidentiality Protocol Endorsement granted May 24, 2019;
- (b) Letter from Applicant's counsel to QCAPs' counsel dated October 29, 2024;
- (c) the Affidavit of André Lespérance sworn October 28, 2024; and

(d) such further and other evidence as counsel may advise and this Court may permit.

October 29, 2024

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

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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

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PROTOCOL FOR MOTION BY ZOOM VIDEO CONFERENCE

Scheduling and Specific Requirements

1. Any person on the Service List that wishes to appear virtually on the motion(s) (“**Participants**”) must register by 4:00 p.m. two (2) business days in advance of the hearing (Tuesday, October, 29, 2024 for the motion(s) scheduled for Thursday, October 31, 2024), by emailing Veritext Litigation Solutions Canada, Inc. (scheduling@neesonsreporting.com) and copying each Monitor’s counsel (aperley@dwpv.com, sfernandes@cassels.com, nancy.thompson@blakes.com). In their email, Participants should provide contact information, including their name, the party they are acting for, their email address and phone number for the counsel slip, along with a statement regarding whether they intend to make submissions.
2. Subject to the Court’s overriding discretion over all matters, Monitors’ counsel will coordinate with Participants and the Court to develop an agenda for the hearing.
3. All material for use on the motion(s) is to be posted on CaseLines, as more fully described in Appendix “B”.
4. Participants will appear by video. Veritext will distribute the Zoom link to registered Participants. Participants are not permitted to forward or share the Zoom link. No person should have access to the hearing on Zoom other than Participants. If a Participant is unable to attend by video, they should contact Monitors’ counsel. Participants should carefully review the technical requirements below.
5. Counsel are required to gown for the hearing.
6. For access by the general public, a YouTube link will be posted on each of the Monitors’ websites by 10:00 a.m. not less than two (2) business days prior to the hearing. The YouTube link will allow the general public to view a livestream of the hearing, but not participate in the hearing. For greater clarity, individuals viewing the livestream via YouTube will not be heard or seen by the Court, Judge or Participants.
7. No recording of any part of the hearing (including audio) may be made unless authorized in advance by the Court.
8. For greater certainty, notice and service requirements are set out in the Rules of Civil Procedure and the various orders and endorsements in the proceedings. For ease of reference, we have included paragraphs 58-63 of the Second Amended and Restated Initial Order dated

March 8, 2019 in the JTIM proceedings, attached as Appendix “A”. It should be noted that similar notice and service requirements have been set out in various orders and endorsements in the parallel proceedings of Imperial and RBH. Nothing in this protocol modifies or amends Orders of the Court related to service requirements, the Rules of Civil Procedure, any Commercial List Practice Direction or other applicable rules.

9. Participants will be placed into a virtual waiting room upon entering the Zoom meeting.

Technical Requirements for Zoom Participants

10. Participants will require a device with a working microphone and camera. The device can be a computer (desktop or laptop), tablet or smartphone. The device must be connected to an internet connection that is sufficient to send and receive video and audio.

11. Each Participant is responsible for ensuring that they have suitable equipment to participate in the hearing and that such equipment works properly. Participants must test such equipment well in advance of the scheduled hearing to ensure:

- (a) that they are familiar with how to use such equipment;
- (b) the compatibility and functioning of such equipment; and
- (c) that the remote location has adequate internet bandwidth to support the use of Zoom without interruption.

12. Each Participant is also responsible for ensuring that they are familiar with the features and operation of Zoom. Participants must ensure that they have downloaded any necessary software, and practiced using Zoom, well in advance of the scheduled hearing.

13. Counsel on Zoom should identify their display name in the following format: [First Name] [Last name], for [Client].

14. Participants should log on using the Zoom link provided approximately 30 minutes before the hearing is scheduled to begin. During this time, Participants should speak to each other to determine if there are any audio/visual/connection issues.

15. It is suggested that Participants use the “gallery view” mode, rather than the “active speaker” mode, available on Zoom.

16. It is suggested that only counsel who are making submissions turn on their cameras during the hearing.

17. Should a Participant become disconnected from Zoom or experience technical difficulties during the hearing, they should immediately inform the Court by sending an email to Veritext Litigation Solutions Canada, Inc. (scheduling@neesonsreporting.com).
18. Further participant information is included in Appendix "B."

APPENDIX "A"

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.

APPENDIX “B”

1. All Participants will have their microphones muted and may only unmute their own microphones when they are addressing the Court. When parties are not muted, they must avoid making extraneous noise (including for example, typing and shuffling papers) as these noises may interfere with the hearing.
2. Participants must ensure that they participate in the Zoom hearing from a well-lit room so that they are easily visible. Participants must also ensure that no filters are active that may distort or otherwise conceal their appearance.
3. Participants must ensure that they participate in the Zoom hearing from a quiet location where they (and the Court) will not be interrupted or disturbed during the hearing.
4. All mobile devices must be turned off or put on silent mode during the hearing.
5. Participants must refrain from speaking over other Participants.
6. Participants should make submissions in accordance with the order set out in the agenda. If there is a need to make submissions out of sequence, Participants should make a request in a manner directed by the Court. The Court may ask Participants to signal when they intend to address the Court by raising their hand (either by physically raising their hand or by using the virtual “raise hand” feature in Zoom).
7. Participants must state their name and who they represent before addressing the Court.
8. Upon entry into the virtual waiting room, each Participant joining by video should identify themselves, including any person off camera that may be viewing the video feed. This also allows any audio or visual issues to be identified. Each Participant is obligated to immediately notify the presiding judge if any additional person joins them in viewing the video feed.
9. If a Participant intends to rely on any documents, the materials you intend to rely on must be served and shared on the relevant CaseLines bundle and all references during the hearing should reference the CaseLines page numbering associated with such CaseLines bundle.
10. If a party wishes to share certain documents during the hearing, the documents should be provided to the Monitors in advance so that it can be added to the agenda and a method for sharing can be set up.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**NOTICE OF MOTION
(Re: Motion to Strike Affidavit)
(Returnable on October 31, 2024)**

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Lawyers for the Applicant

TAB 2

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)**

THE HONOURABLE) FRIDAY, the 24th
)
MR. JUSTICE McEWEN) DAY of MAY, 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.**

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

**ENDORSEMENT (COURT-APPOINTED MEDIATOR COMMUNICATION AND CONFIDENTIALITY
PROTOCOL)**

For ease of reference, the above proceedings will collectively be referred to as the "CCAA Proceedings".

The Honourable Warren K. Winkler, Q.C., former Chief Justice of Ontario, has been appointed as a neutral third party (the "**Court-Appointed Mediator**") to mediate a global settlement of the Tobacco Claims (the "**Mediation Process**"), as defined in each Applicant's Initial Order as amended and restated (the "**Initial Orders**"), in each CCAA Proceeding.

The Court has authorized the following communication and confidentiality protocol between the Court and the Court-Appointed Mediator:

1. The Court and the Court-Appointed Mediator may communicate between one another directly to discuss, on an on-going basis, the conduct of the Mediation Process and the manner in which it will be coordinated with the CCAA Proceedings, including but not

limited to individual matters referred specifically by the Court to the Court-Appointed Mediator for resolution.

2. The Court will not disclose to the Court-Appointed Mediator how they will decide any matter which may come before them for determination. The Court-Appointed Mediator will not disclose to the Court the negotiating positions or confidential information of any of the parties in the Mediation Process.
3. All statements, discussions, offers made and documents produced by any of the parties in the course of the Mediation Process shall not be subject to disclosure through discovery or any other process; shall be confidential; shall not be referred to in Court and shall not be admissible into evidence for any purpose, including impeaching credibility or to establish the meaning and/or validity of any settlement or alleged settlement arising from the Mediation Process.
4. Any notes, records, statements made, discussions had and recollections of the Court-Appointed Mediator and/or his legal counsel, Lax O'Sullivan Lisus Gottlieb LLP, in conducting the Mediation Process shall be confidential and without prejudice and protected from disclosure for all purposes in accordance with paragraph (3) above.
5. The Court-Appointed Mediator shall not be liable to any party or participant for any act or omission in connection with the Mediation Process and shall have the immunity of a Judge of a Superior Court in Canada.



Justice McEwen

TAB 3



Thornton Grout Finnigan LLP
RESTRUCTURING + LITIGATION

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October 29, 2024

BY EMAIL

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Trudel Johnston & Lespérance
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Montreal, QC H2Y 2X8

Attention: Avram Fishman, Mark Meland and
Tina Silverstein

Attention: Philippe Trudel, Bruce Johnston
and André Lespérance

Re: Affidavit of André Lespérance sworn October 28, 2024

We are counsel to JTI-Macdonald Corp. (“**JTIM**”) in connection with its proceedings under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the “**CCAA Proceeding**”). We refer to the Affidavit of André Lespérance sworn October 28, 2024 (the “**Lespérance Affidavit**”) filed in connection with the CCAA Proceeding in response to the Responding Affidavit of William E. Aziz sworn October 24, 2024 in connection with JTIM’s objection to the Motion for a Meeting Order returnable October 31, 2024.

In numerous instances, the Lespérance Affidavit inappropriately refers to discussions in the context of the confidential Court-ordered mediation (the content of such statements are disputed by JTIM).

This is in direct contravention of the Court-Appointed Mediator Communication and Confidentiality Protocol Endorsement granted by the Court on May 24, 2019 (the “**Confidentiality Order**”), which expressly provides that “all statements, discussions, offers made and documents produced by any of the parties in the course of the Mediation Process shall not be subject to disclosure ..., shall be confidential; shall not be referred to in Court and shall not be admissible into evidence for any purpose...”

Accordingly, the Lespérance Affidavit is inadmissible in its current form.

Unless the current Lespérance Affidavit is immediately withdrawn from the record, with an amended and restated affidavit served and filed that removes the offending paragraphs,¹ we will be required to bring this matter to the Court's attention.

Yours truly,

Thornton Grout Finnigan LLP



Robert I. Thornton

RT

cc: William Aziz, Chief Restructuring Officer
Pamela Huff and Linc Rogers, Blake, Cassels & Graydon LLP

¹ The inadmissible paragraphs include paragraphs 13, 24, 28, 31, 32 and 35.

TAB 4

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE CHIEF) THURSDAY THE 31ST
)
JUSTICE MORAWETZ) DAY OF OCTOBER, 2024
)

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.**

ORDER TO STRIKE

THIS MOTION, 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 by way of judicial video conference in Toronto, Ontario in accordance with the Guidelines to Determine Mode of Proceeding in Civil.

ON READING the Applicant’s Notice of Motion to Strike dated October 29, 2024, the Endorsement of Justice McEwen dated May 24, 2019, and on hearing the submissions of counsel for the Applicant, counsel for the Deloitte Restructuring Inc. (the “**Monitor**”) and such other counsel as were present, no one else appearing although duly served as appears from the affidavit of service of Natalie Longmore sworn on October 29, 2024, filed.

1. **THIS COURT ORDERS** that paragraphs 13, 24, 28, 31, 32 and 35 in the Affidavit of André Lespérance sworn October 28, 2024, are inadmissible and are struck from the record.

2. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Applicant and the Monitor in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and the Monitor as may be necessary or desirable to give effect to this Order or to assist the Applicant and the Monitor in carrying out the terms of this Order.

Chief Justice G.B. Morawetz

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

ORDER TO STRIKE

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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)**

Proceeding commenced at Toronto

**MOTION RECORD
(Returnable on October 31, 2024)**

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