

**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.**

**UNOFFICIAL TRANSCRIBED ENDORSEMENT
OF JUSTICE MCEWEN**

March 19, 2019

The Quebec Class Action Plaintiffs (the "Plaintiffs") bring this motion seeking an order suspending the operation of paragraphs 8(c) and 8(d) of the Initial Order of Justice Hainey dated March 8, 2019 (the "Initial Order") thus prohibiting the payments of principal, interest and royalties to JTI-Macdonald TM Corp. pending further Order of the Court.

The Plaintiffs also seek an Order permitting them to oppose or seek a variation of the Initial Order at the comeback hearing scheduled for April 4 and 5, 2019.

The Plaintiffs are supported by HMQ for Ontario.

JTI-Macdonald Corp. ("JTIM") opposes the relief sought. It is supported by JT Canada LLC and PWC, as well as the Monitor.

For the reasons below I am prepared to grant the relief sought pending the return of the comeback hearing or further order made by me as the case management judge.

The Plaintiffs raise a number of arguments primarily as follows:

- JTIM did not disclose to Justice Hainey the negative comments made by Justice Riordan against JTIM and JTI-Macdonald TM Corp. ("TM") with respect to their inter-company contracts concerning payments of principal, interest and royalties: see in particular paras. 1095-97, 1101, 1103 and 2141;
- the affidavit of Robert McMaster filed in support of the Application was vague regarding potential adverse tax consequences;
- when JTIM obtained an initial order from Justice Farley in August 2004 these same payments to TM were not requested nor made;
- subsequent to the order of Justice Farley at various times royalty payments and interest were not paid or in the case of interest the interest rates reduced;

- JTIM also did not disclose to Justice Hainey comments made by Justice Schragger who heard a motion to have JTIM and others post security: see in particular paras. 42 and 52.

Based on the foregoing the Plaintiffs submit the Intercompany Royalty and Interest payments that are scheduled to take place before the comeback hearing ought to be suspended. They argue that JTIM had an obligation to put all of the above information before Justice Hainey and failed to do so. Based on the above the Plaintiffs claim that there is nothing to suggest that JTIM or TM will be prejudiced if the payments stop and that the payments, in any event, are a sham.

Last, the Plaintiffs submit that it is unfair to allow JTIM to continue to make the payments in the above circumstances. It is not in keeping with the purpose of the CCAA and payments ought to be suspended pending an opportunity to adjudicate the matter at the comeback hearing.

JTIM vigorously opposes the relief sought primarily submitting as follows:

- the proper materials were before Justice Hainey;
- the decision of Justice Mongeon in effect “cancels out” the comments made by Justice Riordan;
- the relief sought is designed to inflict pain on a secured creditor;
- there is no request to pay principal and none will be paid absent a further Order of this court;
- if pre-filing royalties are not paid they will be deducted from a deposit held by TM;
- royalties going forward must be paid pursuant to the provisions of s.11 of the CCAA;
- with respect to the issue of interest, it is a secured debt and its suspension could lead to an enormous debt later as it will compound – this would adversely affect plaintiffs in all actions;
- there is a repayment agreement in place to satisfy any judgment with a properly capitalized entity – JT International Holding B.V., with respect to interest (not royalties);
- the Monitor approved JTIM’s submissions and neither JTIM or for that fact the Monitor sought to, in any way mislead the Court or provide insufficient information.

JTIM therefore submits that it is premature to grant the orders sought.

I disagree.

While I am not prepared to cast aspersions with respect to the materials before Justice Hainey at this time the arguments raised by the Plaintiffs persuade me that there should be a pause in the payments pending the return of the comeback hearing.

The comments of Justice Riordan¹ and Schragger raise clear concerns about the legitimacy of the inter-company contracts. Their decisions post-date the decision of Justice Mongeon which was released pre-trial.

¹ Justice Riordan’s factual findings were upheld on appeal.

Further, given the history of reduced or lack of payments after the 2004 order of Justice Farley I am not satisfied at this juncture that the adverse consequences described by Mr. McMaster will be borne out. Further, as noted, the relief concerning principal, interest and royalty payments was not sought before Justice Farley, nor granted.

In all of the above circumstances, pending the comeback hearing or further order, I agree with the Plaintiffs that it is equitable to suspend the payments referred to at Tab DD of Volume 4 of the Application Record; namely the Intercompany Royalty and interest payments (as well as any principal payments although as noted JTIM is not making these payments).

There is no real prejudice to JTIM or TM in ordering this interim suspension pending the return of the matter at the comeback hearing.

Based on the submissions I believe that the only relevant payments the Plaintiffs seek to suspend are noted at Tab DD above. If further clarification is required I can be spoken to as I appreciate that paras. 8(c) and 8(d) of Justice Hainey's order are somewhat broader in nature than the above-noted payments.

McEwen J.