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

***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.**

**Applicant**

# FACTUM OF THE APPLICANT

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# FACTUM OF THE APPLICANT

## PART I - OVERVIEW

1. JTI-Macdonald Corp. (the "**Applicant**" or "**JTIM**") has filed for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. C-36, as amended (the "**CCAA**") to seek a collective resolution of the massive litigation claims being made against it, totalling hundreds of billions of dollars. The Quebec class action plaintiffs (the "**QCAP**"), are making overreaching tactical demands, seeking not just pre-judgment remedies, but pre-*action* remedies against a host of entities affiliated with the Applicant. These remedies would destabilize, disrupt and over tax the business of the Applicant whose profits are needed to fund any possible settlement or plan. The course of action proposed by the QCAP does not represent a responsible path forward and would be contrary to established law and restructuring principles.

2. This factum is filed in connection with the comeback motion (the "**Comeback Motion**") in the CCAA proceedings of the Applicant in accordance with the terms of the Order of Mr. Justice Hainey dated March 8, 2019 (the "**Initial Order**").

3. The terms of the Initial Order, among other things, (i) appoints Deloitte Restructuring Inc. ("**Deloitte Restructuring**") as the monitor of the Applicant (the "**Monitor**"), (ii) authorizes the Applicant to continue its business in the ordinary course, (iii) authorizes the Applicant to make an application for leave to appeal to the Supreme Court of Canada (the "**SCC**") in the Class Actions, and (iv) authorizes the engagement of Blue Tree Advisors Inc. as Chief Restructuring Officer of the Applicant (the "**CRO**").

4. As a result of a recent adverse judgment in two Quebec class action claims (together, the "**Class Actions**") and other tobacco-related litigation in which JTIM is a co-defendant, the Applicant sought protection under the CCAA in an effort to find a comprehensive solution.

5. Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited (together, "**Imperial**") and Rothmans, Benson & Hedges Inc. ("**RBH**") each also filed for protection pursuant to the CCAA on March 15, 2019 and March 22, 2019 respectively. JTIM, Imperial and RBH are collectively referred to as the "**Co-defendants**".

6. The QCAP have moved for certain relief from each of the Co-defendants and specific relief from JTIM. Against each of the Co-defendants, the QCAP seek, *inter alia*, (i) the termination of the CCAA proceedings in the event that a Co-defendant seeks leave to appeal the Class Actions to the SCC or alternatively, to lift the stay of proceedings to allow the QCAP to seek conditions to such appeal, (ii) to prohibit the Co-defendants from making certain payments to related parties, including the payment of shared services, royalties and interest, (iii) a requirement that the fees and disbursements of the CCAA professionals and consultants be taxed every 90 days, and (iv) to lift the stay of proceedings to file an application for a bankruptcy order.

7. In respect of JTIM, the QCAP also seek to (i) revise JTIM's stay of proceedings as against Imperial and RBH; (ii) rescind the appointment of Deloitte Restructuring as the Monitor, and (iii) rescind the appointment of the CRO or alternatively, direct that the fees of the CRO not be paid by JTIM or covered by the Administration Charge (as defined in the Initial Order).

8. A consortium of the Provinces of New Brunswick, British Columbia, Saskatchewan, Manitoba, Nova Scotia and Prince Edward Island (collectively, the "**Consortium**") has filed a Notice of Objection objecting to the Applicant's ability to proceed with an appeal of the Class Actions to the SCC and raised a concern with the appointment of Deloitte Restructuring as the Monitor.

9. The Province of Ontario ("**Ontario**") has sought to lift the stay of proceedings of each of the Co-defendants to permit its litigation to continue in the ordinary course.

10. JTIM requires the protection of the CCAA to effect a global resolution of the litigation claims against it. But for these litigation claims, the Applicant is a profitable company that

provides annual revenue to the provincial and federal governments amounting to more than $1.3 billion in taxes relating to the sale of its products. It is in the best interests of all of the stakeholders of the Co-defendants that they be permitted to maintain the *status quo* of their operations while a global resolution is sought. A cessation of the Applicant's business or a diminishment of its profitability would be to the detriment of all.

11. If the motions against the Applicant were to succeed, the Applicant would be (i) unable to preserve its rights of appeal to the SCC, (ii) unable to maintain its operations in the ordinary course of business and preserve the *status quo*, (iii) unable to service its secured debt causing increased interest expense and likely a significantly increased tax burden (that is otherwise avoidable), and (iv) forced to continue in Ontario with litigation claiming an amount that far exceeds the value of its business at significant expense to the estate, but no gain to the claims resolution process. This is contrary to the tenets of the CCAA.

12. The QCAP are attempting to do indirectly, through the CCAA, what they have chosen not to do directly at law. The purpose of the CCAA is to provide breathing space to a debtor company to restructure its affairs and prevent any tactical manoeuvering among its unsecured creditors. It is the position of the Applicant that the motions against it should be dismissed for the reasons that follow.

## PART II - FACTS

### A. Background

13. Capitalized terms not otherwise defined herein shall be as defined in the affidavit of Robert McMaster sworn April 1, 2019 or the affidavit of William E. Aziz sworn April 1, 2019 (collectively, the "**Comeback Affidavits**"), as applicable. The facts applicable to the Comeback Motion are set out in the Comeback Affidavits and are briefly summarized below.

14. On May 11, 1999, Japan Tobacco Inc. ("**Japan Tobacco**") acquired the international, non-U.S., tobacco assets of RJR Nabisco, Inc., R.J. Reynolds Tobacco Company and their affiliates

(collectively, the "**RJR Group**").[1] Due to the time constraints and complexity of the transaction, many of the necessary planning and implementation steps required to integrate this worldwide acquisition were completed after closing.[2] The acquisition of the Canadian assets of the RJR Group was structured for tax efficiencies as a leveraged buyout (the "**Recapitalization Transactions**").

15. The Applicant is indebted to JTI-Macdonald TM Corp. ("**JTI-TM**") in the amount of approximately $1.2 billion (the "**Secured Loan**").[3] JTIM granted JTI-TM a security interest in all of JTIM's business, undertakings and all of its property and assets pursuant to, *inter alia*, a first registered secured demand debenture (the "**TM Security**").[4]

16. Counsel to the Monitor, in preparation for the CCAA proceedings, reviewed and opined on the validity of the TM Security. The Monitor's counsel concluded that, subject to the assumptions and qualifications contained therein, JTI-TM holds a valid and properly perfected security interest in the personal property of JTIM located in the jurisdictions where the material portion of the Applicant's assets are located.[5]

17. The Secured Loan was granted to JTIM by JTI-TM almost 20 years ago as part of the Recapitalization Transactions.[6]

18. At the time of the acquisition transaction, Canada was generally considered to be a high-tax jurisdiction and JTIM represented approximately one-third of the entire RJR Group's income tax expense.[7] The leveraged buyout structure deployed by the Recapitalization Transactions has well known tax advantages, including the deduction of interest expense by the entity that generates the earnings.[8]

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[1] Affidavit of Robert McMaster sworn March 8, 2019 (the "**Initial Affidavit**") at para. 12, Responding Motion Record of the Applicant, Tab 1, Exhibit "A".
[2] Affidavit of Robert McMaster sworn April 1, 2019 (the "**Comeback Affidavit**") at para. 11, Responding Motion Record of the Applicant, Tab 1.
[3] Affidavit of William E. Aziz sworn April 1, 2019 ("**Aziz Affidavit**") at para. 10, Responding Motion Record of the Applicant, Tab 2.
[4] Initial Affidavit, at para. 46, Responding Motion Record of the Applicant, Tab 1, Exhibit "A".
[5] Pre-filing Report of the Monitor dated March 8, 2019 (the "**Pre-filing Report**") at para. 30.
[6] Initial Affidavit at para. 14, Responding Motion Record of the Applicant, Tab 1.
[7] Comeback Affidavit at para. 17, Responding Motion Record of the Applicant, Tab 1.
[8] Comeback Affidavit at para. 12, Responding Motion Record of the Applicant, Tab 1.

19. The net effect of the Recapitalization Transactions in 1999 was to reduce JTIM's taxable income in Canada resulting in significant Canadian tax savings. For the first five years following the completion of the Recapitalization Transactions, JTIM had an average tax savings of $45 million per year. Currently JTIM saves approximately $27 million per year as a result of its current debt and share structure.[9]

20. The Recapitalization Transactions were reviewed in detail nearly 15 years ago during JTIM's 2004 CCAA Proceedings. The 2004 Monitor noted that the leveraged buyout structure that formed the foundation for the Recapitalization Transactions was not unusual at the time and was typically done primarily for tax purposes.[10]

21. The Applicant sought the protection of the CCAA in this proceeding as a result of the release of the judgment against the Co-defendants of the Quebec Court of Appeal in the Class Actions (the "**QCA Judgment**") in the approximate amount of $13.5 billion (including interest and an additional indemnity) on a solidary basis, which substantially upheld the judgment of the lower Court (the "**Trial Judgment**"). In addition to the QCA Judgment, JTIM is also the subject of significant health care cost recovery litigation and certain other tobacco-related class action litigation (collectively, with the QCA Judgment, the "**Tobacco Claims**").[11]

22. No affiliate of JTIM, including its secured creditor (JTI-TM) or its indirect parent (Japan Tobacco), is (i) a defendant in any of the Tobacco Claims, (ii) an applicant in this CCAA proceeding, (iii) subject to the stay of proceedings provided in the Initial Order, or (iv) is subject to any litigation challenging any of their transactions or relationship with JTIM.[12]

**B. Shared services and other related party transactions**

23. Shared services are common when a corporate group decides to consolidate certain support functions from several departments into one entity or functional group whose mandate is to provide such services to the rest of the corporate group.[13]

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[9] Comeback Affidavit at para. 19, Responding Motion Record of the Applicant, Tab 1.
[10] Comeback Affidavit at para. 21, Responding Motion Record of the Applicant, Tab 1.
[11] Comeback Affidavit at para. 5, Responding Motion Record of the Applicant, Tab 1.
[12] Comeback Affidavit at para. 6, Responding Motion Record of the Applicant, Tab 1.
[13] Aziz Affidavit at para. 28-29, Responding Motion Record of the Applicant, Tab 2.

24. When related party companies exchange goods and services or share resources, the price that is set is called "transfer pricing". Goods and services purchased and sold within a corporate group are done on an arm's length basis at fair value to satisfy taxing authorities that corporate groups are not manipulating internal transfer prices to reduce taxable profits in certain jurisdictions.[14]

25. The Applicant has numerous shared services arrangements with members of the JTI Group on arm's length terms. The Monitor has reviewed the material related party contracts for ongoing services and the payables thereunder and found same to be reasonable in the circumstances.[15]

26. All of the material related party shared services arrangements are terminable for non-payment.[16] If the members of the JTI Group ceased providing services due to non-payment, it would cause irreparable disruption to JTIM's business. The Applicant would have to attempt to outsource these services from third parties, likely at increased costs, if such services could be replaced at all.[17]

**C. The payment of interest and royalties**

27. The Initial Order permits the Applicant to pay all interest due and owing on the Applicant's secured obligations and any royalties due in the ordinary course. The Applicant has not requested, and the Initial Order does not provide, for the payment of principal or dividends to any member of the JTI Group.

28. Prior to the transactions leading to the Secured Loan and TM Security, RJRM (now JTIM) transferred its trademarks to JTI-TM, a wholly-owned subsidiary, to alleviate the capital tax burden of having a high value asset in an operating company.[18] Placing trademarks in an affiliate as an alternative to an operating entity is common practice and has known business advantages and effectively reduced the capital taxes paid by JTIM for several years.[19]

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[14] Aziz Affidavit at para. 30-31, Responding Motion Record of the Applicant, Tab 2.
[15] Comeback Affidavit at para. 46, Responding Motion Record of the Applicant, Tab 1.
[16] Initial Affidavit at paras. 31 and 36, Responding Motion Record of the Applicant, Tab 1.
[17] Comeback Affidavit at para. 49, Responding Motion Record of the Applicant, Tab 1.
[18] Comeback Affidavit at para. 14, Responding Motion Record of the Applicant, Tab 1.
[19] Comeback Affidavit at para. 15, Responding Motion Record of the Applicant, Tab 1.

29. Subsequent to the transfer of the trademarks to JTI-TM, the amount of royalties payable by JTIM to JTI-TM for the license of JTI-TM's trademarks was set by the parties to the trademark and license agreement and were compared to a transfer pricing trademark royalty study that confirmed that the royalty amounts were within an arm's length range.[20]

## D. Relevant litigation

AG Canada Claim

30. In connection with the contraband litigation commenced by the Attorney General of Canada ("**AG Canada**") on August 13, 2003 against the Applicant (which was later settled), AG Canada filed a statement of claim challenging the Recapitalization Transactions as a fraudulent conveyance (the "**AG Canada Claim**"). The AG Canada Claim included JTI-TM as a defendant but the action did not proceed.[21] This was the only time in over 20 years that JTI-TM was made a party to any claim in respect of the Recapitalization Transactions. The AG Canada Claim was dismissed at the end of the 2004 CCAA Proceedings.[22]

2004 CCAA Proceeding

31. At the commencement of the 2004 CCAA Proceedings, JTIM and JTI-TM agreed that JTIM would stop making principal, interest and royalty payments to JTI-TM as at the date of filing. During the 2004 CCAA Proceeding, JTIM was the subject of numerous unexpected business developments, including declining sales volumes due to increased untaxed cigarettes in the market, decreased earnings due to a shift to value brands, and the loss of over $97 million resulting from its investments in asset-backed commercial papers.[23]

32. In 2006, JTIM requested that it be permitted to commence the payment of principal, interest and royalties to JTI-TM, which request was supported by the 2004 Monitor. When determining whether to permit the payments to commence, Justice Farley noted that the Recapitalization Transactions were not proven as a fraudulent conveyance and were of "no material relevance" to

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[20] Aziz Affidavit at para. 26, Responding Motion Record of the Applicant, Tab 2.
[21] Comeback Affidavit at paras. 20 and 22, Responding Motion Record of the Applicant, Tab 1.
[22] Initial Affidavit at para. 83, Responding Motion Record of the Applicant, Tab 1.
[23] Comeback Affidavit at para. 34, Responding Motion Record of the Applicant, Tab 1.

a determination of whether JTIM should be allowed to commence the payment of principal, interest and royalties during the 2004 CCAA Proceedings.[24]

33. The 2004 Monitor reported on the significant and avoidable tax burden that JTIM and others would bear as a result of JTIM's continued failure to pay principal, interest and royalties to JTI-TM. Many of these avoidable tax burdens continue to exist in 2019 if the payment of interest and royalties are not made. Interest would also continue to accrue in JTIM and be compounded in accordance with the terms of the Secured Loan at the rate of 7.75% per annum. Interest on any unpaid royalties would accrue at the rate of 5.85%.[25]

34. The annual interest accrual on the debentures granted by JTIM to JTI-TM would equal approximately $2.4 million in the first year and compound thereafter such that the total amount of liabilities would escalate to approximately $30.8 million by 2023.[26] It is noted that this would be in addition to the tax liability as a result of unpaid interest on the Secured Loan, in the amount of approximately $27 million annually.

The Safeguard Motion

35. Similar to the relief currently being sought, the QCAP brought a motion in the Class Actions to prohibit the Applicant from paying principal, interest and royalties to JTI-TM until a decision was rendered in respect of the Class Actions (the "**Safeguard Motion**"). The Safeguard Motion was denied by Justice Mongeon and leave to appeal such a decision was also denied by the Quebec Court of Appeal.[27]

36. The decision in the Safeguard Motion acknowledged that "the financial consequences of certain transactions may have the effect of draining resources of a corporate entity".[28] However, Justice Mongeon added that "to effectively stop this alleged drainage of resources, the transactions

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[24] *JTI-MacDonald Corp., Re*, 2006 CarswellOnt 855, at para. 5, ["***2006 Endorsement***"] Book of Authorities of the Applicant ("**BOA**"), Tab 1.
[25] Comeback Affidavit at para. 35, Responding Motion Record of the Applicant, Tab 1.
[26] Comeback Affidavit at para. 36, Responding Motion Record of the Applicant, Tab 1.
[27] Comeback Affidavit at para. 25, Responding Motion Record of the Applicant, Tab 1.
[28] Judgment of Justice Mongeon dated December 4, 2013 ("**Safeguard Decision**") at para. 29, Responding Motion Record of the Applicant, Tab 1, Exhibit "F".

in question must be judicially set aside".[29] The Court held that the obligations of JTIM to JTI-TM were still lawfully due and payable to JTI-TM since the Secured Loan and TM Security had never been challenged.[30] Notwithstanding these clear findings, the QCAP took no steps to set aside the Secured Loan or the TM Security.

The Trial Judgment

37. In the Trial Judgment, Justice Riordan characterized the Recapitalization Transactions giving rise to the Secured Loan as "a sham" and "artificial". However, Justice Riordan also acknowledged that "no one has attacked the validity or legality" of the Recapitalization Transactions and that the Court was not being asked "to pronounce on their legality, nor to annul them". The comments of Justice Riordan were made in the context of his analysis of whether the Applicant should be ordered to pay punitive damages.[31] JTI-TM, the secured party, is not a defendant party in the Class Actions and was never sought to be added by the QCAP.[32]

Deposit Motion

38. Subsequent to the Trial Judgment, the Quebec Court of Appeal granted the QCAP's motion to order RBH and Imperial to furnish security (the "**Deposit Judgment**"). This motion did not proceed against JTIM. Justice Schrager stated that any reference in the Deposit Judgment to the "Appellants" was to be read as referring to Imperial and RBH unless the context indicated otherwise.[33]

39. The negative comments made by Justice Schrager with respect to the "Appellants'" profitability and strategic decisions taken in concert with their respective parent companies were only made in respect of Imperial and RBH, not JTIM.

The QCA Judgment

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[29] *Ibid.*
[30] *Safeguard Decision* at para. 97, Responding Motion Record of the Applicant, Tab 1, Exhibit "F".
[31] Aziz Affidavit at para. 14, Responding Motion Record of the Applicant, Tab 2. Trial Judgment of Justice Riordan dated May 27, 2015 at paras. 1101, 1102, 1099 and 2143, Responding Motion Record of the Applicant, Tab 1, Exhibit "B".
[32] Aziz Affidavit at para. 15, Responding Motion Record of the Applicant, Tab 2.
[33] Judgment of Justice Schrager dated October 27, 2015 at para. 2. Responding Motion Record of the Applicant, Tab 1, Exhibit "I".

40. The Quebec Court of Appeal reiterated that it was not making a determination whether the Secured Loan or the TM Security were legal or valid, only that the Recapitalization Transactions could be taken into consideration when awarding punitive damages.[34]

41. Unless a challenge to the validity of the transactions is properly litigated and the Secured Loan and the TM Security are found to be invalid, they remain valid and enforceable obligations of the Applicant in favour of JTI-TM.

## PART III - ISSUES

42. The issues before this Court are:

(a) Should this Court prohibit the Applicant from making any payments to any member of the JTI Group during the CCAA proceedings:

(i) for services rendered to the Applicant;

(ii) for royalties and fees incurred in connection with the use and license of trademarks; or

(iii) in respect of interest owing in respect of the Secured Loan?

(b) Should this Court terminate the stay of proceedings in the Initial Order in respect of the Other Defendants (as defined in the Initial Order)?

(c) Should this Court lift the stay of proceedings to:

(i) allow Ontario to proceed with its litigation against the Applicant in the ordinary course;

(ii) allow the QCAP to file an application for a bankruptcy order against the Applicant and the Co-defendants; or

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[34] Comeback Affidavit at para. 31; Quebec Court of Appeal Judgment dated March 1, 2019 at para. 1158, Responding Motion Record of the Applicant, Tab 1, Exhibit "C".

(iii) allow the QCAP to seek conditions to the Applicant's application for leave to appeal the QCA Judgment to the SCC?

(d) Should this Court require the fees and disbursements of the Applicant's counsel and advisors to be taxed every 90 days?

(e) Should this Court rescind the appointment of Deloitte Restructuring as the Monitor?

(f) Should this Court rescind the appointment of the CRO or not permit the fees of the CRO to be subject to the Administration Charge?

## PART IV - THE LAW AND ARGUMENT

### A. Payments should be made to the JTI Group for services rendered to the Applicant during the CCAA proceedings

43. Pursuant to section 11.01(a) of the CCAA, applicants are required to pay for post-filing obligations as they are incurred:

> Rights of Suppliers
>
> **11.01** No order made under section 11 or 11.02 has the effect of:
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
>
> (b) requiring the further advance of money or credit.[35] [Emphasis added]

44. Further, section 34(4) of the CCAA provides that any person who is required to provide goods or services to a debtor company is not prohibited from requiring cash on delivery and is not required to provide any extension of credit.[36]

45. These sections embody a fundamental principle of Canadian restructuring law, namely, no one should be forced into greater financial exposure to a debtor who is under the supervision of

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[35] *Companies' Creditors Arrangement Act*, R.S.C. 1986 c. C-43, as amended (the "**CCAA**"), s. 11.01.
[36] CCAA, s. 34(4).

the Court by reason of the debtor's insolvency.

46. This Court has allowed a debtor company to continue intercompany transactions in the ordinary course to maintain the *status quo* and to ensure that integrated operations can continue in the usual course while under CCAA protection.[37] It is appropriate to permit such intercompany transactions to continue, particularly when the monitor will be able to adequately monitor any transactions of concern.[38]

47. By seeking to prohibit the payment of contractual obligations for the supply of services and sale of JTI-SA's products, on arm's length terms between the Applicant and numerous members of the JTI Group, the QCAP is effectively seeking to do indirectly what it has never done directly and to enforce a judgment *before any action is even commenced*.

48. There is a remedy at law for *pre-judgment* protection from dissipation of assets by way of an interim injunction. However, the QCAP cannot satisfy any element of this test on the facts.

49. The test for an interim injunction is set out in *RJR – MacDonald Inc. v. Canada (Attorney General)*. In that decision, the SCC held that in order to obtain interim injunctive relief, a party must demonstrate that: (i) there is a serious question to be tried, (ii) the party will suffer irreparable harm if the order is not granted, and (iii) the balance of convenience dictates that the interim relief should be granted.[39]

***There is no serious question to be tried***

50. The QCAP have not provided any legal basis for altering the contractual arrangements between the Applicant and the JTI Group. There is no suggestion that the services provided are not needed, not adequately provided or that the compensation is not appropriate. Despite the QCAP's assertion that the intercompany transactions are all part of an asset stripping scheme, the evidence before this Court establishes that the services are necessary, integral to the business and

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[37] *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 5368 at para. 29., Book of Authorities of the Applicant ("**BOA**"), Tab 2.
[38] *In the Matter of Payless Shoesource Canada Inc.*, Ontario Superior Court of Justice [Commercial List], Court File No. CV-19-00614629-00CL, Initial Order of Morawetz R.S.J. dated February 19, 2019 at para. 10, BOA, Tab 3; *In the Matter of BioAmber Canada Inc. et al.*, Quebec Superior Court (Commercial Division), Court File No. 500-11-054564-188, Order of Pinsonnault J.S.C. dated May 24, 2018 at para. 16, BOA, Tab 4; *Performance Sports Group Ltd., Re*, 2016 ONSC 6800 at paras. 33-35, BOA, Tab 5.
[39] *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 ["***RJR***"] at para. 48, BOA, Tab 6.

at arm's length terms.

51. The effect of the relief sought by the QCAP is a collateral attack on the Applicant's ordinary course operations and a direct attack on members of the JTI Group. Those corporations are not defendants in the Tobacco Claims nor are they applicants in these CCAA proceedings. Such attacks should not be allowed.

52. In the absence of a proceeding to challenge the contractual arrangements, the QCAP have failed to establish that there is any serious issue to be tried in relation to the provision of services by related parties.

***There is no irreparable harm to the QCAP***

53. In *RJR*, irreparable harm was defined as "harm which cannot be quantified in monetary terms or cannot be cured usually because one party cannot collect damages from the other". The irreparable harm refers to the nature of the harm suffered rather than its magnitude. In the context of an interim injunction, irreparable harm means that the plaintiff, before a hearing on the merits, must be at risk of some injury which cannot be compensated or remedied other than through the granting of the requested interlocutory injunction.[40]

54. Proof of irreparable harm to the QCAP cannot be inferred and the evidence of irreparable harm must be clear and not speculative. The QCAP have provided no evidence that they will suffer harm if JTIM continues to pay its related party suppliers for the services they provide. On the contrary, the evidence is that the stakeholders of the Applicant will suffer irreparable harm if JTIM does <u>not</u> continue to pay the JTI Group for the services they provide.

55. The Applicant is receiving fair value for the services provided to it from the JTI Group.[41] These services are integral to the Applicant's continued operations and replacing such services would be difficult, distracting and likely increase the Applicant's operating costs.[42]

56. The QCAP have failed to establish that there is any irreparable harm to the QCAP in

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[40] *Ibid* at para. 64, BOA, Tab 6; *Thales Rail Signalling Solutions v. Toronto Transit Commission*, 2009 CarswellOnt 2368 at para. 29, BOA, Tab 7.
[41] Aziz Affidavit at para. 52, Responding Motion Record of the Applicant, Tab 2.
[42] *Ibid.*

permitting the Applicant, an otherwise profitable business, to maintain the *status quo* of its operations and pay for the services it uses.

***The balance of convenience favours the Applicant***

57. In *RJR*, the SCC held that the balance of convenience involves a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.[43]

58. As stated in the 2006 Endorsement by Farley J., "the continued operation of the applicant in the ordinary course is beneficial not only to the applicant and its related entities including the head parent [Japan Tobacco], but it is beneficial to its various stakeholders including the employees and the tax collector (including the tax collectors of the various governments suing the applicant …)."[44]

59. The effect on the Applicant in respect of certain limited risk distribution ("**LRD**") agreements with its affiliates could be dramatic if the Applicant is prohibited from remitting payments to JTI-SA for the sale of internationally branded products in Canada. In such circumstances, it is likely that JTI-SA would seek an alternate manufacturer and distributor of its products in Canada, meaning that JTIM would lose significant revenue. The manufacture and sale of products relating to the manufacturing agreements and LRD Agreements generate approximately $35 million of revenue annually. [45] The loss of this source of revenue is not in the interests of JTIM or any of its stakeholders.

60. For the foregoing reasons, the Applicant submits that the prohibition of ordinary course payments between the Applicant and other members of the JTI Group for shared services and other related party arrangements will drive the Applicant to reduced profitability and impede the restructuring of the Applicant. This is not in the interests of JTIM or any of its stakeholders.[46]

61. A global resolution to the issues facing JTIM requires profitability, not instability.

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[43] *RJR, supra note* 39 at paras. 67, BOA, Tab 6.
[44] *2006 Endorsement, supra* note 24, at para. 1, BOA, Tab 1.
[45] Aziz Affidavit at para. 54, Responding Motion Record of the Applicant, Tab 2.
[46] Aziz Affidavit at para. 55, Responding Motion Record of the Applicant, Tab 2.

62. The Applicant will benefit from the continuation of services currently provided by the JTI Group. This will avoid the possible disruption, distraction and increased costs to the estate associated with the relief requested by the QCAP. The balance of convenience clearly favours the Applicant.

63. In summary, the QCAP fails on every arm of the *pre-judgment* test for injunctive relief.

**B. <u>Royalty payments should be made to JTI-TM during the CCAA proceedings</u>**

64. All of the statements above regarding the inability of the QCAP to satisfy the test for an interim injunction apply equally to the continuation of the payment of royalties by JTIM.

65. As mentioned above, section 11.01(a) of the CCAA requires applicants to pay for post-filing obligations as they are incurred.

66. The CCAA specifically requires that an applicant pay for the use of licensed property during a CCAA proceeding and has permitted companies to continue making royalty payments during CCAA proceedings.[47] The Court does not have the authority to prohibit a party from paying for the use of licensed property as it would contravene the express provisions of the CCAA. Until such time as the Trademark Agreement (as defined in the Initial Affidavit) between JTIM and JTI-TM is vacated, the royalties must be paid.

67. No one has ever challenged the 1999 transfer of the trademarks to JTI-TM or brought an action to set aside the 1999 Trademark Agreement. The transfer of the trademarks from an operating entity to its wholly-owned subsidiary was completed almost two decades ago. Any action to set aside the acquisition transaction or the Trademark Agreement would be statute barred.[48]

68. The QCAP has already litigated the issue of whether JTIM should be prohibited from paying for the use of JTI-TM's trademarks in the Safeguard Motion and was not successful. The appeal of that decision was denied.[49] The QCAP are attempting a collateral attack on these judicial

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[47] *Smoky River Coal Ltd., Re*, 2001 ABCA 209 at para. 36, BOA, Tab 8.
[48] *Civil Code of Quebec*, S.Q. 1991, c. 64 ("***CCQ***"), Article 1635.
[49] Comeback Affidavit at para. 25, Responding Motion Record of the Applicant, Tab 1.

decisions. They are trying to use the Comeback Motion to circumvent an actual challenge to the Recapitalization Transactions. Justice Mongeon's decision in the Safeguard Motion gave fair warning to the QCAP that in order to prohibit JTIM from making payments of royalties to JTI-TM, they would first have to set aside the transfer of the trademarks to JTI-TM in 1999.

***There is no serious question to be tried***

69. The QCAP have not provided any legal basis for disregarding the Trademark Agreement. The Trademark Agreement has not been set aside or varied and no motion is pending for such relief. The QCAP have failed to establish that there is any issue to be tried, much less a serious issue.

***There is no irreparable harm to the QCAP***

70. JTIM's market share in Canada is largely attributed to the brands of tobacco products it exclusively sells in the Canadian market.[50] If such arrangements were terminated, JTIM's business would effectively cease in its current form. The QCAP have again provided no evidence that they will suffer irreparable harm if JTIM continues to pay for the use of the trademarks owned by JTI-TM. On the contrary, the evidence is that if JTI-TM refuses to permit JTIM to use the trademarks as a result of non-payment under the Trademark Agreement, serious irreparable harm will occur which would be to the detriment of all of the Applicant's stakeholders.

***The balance of convenience favours the Applicant***

71. In the event that JTIM failed to make royalty payments as provided under the Trademark Agreement, there would be negative financial consequences to JTIM and its stakeholders. Pursuant to the Trademark Agreement, in the event that royalties are not paid, interest accrues at JTIM's lender's rate of interest plus 2.00%. As of today's date, that interest rate would be 5.85%.[51] The estimated annual interest accrual on the royalties would be approximately $133,000 in 2019 and build to $2.2 million by 2023.[52] This interest is an avoidable and unnecessary expense to the estate of JTIM.

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[50] Aziz Affidavit at para. 35, Responding Motion Record of the Applicant, Tab 2.
[51] Aziz Affidavit at para. 48, Responding Motion Record of the Applicant, Tab 2.
[52] Comeback Affidavit at para. 36, Responding Motion Record of the Applicant, Tab 1.

72. It is in the best interests of all of the stakeholders of the Applicant that JTIM continue to maintain the *status quo* of its operations during the CCAA proceedings. If JTIM has to cease operating as a result of a cessation of the use of JTI-TM's trademarks, the possibility of a global resolution evaporates. The balance of convenience favours the Applicant.

## C. Interest payments should be made to JTI-TM during the CCAA proceeding

73. As outlined above, the QCAP have never attempted to set aside the Secured Loan or the TM Security or join JTI-TM to any action.[53]

74. The QCAP are asking this Court to treat the Secured Loan and the TM Security as if they do not exist. The QCAP have asserted that the TM Security should be disregarded because it was created for the purposes of creditor proofing. However, the unchallenged testimony of the primary architect of the Recapitalization Transactions, Mary Carol Holbert, was that she was unaware of the existence of any litigation against RJRM (now JTIM) at the time of the acquisition, including the Class Actions, and that the acquisition structure was implemented for tax efficiencies.[54]

75. The QCAP seeks an order in this proceeding that condemns the secured creditor without pleadings, evidence or trial. The QCAP cannot satisfy any element of the test for an interim injunction to restrain the payment of interest to JTI-TM.

### *There is no serious question to be tried*

76. In order for a person's rights to be affected, that person should be a party to such proceeding and have the opportunity to respond to any arguments against it before it is subject to a binding decision.[55] Even if such a challenge was made, as mentioned earlier, it would be without merit and beyond the applicable limitation periods. The QCAP have again failed to establish that there is any issue to be tried.

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[53] Comeback Affidavit at para. 32, Responding Motion Record of the Applicant, Tab 1. This is significant given articles 1631 to 1636 of the *CCQ* that provides third parties with the opportunity to challenge the legality and enforceability of juridical acts such as the Secured Loan and TM Security.
[54] Comeback Affidavit at para. 24, Responding Motion Record of the Applicant, Tab 1.
[55] *Safeguard Decision*, *supra* note 28 at paras. 42-44, Responding Motion Record of the Applicant, Tab 1, Exhibit "F".

***The lack of irreparable harm and the balance of convenience both favour the Applicant***

77. The QCAP will suffer no harm if interest payments are made to JTI-TM. In the event that it is finally determined that JTI-TM was not entitled to receive the post-filing interest payments from JTIM as a result of a successful challenge to the TM Security, JT International Holding B.V. ("**JTIH-BV**"), an entity related to JTIM that owns most of the international tobacco subsidiaries of Japan Tobacco outside of Japan, has provided a Repayment Agreement to JTIM.[56] The Repayment Agreement obligates JTIH-BV to repay JTIM, or cause TM and/or JT-LLC to pay to JTIM, an amount equal to the aggregate of all secured payments received by JTI-TM from JTIM from the date of commencement of these proceedings in the event of such successful challenge.

78. As appears from its latest public financial statements, JTIH-BV has net assets with a book value of approximately USD$28 billion.[57] There is no prejudice to JTIM's stakeholders in the event that the TM Security is successfully challenged due to the Repayment Agreement.

79. The QCAP argue that prohibiting the payment of interest from JTIM to JTI-TM during the CCAA proceedings is beneficial for the Applicant's stakeholders. That is incorrect and the opposite is true.

80. There are numerous negative effects to the Applicant, and its stakeholders, if it is prohibited from continuing to pay interest to its secured creditor, JTI-TM. They include:

(a) interest that will accrue on overdue interest at the rate of 7.75% per annum, the compounding effect of which could be significant if the Applicant's CCAA proceedings take years to resolve. The annual interest accrual on the TM Security would equal approximately $2.4 million in the first year and compound thereafter such that it would escalate to an aggregate of approximately $30.8 million by 2023;[58]

(b) the value of the estate available to unsecured creditors will erode over time because the interest earned on funds not paid (currently 2%) cannot match the interest accruing (compounding at 7.75%);

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[56] Comeback Affidavit at paras. 43-45, Responding Motion Record of the Applicant, Tab 1.
[57] Comeback Affidavit at para. 45, Responding Motion Record of the Applicant, Tab 1.
[58] Comeback Affidavit at para. 36, Responding Motion Record of the Applicant, Tab 1.

(c) affiliates of the Applicant may face significant tax obligations that, under the loan and security agreements, will ultimately be passed back to JTIM;[59]

(d) the Applicant will likely face increased tax obligations commencing in 2022, estimated to be approximately $27 million per year. Options available to reduce this tax effect on the Applicant would be tax inefficient for the affiliates of the Applicant and cannot be relied upon;[60]

(e) increased taxes permanently deplete amounts available to the Applicant to settle with its creditors or fund a plan of compromise or arrangement;[61] and

(f) the Applicant would be disadvantaged *vis-à-vis* the other Co-defendants because the Applicant would face a tax liability deadline not applicable to the other Co-defendants. In effect, the negotiating "playing field" will be tilted against JTIM from the outset.[62]

81. On the other hand, if interest continues to be paid:

(a) compounding interest is avoided completely;

(b) the value of the estate will not be diminished by any interest earned/payable differential;

(c) affiliates will have no increased tax costs that they will claim from JTIM by way of indemnities;

(d) there would be no depletion of the estate by payment of unnecessary and avoidable taxes;

(e) the negotiating playing field would not be tilted; and

(f) if the validity of the Secured Loan and the TM Security are ever successfully attacked, a multi-billion dollar credit-worthy entity has agreed to repay any interest payments paid during the course of this proceeding.

82. Therefore, there will be no irreparable harm to the estate.

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[59] Comeback Affidavit at para. 37, Responding Motion Record of the Applicant, Tab 1.
[60] Aziz Affidavit at paras. 39 and 40, Responding Motion Record of the Applicant, Tab 2.
[61] Aziz Affidavit at para. 41, Responding Motion Record of the Applicant, Tab 2.
[62] Aziz Affidavit at paras. 42 and 43, Responding Motion Record of the Applicant, Tab 2.

83. Further, as noted by Justice Mongeon in the Safeguard Decision, the non-payment of interest on the secured loans would not increase the amounts available to the Applicant's other stakeholders, including the QCAP, since the compounding interest would still be due and owing to JTI-TM.[63]

84. When a CCAA debtor's liquidity permits, it is not unusual to continue paying secured creditors during a restructuring, which has the benefit of limiting the Applicant's secured indebtedness.[64]

85. The CCAA is remedial legislation and the Court should give a broad and liberal interpretation so as to encourage and facilitate successful restructurings where possible.[65] The Courts have held that section 11 of the CCAA provides the courts with a broad and flexible authority, which is at their disposal in order to achieve the objective of the respective CCAA proceedings.[66]

86. The objective of this CCAA proceeding is a collective solution among the Applicant, the Defendants and their common litigation creditors. It is in the best interests of the Applicant and its stakeholders to allow interest to continue to be paid in the ordinary course to avoid the negative repercussions that would follow if interest payments were prohibited. The balance of convenience favours JTIM.

## D. The Court should not amend the stay of proceedings in the Initial Order to allow the Tobacco Claims to proceed against the Other Defendants

87. The Initial Order provides for a stay of proceedings in respect of any person named as a defendant or respondent in any of the Tobacco Claims. The only party that would not otherwise be bound by the stay of proceedings of any of the Co-defendants is the Canadian Tobacco Manufacturers Council ("**CTMC**"). The Tobacco Claims should not be permitted to proceed against the CTMC alone and thus, it is appropriate to maintain the current stay of proceedings to protect against this result.

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[63] Aziz Affidavit at para. 38, Responding Motion Record of the Applicant, Tab 2; *Safeguard Decision* at para. 92, Responding Motion Record of the Applicant, Tab 1, Exhibit "F".
[64] Aziz Affidavit at para. 44.
[65] *Lehndorff General Partner Ltd., Re,* 1993 CarswellOnt 183 ["***Lehndorff***"] at para. 5, BOA, Tab 9.
[66] *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at para. 19, BOA, Tab 10.

## E. The Court should not lift the stay of proceedings to allow an application for a bankruptcy order to be filed

88. As with the imposition of a stay, the lifting of a stay is discretionary. A party seeking to lift the stay faces a very heavy onus. In determining whether to lift a stay of proceedings, the court should consider whether there are sound reasons for doing so that are consistent with the objectives of the CCAA, including a consideration of the balance of convenience and the relative prejudice to parties.[67]

89. The QCAP should not be allowed to lift the stay of proceedings to file an application to petition the Applicant into bankruptcy. This is another tactical move by the QCAP to gain leverage. They have demonstrated no legal or commercial benefit to anyone.

90. This relief is pre-mature and unnecessary at this stage of the CCAA proceedings.

## F. The Court should not lift the stay of proceedings to allow Ontario to proceed with its litigation

91. Ontario has sought to lift the stay of proceedings of each of the Co-defendants to permit its litigation to continue in the ordinary course. As described above, Ontario faces a very heavy onus. The purpose of stay orders are to maintain the status quo in respect of an insolvent company.[68]

92. Allowing one action seeking hundreds of billions of dollars to proceed while all the other actions claiming similar amounts are stayed will drain the resources of the Applicant, unnecessarily distract management and diminish the Applicant's ability to negotiate a successful global resolution of all of the Tobacco Claims. It should not be permitted.

93. The CCAA is meant to level the playing field and create a pause among all stakeholders. It is this inappropriate maneuvering that the CCAA stay is designed to prevent for one claimant to seek to pursue its claims ahead of other claimants.[69]

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[67] *Canwest Global Communications Corp. Re*, 2009 CarswellOnt 7882 at para. 32, BOA, Tab 11.
[68] *Lehndorff, supra* note 65 at para. 5, BOA, Tab 9.
[69] *4519922 Canada Inc. Re*, 2015 ONSC 124 at para. 54, BOA, Tab 12.

## G. The Court should not lift the stay of proceedings to allow the QCAP to seek conditions in respect of any application for leave to appeal to the SCC

94. If the QCAP are permitted to request conditions to the Applicant's ability to seek leave to appeal the QCA Judgment, such as posting a deposit or cash as security, any such payment would constitute a preference under the *Bankruptcy and Insolvency Act* (Canada) and, by analogy, the CCAA. This would have the effect of altering the *status quo* for tactical advantage of one creditor group to the disadvantage of all others, something the collective resolution aspects of the CCAA seeks to avoid.

95. It is the Applicant's position that the best balance of interests is to allow the Applicant to preserve its right to appeal by filing a notice of leave and that no further steps should be permitted to further that appeal. In this regard, no party is prejudiced in the circumstances and no one needs to spend further costs on the leave application unless the resolution efforts fail.

## H. The professionals should not be required to have their fees taxed every 90 days

96. The QCAP have asserted that the professional fees and expenses of the Applicant associated with the CCAA proceedings have been forecasted to be $6.5 million during the first 13-week period. That is incorrect. The forecasted fees and expenses of the Applicant associated with the CCAA proceedings are actually $2.3 million.

97. In Ontario, the Model Initial Order provides that only the Monitor and its counsel's fees are to be taxed and the Model Initial Order does not specify any time intervals when such fees should be taxed. The timing of this taxation is discretionary. In Quebec, the Model Initial Order does not require the taxation of any fees and expenses of the professionals involved in CCAA proceedings.

98. There is no reason to depart from the Ontario Model Initial Order in these circumstances. Requiring the taxation of the fees and expenses of the Applicant's counsel and the Monitor and its counsel every 90 days is a tactical strategy to force the Applicant to incur unnecessary fees and be forced into Court at least every 90 days. The supervising judge can set the timetable as to when and how often he or she wishes to hear from the Applicant, the Monitor and stakeholders. Imposing a timetable straightjacket at this early stage of the proceedings is unnecessary and likely unhelpful. A flexible approach is to be preferred.

## I. Deloitte Restructuring should be permitted to continue as the Monitor of the Applicant

99. As provided for in the Pre-filing Report of the Monitor dated March 8, 2019, Deloitte Restructuring is not subject to any restrictions on whom may be appointed Monitor pursuant to section 11.7(2) of the CCAA, and no party has suggested otherwise.[70] As outlined in the reports of the Monitor filed with the Court, neither Deloitte Restructuring nor any of its affiliates provides any audit services to JTIM or any of its Canadian affiliates.[71] Deloitte Restructuring does not have a conflict or the appearance of a conflict.

100. The QCAP's primary concern with Deloitte Restructuring appears to be based on a role that an affiliate of Deloitte Restructuring played in the Recapitalization Transactions 20 years ago. As noted herein, the 2004 Monitor has already done an extensive analysis of the Recapitalization Transactions.

101. The primary concern of the Consortium appears to be that an independent member of the global Deloitte network provides audit services to Japan Tobacco, JTIM's ultimate parent. Japan Tobacco, however, is not an applicant in these proceedings and Japan Tobacco is not subject to the stay of proceedings as it is not a defendant in any of Tobacco Claims.[72]

102. In the course of preparing for its role as Monitor, Deloitte Restructuring has endeavoured to achieve an extensive understanding of JTIM's operations, financial structure, intercompany relationships, management and organization. [73]

103. Further, monitoring and reporting protocols between JTIM and Deloitte Restructuring have been carefully developed and are now well established. The replacement of Deloitte Restructuring would cause unnecessary disruption to the process and lead to additional professional fees as any replacement monitor would have to be brought up to speed. [74]

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[70] Second Report of the Monitor dated April 1, 2019 at para. 8.
[71] Comeback Affidavit at para. 53, Responding Motion Record of the Applicant, Tab 1.
[72] Comeback Affidavit at para. 51, Responding Motion Record of the Applicant, Tab 1.
[73] Comeback Affidavit at para. 54, Responding Motion Record of the Applicant, Tab 1.
[74] *Ibid*.

## J. The CRO's appointment should not be rescinded or varied

104. Pursuant to its statutory jurisdiction to make any order appropriate in the circumstances under the CCAA,[75] the Court has held that the appointment of a CRO is appropriate as such expertise will assist the debtor in achieving the objectives of the CCAA.[76]

105. JTIM's board of directors has determined in its business judgment that it should engage the CRO on the terms described in the CRO's engagement letter. The CRO is an experienced CRO with extensive finance, accounting and corporate taxation experience.[77] The CRO has significant experience dealing with seemingly intractable situations and many different stakeholders, including litigation claimants, federal and provincial governments.[78]

106. The Applicant requires the CRO to lead the Canada-wide negotiations on behalf of the Applicant with a view to seeking a workable resolution of all claims. The upcoming challenges in this proceeding requires an expert skillset in negotiating multi-party complex deals that no one at the Applicant possesses. The CRO will be able to provide his full attention to the restructuring negotiations whereas senior management of the Applicant are required to remain primarily focused on maintaining the existing business operations.[79]

107. Absent evidence of impropriety, which is absent in this case, the Court should not seek to supplant or replace the role and decision of the board of directors of the Applicant.

108. The QCAP have proposed that alternatively, if the appointment of the CRO is not rescinded, that the CRO's fees should be paid by affiliates of the Applicant that are not an applicant under the CCAA proceedings and the CRO's fees should not be included in the Administration Charge (as defined in the Initial Order). Requiring an affiliate to pay for the CRO's fees is unprecedented and would be extraordinary given that the CRO's engagement is to assist the Applicant during the CCAA proceedings, not its affiliates. The Court has no jurisdiction to require non-parties to pay for services given to a CCAA applicant. Further, it is appropriate to include the

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[75] CCAA, s. 11.
[76] *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 107 at para. 35, BOA, Tab 13.
[77] Aziz Affidavit at para. 3, Responding Motion Record of the Applicant, Tab 2.
[78] Aziz Affidavit at para. 4, Responding Motion Record of the Applicant, Tab 2.
[79] Comeback Affidavit at para. 56, Responding Motion Record of the Applicant, Tab 1.

CRO's fees in the Administration Charge and any success fee that may become payable to the CRO is expressly not included in the Administration Charge.

## PART V - RELIEF REQUESTED

109. The Applicant respectfully submits that this Court should dismiss the motions of the QCAP and Ontario and dismiss the objections of the Consortium for all of the reasons outlined herein.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 3rd day of April, 2019.

**THORNTON GROUT FINNIGAN LLP**
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**SCHEDULE "A"**

**Authorities**

| TAB NO. | CASELAW |
|---|---|
| 1. | *JTI-MacDonald Corp., Re*, 2006 CarswellOnt 855 |
| 2. | *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 5368 |
| 3. | *In the Matter of Payless Shoesource Canada Inc.*, Ontario Superior Court of Justice [Commercial List], Court File No. CV-19-00614629-00CL, Initial Order of Morawetz R.S.J. dated February 19, 2019 |
| 4. | *In the Matter of BioAmber Canada Inc. et al.*, Quebec Superior Court (Commercial Division), Court File No. 500-11-054564-188, Order of Pinsonnault J.S.C. dated May 24, 2018 |
| 5. | *Performance Sports Group Ltd., Re*, 2016 ONSC 6800 |
| 6. | *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 |
| 7. | *Thales Rail Signalling Solutions v. Toronto Transit Commission*, 2009 CarswellOnt 2368 |
| 8. | *Smoky River Coal Ltd., Re*, 2001 ABCA 209 |
| 9. | *Lehndorff General Partner Ltd. Re*, 1993 CarswellOnt 183 |
| 10. | *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 |
| 11. | *Canwest Global Communications Corp. Re*, 2009 CarswellOnt 7882 |
| 12. | *4519922 Canada Inc. Re*, 2015 ONSC 124 |
| 13. | *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 107 |

## 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.

**Rights of suppliers**

**11.01** No order made under section 11 or 11.02 has the effect of

> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
>
> (b) requiring the further advance of money or credit.

**Certain rights limited**

**34 (1)** No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent.

**Certain acts not prevented**

**(4)** Nothing in this section is to be construed as

**(a)** prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the commencement of proceedings under this Act;

**(b)** requiring the further advance of money or credit; or

**(c)** [Repealed, 2012, c. 31, s. 421]

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

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