

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 MOVING PARTY,  
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**

**MOTIONS TO LIFT STAYS IN**

**Court File No. CV-19-615862-00CL, *JTI-Macdonald Corp., Re*  
Court File No. CV-19-616077-00CL, *Imperial Tobacco Canada Limited et al., Re*  
Court File No. CV-19-616779-00CL, *Rothmans, Benson & Hedges Inc., Re*  
RETURNABLE APRIL 4 - 5, 2019**

---

**MINISTRY OF THE ATTORNEY GENERAL**

Crown Law Office – Civil  
720 Bay Street, 8<sup>th</sup> Floor  
Toronto, ON M7A 2S9  
Fax: (416) 326-4181

**Jacqueline L. Wall**, LSO No. 38511D

Tel: (416) 325-8435

Email: [jacqueline.wall@ontario.ca](mailto:jacqueline.wall@ontario.ca)

**Shahana Kar**, LSO No. 33311O

Tel: (416) 314-2080

Email: [shahana.kar@ontario.ca](mailto:shahana.kar@ontario.ca)

**Edmund Huang**, LSO No. 42673F

Tel: (416) 326-4161

Email: [edmund.huang@ontario.ca](mailto:edmund.huang@ontario.ca)

Lawyers for the Moving Party,  
Her Majesty the Queen in right of Ontario

**TO: ATTACHED SERVICE LIST**

**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

---

**INDEX**

---

PART I – NATURE OF THE MOTION AND OVERVIEW OF ONTARIO’S POSITION ..... 1

PART II – STATEMENT OF FACTS ..... 6

    A. Initial Applications by JTIM, ITCAN and RBH under CCAA ..... 6

    B. Scope of the JTIM Stay, ITCAN Stay and RBH Stay ..... 7

    C. Material facts regarding the defendants to the Ontario HCCR Action were not disclosed on the initial applications ..... 8

    D. JTIM’s, ITCAN's and RBH’s CCAA filings are intended to avoid them being held accountable to Ontario in the Ontario HCCR Action ..... 12

    E. JTIM wants to preserve the *status quo* respect to its business but disrupt the *status quo* with respect to the Ontario HCCR Action ..... 13

    F. Lifting the Stays in respect of the Ontario HCCR Action would be consistent with the approach taken in JTIM’s prior CCAA proceeding ..... 14

    G. Evidence filed by JTIM does not support contention that “JTIM may have liability for certain claims being made against” R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International, Inc ..... 18

    H. JTIM, ITCAN and RBH did not provide full disclosure of particulars regarding the status of the Ontario HCCR Action ..... 20

PART III – STATEMENT OF ISSUES AND THE LAW..... 22

    A.    CCAA Applicants bear onus to justify appropriateness of the Stays ..... 23

    B.    Circumstances where Courts have granted a stay of proceedings against  
          third parties which are not applicants under the CCAA ..... 23

    C.    Factors for Court to consider when determining whether to lift a stay of  
          proceedings ..... 25

    D.    The Stays of Ontario HCCR Action should be lifted ..... 29

PART IV – ORDER REQUESTED ..... 33

SCHEDULE "A" - LIST OF AUTHORITIES ..... 35

SCHEDULE "B" - RELEVANT LEGISLATION ..... 36

## **PART I – NATURE OF THE MOTIONS AND OVERVIEW OF ONTARIO’S POSITION**

1. Her Majesty the Queen in right of Ontario (“**Ontario**”) files this factum in support of the motions it brings to lift the stays of Action No. CV-09-387984 bearing the title of proceedings *Her Majesty the Queen in right of Ontario v. Rothmans Inc. et al.* commenced in the Ontario Superior Court of Justice (the “**Ontario HCCR Action**”) that are effected by:

- (a) paragraphs 18 and 19 of the Initial Order (the “**JTIM Stay**”) of the Honourable Justice Hailey dated March 8, 2019 (the “**JTIM Initial Order**”) made in Court File No. CV-19-615862-00CL, *In the Matter of a Plan of Compromise or Arrangement of JTI-Macdonald Corp.* (the “**JTIM CCAA Proceeding**”);
- (b) paragraphs 18 and 19 of the Initial Order (the “**ITCAN Stay**”) of the Honourable Justice McEwen dated March 12, 2019 (the “**ITCAN Initial Order**”) made in Court File No. CV-19-616077-00CL, *In the Matter of a Plan of Compromise or Arrangement of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited* (the “**ITCAN CCAA Proceeding**”); and
- (c) paragraphs 18 and 19 of the Initial Order (the “**RBH Stay**”) of the Honourable Justice Pattillo dated March 22, 2019 (the “**RBH Initial Order**”) made in Court File No. CV-19-616779-00CL, *In the Matter of a Plan of Compromise or Arrangement of Rothmans, Benson & Hedges Inc.* (the “**RBH CCAA Proceeding**”).

The JTIM Stay, the ITCAN Stay and the RBH Stay are hereinafter collectively referred to as the “**Stays**”.

2. Ontario seeks Orders varying the JTIM Initial Order, the ITCAN Initial Order and the RBH Initial Order to authorize and permit Ontario to continue the Ontario HCCR Action against all fourteen of the defendants in the Ontario HCCR Action, with the exception that the taking of any future proceedings to enforce any judgment and/or collect any amount owing or found to be owing by JTI-Macdonald Corp. (“**JTIM**”), Imperial Tobacco Canada Limited (“**ITCAN**”) and/or Rothmans, Benson & Hedges Inc. (“**RBH**”) in the Ontario HCCR Action shall be stayed pending further Order of this Honourable Court.

3. In addition, Ontario seeks a further Order (i) exempting the application of paragraph 65 of the JTIM Initial Order to the Order of Master Short dated March 8, 2019, which granted Ontario leave to amend its Amended Fresh as Amended Statement of Claim, and (ii) lifting the JTIM Stay to authorize and permit:

- (a) the Ontario Superior Court of Justice to take whatever steps are necessary and proper to formally effect the amendments to Ontario's Amended Fresh as Amended Statement of Claim as ordered by Master Short on March 8, 2019; and
- (b) Ontario to serve the Second Amended Fresh as Amended Statement of Claim on all of the defendants to the Ontario HCCR Action.

4. Finally, if necessary, Ontario seeks an order abridging the time for service and filing of Ontario's Notices of Motion, Motion Records and Factum, dispensing with service on any person other than those served, and declaring that the motion is properly returnable on April 4 - 5, 2019.

5. The Ontario HCCR Action was commenced by Ontario on September 29, 2009, pursuant to section 2 of the *Tobacco Damages and Health Care Costs Recovery Act, 2009*, S.O. 2009, c. 13 (the "**Ontario HCCR Act**"), against thirteen tobacco companies, including JTIM, ITCAN and RBH, and the Canadian Tobacco Manufacturers' Council ("**CTMC**").

6. Of the fourteen defendants in the Ontario HCCR Action only three defendants, JTIM, ITCAN and RBH, are defendants and judgment debtors in the two Quebec Class Actions.<sup>1</sup> There is no evidence that the Quebec Superior Court trial judgment of Justice Riordan dated June 9, 2015, and the judgment of the Court of Appeal of Quebec dated March 1, 2019 (collectively, the "**Quebec Class Action Judgments**"), have or will have any financial or other impact whatsoever on any of the other eleven defendants. In particular, JTIM, ITCAN and RBH did not tender any evidence that, if the Stays were not granted in favour of the other eleven defendants who have not filed under the CCAA, any of those eleven defendants would be rendered

---

<sup>1</sup> *Imperial Tobacco Canada ltée c. Conseil Québécois sur le tabac et la santé*, [2019] J.Q. No. 1387. The first class action (the Blais action) sought damages on behalf of persons in Québec who developed lung cancer, throat cancer or emphysema as a result of smoking cigarettes manufactured by the defendants. The second class action (the Létourneau action) sought damages on behalf of persons in Québec who, as a result of smoking cigarettes manufactured by the defendants, developed a dependence on nicotine.

insolvent, put out of business and/or have their values destroyed for their employees, suppliers and customers.

7. Ontario seeks to recover from all fourteen defendants in the Ontario HCCR Action the costs it incurred in regard to the provision of health care benefits caused or contributed to by a “tobacco related wrong” which is defined in section 1(1) of the Ontario HCCR Act to be “a tort committed in Ontario by a manufacturer [of a tobacco product] which causes or contributes to tobacco related disease”, or “a breach of a common law, equitable or statutory duty or obligation owed by a manufacturer to persons in Ontario who have been exposed or might become exposed to a tobacco product”.

8. Over the past decade, Ontario has invested a tremendous amount of time, money and effort to prosecute the Ontario HCCR Action in order to hold the thirteen defendant tobacco companies and the CTMC accountable for their conduct over the period from 1950 to the present. By obtaining *ex parte* the stays of the Ontario HCCR Action, JTIM, ITCAN and RBH have used the CCAA as a sword to cut down Ontario’s efforts and cause delay for an indefinite period of time of likely several years and cause serious prejudice to Ontario.

9. The Stays have the effect of removing the Ontario HCCR Action from the nine year old effective case management by Master Short and Justice Conway and the ongoing oversight of the action’s progress toward trial by Regional Senior Justice Morawetz. If the Stays as they pertain to the Ontario HCCR Action are continued past April 4, 2019, they will act to undo the work that Ontario, all of the defendants, Master Short, Justice Conway and Justice Morawetz have done to move the Ontario HCCR Action forward and prepare it for the projected trial commencement date of late 2020/early 2021. Moreover, Ontario will be barred from proceeding forward with its claims against eleven defendant corporations who have not filed under the CCAA. This state of affairs is highly prejudicial to Ontario.

10. In the hearing of an *ex parte* initial application under the CCAA, it is incumbent on the applicant to be scrupulously fair and transparent with respect to the disclosure to the Court of all facts material to the Court’s decision whether to grant the Initial Order in the form requested by the applicant. Such full and frank disclosure was not provided by JTIM, ITCAN and RBH to

any of the three judges presiding at the initial applications in regard to the Ontario HCCR Action.

11. The Court may vary an Initial Order, particularly if it was granted without notice to any of the parties affected by the order (which is the case here), if there are material facts that were not put before the Court during the initial hearing. The Court may also lift a stay if there are sound reasons to do so including a consideration of the balance of convenience, the relative prejudice to parties and, where relevant, the merits of the proposed action.

12. Ontario submits that an order declaring that the Stays are lifted is warranted on the following grounds:

- (a) The JTIM Stay is excessive, overreaching and not necessary to achieve the objectives of the CCAA;
- (b) Ontario's cause of action against the tobacco companies is *sui generis* and could not have been brought at common law. Section 2(1) of the Ontario HCCR Act is the keystone of the Act because it provides that Ontario "has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong". CCAA proceedings are not a suitable forum for the adjudication to determine Ontario's claims against JTIM, ITCAN and RBH (or any of the other eleven defendants to the Ontario HCCR Action).
- (c) The Quebec Class Actions Judgments are only enforceable against JTIM, ITCAN and RBH (which are the only defendants in the two Quebec Class Actions), not against any of the eleven other defendants in the Ontario HCCR Action, four of which are in the United Kingdom and five of which are in the United States;
- (d) There is no evidence regarding the ability/inability or willingness of the other eleven defendants to the Ontario HCCR Action to satisfy any judgment that may be obtained in the Ontario HCCR Action.
- (e) There is no evidence that any of the defendants in the Ontario HCCR Action, including JTIM, ITCAN and RBH, are seriously prepared to participate in meaningful settlement

discussions regarding the Ontario HCCR Action or any of the other actions pending against them in Canada.

- (f) Paragraph 20 of the JTIM Initial Order permits JTIM “to contest the Quebec Class Actions during the Stay Period ... including without limitation by way of an application for leave to appeal to the Supreme Court of Canada and an appeal on the merits to the Supreme Court of Canada if leave is granted.”<sup>2</sup> JTIM's pending leave application and, if leave is granted, its appeal may act as a strong disincentive for the defendants in the Ontario HCCR Action to engage in any meaningful discussions to move toward a global resolution, thereby introducing unreasonable delay in Ontario's efforts to hold the thirteen defendant tobacco companies and the Canadian Tobacco Manufacturers' Council accountable for their conduct over the period from 1950 to the present;
- (g) The RBH Initial Order authorizes RBH to serve and file an application for leave to appeal to the Supreme Court of Canada, but provides that “no further step or proceeding shall be taken by the Applicant or any other Person in respect of such application without further order of this Court”.<sup>3</sup> This provision is even more problematic than paragraph 20 of the JTIM Initial Order, because it has the potential to cause even more delay than if RBH were authorized to exhaust its appeal rights before the Supreme Court of Canada;
- (h) The press release issued by British American Tobacco p.l.c. (“**BAT plc**”) dated March 12, 2019, states that “ITCAN will look to resolve not only the Quebec case but also all other tobacco litigation in Canada”. The press release does not disclose that BAT plc is a defendant in the “other tobacco litigation in Canada”; moreover, the press release contains no indication that BAT plc is looking to resolve such litigation as against it;<sup>4</sup>
- (i) Similarly, RBH's press release dated March 22, 2019, contains no indication that RBH contemplates having either Philip Morris International, Inc. or Philip Morris U.S.A. Inc.

---

<sup>2</sup> JTIM Initial Order, para. 20 - Exhibit “A” to Affidavit of Peter Entecott sworn March 28, 2019 (“**Entecott Affidavit**”), Ontario's Motion Record, Tab 2A.

<sup>3</sup> RBH Initial Order, para. 20 – Exhibit “G” to Entecott Affidavit, Ontario's Motion Record, Tab 2G.

<sup>4</sup> BAT plc Press Release dated March 12, 2019 - Exhibit “DD” to Entecott Affidavit, Ontario's Motion Record, Tab 2DD.



participate in “reaching an arrangement that could resolve all pending litigation”.<sup>5</sup> The press release issued by Philip Morris International, Inc. expresses the view that there is “a significant lack of clarity with respect to several factors, including the likelihood of resolving in the CCAA process the underlying litigation to which RBH is a party, the financial and other parameters of any resolution of the underlying litigation, and the length of the CCAA process.”<sup>6</sup> It is significant to note that the Philip Morris International, Inc. press release does not make any mention of Philip Morris International, Inc. participating in a settlement; and

- (j) A lifting of the Stays would not preclude Ontario from participating in any settlement discussions with any of the defendants. Indeed, parties routinely engage in concurrent litigation, including trials, while negotiating.

13. Based on the foregoing, the balance of convenience, the assessment of the relative prejudice to Ontario versus JTIM, ITCAN and RBH, and the merits of the Ontario HCCR Action favour the granting of the Orders requested by Ontario. Just as JTIM, ITCAN and RBH seek to maintain their *status quo* and carry on business as usual without disruption, Ontario similarly seeks to maintain the *status quo* of continuing to prosecute and prove its claim against all fourteen defendants in the Ontario HCCR Action.

14. The approach proposed by Ontario is not novel or unreasonable. In fact, this is precisely the approach followed for six years during JTIM’s prior CCAA proceeding from 2004 – 2010, and while JTIM, ITCAN and RBH pursued their appeals in the Quebec Class Action before the Court of Appeal of Quebec from June, 2015 – March, 2019.

## **PART II – STATEMENT OF FACTS**

### **A. Initial Applications by JTIM, ITCAN and RBH under CCAA**

15. On March 7, 2019, Ontario requested of JTIM, ITCAN and RBH that, if they decided to bring an application seeking protection under the CCAA, they provide Ontario with reasonable

---

<sup>5</sup> RBH Press Release dated March 22, 2019 - Exhibit “EE” to Entecott Affidavit, Ontario's Motion Record, Tab 2EE.

<sup>6</sup> Philip Morris International Inc. Press Release dated March 22, 2019 - Exhibit “FF” to Entecott Affidavit, Ontario's Motion Record, Tab 2FF.

notice of the hearing date and serve their application materials on Ontario in advance of the initial hearing. None of JTIM, ITCAN or RBH provided Ontario with notice of their initial applications.<sup>7</sup>

16. On March 8, 2019, JTIM brought an *ex parte* application under the CCAA before Justice Hailey who granted the JTIM Initial Order.<sup>8</sup>

17. On March 12, 2019, ITCAN and Imperial Tobacco Company Limited (which is not a defendant in the Ontario HCCR Action), brought an *ex parte* application under the CCAA before Justice McEwen who granted the ITCAN Initial Order.<sup>9</sup>

18. On March 22, 2019, RBH brought an *ex parte* application under the CCAA before Justice Pattillo who granted the RBH Initial Order.<sup>10</sup>

#### **B. Scope of JTIM Stay, ITCAN Stay and RBH Stay**

19. The table below summarizes the scope and duration of each of the JTIM Stay, the ITCAN Stay and the RBH Stay with respect to the fourteen entities that are defendants in the Ontario HCCR Action:

<b>Defendant Corporations in Ontario HCCR Action</b>	<b>Action stayed by JTIM Stay until April 5, 2019</b>	<b>Action stayed by ITCAN Stay until April 11, 2019</b>	<b>Action stayed by RBH Stay until April 19, 2019</b>
JTI-Macdonald Corp.	<b>Yes</b>	No	No
Imperial Tobacco Canada Limited	<b>Yes</b>	<b>Yes</b>	No
Rothmans, Benson & Hedges Inc.	<b>Yes</b>	No	<b>Yes</b>
Rothmans Inc.	<b>Yes</b>	No	No
British American Tobacco (Investments) Limited	<b>Yes</b>	<b>Yes</b>	No
B.A.T. Industries p.l.c	<b>Yes</b>	<b>Yes</b>	No
British American Tobacco p.l.c.	<b>Yes</b>	<b>Yes</b>	No
Carreras Rothmans Limited	<b>Yes</b>	<b>Yes</b>	No
R.J. Reynolds Tobacco Company	<b>Yes</b>	No	No
R.J. Reynolds Tobacco International Inc.	<b>Yes</b>	No	No
Altria Group, Inc.	<b>Yes</b>	No	No

<sup>7</sup> Entecott Affidavit, paras. 97-99; letters from Jacqueline Wall to Guy Pratte, Deborah Glendinning and Paul Steep dated March 7, 2019 - Exhibits “X”, “Y” and “Z” to Entecott Affidavit, Ontario’s Motion Record, Tabs 2X, 2Y and 2Z.

<sup>8</sup> JTIM Initial Order – Exhibit “A” to Entecott Affidavit, Ontario’s Motion Record, Tab 2A.

<sup>9</sup> ITCAN Initial Order – Exhibit “E” to Entecott Affidavit, Ontario’s Motion Record, Tab 2E.

<sup>10</sup> RBH Initial Order – Exhibit “G” to Entecott Affidavit, Ontario’s Motion Record, Tab 2G.

<b>Defendant Corporations in Ontario HCCR Action</b>	<b>Action stayed by JTIM Stay until April 5, 2019</b>	<b>Action stayed by ITCAN Stay until April 11, 2019</b>	<b>Action stayed by RBH Stay until April 19, 2019</b>
Philip Morris U.S.A. Inc.	<b>Yes</b>	No	No
Philip Morris International, Inc.	<b>Yes</b>	No	<b>Yes</b>
Canadian Tobacco Manufacturers' Council	<b>Yes</b>	No	No

20. The RBH Stay does not stay the Ontario HCCR Action as against Philip Morris USA Inc. (“**PM USA**”). The RBH Initial Order stays proceedings in respect of RBH<sup>11</sup> and “any member of the PMI Group”.<sup>12</sup> In the RBH Initial Order, “PMI Group” is defined to mean “Philip Morris International Inc. and all entities related to or affiliated with it, other than the Applicant [RBH]”.<sup>13</sup> In the affidavit of Peter Luongo sworn March 22, 2019 (the “**Luongo Affidavit**”), “PMI Group” is defined as “consisting of RBH’s ultimate parent, Philip Morris International Inc. (“**PMI**”) and its affiliates, including RBH”.<sup>14</sup> PM USA is not listed on the Philip Morris International Inc. Organizational Chart.<sup>15</sup>

21. In its Statement of Defence in the Ontario HCCR Action, PM USA pleads that “it was formerly known as Philip Morris Inc. and is a Virginia corporation”. PM USA further pleads that “it and Altria Group, Inc. have had no corporate affiliation with PMI since a March 28, 2008 spinoff”.<sup>16</sup>

**C. Material facts regarding the defendants to the Ontario HCCR Action were not disclosed on the initial applications**

22. The application materials and the Report of the Proposed Monitor for JTIM did not disclose material facts regarding the jurisdiction of incorporation, corporate status and relationships of any of the fourteen defendants in the Ontario HCCR Action, other than JTIM. For the sake of completeness, Ontario has set out in paragraphs 21 to 35 below, some basic information regarding the fourteen defendants to the Ontario HCCR Action. The material facts set out in these paragraphs are excerpted from affidavits sworn in 2010 and 2012 by

<sup>11</sup> RBH Initial Order, para. 18 – Exhibit “G” to Entecott Affidavit, Ontario’s Motion Record, Tab 2G.

<sup>12</sup> RBH Initial Order, para. 19 – Exhibit “G” to Entecott Affidavit, Ontario’s Motion Record, Tab 2G.

<sup>13</sup> RBH Initial Order, para. 4(c) – Exhibit “G” to Entecott Affidavit, Ontario’s Motion Record, Tab 2G.

<sup>14</sup> Luongo Affidavit, para. 1 – Exhibit “H” to Entecott Affidavit, Ontario’s Motion Record, Tab 2H.

<sup>15</sup> Luongo Affidavit, Exhibit “A” – Exhibit “H” to Entecott Affidavit, Ontario’s Motion Record, Tab 2H.

<sup>16</sup> Statement of Defence of Philip Morris USA Inc., paras. 9, 10 and 20, Ontario’s Motion Record, Tab 13.

representatives of certain of the defendant corporations in support of the defendants' motions challenging the jurisdiction of the Ontario Superior Court of Justice in the Ontario HCCR Action and the defendants' Statements of Defence.

23. **JTI-Macdonald Corp.** is a private company that was continued as a corporation under the *Canada Business Corporations Act* in April, 2012, and maintains its registered head office in Mississauga, Ontario.<sup>17</sup>

24. **R.J. Reynolds Tobacco Company** ("RJRT") was incorporated in North Carolina in 2004, and its principal place of business is in Winston-Salem, North Carolina. It does not have employees or assets in Canada. Its assets are entirely located within the United States, with the only exceptions being assets of nominal value from time-to-time that may be in transit outside the United States.<sup>18</sup>

25. **R.J. Reynolds Tobacco International, Inc.** ("RJRTI") was incorporated in Delaware in 1976, and its principal office address is in Winston-Salem, North Carolina. It is an inactive shell corporation with no assets or employees. It is a wholly-owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc. which is not a defendant in the Ontario HCCR Action.<sup>19</sup>

26. The factum filed by JTIM on its initial application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), contains the following statements regarding the relationship of JTIM, RJRT and RJRTI which were used to justify the extension of the JTIM Stay to include the latter two companies:

(a) "The HCCR Actions have also been initiated against Reynolds Tobacco and R.J. Reynolds Tobacco International, Inc. (together, "**Reynolds**") as predecessors to JTIM [emphasis added]";<sup>20</sup> and

---

<sup>17</sup> Affidavit of Robert McMaster sworn March 8, 2019 ("**McMaster Affidavit**"), para. 10 – Exhibit "B" to Entecott Affidavit, Ontario's Motion Record, Tab 2B.

<sup>18</sup> Affidavit of Thomas R. Adams sworn February 15, 2010, para. 3 – Exhibit "I" to Entecott Affidavit, Ontario's Motion Record, Tab 2I; Affidavit of Thomas R. Adams sworn November 1, 2010, paras. 3, 5 and 6 - Exhibit "J" to Entecott Affidavit, Ontario's Motion Record, Tab 2J.

<sup>19</sup> Affidavit of Thomas R. Adams sworn February 15, 2010, para. 4 - Exhibit "I" to Entecott Affidavit, Ontario's Motion Record, Tab 2I; Affidavit of Thomas R. Adams sworn November 1, 2010, para. 9 - Exhibit "J" to Entecott Affidavit, Ontario's Motion Record, Tab 2J.

<sup>20</sup> JTIM's Factum dated March 8, 2019, para. 18, Ontario's Motion Record, Tab 17.

(b) “Reynolds is named as a defendant in the HCCR Actions as it was the predecessor to JTIM at all the relevant times. As the defence of Reynolds and JTIM are connected, it would be inequitable, and a potential disadvantage to the Applicant, to allow the actions to continue against Reynolds alone [emphasis added].”<sup>21</sup>

27. The foregoing statements in JTIM’s factum appear to be contradicted by the material facts pleaded in the statements of defence delivered in the Ontario HCCR Action which establish that RJRT and RJRTI were never predecessors to JTIM. Rather, RJRT owned RJR-Macdonald Inc. and an affiliate, which were sold to Japan Tobacco Inc. and renamed JTIM. In other words, RJRT was the previous owner of JTIM nineteen years ago. There is no corporate connection after 1999.<sup>22</sup>

28. **Carreras Rothmans Limited** is a non-trading, non-operating company that carries on no business of any kind. Since March, 1984, the company has been dormant and its functions have been limited to meeting the statutory requirements imposed on dormant companies incorporated in England, such as filing annual reports and accounts.<sup>23</sup>

29. **B.A.T. Industries p.l.c.** (“**BAT Industries**”) is a public limited company incorporated under the laws of England and Wales and has its registered office in London, England. “As a holding company within a large corporate group, B.A.T. Industries’ role was to administer its investment interests as a shareholder, directly and indirectly, of hundreds of subsidiaries and associates worldwide”. Between July 23, 1976 and September 7, 1998, BAT Industries was the ultimate parent company of the “BAT Group”.<sup>24</sup>

30. **British American Tobacco (Investments) Limited** (“**BAT Investments**”) was formerly known as British-American Tobacco Company Limited (“**BATCo**”). It is a limited company incorporated under the laws of England and Wales and has its registered office in London, England. On July 23, 1976 BAT Industries became the parent holding company of various

<sup>21</sup> JTIM’s Factum dated March 8, 2019, para. 34, Ontario’s Motion Record, Tab 17.

<sup>22</sup> Statement of Defence of JTIM, paras. 2, 10 and 14, Ontario’s Motion Record, Tab 11; Statement of Defence of RJRT, paras. 15, 16, 18, Ontario’s Motion Record, Tab 15; and Statement of Defence of RJRTI, paras. 13, 14 and 15, Ontario’s Motion Record, Tab 16.

<sup>23</sup> Affidavit of Richard Cordeschi sworn January 12, 2010, para. 6 – Exhibit “M” to Entecott Affidavit, Ontario’s Motion Record, Tab 2M.

<sup>24</sup> Affidavit of Nicola Snook sworn January 12, 2010, paras. 4, 5, 6, 8, 9 and 15 – Exhibit “L” to Entecott Affidavit, Ontario’s Motion Record, Tab 2L.

subsidiary, affiliate and associate companies owned by BATCo. The result was that BAT Investments became an intermediate holding company, below BAT Industries, for all of the tobacco operating subsidiaries.<sup>25</sup>

31. **British American Tobacco p.l.c.** (“**BAT plc**”) was incorporated on July 23, 1997, under the laws of England and Wales, and has its registered office in London, England. It is a public company. As of September 7, 1998, BAT plc became the ultimate parent company of B.A.T. Industries p.l.c. and its tobacco subsidiaries, including British American Tobacco (Investments) Limited.<sup>26</sup>

32. **ITCAN** is a privately-held corporation incorporated under the *Canada Business Corporations Act* that is 100% owned by British American Tobacco International (Holdings) B.V. Its registered head office is in Brampton, Ontario.<sup>27</sup>

33. On December 1, 2009, **Rothmans Inc.** and **Rothmans, Benson & Hedges Inc.** amalgamated with each other under the name Rothmans, Benson & Hedges Inc. (“**RBH Inc.**”). RBH Inc. is incorporated pursuant to the *Canada Business Corporations Act* and has its corporate headquarters in Toronto. Since September, 2008, RBH has been an indirect wholly owned subsidiary of PMI, its “ultimate indirect parent company”.<sup>28</sup>

34. **Altria Group, Inc.** (“**Altria**”) was formerly known as Philip Morris Companies Inc. and is a Virginia corporation with offices in Richmond, Virginia. It is a holding company. Between 1986 and March, 2008, corporate entities related to Altria maintained a 40% shareholder interest in RBH.<sup>29</sup>

---

<sup>25</sup> Affidavit of Richard Cordeschi sworn January 12, 2010, paras. 4-7 – Exhibit “N” to Entecott Affidavit, Ontario’s Motion Record, Tab 2N.

<sup>26</sup> Affidavit of Nicola Snook sworn January 12, 2010, paras. 2, 3 and 6 – Exhibit “K” to Entecott Affidavit, Ontario’s Motion Record, Tab 2K.

<sup>27</sup> Affidavit of Eric Thauvette sworn March 12, 2019 (“**Thauvette Affidavit**”), para. 17 - Exhibit “F” to Entecott Affidavit, Ontario’s Motion Record, Tab 2F.

<sup>28</sup> Statement of Defence of Rothmans Inc. and RBH, paras. 1, 8 and 9; Ontario’s Motion Record, Tab 14; Luongo Affidavit, paras. 22 – Exhibit “H” to Entecott Affidavit, Ontario’s Motion Record, Tab 2H; PMI Organizational Chart – Exhibit “AA” to Luongo Affidavit – Exhibit “H” to Entecott Affidavit, Ontario’s Motion Record, Tab 2H.

<sup>29</sup> Statement of Defence of Altria Group, Inc., paras. 8, 12 and 19, Ontario’s Motion Record, Tab 4.

35. **PM USA** was formerly known as Philip Morris Inc. and is a Virginia corporation with offices in Richmond, Virginia. U.S. sourced tobacco products (cigarettes) manufactured by PM USA were sold in Canada from the early 1960s until 1989.<sup>30</sup>

36. **PMI** is a Virginia corporation with offices in New York, New York. It is a holding company. Since a March 28, 2008 spinoff, it has had no corporate affiliation with PM USA or Altria Group, Inc. Since September, 2008, RBH has been an indirect wholly owned subsidiary of PMI.<sup>31</sup>

37. The **CTMC** has its registered office in Gatineau, Québec. At the time of filing its statement of defence in 2016, the following Canadian tobacco manufacturers comprised the members of the CTMC: JTIM, ITCAN and RBH.<sup>32</sup> CTMC pleads in its Statement of Defence that it “has been inactive in all material respects since June 2001”.<sup>33</sup>

**D. JTIM’s, ITCAN’s and RBH’s CCAA filings are intended to avoid them being held accountable to Ontario in the Ontario HCCR Action**

38. There is no evidence that any of JTIM, ITCAN and/or RBH intend to restructure their affairs; rather, their clear intention is to continue with “business as usual” and maintain the *status quo* with respect to their business operations and emerge from the CCAA proceedings having effectively shed their liabilities for their conduct in respect of Canada from 1950 to the present.

39. Properly viewed, the CCAA filings by JTIM, ITCAN and RBH are a scheme to use the CCAA as a sword to obtain an unwarranted stay of the Ontario HCCR Action (and all other litigation pending against them across Canada). In the absence of any consultation with Ontario, JTIM, ITCAN and RBH seek to improperly wrest control of the prosecution of the Ontario HCCR Action from Ontario, and from the active, ongoing case management of Master Short and Justice Conway and Justice Morawetz’s oversight of the case’s progress toward the projected trial date of late 2020/early 2021.

---

<sup>30</sup> Statement of Defence of Philip Morris USA Inc., paras. 9-10 and 18, Ontario’s Motion Record, Tab 13.

<sup>31</sup> Statement of Defence of Philip Morris International Inc., paras. 13, 15, 23, Ontario’s Motion Record, Tab 12; Luongo Affidavit, para. 1 – Exhibit “H” to Entecott Affidavit, Ontario’s Motion Record, Tab 2H.

<sup>32</sup> Statement of Defence of CTMC, para. 2(c), Ontario’s Motion Record, Tab 9.

<sup>33</sup> Statement of Defence of CTMC, para. 8, Ontario’s Motion Record, Tab 9.

40. JTIM, ITCAN and RBH made the following bald assertions to this Honourable Court, ones which were entirely unsupported by any evidence of any plan(s) to achieve their stated objectives:

- (a) “JTIM has decided to seek a collective solution for the benefit of all stakeholders in respect of the QCA Judgment and the other multi-billion dollar claims currently being pursued against it. The requested stay under the CCAA will allow JTIM time and a platform to achieve such a solution”.<sup>34</sup>
- (b) “The Applicants [ITCAN and Imperial Tobacco Canada Limited] therefore seek a stay of proceedings in favour of BAT and the BAT Affiliates with the objective of facilitating a global resolution of the Tobacco Claims”.<sup>35</sup>
- (c) “A stay of proceedings against RBH is necessary at this time to, among other things, provide a forum to explore a CCAA plan of compromise or arrangement that would resolve the litigation claims and maximize recovery for creditors and other Stakeholders. In particular, the stay of proceedings would permit RBH to address its litigation exposure in a collective manner while preventing prejudice to certain claimants arising from the happenstance of one massive judgment leading to enforcement proceedings or other claims have been heard”.<sup>36</sup>

41. On March 18, 2019, Justice McEwen granted the motion brought by the Québec class action plaintiffs, and supported by Ontario, and issued an order suspending payments of principal, interest and royalties by JTIM to JTIM-Macdonald TM Corp. pending further order of the Court.<sup>37</sup> JTIM’s vigorous opposition to that motion belies its assertion that it seeks a “collective solution” of the claims pending against it.

---

<sup>34</sup> McMaster Affidavit, para. 9 – Exhibit “B” to Entecott Affidavit, Ontario’s Motion Record, Tab 2B.

<sup>35</sup> Thauvette Affidavit, paras. 152-153 – Exhibit “F” to Entecott Affidavit, Ontario’s Motion Record, Tab 2F.

<sup>36</sup> Luongo Affidavit, para. 139 – Exhibit “H” to Entecott Affidavit, Ontario’s Motion Record, Tab 2H.

<sup>37</sup> *JTI-Macdonald Corp. (Re)*, Handwritten Endorsement and Unofficial Transcription of Endorsement of Justice McEwen dated March 19, 2019, Ontario’s Book of Authorities, Tab 2.



**E. JTIM wants to preserve the *status quo* with respect to its business but disrupt the *status quo* with respect to the Ontario HCCR Action**

42. In support of the JTIM CCAA application, Robert McMaster deposed that “JTIM is an economically viable company that is able to meet its ordinary course obligations as they become due”, and that “JTIM requires the protections afforded under the CCAA in order to maintain the *status quo* of its operations, to allow for an application for leave and, successful, to appeal the QCA Judgment to the Supreme Court of Canada ...”.<sup>38</sup>

43. The McMaster Affidavit further states: “in parallel with any appeal of the QCA Judgment, JTIM has decided to seek a collective solution ... [Emphasis added]”.<sup>39</sup> In the motions to lift the Stays, Ontario is seeking to do exactly what JTIM contemplates doing itself, which is to concurrently carry on litigation while exploring the possibility of a settlement of the Ontario HCCR Action with all of the defendants.

**F. Lifting the Stays in respect of the Ontario HCCR Action would be consistent with the approach taken in JTIM’s prior CCAA proceeding**

44. JTIM disclosed in its application materials that it previously had a six year long CCAA proceeding from August 24, 2004 to April 16, 2010 (the “**JTIM’s 2004 CCAA Proceeding**”).<sup>40</sup> That filing was a direct result of the issuance by the Minister of Revenue for the Province of Quebec of a Notice of Assessment and the tax collection action that followed thereafter<sup>41</sup> relating to alleged smuggling activities of JTIM and other tobacco companies in the early 1990s (the “**Contraband Claims**”). The Contraband Claims were advanced by the Attorney General of Canada and seven provinces and totaled many billions of dollars.<sup>42</sup>

45. There are striking parallels between JTIM's 2019 CCAA proceeding and JTIM’s 2004 CCAA Proceeding which are highly instructive in assisting this Court’s determination as to whether the Stays should be continued in respect of the Ontario HCCR Action.

<sup>38</sup> McMaster Affidavit, paras. 6 and 8 – Exhibit “B” to Entecott Affidavit, Ontario’s Motion Record, Tab 2B.

<sup>39</sup> McMaster Affidavit, para. 9 - Exhibit “B” to Entecott Affidavit, Ontario’s Motion Record, Tab 2B.

<sup>40</sup> McMaster Affidavit, paras. 79 – 83 - Exhibit “B” to Entecott Affidavit, Ontario’s Motion Record, Tab 2B.

<sup>41</sup> *JTI-Macdonald Corp. (Re)*, [2010] O.J. No. 3485 at para. 4, Ontario’s Book of Authorities, Tab 3.

<sup>42</sup> *JTI-Macdonald Corp. (Re)*, (2009), 61 C.B.R. (5<sup>th</sup>) 117 at paras. 3-4, Ontario’s Book of Authorities, Tab 4.

46. The *status quo* during JTIM's 2004 CCAA Proceeding was for all of the provincial HCCR actions to continue while JTIM negotiated a resolution of Canada's and the provinces' Contraband Claims. At that time, no attempt was made to achieve a global settlement of all of the class actions and HCCR claims across Canada.

47. In support of its 2019 initial application, JTIM's affiant, McMaster, deposed as follows:

At the time of the 2004 Initial Order, many of the litigation claims that are discussed herein were being pursued against JTIM, which posed the threat of enormous judgments against JTIM, among others. However, no claimant, with the exception of the MRQ [Minister of Revenue for the Province of Québec], had the ability to disrupt JTIM from carrying on business in the ordinary course until a judgment was rendered and execution steps were taken. As discussed herein, the Class Action Plaintiffs have the same ability to prevent JTIM from carrying on business in the ordinary course as the MRQ did in 2004, through enforcement of the QCA Judgment [emphasis added].<sup>43</sup>

48. Similarly, Ontario has no ability to disrupt JTIM from carrying on business in the ordinary course during its 2019 CCAA proceeding. The Orders sought by Ontario include the exception that the taking of any proceedings to enforce any judgment and/or collect any amount owing or found to be owing by JTIM, ITCAN and/or RBH in the Ontario HCCR Action shall be stayed pending further Order of this Honourable Court.

49. The Endorsements issued during the pendency of JTIM's 2004 CCAA Proceeding provide further information regarding what the *status quo* was for nearly six years.

50. In the 2004 CCAA Proceeding, British Columbia brought a motion for an order requesting the Court to fix a claims bar date in relation to the Crown HCCR claims. In his Endorsement dated October 30, 2009, dismissing the motion Justice Cumming made the following statements:

(a) In regard to the Claims Protocol that was not negotiated until four years into JTIM's 2004 CCAA Proceeding:

---

<sup>43</sup> McMaster Affidavit, para. 82 - Exhibit "B" to Entecott Affidavit, Ontario's Motion Record, Tab 2B.

An elaborate 23 page Crown Claims Protocol was negotiated in August, 2008 [4 years after the issuance of the Initial Order] between the Crown claimants, the Company, its affiliates, and some six other entities (including Japan Tobacco Inc. and RJR) which are the subject of the Crown smuggling claims. In brief, the Crown Claims Protocol provides that the Attorney General of Canada Crown smuggling claim shall proceed with the provincial Crown smuggling claims held in abeyance, findings of fact in the Canada smuggling claim being binding upon the provincial Crown smuggling claims parties and a final decision as to liability following a trial on the merits as alleged in the Canada smuggling claim being binding upon all Crown claimants as provided in the Protocol.<sup>44</sup>

- (b) In regard to the lifting of the CCAA stay on the consent of JTIM and its Monitor to permit the issuance of statements of claim in the provincial HCCR actions:

The Company and Monitor have consented to a lifting of the stay of proceedings (provided by subparagraph 4(a) of the CCAA Initial Order) in respect of the HCCR claims commenced after the commencement of the CCAA proceeding, August 24, 2004, subject to the proviso that the lift of the stay of proceedings does not extend to any enforcement of judgment action.<sup>45</sup>

- (c) In regard to the characterization of JTIM's 2004 CCAA Proceeding as a "litigation scheme":

It is to be noted that the CCAA proceeding as initiated did not contemplate a restructuring but rather a litigation scheme in the first instance before any restructuring Plan of Arrangement might be developed. That is, this was seen as a unique CCAA proceeding.<sup>46</sup>

- (d) In regard to JTIM's position that it intended to continue to defend the provincial HCCR actions during the pendency of JTIM's 2004 CCAA Proceeding:

The present stated position of the Company, as set forth by its affiant, Mr. Michel A. Poirier, CEO of the Company, is that the Company does not seek to compromise the HCCR claims but rather

<sup>44</sup> *JTI-Macdonald Corp. (Re)*, (2009), 61 C.B.R. (5<sup>th</sup>) 117 at para. 7, Ontario's Book of Authorities, Tab 4.

<sup>45</sup> *JTI-Macdonald Corp. (Re)*, (2009), 61 C.B.R. (5<sup>th</sup>) 117 at para. 17, Ontario's Book of Authorities, Tab 4.

<sup>46</sup> *JTI-Macdonald Corp. (Re)*, (2009), 61 C.B.R. (5<sup>th</sup>) 117 at para. 21, Ontario's Book of Authorities, Tab 4.

intends to continue to defend those claims “outside” the CCAA proceedings.<sup>47</sup>

- (e) In regard to the position taken by the foreign defendants to the provincial HCCR actions in JTIM’s 2004 CCAA Proceeding:

Conversely, (and leaving aside the constitutional issue) the fact is that the existing and anticipated HCCR claims will involve multiple defendants, both domestic and foreign (and who have objected to being brought within this CCAA proceeding). Given the multiple defendants, the HCCR claims will necessarily have to proceed in the civil courts. It might well unnecessarily complicate and delay these civil court proceedings, as well as this CCAA proceeding, to make a Crown HCCR Claims Bar Order at this time relating to HCCR claims against the Company [emphasis added].<sup>48</sup>

51. In his Endorsement dated March 29, 2005, made in JTIM’s 2004 CCAA Proceeding, Justice Farley held that the CCAA ought not to be used as a sword:

Allow me to further comment that a CCAA stay order should be taken in context. It is to be used as a shield, not a sword. To my mind, any provision that allows an applicant with the consent of a Monitor to lift the stay should not be used to allow such an applicant to hit out in an offensive way, even when this hitting out may be characterized as merely a defensive measure. To proceed with such litigation activity should require the direct and specific approval of the Court.<sup>49</sup>

52. In his Endorsement dated July 27, 2010, approving an Order terminating the 2004 CCAA Proceeding, Justice Campbell made the following statements:

In all but the three Other Actions (discussed below), the non-Crown litigants are plaintiffs in multi-party, industry-wide class action litigation that would not be adversely impacted, in the Monitor’s view, by allowing the Applicant to emerge from this CCAA Proceeding. The Applicant and the Monitor have allowed the litigation to proceed in the ordinary course and accordingly, notwithstanding the stay of proceedings herein, the *status quo* of

<sup>47</sup> *JTI-Macdonald Corp. (Re)*, (2009), 61 C.B.R. (5<sup>th</sup>) 117 at para. 25, Ontario’s Book of Authorities, Tab 4.

<sup>48</sup> *JTI-Macdonald Corp. (Re)*, (2009), 61 C.B.R. (5<sup>th</sup>) 117 at para. 36, Ontario’s Book of Authorities, Tab 4.

<sup>49</sup> *JTI-Macdonald Corp. (Re)*, [2005] O.J. No. 1202, at para. 6, Ontario’s Book of Authorities, Tab 5.

these litigation claims would essentially be maintained if the CCAA Proceedings were terminated [emphasis added].<sup>50</sup>

....

JTI-Macdonald has achieved a settlement of the Contraband Claims that precipitated and have been the exclusive focus of the CCAA proceedings. As a result, JTI-Macdonald no longer requires protection from its creditors pursuant to the CCAA, as other than with respect to the Contraband Claims, JTI-Macdonald has carried on business in the ordinary course throughout the tenure of the CCAA proceedings. The termination of the CCAA proceedings will not impact Unaffected Claims that have been ongoing against JTI-Macdonald for sometime, as the CCAA stay of proceedings was routinely lifted on the consent of the Monitor and JTI-Macdonald to permit parties to continue their proceedings against JTI-Macdonald and other parties. As a result, JTI-Macdonald submits that the Court should grant an Order terminating the CCAA proceedings and the related and ancillary relief with respect thereto [emphasis added].<sup>51</sup>

53. JTIM and the Monitor consented to the issuance of the Statement of Claim in the Ontario HCCR Action on September 29, 2009, while JTIM was under the protection of the CCAA proceeding.

**G. Evidence filed by JTIM does not support contention that “JTIM may have liability for certain claims being made against” R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International, Inc.**

54. Based on the scant evidence provided by JTIM, it is unclear whether JTIM has any potential indemnification obligation or other exposure in regard to the liability of RJRT and/or RJRTI.

55. JTIM relies upon an excerpt from a Purchase Agreement to support its request that the Ontario HCCR Action (and all other pending litigation in Canada) be stayed against RJRT and RJRTI. Specifically, McMaster deposed as follows:

Pursuant to a Purchase Agreement dated as of March 9, 1999 as amended and restated as of May 11, 1999 (the “Purchase

<sup>50</sup> *JTI-Macdonald Corp. (Re)*, [2010] O.J. No. 3485 at para. 13(c), Ontario’s Book of Authorities, Tab 3.

<sup>51</sup> *JTI-Macdonald Corp. (Re)*, [2010] O.J. No. 3485 at para. 18, Ontario’s Book of Authorities, Tab 3.

**Agreement**”), Japan Tobacco agreed to indemnify the RJR Group as a former parent of JTIM, for any Damages (as defined therein) incurred by the RJR Group for liabilities or obligations relating to the health effects of any products manufactured or sold by the RJR Group at any time that were consumed or intended to be consumed outside the United States, including products that were sold prior to the purchase of the business by Japan Tobacco. JTIM may have liability for certain claims being made against Reynolds. In order to effect a CCAA stay for JTIM and allow for a collective solution to the HCCR Actions, it is also beneficial to have those claims stayed against Reynolds [emphasis added].<sup>52</sup>

56. The Report of the Proposed Monitor, Deloitte Restructuring Inc., dated March 8, 2019 that JTIM filed on its initial application contains the following statement:

... JTIM is also the subject of lawsuits filed by each of the ten provinces against tobacco industry members relating to the potential recovery of health-care costs resulting from alleged “tobacco-related wrongs” (the “**HCCR Actions**”). The defendants in such actions include R.J. Reynolds Tobacco Co. and R.J. Reynolds Tobacco International, Inc. (collectively, “**Reynolds**”), which parties benefit from an indemnity arising from the purchase agreement between the RJR Group and Japan Tobacco. As stated in the McMaster Affidavit, JTIM may have liability for the indemnification claims should a judgment be rendered against Reynolds [emphasis added].<sup>53</sup>

57. However, the excerpts of the Purchase Agreement which comprise Exhibit “AA” to the McMaster Affidavit do not appear to support the position that JTIM may have liability for claims being made against RJRT and RJRTI, including Ontario HCCR Action.<sup>54</sup> Rather, the Purchase Agreement provides that Japan Tobacco Inc. (the “Buyer”) agrees to indemnify and hold RJRT harmless from any and all damages incurred by RJRT arising out of any “RJRI Liabilities” which is defined to mean, *inter alia*:

---

<sup>52</sup> McMaster Affidavit, para. 61 - Exhibit “B” to Entecott Affidavit, Ontario’s Motion Record, Tab 2B; Report of the Proposed Monitor, Deloitte Restructuring Inc. dated March 8, 2019, paras. 74 and 75 – Exhibit “D” to Entecott Affidavit, Ontario’s Motion Record, Tab 2D.

<sup>53</sup> Report of the Proposed Monitor, Deloitte Restructuring Inc., dated March 8, 2019, para. 22 – Exhibit “D” to Entecott Affidavit, Ontario’s Motion Record, Tab 2D.

<sup>54</sup> Purchase Agreement – Exhibit “AA” to McMaster Affidavit, Exhibit “B” to Entecott Affidavit, Ontario’s Motion Record, Tab 2B.

... all liabilities and obligations arising out of any action ... which may ... be made, commenced, asserted or pursued that in any way are based upon and arise from tobacco products or any description consumed or intended to be consumed outside of the United States, including ... all such liabilities and obligations relating to or arising in any way from (A) the manufacture, marketing, development, advertising, research, distribution or sale of such products on or before the Closing Date and (B) any statement or other actions or omissions of any member of either the RJRI Group ... made or occurring on or before the Closing Date relating to such products ...

<sup>55</sup>

58. The Purchase Agreement further provides that Japan Tobacco Inc., as the “Buyer”:

... hereby indemnifies each member of the Seller’s Group [which includes RJRT] ... and agrees to hold each of them harmless from any and all Damages incurred or suffered by any member of the Seller’s Group ... arising out of ... any RJRI Liabilities; *provided* that it is understood that Sellers will first pursue any claims under this Section 11.02(b) against members of the RJRI Group before making claims against Buyer, and that Buyer will only be secondarily liable for such claims.<sup>56</sup>

59. It appears that Japan Tobacco Inc. may ultimately be liable to indemnify RJRT and RJRTI in connection with the Ontario HCCR Action.

**H. JTIM, ITCAN and RBH did not provide full disclosure of particulars regarding the status of the Ontario HCCR Action**

60. The affidavit of Peter Entecott (“**Entecott Affidavit**”) filed by Ontario in support of its motions to lift the stays effected by the Initial Orders issued in the JTIM, ITCAN and RBH CCAA Proceedings sets out full, detailed particulars<sup>57</sup> which demonstrate that, for the past decade, Ontario has devoted tremendous resources toward moving the Ontario HCCR Action to the point where, with the assistance of effective, ongoing case management by Master Short and Justice Conway and the oversight of the action’s progress toward trial by Regional Senior Justice Morawetz, the case is on track to commence trial in eighteen months i.e. late 2020. The parties

<sup>55</sup> Purchase Agreement - Exhibit “AA” to McMaster Affidavit, Article 1, Section 1.01 and Article 11, Section 11.02(b)(iii) – Exhibit “B” to Entecott Affidavit, Ontario’s Motion Record, Tab 2B.

<sup>56</sup> Purchase Agreement - Exhibit “AA” to McMaster Affidavit, Article 1, Article 11, Section 11.02(b)(iii) – Exhibit “B” to Entecott Affidavit, Ontario’s Motion Record, Tab 2B.

<sup>57</sup> Entecott Affidavit, paras. 22 to 81, Ontario’s Motion Record, Tab 2.

are now in position to commence trial on that projected date despite the fact that the defendants' vigorous defence of the Ontario HCCR Action has already caused many years of delay in moving the case to trial, including motions by the defendants challenging the Ontario Court's jurisdiction over the foreign defendants, seeking to strike the statement of claim and demanding further and better particulars. Ontario was even compelled to bring a motion to obtain the Master Short's approval of the Discovery Plan which was settled on consent after protracted negotiations. In order to address the complexity and sheer number of productions made by Ontario (in excess of 135,000 documents) and the fourteen defendants (in excess of 8 million documents), the parties negotiated and consented to a confidentiality order and a clawback protocol to address any inadvertent disclosure by any party of a document that is privileged, subject to public interest immunity or subject to a statutory prohibition on disclosure.

61. Ontario submits that JTIM, ITCAN and RBH failed to provide full and proper disclosure to the presiding judges regarding the history and status of the Ontario HCCR Action. They each omitted material facts that are known to them, and downplayed and minimized the status of the Ontario HCCR Action in a manner designed to support their position. None of the three applicants disclosed that the Ontario HCCR Action is case managed by Master Short and Justice Conway and overseen by Justice Morawetz to whom Master Short reports regarding the status of the case.<sup>58</sup> Furthermore, none of the applicants disclosed the tabling of a projected date for commencement of trial in late 2020/early 2021.

62. JTIM's CCAA application contained the following brief summary regarding the "status" of the Ontario HCCR Action: "It was commenced in September 2009 against tobacco industry members, including JTIM. The statement of claim contains allegations of joint and several liabilities among all the defendants but does not specify any individual amount or percentages within the full claimed amount of \$330 billion. The pre-trial process is ongoing and a trial date is not yet scheduled".<sup>59</sup>

63. In his affidavit, McMaster further deposed that "On May 31, 2018, the Province of Ontario indicated to the defendants that it intends to amend its Statement of Claim to increase the

---

<sup>58</sup> Entecott Affidavit, paras. 25, 29, 42, 50-53, 59-60, 63, 69-70, 72, 75-76, 78-79, and 88-90 Ontario's Motion Record, Tab 2.

<sup>59</sup> McMaster Affidavit, para. 62 - Exhibit "B" to Entecott Affidavit, Ontario's Motion Record, Tab 2B.



amount claimed to \$330 billion from \$50 billion”.<sup>60</sup> McMaster did not disclose that: (i) on June 28, 2018, Ontario had served a motion to amend its Fresh as Amended Statement of Claim; (ii) none of the defendants, including JTIM, opposed the amendment motion; and (iii) during the Case Conference on the morning of March 8, 2019, which was attended by counsel for JTIM, Master Short had advised the parties of his intention to sign the amendment order that same day.

64. It was necessary for Master Short to issue a fresh Order granting Ontario leave to amend its pleading and deliver the Second Amended Fresh as Amended Statement of Claim after the Court Office misplaced the original order signed by Master Short and Ontario’s original motion record.<sup>61</sup>

65. By operation of paragraph 65 of the JTIM Initial Order, Master Short’s Order dated March 8, 2019, granting Ontario leave to amend its pleading is deemed not to have been issued. Accordingly, Ontario seeks an order lifting the JTIM stay to rectify this situation.

66. The affidavit of Eric Thauvette (“**Thauvette**”) that ITCAN filed in support of its CCAA initial application, attached as Exhibit “R” the draft Second Amended Fresh as Amended Statement of Claim in the Ontario HCCR Action, and provided a high-level overview of some of the allegations against the defendant tobacco companies.<sup>62</sup> However, Thauvette deposed that the Ontario HCCR Action is at a “preliminary stage”,<sup>63</sup> which is not an accurate statement based upon the evidence set forth in the Entecott Affidavit filed by Ontario in support of the lift stay motions.

67. The affidavit of Peter Luongo (“**Luongo**”) filed in the RBH CCAA Proceeding merely described the “Current status” of the Ontario HCCR Action as “Pre-trial discovery ongoing”.<sup>64</sup>

---

<sup>60</sup> McMaster Affidavit, para. 62, footnote 1 - Exhibit “B” to Entecott Affidavit, Ontario’s Motion Record, Tab 2.

<sup>61</sup> Entecott Affidavit, paras. 90-93, Ontario’s Motion Record, Tab 2.

<sup>62</sup> Thauvette Affidavit, paras. 145-147 - Exhibit “F” to Entecott Affidavit, Ontario’s Motion Record, Tab 2F.

<sup>63</sup> Thauvette Affidavit, para. 148 - Exhibit “F” to Entecott Affidavit, Ontario’s Motion Record, Tab 2F.

<sup>64</sup> Luongo Affidavit, para. 118 - Exhibit “H” to Entecott Affidavit, Ontario’s Motion Record, Tab 2H.

### **PART III – STATEMENT OF ISSUES AND THE LAW**

68. This Honourable Court is required to determine the following issues on Ontario's motions:

- (a) Should this Court grant Orders lifting the JTIM Stay, the ITCAN Stay and the RBH Stay and varying the JTIM Initial Order, the ITCAN Initial Order and the RBH Initial Order to authorize Ontario to continue the Ontario HCCR Action against all fourteen of the defendants in the Ontario HCCR Action, with the exception that the taking of any proceedings to enforce any judgment and/or collect any amount owing or found to be owing by JTIM, ITCAN and/or RBH in the Ontario HCCR Action shall be stayed pending further Order of this Honourable Court?
- (b) Should this Court grant an Order exempting the application of paragraph 65 of the JTIM Initial Order to the Order of Master Short dated March 8, 2019, which granted Ontario leave to amend its Amended Fresh as Amended Statement of Claim, and lifting the JTIM Stay, the ITCAN Stay and the RBH Stay to authorize and permit:
  - (i) the Ontario Superior Court of Justice to formally amend Ontario's Amended Fresh as Amended Statement of Claim in the form of the Second Amended Fresh as Amended Statement of Claim; and
  - (ii) Ontario to serve the Second Amended Fresh as Amended Statement of Claim on all of the defendants to the Ontario HCCR Action?

#### **A. CCAA Applicants bear onus to justify appropriateness of the Stays**

69. At the hearing of their initial applications, pursuant to section 11.02(3)(a) of the CCAA, JTIM, ITCAN and RBH all bore the burden of proof to satisfy the Court that circumstances existed that made the stay orders appropriate.<sup>65</sup>

---

<sup>65</sup> CCAA, s. 11.02(3)(a).

70. At the return of the Comeback Motions, the onus rests solely on JTIM, ITCAN and RBH to justify the appropriateness of the terms of the Initial Orders which they obtained from three different judges on *ex parte* applications.<sup>66</sup>

**B. Circumstances where Courts have granted a stay of proceedings against third parties which are not applicants under the CCAA**

71. Courts have an inherent jurisdiction to impose a stay of proceedings against third parties which have not applied for protection under the CCAA, where it is “important to the reorganization and restructuring process and where it is just and reasonable to do so”.<sup>67</sup>

72. The factors that the Courts have considered in determining whether to extend a stay of proceedings to non-applicant third parties include the following considerations:<sup>68</sup>

- (a) the business and operations of the third party was significantly intertwined and integrated with those of the debtor company;<sup>69</sup>
- (b) extending the stay to the third party would help maintain stability and value during the CCAA process;<sup>70</sup>
- (c) not extending the stay to the third party would have a negative impact on the debtor company’s ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company;<sup>71</sup>
- (d) if the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant;<sup>72</sup>

---

<sup>66</sup> *JTI-Macdonald Corp. (Re)*, [2004] O.J. No. 3671 at para. 4, Ontario’s Book of Authorities, Tab 6.

<sup>67</sup> *Tamerlane Ventures Inc. (Re)*, [2013] O.J. No. 3936 at para. 21 (S.C.J.), Ontario’s Book of Authorities, Tab 7; see also *Lehndorff General Partner Ltd. (Re)*, (1993) 9 BLR (2d) 275 at pp. 5-7, Ontario’s Book of Authorities, Tab 8.

<sup>68</sup> *JTI-Macdonald Corp. Re*, 2019 ONSC 1625 at para. 15; Ontario’s Book of Authorities, Tab 9.

<sup>69</sup> *Canwest Publishing Inc (Re)*, 2010 ONSC 222 at paras. 33-34, Ontario’s Book of Authorities, Tab 10.

<sup>70</sup> *Tamerlane Ventures Inc (Re)*, 2013 ONSC 5461 at para. 20, Ontario's Book of Authorities, Tab 7.

<sup>71</sup> *Pacific Exploration & Production Corp (Re)*, 2016 ONSC 5429 at para. 26(b), Ontario's Book of Authorities, Tab 11.

<sup>72</sup> *Target Canada Co (Re)*, 2015 ONSC 303 at paras 1, 6, 15 and 34, Ontario's Book of Authorities, Tab 12.

- (e) failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;<sup>73</sup>
- (f) if the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the event of future breaches by the debtor company or breaches that are not related to the released claims;<sup>74</sup> and
- (g) the balance of convenience favours extending the stay to the third party.<sup>75</sup>

73. Justice Hailey relied upon *Tamerlane Ventures Inc., Re* and *Pacific Exploration & Production Corp., Re* to conclude that “granting the requested stay of proceedings to the other defendants will allow JTIM to attempt to arrive at a collective solution with respect to the Quebec Class Action and the HCCR actions.”<sup>76</sup> The JTIM Stay has the effect of staying all proceedings in all jurisdictions in Canada as against all of the defendants in such proceedings, including the Ontario HCCR Action.

74. Justice McEwen relied upon the same authorities to conclude that it was reasonable to extend the ITCAN Stay “where most of the outstanding proceedings against ITCAN also name BAT and the BAT Affiliates as co-defendants”.<sup>77</sup> The ITCAN Stay has the effect of staying the Ontario HCCR Action against five of the fourteen defendants thereto.

75. Justice Pattillo also relied upon *Pacific Exploration & Production Corp., Re* to support his Order extending the RBH Stay to “proceedings in Canada as against other members of the PMI Group that relate to RBH, the Business or Property or a Tobacco Claim as defined in the

---

<sup>73</sup> *Pacific Exploration & Production Corp (Re)*, 2016 ONSC 5429 at para. 26(d), Ontario's Book of Authorities, Tab 11.

<sup>74</sup> *Pacific Exploration & Production Corp (Re)*, 2016 ONSC 5429 at para. 26(e), Ontario's Book of Authorities, Tab 11.

<sup>75</sup> *Calpine Canada Energy Ltd, Re*, 2006 ABQB 153 at para. 34, Ontario's Book of Authorities, Tab 13.

<sup>76</sup> *JTI-Macdonald Corp. Re*, 2019 ONSC 1625 at paras. 14 - 16, Ontario's Book of Authorities, Tab 9.

<sup>77</sup> *Imperial Tobacco Canada Limited, et al., Re*, 2019 ONSC 1684 at paras. 11-12, Ontario's Book of Authorities, Tab 14.

material ...".<sup>78</sup> The RBH Stay has the effect of staying the Ontario HCCR Action against two of the fourteen defendants thereto.

### **C. Factors for Court to consider when determining whether to lift a stay of proceedings**

76. The power to lift a stay of proceedings under section 11.02(1) CCAA is discretionary. In determining whether a stay should be lifted, the Court must always have regard to the particular facts. There is no statutory test under the CCAA to guide the court in determining whether to lift a stay.<sup>79</sup>

77. In *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, the Saskatchewan Court of Appeal articulated the following test for lifting a stay of proceedings under the CCAA that is based on sound reasons consistent with the scheme of the CCAA:

In determining what constitutes "sound reasons," much is left to the discretion of the judge. However, previous decisions on this point provide some guidance as to factors that may be considered:

- (a) the balance of convenience;
- (b) the relative prejudice to the parties;
- (c) the merits of the proposed action, where they are relevant to the issue of whether there are "sound reasons" for lifting the stay (i.e., as was said in *Ma, Re*, if the action has little chance of success, it may be harder to establish "sound reasons" for allowing it to proceed).

The supervising CCAA judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11(6). Ultimately, it is in the discretion of the supervising CCAA judge as to whether the proposed action ought to be allowed to proceed in the face of the stay.<sup>80</sup>

---

<sup>78</sup> *Rothmans, Benson & Hedges Inc., Re*, Handwritten Endorsement and Unofficial Transcribed Endorsement of Justice Patillo dated March 22, 2019, page 3, Ontario's Book of Authorities, Tab 15.

<sup>79</sup> *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 1692 at paras. 14-15 (Q.B.), Ontario's Book of Authorities, Tab 16.

<sup>80</sup> *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, [2007] S.J. No. 313 at paras. 67 - 68 (C.A.), Ontario's Book of Authorities, Tab 17.

78. In *Humber Valley Resort Corp. (Re)*, the court considered the evolution of the criteria for lifting a stay set out in *Canadian Airlines* and *ICR Commercial Real Estate* and held that the test for lifting a stay should not be as stringent as that set out in McLaren's text and referenced in *Canadian Airlines*. The court concluded that the appropriate test should be a true balancing of the levels of the prejudice to the parties as follows:

In considering the six tests set out by the Alberta Queens Bench in *Canadian Airlines (supra)*, the single most important test is whether Maxium would be severely prejudiced by the refusal to lift the Stay of Proceedings and that there would be no resulting prejudice to the Resort or to its creditors. It is interesting to note the strong language of this particular condition. Maxium is required to be [severely] prejudiced by the refusal to lift the Stay of Proceedings. On the other hand, there must be "no resulting prejudice" to the Resort or to the position of its creditors if the Stay is lifted. It is difficult to reconcile this extremely strong statement with the requirement set out by the Saskatchewan Court of Appeal in *ICR Commercial Real Estate (supra)* that the Court has to consider a "balance of convenience". It is difficult to conceive how there can be any consideration of a balance of convenience where the *Canadian Airline (supra)* decision requires that there be no prejudice to the debtor company or to the position of its creditors. If there is no prejudice, what is there to be balanced against the impact upon Maxium if it is not to repossess? I am not satisfied that the tests which I should apply should be as stringent as that set out in condition number six, paragraph 20 of the *Canadian Airlines (supra)* decision. Rather, I am satisfied that there merely should be a balancing of the levels of prejudice to the creditor, Maxium, or to the Resort, depending upon whether the application to lift the Stay or Proceedings is allowed or not. This consideration needs to be made in light of the stated purpose of the CCAA, which is to allow a corporation sufficient time to restructure itself and that the Stay of Proceedings is not intended to maintain an absolute Stay of Proceedings at the positions existing before the Initial Order, insofar as they relate to either the Corporation or to creditors [emphasis added].<sup>81</sup>

79. In *Canwest Global Communications Corp. (Re)*, Justice Pepall set out the current approach for a court considering an application to lift a CCAA stay:

---

<sup>81</sup> *Humber Valley Resort Corp. (Re)*, [2008] N.J. No. 318 at para. 18 (T.D.), Ontario's Book of Authorities, Tab 18.

As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"<sup>11</sup>, an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*<sup>12</sup>. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.<sup>13</sup>

Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.*<sup>14</sup> and Professor McLaren has added three more since then. They are:

1. When the plan is likely to fail.
2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).
3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).
4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
7. There is a real risk that a creditor's loan will become unsecured during the stay period.

8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.
9. It is in the interests of justice to do so.<sup>82</sup>

80. In summary, the factors to be considered in assessing whether it is appropriate to lift a stay can be grouped into three general categories:

- (a) the relative prejudice to parties;
- (b) the balance of convenience; and
- (c) where relevant, the merits of the matter.<sup>83</sup>

81. In *Puratone Corp., Re*, the Court held that the three above considerations:

... are all to be viewed together and in the context of the nature and timing of the CCAA process before the court. The same request may very well receive a different reception in the case of an application for the lifting of a stay early in a CCAA proceeding that contemplates a true restructuring than in the case of an application brought late in a CCAA proceeding that involves only the sale of assets. In the former situation, the existence of a contemporaneous action might jeopardize the ability of the company to restructure as intended. In the latter case, the restructuring, such as it is, has been accomplished and the only issue being left to sort through is who is entitled to the money. In my view, a court would be more receptive to lifting the stay in the latter case than in the former.<sup>84</sup>

#### **D. The Stays of Ontario HCCR Action should be lifted**

82. The determination of whether this Court should lift the JTIM Stay, the ITCAN Stay and the RBH Stay is a fact specific exercise of the Court's discretion. Most of the factors that have been considered in other cases are not applicable to this case.

---

<sup>82</sup> *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 5379 at paras. 32 - 33 (S.C.J.), Ontario's Book of Authorities, Tab 19; *Canwest Global Communications Corp. (Re)*, 2010 ONSC 3530 at para. 41, Ontario's Book of Authorities, Tab 25.

<sup>83</sup> *Re Timminco* [2012] O.J. No. 1949 at para. 17 (S.C.J.), Ontario's Book of Authorities, Tab 20.

<sup>84</sup> *Puratone Corp., Re*, 2013 MBQB 171 at para. 15, Ontario's Book of Authorities, Tab 21.



83. The **balance of convenience** favours lifting the stays of the Ontario HCCR Action.

84. The purpose of the CCAA stay was reviewed by this Court in *Growthworks Canadian Fund Ltd. (Re)*:

A stay of proceedings is a key element of any CCAA process. It affects the positions of a company's secured and unsecured creditors, as well as others who could potentially jeopardize the success of the restructuring plan and the continuance of the company. A stay affords a company breathing room in which to re-organize its affairs and compromise its obligations, or to divest assets to enable the business to operate under different ownership while generating funds to pay obligations or, in complex situations, to effect an orderly liquidation of the business enterprise.<sup>85</sup>

85. As was the case with JTIM's 2004 CCAA Proceeding, the 2019 CCAA proceedings commenced by JTIM, ITCAN and RBH are best characterized as and should be recognized to be "litigation schemes". By obtaining the Stays in three separate *ex parte* CCAA filings before three different judges, which, taken together, extend to all of the litigation pending across Canada against them and the non-filing third parties, JTIM, ITCAN and RBH are attempting to manoeuvre a better outcome for themselves and the other eleven corporations which are defendants in the Ontario HCCR Action, than it would have if the three filing corporations were obliged to settle the terms for the satisfaction of the Quebec judgments and then later deal with the provincial HCCR Actions.

86. None of the applicants have disclosed any meaningful or even proposed restructuring plans which would be put at risk if Ontario is permitted to continue to prove its claim against the fourteen defendants to the Ontario HCCR Action, in particular the eleven defendants other than JTIM, ITCAN and RBH. Indeed, the *status quo* throughout JTIM's 2004 CCAA Proceeding as well as since the release of the Quebec trial judgment dated June 9, 2015, was to have the case-managed Ontario HCCR Action proceed. This is not a case in which the three applicants need to be protected from harassment by creditors who are dissatisfied with the state of their outstanding accounts. Moreover, there is no evidence that allowing the Ontario HCCR Action to continue will be in any manner disruptive to any of JTIM, ITCAN and RBH.

---

<sup>85</sup> *Growthworks Canadian Fund Ltd. (Re)*, 2014 ONSC 1856 at para 60, Ontario's Book of Authorities, Tab 22.

87. The balancing of the **relative prejudice** to JTIM, ITCAN and RBH versus Ontario tips strongly in Ontario's favour for the following reasons:

- (a) It is difficult to conceive how a CCAA claims process could be fashioned to fairly and efficiently adjudicate all of the provincial HCCR claims, including the Ontario HCCR Action;
- (b) The Ontario HCCR Action is not suitable for adjudication within the CCAA proceeding. It is a *sui generis* claim brought pursuant to the Ontario HCCR Act which contains unique provisions which not been adjudicated upon. Permitting the Ontario HCCR Action to proceed will facilitate the proper and timely adjudication of Ontario's claim in the forum best suited for that adjudication;
- (c) It is highly prejudicial to Ontario to compel it to compromise its claims against eleven non-filing third parties which are defendants to the Ontario HCCR Action by giving Ontario no alternative but to resolve its claims against all fourteen defendants within the CCAA proceeding;
- (d) Throughout JTIM's 2004 CCAA Proceeding as well as since the Quebec trial judgment was released in 2015, JTIM, ITCAN and RBH have been vigorously defending the Ontario HCCR Action without any incident or complaint. There is no evidence that to continue to do so would be a "distraction" of such a magnitude that it would impair any attempt on their part to achieve a global resolution of all claims pending against them in Canada.
- (e) In the Ontario HCCR Action groups of defendants are represented by the same counsel (see table below)<sup>86</sup> such that none of the defendants would be prejudiced if the Ontario HCCR Action continued to be prosecuted during the pendency of the three CCAA proceedings:

---

<sup>86</sup> Statements of defence of fourteen defendants to Ontario HCCR Action, Ontario's Motion Record, Tabs 3 – 16.

Defendant Corporations in Ontario HCCR Action	Counsel representing Defendant Corporations
JTI-Macdonald Corp.	Borden Ladner Gervais LLP
R.J. Reynolds Tobacco Company	Borden Ladner Gervais LLP
R.J. Reynolds Tobacco International Inc.	Borden Ladner Gervais LLP
Imperial Tobacco Canada Limited	Osler, Hoskin & Harcourt LLP
Rothmans, Benson & Hedges Inc.	Gowling WLG (Canada) LLP
Rothmans Inc.	Gowling WLG (Canada) LLP
British American Tobacco (Investments) Limited	Stikeman Elliott LLP
B.A.T. Industries p.l.c	Stikeman Elliott LLP
British American Tobacco p.l.c.	Stikeman Elliott LLP
Carreras Rothmans Limited	Harper Grey LLP
Altria Group, Inc.	McCarthy Tétrault LLP
Philip Morris U.S.A. Inc.	McCarthy Tétrault LLP
Philip Morris International, Inc.	McCarthy Tétrault LLP
Canadian Tobacco Manufacturers' Council	Ormston List Frawley LLP

- (f) In the Ontario HCCR Action, Ontario is advancing *inter alia* a claim based in conspiracy. It would be more challenging, though certainly possible, for Ontario to try the action without the participation of JTIM, ITCAN and RBH.
- (g) There will be no prejudice to JTIM, ITCAN and RBH if the stays are lifted. Ontario is prepared to accept an Order which bars it from the taking of any proceedings to enforce any judgment and/or collect any amount owing or found to be owing by JTIM, ITCAN and/or RBH in the Ontario HCCR Action pending further Order of this Honourable Court.

88. The stay has been lifted in cases where prejudice is limited to matters of inconvenience and expense, such as answering written interrogatories and producing representatives to be examined at discovery.<sup>87</sup>

89. Ontario submits that the Ontario HCCR Action is a **meritorious claim**. Some of the allegations advanced in the Quebec Class Actions are very similar to the allegations of “tobacco related wrongs” advanced by Ontario in the Ontario HCCR Action. The decision of the Quebec

<sup>87</sup> *Wabush Iron Co. Ltd. (Arrangement relatif à)*, 2016 QCCS 6061 at paras. 40, 45, and 47, Ontario’s Book of Authorities, Tab 23.

Court of Appeal upholding the trial judgment included the following findings regarding the conduct of JTIM, ITCAN and RBH (unofficial English translations):<sup>88</sup>

[476] One could, by way of preamble, underline the particularly heightened intensity of the duty to inform applicable here to the appellants. The appellants have in fact, during the entire litigation period, sold to the general public a product without a particular use, the cigarette, a product to be inhaled (thereby introduced to the body of its users) that presents a harmful and potentially fatal danger, as it develops over time, which duration promotes its addictive character.

[477] Did the appellants fail in this duty to inform? One cannot answer this question but in the affirmative. Not only did they intentionally hide from the public and users the pathological and addictive features of cigarettes that they sold, but they collectively formed and put into practice, in parallel fashion, a program of misinformation designed to undermine all information contrary to their interests: they have maintained false scientific controversies, diverted debates, lied to the public (and even to public authorities), enveloping this in misleading publicity strategies that violated their own codes of conduct (and, since 1980, violated the *Consumer Protection Act*).

[496] The above evidence is more than abundant: the appellants have, during the entire period in question, failed in their duty to inform, a duty which, given the danger presented by the cigarette, a toxic and addictive product, was heightened. Their failure is two-fold: first, they did not provide information to the public or users or did not provide adequate information; in addition, they actively misinformed the public and users in attacking in different ways the credibility of warnings, advice and explanations given and disseminated by others (governments, medical groups, anti-smoking groups etc.) with regard to the harms of the cigarette and by using misleading publicity strategies.

[563] Therefore, between 1950 and 1998, the appellants, in light of what they hid (until 1994) and what they falsely conveyed and promoted, deliberately breached the duty to inform which applied to them as cigarette manufacturers, regardless of the angle of consideration ...

---

<sup>88</sup> *Imperial Tobacco Canada ltée c. Conseil Québécois sur le tabac et la santé*, [2019] J.Q. No. 1387 at paras. 476, 477, 496 and 563, Unofficial English Translation prepared by Ontario, Ontario's Book of Authorities, Tab 24.

[564] In addition, one can speak of bad faith conduct arising from a deliberate concealment of the effects of cigarettes on the health of its users, and a negation, minimization and systematic trivialization of these effects grounded in the cleverly but artificially maintained idea of a scientific controversy and the alleged weakness of the links between the cigarette and illnesses or dependence, all coated in a misleading advertising strategy.

90. The lifting of the Stays would not undermine or otherwise have any impact on the CCAA's objective of protecting JTIM, ITCAN and RBH and providing a structured environment for the negotiation of compromises between the debtor companies and their creditors for the benefit of both.

91. Thus, it is submitted that the balance of convenience, the assessment of the relative prejudice and the merits of the Ontario HCCR Action favour the position of Ontario on its lift stay motions. In particular, there are no grounds to justify shielding the non-filing third parties from Ontario taking steps to move the Ontario HCCR Action forward to the projected trial date of late 2020/early 2021.

#### **PART IV – ORDER REQUESTED**

92. For the reasons set out above, Ontario requests that this Honourable Court grant the Orders requested in the Notices of Motion filed by Ontario in the JTIM CCAA Proceeding, the ITCAN CCAA Proceeding and the RBH CCAA Proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: March 29, 2019

  
 \_\_\_\_\_  
**Jacqueline L. Wall**  
**Shahana Kar**  
**Edmund Huang**

Counsel to the Moving Party,  
 Her Majesty the Queen in right of Ontario

**SCHEDULE “A”****Authorities**

1. *Tobacco Damages and Health Care Costs Recovery Act, 2009*, S.O. 2009, c. 13.
2. *JTI-Macdonald Corp. (Re)*, Handwritten Endorsement and Unofficial Transcription of Endorsement of Justice McEwen dated March 19, 2019.
3. *JTI-Macdonald Corp. (Re)*, [2010] O.J. No. 3485 (S.C.J.).
4. *JTI-Macdonald Corp. (Re)*, (2009), 61 C.B.R. (5<sup>th</sup>) 117 (S.C.J.).
5. *JTI-Macdonald Corp. (Re)*, [2005] O.J. No. 1202 (S.C.J.).
6. *JTI-Macdonald Corp. (Re)*, [2004] O.J. No. 3671 (S.C.J.).
7. *Tamerlane Ventures Inc. (Re)*, [2013] O.J. No. 3936 (S.C.J.).
8. *Lehndorff General Partner Ltd. (Re)*, (1993) 9 BLR (2d) 275 (S.C.J.).
9. *JTI-Macdonald Corp, Re*, 2019 ONSC 1625 (S.C.J.).
10. *Canwest Publishing Inc. (Re)*, 2010 ONSC 222 (S.C.J.).
11. *Pacific Exploration & Production Corp (Re)*, 2016 ONSC 5429.
12. *Target Canada Co (Re)*, 2015 ONSC 303.
13. *Calpine Canada Energy Ltd, Re*, 2006 ABQB 153.
14. *Imperial Tobacco Canada Limited, et al., Re*, 2019 ONSC 1684.
15. *Rothmans, Benson & Hedges Inc., Re*, Handwritten Endorsement and Unofficial Transcribed Endorsement of Justice Pattillo dated March 22, 2019.
16. *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 1692 (Q.B.).
17. *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, [2007] S.J. No. 313 (C.A.).
18. *Humber Valley Resort Corp. (Re)*, [2008] N.J. No. 318 (T.D.).
19. *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 5379 (S.C.J.).
20. *Re Timminco* [2012] O.J. No. 1949 (S.C.J.).

21. *Puratone Corp., Re*, 2013 MBQB 171.
22. *Growthworks Canadian Fund Ltd. (Re)*, 2014 ONSC 1856.
23. *Wabush Iron Co. Ltd. (Arrangement relatif à)*, 2016 QCCS 6061.
24. *Imperial Tobacco Canada ltée c. Conseil Québécois sur le tabac et la santé*, [2019] J.Q. No. 1387 at paras. 476, 477, 496 and 563, Unofficial English Translation prepared by Ontario.
25. *Canwest Global Communications Corp. (Re)*, 2010 ONSC 3530.

## SCHEDULE “B”

### Relevant Statutes

#### Companies’ Creditors Arrangement Act

##### Definitions

2. (1) In this Act,

“claim” means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*;

##### 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.

##### Stays, etc. — initial application

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.

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

---

**FACTUM**

---

**MINISTRY OF THE ATTORNEY GENERAL**

Crown Law Office - Civil  
8th Floor, 720 Bay Street  
Toronto, Ontario M7A 2S9  
Fax: (416) 326-4181

**Jacqueline L. Wall**, LSO No. 38511D  
Tel: (416) 325-8435  
Email: [jacqueline.wall@ontario.com](mailto:jacqueline.wall@ontario.com)

**Shahana Kar**, LSO No. 33311O  
Tel: (416) 314-2080  
Email: [shahana.kar@ontario.com](mailto:shahana.kar@ontario.com)

Counsel to the Moving Party,  
Her Majesty the Queen in right of Ontario