

Court File No.

**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 IMPERIAL TOBACCO CANADA LIMITED,
AND IMPERIAL TOBACCO COMPANY LIMITED

Applicants

FACTUM OF THE APPLICANTS

March 12, 2019

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PART I - NATURE OF THIS APPLICATION

1. Imperial Tobacco Canada Limited (“**ITCAN**”) and its subsidiary Imperial Tobacco Company Limited (“**ITCO**”) (together, the “**Applicants**”) seek an Initial Order and related relief under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the “**CCAA**”). The Applicants are seeking an initial stay of proceedings under section 11.02(1) of the CCAA (the “**CCAA Stay**”) for the primary purpose of effecting a global resolution of multiple claims in Canada that have been brought or could be brought against them in relation to the development, production, marketing, advertising of, any representations made in respect of, the purchase, sale and use of or exposure to Tobacco Products¹ (the “**Tobacco Claims**”). It is proposed that FTI Consulting Canada Inc. act as monitor (the “**Monitor**”) in this proceeding.

2. The Applicants face an existential threat from litigation across Canada, including multiple class actions, government claims seeking to recover health care costs, and other ongoing proceedings (collectively, the “**Tobacco Litigation**”). Although the Applicants dispute liability

¹ As defined in the proposed Draft Initial Order, Application Record, Notice of Application, Schedule A [Draft Initial Order].

and entitlement to relief, the plaintiffs in the Tobacco Litigation in the aggregate seek hundreds of billions of dollars in damages, the total of which exceeds the Applicants' total assets by many orders of magnitude.

3. The need for relief under the CCAA has been precipitated by the issuance of a judgment by the Quebec Court of Appeal on March 1, 2019 (the “**Quebec Appeal Judgment**”). The Quebec Appeal Judgment affirmed an award of damages against ITCAN and its two co-defendants in the Létourneau and Blais class proceedings, which were brought on behalf of two classes of individuals numbering in excess of one million members. The Quebec Appeal Judgment is in the unprecedented amount of \$13.5 billion against all three defendants. ITCAN's share of the Quebec Appeal Judgment exceeds \$9 billion.

4. The Applicants do not have the financial resources to pay their share of the Quebec Appeal Judgment. Moreover, taking into account the contingent liabilities arising out of the other Tobacco Litigation, they are clearly insolvent. The Applicants believe that it is in their best interests and the best interests of all of their stakeholders to engage in a restructuring process.

5. The overriding objective of this proceeding is to achieve a global resolution of all of the Tobacco Claims in a controlled and orderly process that seeks to achieve fairness among claimants, with the benefit of Court and Monitor supervision. It would be fundamentally unfair to other persons with Tobacco Claims if the Applicants' resources were exhausted in attempting to satisfy the Quebec Appeal Judgment simply because the Quebec plaintiffs were the first across the finish line in reducing their Tobacco Claims to judgment.

6. Given that the Tobacco Claims involve a very large number of claimants, the Applicants propose that this Court appoint an impartial third party (the “**Tobacco Claimant Representative**”) to represent the interests of the Tobacco Claimants in the restructuring

proceeding. Former Chief Justice of Ontario, Warren K. Winkler, has consented to act in this capacity. The Applicants propose that the Tobacco Claimant Representative be appointed on an interim basis under the Initial Order.

7. While this proceeding is underway, the Applicants intend to carry on business in the ordinary course to preserve the overall value of the enterprise. At the conclusion of this proceeding, it is anticipated that the Applicants' business will be preserved, consistent with the objectives of the CCAA, for the benefit of their employees and other stakeholders, such as retirees, customers, landlords, suppliers, wholesalers, retailers and taxing authorities.

8. For these reasons, and for the reasons set out below, the Applicants submit that this Honourable Court should grant the requested Initial Order, together with the related relief.

PART II - FACTS

9. The facts with respect to this Application are set out in the Affidavit of Eric Thauvette.²

A. The Business of the Applicants

10. ITCAN primarily imports tobacco products, but recently also imports Tobacco Heated Products (“**THPs**”) and Vaping Products (collectively, the “**potentially reduced-risk products**” or “**PRRPs**”).³ Its subsidiary, ITCO, is the exclusive distributor of tobacco products and PRRPs imported by ITCAN, selling 15 brands of cigarette products and PRRPs under various trademarks to approximately 26,825 retailers and 184 wholesalers. ITCAN's primary stakeholders include its employees, its ultimate parent company (British American Tobacco,

² Affidavit of Eric Thauvette, sworn March 12, 2019 [Thauvette Affidavit]. Capitalized terms in this Factum not otherwise defined have the same meanings as in the Thauvette Affidavit.

³ The specific products imported and distributed by the Applicants are set out in a chart in the Thauvette Affidavit, para. 31.

p.l.c. (“**BAT**”)), retirees, customers, landlords, suppliers, and contingent litigation creditors, including the governments of the ten provinces of Canada.⁴

(a) Sale of Tobacco Products in Canada

11. ITCAN leads the Canadian tobacco industry with roughly 48 percent of the market share of all legal sales in 2018. The two other major Canadian manufacturers and distributors of tobacco products are Rothmans Benson & Hedges Inc. (“**RBH**”) and JTI-MacDonald Corp. (“**JTI-MacDonald**”). JTI has sought court protection under the CCAA.⁵

12. The legal tobacco industry is highly regulated and generates significant tax revenues. In 2018, the Applicants’ operations generated taxes payable to various levels of government totalling approximately \$4.0 billion. Tax represents 64 percent or more of the retail price of tobacco products, depending on the province.⁶

13. On the other hand, based on industry publications the illegal tobacco industry is estimated to make up almost one quarter of the market. If the legal producers of tobacco products in Canada were to cease operating, it would not be unreasonable to foresee that the illegal tobacco trade will expand to fill the void.⁷

(b) The Applicants’ Operations

(i) Product Manufacture and Import from Outside Canada

14. ITCAN purchases finished conventional cigarette products from its affiliate, British American Tobacco Mexico S.A. de C.V. and imports them into Canada through the US, largely

⁴ Thauvette Affidavit, para. 4.

⁵ Thauvette Affidavit, para. 28.

⁶ Thauvette Affidavit, paras. 4, 29.

⁷ Thauvette Affidavit, paras. 15, 30.

into Ontario.⁸ ITCAN acquires title to the purchased finished product once it is loaded onto trucks in Mexico. Based on 2018 data, at any given time there are approximately four weeks' worth of finished product inventory stored in U.S. warehouses, one-and-a-half weeks' worth of inventory in transit, and 8 to 10 days' worth of inventory in Canada.⁹

15. ITCAN also buys a small amount of tobacco finished products from two other BAT affiliated companies: (a) British American Tobacco (Supply Chain WE) Limited, which supplies certain Vogue, Du Maurier, and Pall Mall super slim cigarettes that are currently imported from Poland and Switzerland; and (b) Souza Cruz S.A., which supplies John Player Choice cigarettes that are currently imported from Brazil. In both cases, ITCAN takes title to the goods upon delivery in Montreal.¹⁰

16. Additionally, ITCAN buys raw materials and pays an assembly fee to Bastos du Canada Limitée, a competitor, to manufacture a small amount of Marlboro and other branded cigarettes in Quebec which cannot be produced in Mexico due to trademark issues.¹¹

17. The PRRPs (or their constituent parts) are purchased by ITCAN from Nicoventures Trading Limited (“**Nicoventures**”), a BAT affiliate that sources the PRRPs from outside Canada. Pursuant to distribution agreements with Nicoventures, ITCAN acts as Nicoventures' exclusive

⁸ Thauvette Affidavit, paras. 19, 67–68. All ITCAN purchases of finished products from BAT affiliates referenced in the Thauvette Affidavit are at an agreed-upon, arm's-length price.

⁹ Thauvette Affidavit, para. 68.

¹⁰ Thauvette Affidavit, paras. 19, 69. Kuehne and Nagel manages the logistics of importing the super slim products.

¹¹ Thauvette Affidavit, para. 19.

distributor of the PRRPs in Canada and earns licensing fees. ITCO acts as the ultimate distributor of both PRRPs in Canada pursuant to an agreement with ITCAN.¹²

(ii) Supply Chain Within Canada

18. Finished products arriving in Canada are transported to distribution centres located in Alberta, British Columbia, Newfoundland and Labrador, Ontario and Quebec. Pursuant to an agreement with ITCAN, ITCO is in charge of distribution of finished products from all of the distribution centres. ITCO has contracted with Ryder Integrated Logistics, a division of Ryder Truck Rental Canada Ltd. (“**Ryder**”) to supply and operate all of the distribution centres in Canada, with the exception of one distribution centre in Newfoundland and Labrador, which is supplied and operated by Baine Johnston Corporation (“**BJC**”).¹³

19. ITCO buys finished cigarette products and PRRPs from ITCAN pursuant to a sales and distribution agreement and sells and distributes them to third parties, including wholesalers and retailers (including duty free retailers). ITCO also buys materials for roll-your-own cigarettes from third party suppliers and sells them to retailers.¹⁴

20. ITCO is the only Applicant that sells finished cigarette products and PRRPs to wholesalers and retailers. Typically, ITCO engages Ryder or BJC to pick and pack and manage delivery of orders to ITCO’s customers either directly or through subcontractors. In remote or

¹² Thauvette Affidavit, paras. 23, 71–72. In addition to the two Distribution Agreements, ITCAN has also entered into a Supply of Marketing Services Agreement with Nicoventures to provide marketing support services to Nicoventures in exchange for Nicoventures paying all “Charges” under the agreement. See Thauvette Affidavit, para. 73.

¹³ Thauvette Affidavit, paras. 41, 74.

¹⁴ Thauvette Affidavit, paras. 20, 75.

less densely populated areas, ITCO engages Wallace & Carey Inc. (a wholesaler) for this purpose.¹⁵

21. The PRRPs include the following and are sold under various licensing agreements:

(a) a THP and tobacco sticks which creates an inhalable vapour (the “**Glo Products**”). Glo Products are sold in British Columbia, Alberta and Ontario through retailers and online. In addition, Glo Products are sold from an adults-only location in Vancouver operated by ITCO.

(b) electronic cigarettes, or “e-cigarettes”. The Vype e-cigarette product converts liquid nicotine into a mist or vapour that the user inhales. Since the passing of Bill S-5, the Applicants have begun selling their Vype e-cigarette products in Canada to retailers, duty free retailers, and online.¹⁶

22. Maintaining the stability of this global supply chain is critical during this proceeding.

(c) **Employees & Benefits**

23. As of December 31, 2018, approximately 466 full-time and 98 contract employees across Canada rely on the continued existence of the Applicants for their livelihoods. Wages and salaries for 2018 totalled approximately \$70 million.¹⁷

24. The Applicants have three registered Canadian pension plans. The Imasco Pension Fund Society (“**IPFS**”) and the Imperial Tobacco Corporate Pension Plan (“**ITCPP**”) are defined benefit (DB) plans (collectively, the “**DB Plans**”). The DB Plans were closed to new members in

¹⁵ Thauvette Affidavit, paras. 76–77.

¹⁶ Thauvette Affidavit, paras. 22, 33–34.

¹⁷ Thauvette Affidavit, paras. 4, 45–47. A chart setting out the location of the Applicants’ active full-time employees by province as of December 31, 2018 is set out at para. 45 of the Thauvette Affidavit.

May 2006. However, some active employees are DB Plan members. A defined contribution plan (the “**DC Plan**”) exists for employees who have joined the Applicants since May 2006.¹⁸

25. In addition, there is a US defined benefit plan (the “**IGHI U.S. Pension Plan**”) sponsored by one of ITCAN’s U.S. subsidiaries, IHGI (defined below).¹⁹

26. Eligible senior executives of ITCAN participate in some of BAT’s stock-based compensation plans, including a long-term incentive plan and a deferred share bonus scheme. In addition, unfunded post-retirement and post-employment benefits are available to approximately 2051 members of the DB Plans and to approximately 148 IHGI U.S. Pension Plan members. They are not available to DC Plan members.²⁰

27. Details of the bonuses payable to certain key employees during this restructuring are set out in the Thauvette Affidavit. No related charge or security is being sought in relation to these bonuses in the proposed Initial Order.²¹

(d) Real Estate and Leases

28. ITCAN leases its registered head office in Brampton, Ontario, as well as other office space in Montreal. ITCAN also leases office space in Manhattan, New York where it is

¹⁸ Thauvette Affidavit, para. 49.

¹⁹ Thauvette Affidavit, para. 54. See Thauvette Affidavit, Exhibit “C” for detailed descriptions of the four pension plans, as well as other non-registered obligations.

²⁰ Thauvette Affidavit, paras. 57–60, 65. The aggregate annual cash contribution in 2018 to provide these benefits was approximately \$5.1 million for Canada and US \$1.7 million for the U.S. See Thauvette Affidavit, para. 66.

²¹ Thauvette Affidavit, paras. 61–63.

registered to do business. This is ITCAN's only place of business in the United States and is used to assist with managing ITCAN's United States interests.²²

29. Although Ryder entered into warehouse leases for the distribution centres, the leases can be assigned by Ryder to ITCO in certain circumstances. ITCO reimburses Ryder, in its capacity (*inter alia*) as operator of distribution centres, for all approved operating costs incurred on behalf of ITCO, including leasing costs.²³ ITCO leases space in Vancouver, BC for the adults-only retail space that sells Glo Products and accessories.²⁴

B. Corporate Structure of the Applicants

30. ITCAN is a privately held corporation incorporated under the *Canada Business Corporations Act*. It is 100 percent owned by British American Tobacco International (Holdings) B.V., an indirect subsidiary of BAT. As of October 4, 2017, the Applicants' registered head office is located in Brampton, Ontario. The Applicants' central decision-making functions are exercised in Canada.²⁵

31. ITCO, the other Applicant in this proceeding, is wholly-owned by ITCAN. ITCO is the largest revenue generator of ITCAN's subsidiaries. ITCO pays discretionary dividends annually to ITCAN from profits earned from its operations and, as of December 31, 2018 employs all of the Applicants' approximately 255 full time employees who work in sales positions.²⁶

²² Thauvette Affidavit, paras. 38, 40. One ITCAN subsidiary, 2004969 Ontario Inc., also owns a small parcel of contaminated land in Ontario at the site of its former tobacco processing and storage operation. See Thauvette Affidavit, paras. 24(d), 39.

²³ Thauvette Affidavit, para. 42. BJC receives certain fees for its services, rather than reimbursement for operating costs.

²⁴ Thauvette Affidavit, para. 43.

²⁵ Thauvette Affidavit, para. 17.

²⁶ Thauvette Affidavit, paras. 17, 21.

32. ITCAN directly or indirectly owns 100 percent of the shares of certain Canadian subsidiaries, as well as Liggett & Myers Tobacco Company of Canada Limited (“**Liggett & Myers**”). Liggett & Myers is a dormant Canadian company in which ITCAN has a 50% voting interest and 70% equity participation. It holds the Canadian trademark for Chesterfield. The Applicants distribute a small quantity of products with this trademark.²⁷

33. ITCAN’s foreign subsidiaries include Imasco Holdings Group Inc. (“**IHGI**”); ITL (USA) Limited; Genstar Pacific Corporation; Imasco Holdings Inc.; and Southward Insurance Ltd.²⁸

34. ITCAN is requesting that the CCAA Stay be extended in favour of its subsidiaries and Liggett & Myers.²⁹

C. Services Provided by BAT or BAT Affiliates

35. In addition to manufacturing services and financial services (described elsewhere), the Applicants benefit from numerous services provided by BAT, or BAT affiliates including: (a) computer systems integration and hosting; (b) IT support; (c) product development and testing; (d) accounting and human resources; (e) licenses for using innovations and technology packages and communications packages; (f) technical and advisory services; (g) integrated sales and operations planning; and (h) global purchasing power.³⁰

²⁷ Thauvette Affidavit, paras. 18, 24(c). A chart showing the corporate structure of the Applicants is set out in the Thauvette Affidavit at para. 18. The roles played by the subsidiaries in this structure is described at para. 24 of the Thauvette Affidavit.

²⁸ Detailed descriptions of these subsidiaries are found at para. 25 of the Thauvette Affidavit.

²⁹ Thauvette Affidavit, paras. 26, 152.

³⁰ See Thauvette Affidavit, para. 112 for a detailed description of the shared services arrangements involving BAT or a BAT affiliate. Although the Applicants are not at arm’s length from the BAT Affiliates, the Applicants and the BAT Affiliates ensure that amounts paid to the BAT Affiliates are consistent that would be paid by arm’s length parties in the same circumstances. See Thauvette Affidavit, para. 114.

36. Details of the Accommodation Agreement entered into with the BAT Affiliates for the purposes of preserving these arrangements during this proceeding are set out in the Thauvette Affidavit.³¹

D. Financial Position

(a) Credit Arrangements

37. ITCAN's credit arrangements are extended by a BAT related company, B.A.T. International Finance p.l.c. ("**BATIF**"). As of June 28, 2018, ITCAN has a \$30 million committed secured revolving credit facility that matures on June 28, 2019. This Revolving Credit Facility is available on an "as needed basis" for ITCAN's operating costs. On a weekly basis, ITCAN either pays down or draws from the Revolving Credit Facility. As of March 4, 2019, ITCAN had not drawn down on the Revolving Credit Facility.³²

38. The repayment obligations of ITCAN under the Revolving Credit Facility are secured by the common shares of ITCAN's subsidiary, Imperial Brands Ltd., a guarantee from Imperial Brands and a hypothec on trademarks owned by Imperial Brands. ITCAN also has access to a \$25 million overdraft facility with the BNS, which serves as a back-stop to the Revolving Credit Facility. Nothing has been drawn on the overdraft facility.³³

39. As a result of BATIF's security over the Imperial Brands shares and trademarks, ITCAN cannot create security on or over, or affecting these trademarks or shares, dispose of all or part of these trademarks or shares, or take any step that would depreciate or prejudice their value,

³¹ Thauvette Affidavit, para. 115.

³² Thauvette Affidavit, paras. 93, 98-99.

³³ Thauvette Affidavit, paras. 94, 100.

without BATIF's consent. Moreover, ITCAN is prohibited from any additional borrowing in excess of \$50 million without BATIF's consent.³⁴

(b) **Tax Bonds and Letters of Credit**

40. The Applicants are required to collect federal excise taxes and import duties ("**Federal Tobacco Tax**") and provincial tobacco taxes ("**PTT**") (collectively, the "**Tobacco Taxes**") on all tobacco products imported into Canada and sold in a province. The Applicants currently hold the amounts collected as Tobacco Taxes and remit them as required. The Applicants have posted bonds to the federal and provincial government authorities to secure the Tobacco Tax obligations. The Applicants also collect GST, HST, PST and other retail sales taxes in connection with the sale of tobacco products, which are also remitted monthly in arrears (the "**Sales Taxes**", together with the Tobacco Taxes, the "**Sales & Excise Taxes**").³⁵

41. The peak monthly Federal Tobacco Tax, PTT and GST/HST are estimated to be approximately \$228 million, \$282 million and \$70 million, respectively.³⁶

42. ITCAN and ITCO have posted bonds or LOCs in respect of certain tax obligations.³⁷ On March 26, 2010, ITCAN entered into an unsecured committed Credit Agreement in the amount of \$100 million with the BNS (the "**BNS LOC Facility**"), which is extended yearly. The BNS LOC Facility only permits the issuance of LOCs to meet ITCAN's obligations in relation to past, present and future taxes or other such charges imposed by any government authority. Two LOCs

³⁴ Thauvette Affidavit, paras. 95–96.

³⁵ Thauvette Affidavit, para. 80.

³⁶ All of these numbers include an estimate to address the amount of tax that has been collected but is to be remitted at the next remittance date. See Thauvette Affidavit, para. 81.

³⁷ Thauvette Affidavit, paras. 82–83. The aggregate amount of such bonds or LOCs is approximately \$111 million. In addition, IHGI has posted a LOC in the amount of approximately USD \$0.3 million. See also Thauvette Affidavit, Exhibit "F" for a sample of the bond documents, which are largely similar.

in respect of Alberta and British Columbia Tobacco Taxes in the total amount of \$30 million are the only current LOCs issued under the BNS LOC Facility.³⁸

43. ITCAN has an irrevocable standby LOC issued by HSBC for the benefit of the Minister of Finance (Ontario) in the amount of \$28 million for certain of ITCAN's tax obligations.³⁹

E. Financial Position of the Applicants

44. Detailed information regarding the financial position of the Applicants is set out in the Thauvette Affidavit, as well as in the audited consolidated financial statements for the fiscal year ended December 31, 2018.⁴⁰

45. As of December 31, 2018, ITCAN had total assets of \$5,535 million. ITCAN's total liabilities were approximately \$1,088 million. Capital and reserves totalled \$4,447 million. In 2018, profits before taxes, interest and adjusting items totalled \$792 million, as compared to \$673 million in 2017. ITCAN's profits after taxes, interest and adjusting items increased from \$487 million in 2017 to \$589 million in 2018.⁴¹

F. Need for Relief

46. The Applicants face an existential threat from the Tobacco Litigation in Canada. The plaintiffs collectively seek hundreds of billions of dollars in damages, which, if those claims were successful, would exceed the Applicants' total assets many times over. Not only does the maximum amount of ITCAN's share of the Quebec Appeal Judgment, taken in isolation, exceed

³⁸ Thauvette Affidavit, para. 84.

³⁹ Thauvette Affidavit, para. 85.

⁴⁰ Thauvette Affidavit, paras. 116–128 and Exhibit "I". All amounts are in Canadian dollars unless otherwise specified.

⁴¹ Thauvette Affidavit, paras. 117, 123, 126, 128.

the Applicants' ability to pay, but there are numerous competing claims across Canada that need to be resolved in a fair and equitable manner.⁴²

(a) **The Quebec Appeal Judgment**

47. The Quebec Appeal Judgment is the result of two class actions filed against ITCAN, JTI MacDonald and Rothmans in 1998 in the Quebec Superior Court seeking in excess of \$20 billion in compensatory and punitive damages. The trial judgment (the "**Quebec Class Action Judgment**") was released on May 27, 2015 and condemned ITCAN and its two co-defendants to pay \$15.6 billion. ITCAN's share was approximately \$10.6 billion plus post-judgment interest.⁴³

48. The Quebec Court of Appeal ordered ITCAN to pay a total of \$758 million as security for proceeding with its appeal from the Quebec Class Action Judgment. The security was payable in equal instalments over seven quarters starting on December 30, 2015. These instalments have now all been paid.⁴⁴

49. The Quebec Appeal Judgment substantially upheld the lower court's decision. The Quebec Appeal Judgment made two notable modifications to the trial judgment: (i) the total claim amount was reduced by just over \$1 million; and (ii) the claim amount was divided into 15 different increments which bear interest from various dates between November 20, 1998 and December 31, 2011 (instead of having the entire claim amount the bear interest from November

⁴² Thauvette Affidavit, paras. 5, 129. See Thauvette Affidavit, Exhibit "A" for a copy of the Quebec Appeal Judgment.

⁴³ Thauvette Affidavit, paras. 132–133. See Thauvette Affidavit, Exhibit "J" for a copy of the Quebec Class Action Judgment.

⁴⁴ Thauvette Affidavit, para. 137. See Thauvette Affidavit, Exhibit "K" for a copy of the Court of Appeal's decision cancelling the Provisional Execution Order. See Thauvette Affidavit, Exhibit "M" for a copy of the Court of Appeal's decision requiring ITCAN to post security for the appeal. See Thauvette Affidavit, Exhibit "N" for the judgment of the Quebec Court of Appeal, rejecting ITCAN's motion to vary the payment terms of the security.

20, 1998), which reduced the interest payable on the total claim amount by approximately \$3 billion. Following the rendering of the Quebec Appeal Judgment:

- (a) the total liability for moral damages, with interest and additional indemnity, is over \$13.5 billion, of which ITCAN's share is \$9,064,365,117.54 with interest and additional indemnity as of the date of the Quebec Appeal Judgment; and
- (b) in addition to moral damages, ITCAN is condemned to pay punitive damages that, with interest and additional indemnity, totals \$89,199,977.26 as of the date of the Quebec Appeal Judgment. In total, the Quebec Appeal Judgment condemns ITCAN to pay a total of \$9,153,565,094.80.⁴⁵

50. In addition, the Quebec Appeal Judgment provides that ITCAN must deposit, by April 30, 2019, an initial amount of \$670,000,000 in its attorney's trust account, along with the total amount of punitive damages. The plaintiffs have the right to request additional deposits should the initial deposit of ITCAN (and the other defendants) prove insufficient to cover all claims made by eligible members of the class.⁴⁶

51. ITCAN is unable to pay the maximum amount owing under the Quebec Appeal Judgment. The amount that ITCAN is condemned to pay under the judgment is billions of dollars more than all of its assets as of December 31, 2018.⁴⁷

(b) **Other Tobacco Litigation**

52. ITCAN is facing more than 20 large Tobacco Litigation proceedings. Four of these have been brought in Ontario and claim damages totalling well over \$330 billion. These proceedings

⁴⁵ Thauvette Affidavit, para. 139.

⁴⁶ Thauvette Affidavit, para. 140.

⁴⁷ Thauvette Affidavit, para. 142.

include: (a) government “Medicaid” actions seeking to recover health care costs incurred in connection with smoking-related diseases; (b) smoking and health class actions seeking damages on behalf of individuals suffering from several smoking-related diseases;⁴⁸ and (c) a class action brought by Ontario tobacco growers in relation to certain pricing practices of ITCAN. Most of this litigation is at a preliminary stage.⁴⁹

53. All of the Tobacco Litigation, together with the Tobacco Claims not currently being litigated, are intended to be subject to the global resolution proposed in this CCAA proceeding.

PART III - ISSUES AND THE LAW

A. Issues

54. The Applicants are entitled to the relief sought in the draft Initial Order, including:

- (a) The Applicants are entitled to seek protection under the CCAA on the basis that:
 - (i) the Applicants’ registered office and chief place of business is Ontario; (ii) the Applicants are insolvent; and (iii) the CCAA can be used to effect a global resolution of litigation claims;
- (b) The CCAA Stay should be granted and this Court has the jurisdiction to extend the stay to BAT and the BAT Affiliates (defined below), as well as to the subsidiaries and to Liggett & Myers;
- (c) This Court should exercise its discretion to approve the Court-ordered charges, including (i) the Tobacco Claimant Representative Charge; (ii) the Administration Charge; (iii) the Directors’ Charge; and (iv) the Sales & Excise Taxes Charge.

⁴⁸ See Thauvette Affidavit, Exhibit “S” for copies of the class action Statements of Claim. Note that not only are the issues raised in these class proceeding similar, seven of these actions were filed by the same law firm.

⁴⁹ Thauvette Affidavit, para. 143–151. See Thauvette Affidavit, Schedule “A” for a chart summarizing the litigation underway across Canada.

B. The Applicants are Entitled to Seek Protection Under the CCAA

(a) Ontario is the Appropriate Venue in this Proceeding

55. Subsection 9(1) of the CCAA provides that an application for a CCAA Stay may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.⁵⁰ Case law indicates that "head office" means registered office, as determined under corporate law.⁵¹ As of October 4, 2017, Brampton, Ontario is the location of the Applicants' registered head office.⁵²

(b) The Applicants Are Insolvent

56. The CCAA applies to a "debtor company" or affiliated debtor companies where the total of claims against the debtor or its affiliates exceeds five million dollars.⁵³ The Applicants are affiliated debtor companies with total claims against them that far exceed \$5 million. In fact, this test is satisfied solely by virtue of the quantum of the Quebec Appeal Judgment.⁵⁴

57. Pursuant to section 2 of the CCAA, a "debtor company" means, *inter alia*, a company that is insolvent.⁵⁵ There is no definition of "insolvent" in the CCAA. Whether a company is insolvent for the purposes of the definition of "debtor company" is evaluated by reference to the

⁵⁰ CCAA, s. 9(1).

⁵¹ *Re Oblats de Marie Immaculée du Manitoba*, 2002 SKQB 161 at para. 13, citing *Royal Bank v. Perfection Foods Ltd.*, 1991 CarswellPEI 116 (SC (TD)).

⁵² Thauvette Affidavit, para. 17.

⁵³ CCAA, s. 3(1).

⁵⁴ *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358. See Thauvette Affidavit, Exhibit "A" for a copy of the Quebec Appeal Judgment.

⁵⁵ CCAA, ss. 2, 3(1).

definition of “insolvent person” in the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (“**BIA**”)⁵⁶ and to the expanded concept of insolvency accepted by this Court in *Stelco*.⁵⁷

58. In order to give effect to the objectives of the CCAA of allowing the debtor company breathing room to restructure, a debtor is insolvent under the *Stelco* approach if there is a looming liquidity crisis such that it is reasonably foreseeable that the debtor will run out of cash unless its business is restructured.⁵⁸ Under the *Stelco* approach, it is both necessary and appropriate to take into account the contingent liabilities arising from litigation to which the debtor company is subject, as well as the current liabilities.⁵⁹

59. Even without taking into account the contingent liabilities represented by the other Tobacco Litigation, the Applicants are currently insolvent on the basis that they face an imminent liquidity crisis resulting from the Quebec Appeal Judgment that clearly satisfies the expanded *Stelco* test. ITCAN’s and ITCO’s financial affairs are inextricably intertwined, as are their businesses.⁶⁰ The Applicants therefore require the CCAA Stay and other relief in order to restructure their affairs and attempt to maximize enterprise value.⁶¹

⁵⁶ BIA, s. 2.

⁵⁷ *Re Stelco Inc.*, 2004 CarswellOnt 1211 (Sup Ct [Comm List]), leave to appeal to ONCA refused, 2004 CarswellOnt 2936, leave to appeal to SCC refused, 2004 CarswellOnt 5200 [*Stelco*].

⁵⁸ *Stelco*, above at note 57 at para. 26. *Stelco* has been followed in a number of cases, including recently in *Re Target Canada Co.*, 2015 ONSC 303 at paras. 26–27 [*Target*] in which Morawetz J. concluded that the debtor company was insolvent either under the BIA test or the expanded *Stelco* test.

⁵⁹ See *Re 4519922 Canada Inc.*, 2015 ONSC 124 at paras. 23–35 [*Coopers & Lybrand*] for an example of an analysis of the test for insolvency under the CCAA where the debtor company was subject to in excess of \$1 billion in contingent liabilities associated with ongoing litigation.

⁶⁰ The fact that the operations of several affiliated companies are significantly intertwined such that CCAA protection of all of these affiliates is essential to ensure the success of the restructuring is sufficient to allow the Court to conclude that the affiliates are appropriate applicants under the CCAA. See *Re First Leaside Wealth Management Inc.*, 2012 ONSC 1299 at para. 30.

⁶¹ Thauvette Affidavit, para. 152.

(c) **Use of CCAA to Provide Equitable Recoveries to Litigation Claimants**

60. The requested CCAA Stay will allow the Applicants to effect a global resolution of the Tobacco Claims in a fair and equitable manner.⁶² This purpose is squarely within the core objective of the CCAA as a flexible regime designed to allow a debtor company to restructure its business and to emerge as a going concern, thereby avoiding liquidation, with the associated costs to all stakeholders.⁶³

61. On numerous occasions, the flexibility of the CCAA has been invoked in order to provide for a fair and equitable resolution of multiple litigation claims against a debtor company. Notable examples include: *Canadian Red Cross*;⁶⁴ *MuscleTech*;⁶⁵ *Sino-Forest*;⁶⁶ *Montreal, Maine & Atlantic Canada*;⁶⁷ and *Coopers & Lybrand*.⁶⁸

62. The CCAA Stay and, ultimately, a CCAA plan of compromise or arrangement, creates a level playing field among litigation claimants. Such relief prevents the unfairness to a plaintiff

⁶² Thauvette Affidavit, paras. 15–16.

⁶³ See e.g. *Coopers & Lybrand*, above note 59 at para. 54.

⁶⁴ There are no reported reasons in support of the initial stay of proceedings in *Canadian Red Cross*. However, the purpose of the CCAA proceeding is summarized in Blair J.’s reasons supporting the sale and transfer of the assets of the Red Cross to a new agency. *Re Canadian Red Cross Society*, 1998 CarswellOnt 3346 at para. 2 (Ct J (Gen Div) [Comm List]): “The Red Cross finds itself in this predicament primarily as a result of some \$8 billion of tort claims being asserted against it (and others, including governments and hospitals) by a large number of people who have suffered tragic harm from diseases contacted as a result of a blood contamination problem that has haunted the Canadian blood system since at least the early 1980’s.”

⁶⁵ See *MuscleTech Research and Development Inc.*, (Court File No. 06-CL-6241), Endorsement of Farley J. dated January 18, 2006 (Sup Ct [Comm List]) [*MuscleTech*]. See also *Re MuscleTech Research and Development Inc.*, 2006 CarswellOnt 720 at para. 9 (Sup Ct [Comm List]), citing *Re Grace Canada Inc.*, 2005 CarswellOnt 6648 at paras. 5, 11 (Sup Ct [Comm List]) [*Grace Canada*].

⁶⁶ *Re Sino-Forest Corp.*, 2012 ONSC 2063 at paras. 4, 16, 24 [*Sino-Forest*].

⁶⁷ *Re Montreal Maine & Atlantic Canada Co.*, 2013 QCCS 4039 [*MMAC*].

⁶⁸ *Coopers & Lybrand*, above note 59 at para. 41.

whose claim has not yet come to trial that would result if other plaintiffs whose claims have been reduced to judgment are permitted to deplete the funds of the judgment debtor.⁶⁹

63. The fact that the Quebec plaintiffs have had their claims reduced to judgment does not give them higher rights to recovery than any other Tobacco Claimant. It simply means that their litigation was decided first. It would be unfair to subsequent Tobacco Claimants, who may also have meritorious claims that have not yet been determined, to see all of the Applicants' assets dedicated to the satisfaction of some portion of the Quebec Appeal Judgment.

64. The requested CCAA Stay is critical to permit the Applicants to continue going-concern operations for the benefit of all stakeholders, while providing the Applicants with the time necessary to achieve a fair, equitable and global resolution of all the Tobacco Claims.

C. Extension of the CCAA Stay to Non-Applicants

(a) BAT and the BAT Affiliates

65. The Applicants seek to extend the stay of proceedings to BAT and to certain of its affiliates⁷⁰ (collectively, the "**BAT Affiliates**") but only in relation to the Tobacco Claims and proceedings related to the Applicants, their business or their property. This Court's authority to do so derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on "any terms that [the Court] may impose."⁷¹

⁶⁹ *Coopers & Lybrand*, above note 59 at para. 55, citing by way of example, *MMAC* and *Muscletech*.

⁷⁰ B.A.T. International Finance p.l.c., B.A.T. Industries P.L.C., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, and entities related to or affiliated with them other than the Applicants and the ITCAN Subsidiaries (as defined in the Initial Order).

⁷¹ CCAA, s. 11.02(1). See also CCAA, s. 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."

66. Such an order has been held to be justified where it furthers the purpose of the CCAA stay or where the failure to extend the Court's protection to the non-applicant would undermine the debtor company's ability to achieve a successful restructuring. For example, a CCAA stay has been extended to: (i) one or more subsidiaries or affiliates of the CCAA applicants that had guaranteed the applicants' secured loans;⁷² (ii) the parent corporation and certain other U.S. affiliates of the CCAA debtor;⁷³ (iii) partnerships in which the debtor company or its affiliates are partners;⁷⁴ and (iv) insurers of a partnership where the insurers had contributed a substantial amount towards a global settlement of litigation claims.⁷⁵

67. The extension of the CCAA Stay to BAT and the BAT Affiliates is just and reasonable in the circumstances:

- (a) On more than one occasion, a CCAA Court has extended a stay of proceedings in favour of a non-applicant co-defendant of the debtor in order to ensure that inter-related proceedings were resolved consistently within the insolvency proceeding.⁷⁶ Most of the Tobacco Litigation proceedings against ITCAN also name BAT and the BAT Affiliates as co-defendants, alleging that all the

⁷² *Re Tamerlane Ventures Inc.*, 2013 ONSC 5461 at para. 21 [*Tamerlane*]. See also *Re Cinram International Inc.*, 2012 ONSC 3767 at paras. 61–65 [*Cinram*] (stay extended to a number of non-applicant entities, including subsidiaries of the debtor company that were parties to an agreement with an applicant as surety, guarantor or otherwise); *Sino-Forest*, above note 66 at paras. 5, 31 (stay extended to a number of non-applicant subsidiaries that acted as guarantor for the obligations of the applicant).

⁷³ *Target*, above note 58 at paras. 49–50.

⁷⁴ See e.g. *Target*, above note 58 at paras. 38–40; *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 ONSC 222 at paras. 33–34 [*Canwest Publishing*].

⁷⁵ *Coopers & Lybrand*, above note 59 at paras. 68–72. See also *MMAC*, above note 67.

⁷⁶ *Grace Canada*, above note 63 at para. 12. See also *Campeau v. Olympia & York Developments Ltd.*, 1992 CarswellOnt 185 at paras. 23–25 (Ct J (Gen Div)) [*Campeau*] (extending a CCAA stay to a third party defendant in litigation arising out of the same facts as litigation involving the debtor); *Muscletech*, above note 65 (extending the CCAA stay to a number of non-applicants where the claims against the non-applicants were derivative of claims against the debtor and where the stay would facilitate a global resolution of the litigation).

defendants are jointly and severally liable for having engaged in a conspiracy to suppress information regarding the dangers of smoking and to encourage smoking. These claims can only effectively be determined in one forum to avoid inconsistent outcomes and to facilitate a full global resolution of the Tobacco Claims.⁷⁷

- (b) In addition, the CCAA Stay serves the well-recognized purpose of shielding the debtor company from having to devote time and scarce resources to addressing litigation against it in order to allow the debtor and its Board and management to focus on the restructuring.⁷⁸ BAT and the BAT Affiliates would require the considerable assistance and involvement of ITCAN personnel and resources if the Tobacco Litigation were to continue against them, causing considerable prejudice to the ability of the Applicants to successfully restructure.⁷⁹ On the other hand, there would be no prejudice to the Tobacco Litigation plaintiffs if a stay were extended to BAT and BAT Affiliates since their claims are not being precluded, merely postponed and their claims may be addressed more expeditiously than otherwise might have been the case.⁸⁰

In order to achieve a global resolution of the Tobacco Claims, the resources and efforts of ITCAN, BAT and the BAT Affiliates must be devoted to developing and implementing a plan of compromise or arrangement that can achieve the necessary consensus among affected stakeholders without the costs and

⁷⁷ Thauvette Affidavit, paras. 11–12. See also Thauvette Affidavit, para. 153(a).

⁷⁸ *Re Nortel Networks Corp.*, 2009 CarswellOnt 4806 at paras. 20, 27, 36 (Sup Ct [Comm List]).

⁷⁹ Thauvette Affidavit, para. 13.

⁸⁰ See *Campeau*, above note

distraction associated with the continued pursuit of the Tobacco Litigation against BAT and the BAT affiliates.⁸¹

- (c) Finally, the ongoing and future contributions to the success of the Applicants' restructuring by BAT and the BAT Affiliates justifies the extension of the CCAA Stay to protect these entities in this proceeding.

(b) Non-Applicant Subsidiaries and Liggett & Myers

68. The Applicants further request that the CCAA Stay be extended to ITCAN's wholly-owned non-Applicant subsidiaries and to Liggett & Myers. This Court's jurisdiction to extend the CCAA Stay to the non-Applicant subsidiaries and Liggett & Myers is based on the same legal principles as set out above.⁸² These non-Applicant entities are highly integrated with the Applicants and are indispensable to the Applicants' business and restructuring. Certain of them hold the trademarks or other assets of ITCAN; others provide services to ITCAN, share the cash management system with ITCAN or have guaranteed ITCAN debts from time to time.⁸³

D. Court-Ordered Charges

(a) Administration Charge

69. The Applicants request that the Monitor, its counsel, and counsel to the Applicants be protected by a Court-ordered charge on all of the present and future assets, property and undertaking of the Applicants (the "**Property**") up to a maximum amount of CAD \$5 million as security for their respective fees and disbursements (the "**Administration Charge**"). The

⁸¹ Thauvette Affidavit, para. 13. See also Thauvette Affidavit, para. 153(b).

⁸² See e.g. *Tamerlane*, above note 70; *Cinram*, above note 70; *Sino-Forest*, above note 64.

⁸³ Thauvette Affidavit, para. 10.

Administration Charge will rank *pari passu* with the Tobacco Claimant Representative Charge and will have first priority over all other court-ordered charges.⁸⁴

70. Section 11.52 of the CCAA provides that the Court has jurisdiction to grant an administration charge and to accord this charge priority over the claim of any secured creditor of the company. The proposed Administration Charge is reasonable in light of the size and complexity of the Applicants' business, the integral role that the beneficiaries of the Charge will play in the restructuring, and there is no unwarranted duplication of roles.⁸⁵ The proposed Monitor is of the view that the Administration Charge is appropriate in the circumstances.

(b) Tobacco Claimant Representative Charge

71. The Applicants request the appointment of the Tobacco Claimant Representative on an interim basis until April 30, 2019 or as may be agreed to by the Applicants and the Monitor (the "**Interim Period**") for the reasons set out in detail in the Affidavit of Nancy Roberts.⁸⁶ It is critical to the success of the Applicants' restructuring initiatives that the claims of all Tobacco Claimants be considered under one umbrella to ensure uniformity of treatment, to avoid economic tensions between Tobacco Claimants, to deal with competing claims of class counsel, and to streamline the process for the resolution of such claims.⁸⁷

72. The Applicants propose that the Tobacco Claimant Representative will be a court officer with a mandate to represent the interests of all Persons with Tobacco Claims, except the Government Claimants. The Tobacco Claimant will have the mandate to carry out certain Interim Duties, including: (a) retaining independent legal counsel and other advisors to assist

⁸⁴ Thauvette Affidavit, para. 155; Draft Initial Order, para. 45.

⁸⁵ *Canwest Publishing*, above note 74 at para. 54. See also *Target*, above note 58 at paras. 73–74.

⁸⁶ Affidavit of Nancy Roberts, sworn March 12, 2019, paras. 6–15 [Roberts Affidavit].

⁸⁷ Roberts Affidavit, para. 15.

with the Interim Duties; (b) consulting with Tobacco Claimants, the Monitor, the Applicants and other creditors and stakeholders of the Applicants with respect to (i) the establishment of a committee of Tobacco Claimants to provide input to the Tobacco Claimant Representative and (ii) the procedural mechanisms to be implemented to facilitate the resolution of the Tobacco Claims; (c) accept a court appointment of a similar nature to represent claimants with interests similar to the Tobacco Claimants in any proceedings under the CCAA commenced by any of the Applicants' co-defendants in the Tobacco Litigation; and (d) apply to the Court for advice and directions, as required.⁸⁸

73. Before the end of the Interim Period, the Applicants will bring a motion to seek the permanent appointment of the Tobacco Claimant Representative to represent the interests of all of the Tobacco Claimants in negotiating a settlement with the Applicants and others.⁸⁹ It is anticipated that the proposed mandate for the Tobacco Claimant Representative will be to: (a) represent the interests of the Tobacco Claimants in the CCAA proceedings, including in relation to negotiations to settle with the Applicants, the BAT Affiliates and others and the development of the Plan; (b) negotiate on behalf of the Tobacco Claimants fair and reasonable class counsel fees with class counsel in the various class actions; (c) negotiate and consult with the Government Claimants; (d) constitute a Tobacco Claimant Committee to consult with the Tobacco Claimant Representative as appropriate; (e) consult with the Monitor in connection with the negotiations of the settlement of any Tobacco Claims and the development of a plan; and (f) report the Court and to Tobacco Claimants, as appropriate.⁹⁰

⁸⁸ Roberts Affidavit, para. 4.

⁸⁹ Roberts Affidavit, para. 5.

⁹⁰ Roberts Affidavit, para. 16.

74. It is further proposed that the Tobacco Claimant Representative, his counsel and other advisors be granted a Court-ordered charge (the “**Tobacco Claimant Representative Charge**”) to secure their fees and disbursements relating to the services rendered up to a maximum of CDN \$1 million. The Tobacco Claimant Representative Charge will rank *pari passu* with the Administration Charge and have first priority over all other charges.

75. This Court’s jurisdiction to appoint the Tobacco Claimant Representative derives from the Court’s power to make any order that is considered appropriate under section 11 of the CCAA.⁹¹ In addition, section 11.52(1) of the CCAA authorizes the Court to grant a charge over the assets of the debtor company to fund the expenses of advisors or representatives engaged by the company or interested third parties where the court is satisfied that the security or charge is necessary for their effective participation in the CCAA proceeding.⁹²

76. Courts have frequently made orders appointing representatives for different constituencies whose participation in an insolvency proceeding will be facilitated by such appointment, including: (a) employees and franchisees;⁹³ (b) class members or litigation claimants in an uncertified class proceeding;⁹⁴ and (c) parties with future, as yet unknown warranty claims against the debtor.⁹⁵

⁹¹ CCAA, s. 11. See also Rule 10.01(1) of the *Rules of Civil Procedure*, RRO 1990, Reg. 194, r. 10.01(1) (which provides for the Court to make a representation order).

⁹² CCAA, s. 11.52(1)(c).

⁹³ See *Target*, above note 58 at paras. 60–61; *Re Target Canada Co.*, 2015 ONSC 1028 at paras. 33–35.

⁹⁴ *Canadian Red Cross Society*, (Court File No. 98-CL-002970), Initial Order of Blair J. dated July 29, 1998 at para. 2 (Ct J (Gen Div) [Comm List]); *Grace Canada Inc.*, (Court File No. 01-CL-4081), Order of Farley J. dated February 8, 2006 (Sup Ct [Comm List]). In subsequent proceedings, representative counsel in the *Grace* proceeding was held to have the authority to enter into a settlement extinguishing the litigation claims, subject to court approval. See *Re Grace Canada Inc.*, 2008 CarswellOnt 6284 at paras. 32–35 (Sup Ct [Comm List]). See also *Montreal, Maine & Atlantic Canada Co.*, (Court File No. 450-11-000167-134), Order of Dumas J.S.C. dated April 4, 2014 at para. 5 (QC Sup Ct [Comm Div]).

⁹⁵ *Re New Home Warranty of British Columbia*, 1999 CarswellBC 1916 at paras. 3, 13 (SC).

77. The following factors can and should inform the Court's exercise of discretion to appoint the Tobacco Claimant Representative in this proceeding:⁹⁶

- (a) Vulnerability: As individuals, the Tobacco Claimants are clearly vulnerable in this proceeding because of the sheer magnitude of the number of affected persons and the inevitable difficulties they would have in representing their own interests.
- (b) Benefit to the Debtor: The Tobacco Claimant Representative provides an efficient and effective manner for communicating with the Applicants regarding Tobacco Claimants' interests, thereby facilitating the administration of the proceedings and avoiding multiple retainers/duplication. This in turn benefits all stakeholders of the Applicants who have an interest in an efficient, fair resolution of this proceeding.
- (c) Social Benefit: The Tobacco Claimant Representative will assist in creating a level playing field among Tobacco Claimants at different stages of their claims, including Claimants (i) whose Tobacco Claims have already been reduced to judgment, (ii) who are part of a certified class action in which no judgment has been rendered, or (iii) who are not part of a certified class proceeding.

78. The proposed Monitor supports the appointment of the Tobacco Claimant Representative and the granting of the Tobacco Claimant Representative Charge.

(c) **Directors' Charge**

79. Pursuant to s. 11.51 of the CCAA, the Court has authority to grant a priority charge to the directors and officers of a company as security for the indemnity provided by the company in

⁹⁶ *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 ONSC 1328 at para. 21.

respect of certain statutory obligations. This protection against personal liability arising out of the restructuring ensures the continued service of the directors and officers during the restructuring, creating stability and continuity.⁹⁷

80. The ITCAN and ITCO Board of Directors consists of four senior executives, the majority of whom have been intimately involved in the events leading up to this CCAA filing and in the development of strategies to reflect the competing interests of the Applicants' divergent stakeholder groups. The Applicants require the continuing support of their Directors and Officers (the "**Directors**") to preserve the value of the Applicants' business as a going concern and to address the financial challenges associated with these CCAA proceedings.⁹⁸

81. The Directors are exposed to potential personal liability in relation both to certain Employee Liabilities⁹⁹ and Sales & Excise Taxes.¹⁰⁰ Due to the discrete nature of these liabilities, the Applicants are seeking separate charges for the Employee Liabilities (the "**Directors' Charge**") and Sales and Excise Taxes (the "**Sales & Excise Tax Charge**"). This approach creates transparency for stakeholders such as, for example, the government entities who are the intended beneficiaries of the proposed Sales & Excise Tax Charge.¹⁰¹

82. The economic value of contractual indemnities granted to directors by insolvent entities is questionable. Moreover, although the Applicants maintain typical director and officer liability insurance (the "**D&O Insurance**") extending primary coverage with \$15 million aggregate

⁹⁷ *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 at para. 48 (Sup Ct [Comm List]).

⁹⁸ Thauvette Affidavit, para. 157.

⁹⁹ Employee Liabilities include unpaid accrued wages and vacation pay, unremitted source deductions, health taxes, workers' compensation premiums and other payroll related obligations. See Thauvette Affidavit, para. 159.

¹⁰⁰ Thauvette Affidavit, para. 159. See also discussion above regarding Sales & Excise Tax obligations.

¹⁰¹ Thauvette Affidavit, para. 160.

limits of liability and excess liability policies with cumulative aggregate limits of liability of \$230 million, the Directors are collectively reluctant to rely solely on the D&O Insurance given the risks of possible coverage related issues beyond their control in a complex restructuring.¹⁰²

83. Based on the Monitor's estimate of potential exposure to the Employee Liabilities the Applicants seek a \$16 million Directors' Charge. Under the draft Initial Order, the Directors have recourse to the Directors' Charge in the event only that the D&O Insurance is not available or applicable. It is proposed that the Directors' Charge will rank behind the lien securing the Revolving Credit Facility and the Administration Charge.¹⁰³

(d) Sales & Excise Tax Charge

84. The Applicants collect significant amounts of Sales & Excise Taxes to be remitted to the applicable government authorities on statutory remittance dates. Collected but unremitted Sales Taxes and Tobacco Taxes at any given time can exceed \$70 million and \$510 million respectively, creating significant potential financial exposure for the Directors.¹⁰⁴

85. The Applicants are requesting a court-ordered Sales & Excise Tax Charge in the amount of \$580 million over the Property to secure the remittance of collected but unremitted Sales & Excise Taxes. The proposed quantum of the Sales & Excise Tax Charge takes into account the bonds and letters of credit posted with applicable government authorities. It is proposed that the Sales & Excise Tax Charge rank behind the other court-ordered charges.¹⁰⁵

¹⁰² Thauvette Affidavit, para. 161.

¹⁰³ Thauvette Affidavit, paras. 163, 171.

¹⁰⁴ Thauvette Affidavit, paras. 165, 168.

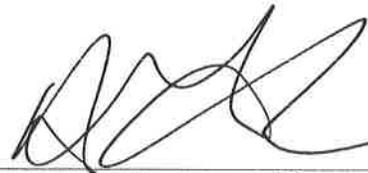
¹⁰⁵ Thauvette Affidavit, paras. 169, 171.

86. This Court has the authority to grant the Taxes Charge under section 11.51 of the CCAA and the same authorities that support the Directors' Charge. The Sales & Excise Tax Charge is essential to reassure applicable government authorities regarding the ongoing remittance of Sales & Excise Taxes during these proceedings. In order to facilitate this restructuring, these government authorities are stayed during the CCAA period from requiring any additional security or bonding from the Applicants for the Sales & Excise Taxes.¹⁰⁶

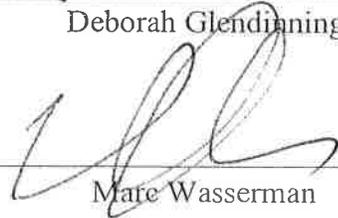
PART IV -NATURE OF THE ORDER SOUGHT

87. The Applicants therefore request an Order substantially in the form of the draft Order attached as Schedule "A" to the Notice of Application.

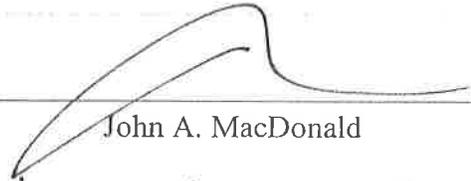
ALL OF WHICH IS RESPECTFULLY SUBMITTED:



Deborah Glendinning



Marc Wasserman



John A. MacDonald



Michael De Lellis

¹⁰⁶ Thauvette Affidavit, paras. 169-170.

Schedule "A"

LIST OF AUTHORITIES

Case Law

1. *Campeau v. Olympia & York Developments Ltd.*, 1992 CarswellOnt 185 (Ct J (Gen Div))
2. *Canadian Red Cross Society*, (Court File No. 98-CL-002970), Initial Order of Blair J. dated July 29, 1998 (Ct J (Gen Div) [Comm List])
3. *Grace Canada Inc.*, (Court File No. 01-CL-4081), Order of Farley J. dated February 8, 2006 (Sup Ct [Comm List])
4. *Montreal, Maine & Atlantic Canada Co.*, (Court File No. 450-11-000167-134), Order of Dumas J.S.C. dated April 4, 2014 (QC Sup Ct [Comm Div])
5. *MuscleTech Research and Development Inc.*, (Court File No. 06-CL-6241), Endorsement of Farley J. dated January 18, 2006 (Sup Ct [Comm List])
6. *Re 4519922 Canada Inc.*, 2015 ONSC 124
7. *Re Canadian Red Cross Society*, 1998 CarswellOnt 3346 (Ct J (Gen Div) [Comm List])
8. *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 (Sup Ct [Comm List])
9. *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 ONSC 1328
10. *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 ONSC 222
11. *Re Cinram International Inc.*, 2012 ONSC 3767
12. *Re First Leaside Wealth Management Inc.*, 2012 ONSC 1299
13. *Re Grace Canada Inc.*, 2008 CarswellOnt 6284 (Sup Ct [Comm List])
14. *Re Grace Canada Inc.*, 2005 CarswellOnt 6648 (Sup Ct [Comm List])
15. *Re Montreal Maine & Atlantic Canada Co.*, 2013 QCCS 4039
16. *Re MuscleTech Research and Development Inc.*, 2006 CarswellOnt 720 (Sup Ct [Comm List])
17. *Re New Home Warranty of British Columbia*, 1999 CarswellBC 1916 (SC)
18. *Re Nortel Networks Corp.*, 2009 CarswellOnt 4806 (Sup Ct [Comm List])
19. *Re Oblats de Marie Immaculée du Manitoba*, 2002 SKQB 161

20. *Re Sino-Forest Corp.*, 2012 ONSC 2063
21. *Re Stelco Inc.*, 2004 CarswellOnt 1211 (Sup Ct [Comm List]), leave to appeal to ONCA refused, 2004 CarswellOnt 2936, leave to appeal to SCC refused 2004 CarswellOnt 5200.
22. *Re Tamerlane Ventures Inc.*, 2013 ONSC 5461
23. *Re Target Canada Co.*, 2015 ONSC 303
24. *Re Target Canada Co.*, 2015 ONSC 1028
25. *Royal Bank v. Perfection Foods Ltd.*, 1991 CarswellPEI 116 (SC (TD))

Schedule “B”

BANKRUPTCY AND INSOLVENCY ACT

R.S.C. 1985, c. B-3, as amended

2. [...]

“insolvent person”
« *personne insolvable* »

“insolvent person” means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

COMPANIES’ CREDITORS ARRANGEMENT ACT

R.S.C. 1985, c. C-36, as amended

2.(1) [...]

“debtor company”
« *compagnie débitrice* »

“debtor company” means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

[...]

Application

3. (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

[...]

Jurisdiction of court to receive applications

9. (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

R.S., c. C-25, s. 9.

[...]

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.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

[...]

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.

2005, c. 47, s. 128.

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.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F).

[...]

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

1997, c. 12, s. 124; 2000, c. 30, s. 156; 2001, c. 34, s. 33(E); 2005, c. 47, s. 128; 2007, c. 36, s. 65.

[...]

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify

the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

[...]

2005, c. 47, s. 131; 2007, c. 36, s. 78.

**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 IMPERIAL TOBACCO CANADA LIMITED., et al.**

Applicants

Court File No.

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

**PROCEEDING COMMENCED AT
TORONTO**

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