

COURT FILE NUMBER 2301 - 08305

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS  
ARRANGEMENT ACT*, RSC 1985, c C-36, as amended

AND IN THE MATTER OF THE COMPROMISE OR  
ARRANGEMENT OF WALLACE & CAREY INC., LOUDON  
BROS LIMITED, and CAREY MANAGEMENT INC.

DOCUMENT **BENCH BRIEF OF LAW**

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File No.: 0221652.0006

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## I. INTRODUCTION

1. Wallace & Carey Inc. (“**Wallace & Carey**”), Loudon Bros Limited (“**Loudon Bros**”), and Carey Management Inc. (“**CMI**”, and together with Wallace & Carey, and Loudon Bros, the “**Applicants**”, or the “**Companies**”) obtained an initial order (the “**Initial Order**”) on June 22, 2023, under the *Companies’ Creditors Arrangement Act*, RSC 1985, c. C-36 (the “**CCAA**”).<sup>1</sup> Wallace & Carey and Loudon Bros are collectively referred to herein as the “**Logistics Companies**”.

2. Pursuant to the Initial Order:

- (a) KSV Restructuring Inc. was appointed Monitor;
- (b) the Stay Period was granted up to July 1, 2023;
- (c) the Charges were approved in the following priority
  - (i) First – Administration Charge (to the maximum amount of \$250,000);
  - (ii) Second – Lender Priority Charge (to the maximum amount of \$55,000,000 plus interest, fees, and expenses);
  - (iii) Third – D&O Charge (to the maximum amount of \$3,300,000);
  - (iv) Fourth – the Encumbrances existing as of the date of the Initial Order in favour of the Lender securing the pre-filing obligations owing under the CIBC Credit Agreement including, for greater certainty, obligations in connection with the BCAP Loan; and
  - (v) Fifth – Tobacco Tax Charge (to the maximum amount of \$18,000,000); and
- (d) the Applicants were authorized to carry on business in a manner consistent with the preservation of the Property, the restructuring proposed, and to make certain payments in connection with their business.

3. At the “Comeback Hearing”, the Applicants are seeking an amended and restated Initial Order (the “**ARIO**”):

- (a) extending the Stay Period up to and including September 20, 2023;

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<sup>1</sup>The Initial Order of Justice G.A. Campbell, dated June 22, 2023 (“**Initial Order**”). The Initial Order can be found on the Monitor’s website: <https://www.ksvadvisory.com/experience/case/wallace-and-carey>.

- (b) declaring that the Applicants may file a plan of compromise or arrangement;
- (c) declaring that the Applicants may pursue an orderly restructuring of the Business and the Property;
- (d) increasing the Administration Charge to the aggregate amount of \$750,000;
- (e) increasing the D&O Charge to the aggregate amount of \$4,000,000; and
- (f) increasing the Tobacco Tax Charge to the aggregate amount of \$26,000,000.

4. Capitalized terms used herein and not otherwise defined have the meanings given to them in Birnie Affidavit No. 1 (defined below) or the Initial Order.

## II. **FACTS**

5. The facts underlying this Application are set out in detail in the affidavit of Brian M. Birnie sworn June 21, 2023 (“**Birnie Affidavit No. 1**”). A summary of the key facts for the relief sought at the Comeback Hearing are below.

### A. **Background**

6. Wallace & Carey is a family owned business that was founded in 1921. Servicing more than 7,000 customers across the country, Wallace & Carey has grown to become one of Canada’s largest independent wholesale distribution and logistics companies.<sup>2</sup>

7. Loudon Bros is a wholly owned subsidiary of Wallace & Carey. Loudon Bros is Thunder Bay’s leading foodservice wholesaler and distributor, serving convenience stores, grocery stores, restaurants, foodservice providers, not-for-profits, and various retail sector businesses throughout Northwestern Ontario.<sup>3</sup>

8. CMI is the parent company and sole shareholder of Wallace & Carey. CMI provides management services to the Logistics Companies.<sup>4</sup>

9. The Business is facing unprecedented challenges that resulted from the COVID-19 global pandemic and its attendant supply chain disruptions and lockdowns, and subsequent inflationary pressures and interest rate increases. These financial stressors have been exacerbated by

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<sup>2</sup> Affidavit No. 1 of Brian M. Birnie sworn on June 21, 2023 (“**Birnie Affidavit No. 1**”) at para 2, 8, 20, 21.

<sup>3</sup> Affidavit No. 2 of Brian M. Birnie sworn June 27, 2023 (“**Birnie Affidavit No. 2**”) at para 9.

<sup>4</sup> *Ibid* at para 10.

significant declines in the sale of tobacco, a key product supplied by the Business. The Logistics Companies are consequently facing a liquidity crisis that has put the viability of the Business and the continued employment of their 650 employees at risk.<sup>5</sup>

10. As a result, the Applicants sought and obtained creditor protection and related relief under the CCAA pursuant to the Initial Order.<sup>6</sup>

**B. The Applicants' Activities since the Initial Order**

11. Since the Initial Order was granted, the Applicants have, with the assistance of their legal counsel and the Monitor, among other things:

- (a) hosted several town hall meetings and question and answer periods with employees at each location to advise them of the CCAA proceedings, what led to the filing, and the Applicants' plans for the business going forward;
- (b) immediately reached out to customers to advise them of the CCAA proceedings and the intention for there to be continued operations of the Business during the CCAA proceedings;
- (c) advised and engaged with vendors, suppliers, provincial and territorial tobacco tax authorities, and other creditors regarding these CCAA proceedings, the Applicants' business during these CCAA proceedings, and various other issues; and
- (d) reviewed forecasted operating costs to conserve capital during these CCAA proceedings.<sup>7</sup>

**III. ISSUES AND THE LAW**

12. The issues to be addressed before this Honourable Court are whether:

- (a) the Stay Period should be extended to September 20, 2023;
- (b) the Administration Charge should be increased to \$750,000;
- (c) the D&O Charge should be increased to \$4,000,000; and

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<sup>5</sup> *Ibid* at para 11.

<sup>6</sup> Initial Order, *supra* note 1; Birnie Affidavit No. 2, *supra* note 3 at para 12.

<sup>7</sup> Birnie Affidavit No. 2, *supra* note 3 at para 14.

(d) the Tobacco Tax Charge should be increased to \$26,000,000.

**A. The Stay Period Should be Extended**

13. The Applicants seek an extension of the Stay Period up to and including September 20, 2023.

14. A court may grant an extension of the stay of proceedings where the court is satisfied that: (i) circumstances exist that make the order appropriate; and (ii) the debtor has acted, and is continuing to act, in good faith and with due diligence.<sup>8</sup>

15. A stay of proceedings is appropriate to provide a debtor with breathing room while it tries to stabilize its operations and reorganize as a going concern to maximize value for stakeholders.<sup>9</sup>

16. The Applicants have acted in good faith and with due diligence since the Initial Order. During the initial 10-day Stay Period, the Applicants have, among other things, stabilized their operations, communicated with key stakeholders, reviewed and reduced operating costs and expenses, and provided information relating to the CCAA proceedings.<sup>10</sup>

17. The proposed extension to the Stay Period is reasonable in light of the Cash Flow Projections, and will provide the Applicants with sufficient time and the breathing room to hold discussions with creditors and put forward a plan of compromise or arrangement.<sup>11</sup> The proposed extension of the Stay Period also aligns with milestones in the CIBC Forbearance Agreement.<sup>12</sup>

18. The Monitor is supportive of the proposed extension of the Stay Period.<sup>13</sup>

**B. The Administration Charge Should Be Increased**

19. The Applicants seek to increase the Administration Charge from \$250,000 to \$750,000 in order to provide security for the professional fees and disbursements of the Monitor, counsel for the Monitor, and counsel for the Applicants (collectively, the “**Restructuring Professionals**”) during the extended Stay Period.

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<sup>8</sup> *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 (“**CCAA**”) at ss. 11.02(2) and (3) [TAB 1].

<sup>9</sup> *Target Canada Co, Re*, 2015 ONSC 303 at para 8 [TAB 2].

<sup>10</sup> Birnie Affidavit No. 2, *supra* note 3 at para 14.

<sup>11</sup> *Ibid* at para 20.

<sup>12</sup> *Ibid* at para 19 and Exhibit “A”.

<sup>13</sup> *Ibid* at para 22.

20. A court may grant an administration charge in a CCAA proceeding pursuant to section 11.52 of the CCAA.<sup>14</sup>

21. In deciding whether to grant an administration charge, courts have considered a number of factors including: (i) the size and complexity of the businesses being restructured; (ii) the role of the beneficiaries of the charge; (iii) whether there is unwarranted duplication of roles; (iv) whether the amount of the proposed charge appears to be fair and reasonable; (v) the position of the secured creditors likely to be affected by the charge; and (vi) the position of the monitor.<sup>15</sup>

22. The Applicants submit that it is appropriate for this Court to exercise its discretion to increase the Administration Charge as:

- (a) the quantum of the increased Administration Charge is in line with the nature and size of the Applicants' business and the involvement required by the professional advisors;
- (b) the Restructuring Professionals will play a critical role in assisting the Applicants with the development of a plan of arrangement and compromise and the progression of these CCAA proceedings;
- (c) each proposed beneficiary of the Administration Charge is performing a distinct function and there is no duplication of roles;
- (d) the Applicants believe that these additional professional fees are necessary and reasonable in light of the potential stakeholder value that could be maximized; and
- (e) the Monitor supports the proposed increased Administration Charge.

**C. The D&O Charge Should Be Increased**

23. The Applicants are seeking approval from this Court to increase the D&O Charge from \$3.33 million to \$4.0 million to secure the indemnification of the directors and officers of the Companies for liabilities they may incur during the within CCAA proceedings in their capacities as directors and officers.<sup>16</sup>

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<sup>14</sup> CCAA, *supra* note 8 s. 11.52 [TAB 1].

<sup>15</sup> *Canwest Publishing Inc., Re*, 2010 ONSC 222 at para 54 [TAB 3]; *Re Lydian International Limited*, 2019 ONSC 7473 at para 46 [TAB 4].

<sup>16</sup> Birnie Affidavit No. 1, *supra* note 2 at paras 178-184.

24. Section 11.51 of the CCAA provides the Court with the jurisdiction to grant the D&O Charge in an amount the Court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it.<sup>17</sup>

25. The Companies submit that the D&O Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Court to exercise its jurisdiction to grant the D&O Charge in favour of the directors and officers of the Companies as:

- (a) the directors and officers may be subject to potential liabilities in connection with these CCAA proceedings and have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;
- (b) the Companies' do not have directors' and officers' insurance;
- (c) the proposed D&O Charge would only cover obligations and liabilities that the Companies' directors and officers may incur after the commencement of these CCAA proceedings and does not cover wilful misconduct or gross negligence;
- (d) the Companies' directors and officers have been actively involved in the Companies' efforts to address their challenging circumstances, including through overseeing the Companies' restructuring efforts, the Companies' review and exploration of opinions in connection with their liquidity and financial challenges, communications with key customers and creditors, and preparation for and commencement of these CCAA proceedings;
- (e) the Companies will require the active and committed involvement of their directors and officers in order to complete a successful restructuring;
- (f) the Companies' secured creditors do not object to the increase to the charge; and
- (g) the amount of the D&O Charge has been calculated based on the estimated potential exposure of the Companies' directors and officers and has been reviewed with the Monitor.<sup>18</sup>

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<sup>17</sup> CCAA, *supra* note 8 s. 11.51 [TAB 1].

<sup>18</sup> Birnie Affidavit No. 2, *supra* note 3 at para 25.



**D. The Tobacco Tax Charge Should Be Increased**

26. The Applicants are seeking to increase the charge in favour of the provincial and territorial tobacco tax authorities that are entitled to receive payments or collect monies from the Logistics Companies in respect of collected but unremitted tobacco taxes (the “**Tobacco Tax Charge**”) from \$18 million to \$26 million.

27. The Tobacco Tax Charge will protect its beneficiaries from any exposure due to unpaid post-filing tobacco taxes. The Tobacco Tax Charge also has the benefit of protecting the Logistics Companies’ directors and officers as the non-payment of such taxes attracts liability for the directors and officers pursuant to the various statutes under which the tobacco taxes are collected.<sup>19</sup>

28. Section 11 of the CCAA provides this Court with statutory authority to grant any charge or order it deems necessary as follows:<sup>20</sup>

**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.

29. The Ontario Superior Court (Commercial List) recently granted a similar tax charge in *JTI-Macdonald Corp.*<sup>21</sup> and *Imperial Tobacco Canada Ltd.*<sup>22</sup>

30. In approving the tax charge in *JTI-Macdonald Corp.*, the Ontario Superior Court of Justice (Commercial List) was satisfied that the tax charge protected the directors and officers from becoming personally liable for taxes owed. The Court also noted that the proposed monitor in that case was of the view the charge was reasonable and appropriate.<sup>23</sup>

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<sup>19</sup> Birnie Affidavit No. 1, *supra* note 2 at paras 187–188.

<sup>20</sup> CCAA, *supra* note 8 s. 11 [TAB 1].

<sup>21</sup> See the Second Amended and Restated Initial Order of the CCAA Proceedings of *JTI-Macdonald Corp.*, Court File No. CV-19-615862-00CL (“**JTI-Macdonald Second ARIO**”) at paras 25, 46 [TAB 5].

<sup>22</sup> See the Second Amended and Restated Initial Order of the CCAA Proceedings of *Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited*, Court file No. CV-19-616077-00CL at para 25 [TAB 6].

<sup>23</sup> *JTI-Macdonald Corp., Re*, 2019 ONSC 1625, 2019 CarswellOnt 3653 (“**JTI-Macdonald Corp.**”) at para 23 [TAB 7].

31. The applicants in *Imperial Tobacco* relied on Section 11.51 of the CCAA as authority for the court to grant a tax charge.<sup>24</sup> In approving the charge the Ontario Superior Court of Justice (Commercial List) held the \$580 million charge was reasonable to protect the directors from personal liability.<sup>25</sup>

32. The Applicants submit the Tobacco Tax Charge is reasonable in the circumstances because (i) the amount is sufficient to meet the Applicants projected provincial and territorial statutory obligations during the proposed Stay Period;<sup>26</sup> (ii) the Proposed Monitor is of the view that the Tobacco Tax Charge is reasonable and appropriate in the circumstances;<sup>27</sup> and (iii) if a tax authority were to require that a bond be paid due to unremitted taxes, it would cripple the Companies' cash flow and the ability to continue regular operations during these proceedings.<sup>28</sup>

33. The Initial Order granted authorization to the Companies to pay the Tobacco Taxes in the normal course, whether such taxes arose or were required to be remitted before or after the date of the Initial Order.<sup>29</sup>

34. The Ontario Superior Court of Justice (Commercial List) provided similar authorization in *JTI-Macdonald Corp.*<sup>30</sup>

35. In granting this relief, the Court in *JTI-Macdonald Corp* noted that: (i) the applicant was expected to have sufficient cash to maintain its pre-filing and post-filing obligations; (ii) the applicant depended on timely and continuous supply from its suppliers; (iii) maintaining *status quo* operations was in the best interests of all of stakeholders; and (iv) the proposed monitor was in support of the payments.<sup>31</sup>

36. In this case: (i) the Applicants Cash Flow Projections contemplate and allow for the payment of the Tobacco Tax obligations in the ordinary course, including pre-filing amounts; (ii) the Business is dependent on keeping their tobacco licences in good standing; (iii) if bonds are

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<sup>24</sup> Factum of the Applicants in the CCAA Proceedings of *Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited* at para 86 [TAB 8].

<sup>25</sup> *Imperial Tobacco Canada Limited, et al, Re*, 2019 ONSC 1684 at para 21 [TAB 9].

<sup>26</sup> Birnie Affidavit No. 1, *supra* note 2 at para 186.

<sup>27</sup> Birnie Affidavit No. 2, *supra* note 3 at para 25.

<sup>28</sup> Birnie Affidavit No. 1, *supra* note 2 at para 116.

<sup>29</sup> Initial Order, *supra* note 1 at paras 7–8.

<sup>30</sup> *JTI-Macdonald Second ARIO*, *supra* note 21 at para 10 [TAB 5].

<sup>31</sup> *JTI-Macdonald Corp.*, *supra* note 23 at para 25 [TAB 7].

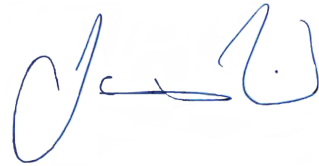
imposed by tax authorities it will be detrimental to operations of the Logistics Companies; and (iv) the Monitor is supportive of the tobacco tax payments.

**IV. CONCLUSION**

37. Based on the foregoing, the Applicants requests that this Honourable Court grant an ARIO in the form proposed in the Application.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27<sup>th</sup> DAY OF JUNE, 2023.**

**MILLER THOMSON LLP**



Per:

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James W. Reid  
Counsel for the Applicants,  
Wallace & Carey Inc., Loudon  
Bros Limited, and Carey  
Management Inc.

## TABLE OF AUTHORITIES

TAB NO.	AUTHORITY
1.	<a href="#"><u>Companies' Creditors Arrangement Act</u></a> , RSC 1985, c C-36 (excerpts)
2.	<a href="#"><u>Target Canada Co. Re.</u></a> 2015 ONSC 303 (excerpts)
3.	<a href="#"><u>Canwest Publishing Inc., Re.</u></a> 2010 ONSC 222 (excerpts)
4.	<a href="#"><u>Re Lydian International Limited</u></a> , 2019 ONSC 7473 (excerpts)
5.	<a href="#"><u>Second Amended and Restated Initial Order of the CCAA Proceedings of JTI-Macdonald Corp.</u></a> , Court File No. CV-19-615862-00CL (excerpts)
6.	<a href="#"><u>Second Amended and Restated Initial Order of the CCAA Proceedings of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited</u></a> , Court file No. CV-19-616077-00CL (excerpts)
7.	<a href="#"><u>JTI-Macdonald Corp., Re, 2019 ONSC 1625</u></a> , 2019 CarswellOnt 3653 (excerpts)
8.	<a href="#"><u>Factum of the Applicants in the CCAA Proceedings of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited</u></a> (excerpts)
9.	<a href="#"><u>Imperial Tobacco Canada Limited, et al, Re</u></a> , 2019 ONSC 1684 (excerpts)

**TAB 1**



CANADA

CONSOLIDATION

CODIFICATION

## Companies' Creditors Arrangement Act

## Loi sur les arrangements avec les créanciers des compagnies

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

L.R.C. (1985), ch. C-36

Current to May 29, 2023

À jour au 29 mai 2023

Last amended on April 27, 2023

Dernière modification le 27 avril 2023

### Form of applications

**10 (1)** Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

### Documents that must accompany initial application

**(2)** An initial application must be accompanied by

- (a)** a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
- (b)** a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
- (c)** copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

### Publication ban

**(3)** The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

### 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.

### Relief reasonably necessary

**11.001** An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be

### Forme des demandes

**10 (1)** Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

### Documents accompagnant la demande initiale

**(2)** La demande initiale doit être accompagnée :

- a)** d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;
- b)** d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;
- c)** d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

### Interdiction de mettre l'état à la disposition du public

**(3)** Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

### Pouvoir général du tribunal

**11** Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

### Redressements normalement nécessaires

**11.001** L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation

limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

### 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 10 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

de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

### Droits des fournisseurs

**11.01** L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

- a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;
- b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

### Suspension : demande initiale

**11.02 (1)** Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

- a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;
- b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;
- c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

### Suspension : demandes autres qu'initiales

**(2)** Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

- a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);
- b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;



(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.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

#### Stays — directors

**11.03 (1)** An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

#### Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

#### Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

#### Persons obligated under letter of credit or guarantee

**11.04** No order made under section 11.02 has effect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made,

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

#### Preuve

(3) Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

#### Restriction

(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

#### Suspension — administrateurs

**11.03 (1)** L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, ès qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

#### Exclusion

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

#### Présomption : administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article.

2005, ch. 47, art. 128.

#### Suspension — lettres de crédit ou garanties

**11.04** L'ordonnance prévue à l'article 11.02 est sans effet sur toute action, poursuite ou autre procédure contre la

is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

#### Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

1997, c. 12, s. 124; 2005, c. 47, s. 128.

#### 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

convaincu que ce dernier, sans raisons valables, compromet ou compromettra vraisemblablement la possibilité de conclure une transaction ou un arrangement viable ou agit ou agira vraisemblablement de façon inacceptable dans les circonstances.

#### Vacance

(2) Le tribunal peut, par ordonnance, combler toute vacance découlant de la révocation.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

#### Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

**11.51 (1)** Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de celle-ci sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après l'introduction d'une procédure sous le régime de la présente loi.

#### Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

#### Restriction — assurance

(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la compagnie peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

#### Négligence, inconduite ou faute

(4) Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

#### Biens grevés d'une charge ou sûreté pour couvrir certains frais

**11.52 (1)** Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie débitrice sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

- (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.

#### Bankruptcy and Insolvency Act matters

**11.6** Notwithstanding the *Bankruptcy and Insolvency Act*,

- (a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and
- (b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from
  - (i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or
  - (ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

1997, c. 12, s. 124.

#### Court to appoint monitor

**11.7 (1)** When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

- a) les débours et honoraires du contrôleur, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;
- b) ceux des experts dont la compagnie retient les services dans le cadre de procédures intentées sous le régime de la présente loi;
- c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente loi.

#### Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

#### Lien avec la Loi sur la faillite et l'insolvabilité

**11.6** Par dérogation à la *Loi sur la faillite et l'insolvabilité* :

- a) les procédures intentées sous le régime de la partie III de cette loi ne peuvent être traitées et continuées sous le régime de la présente loi que si une proposition au sens de la *Loi sur la faillite et l'insolvabilité* n'a pas été déposée au titre de cette même partie;
- b) le failli ne peut faire une demande au titre de la présente loi qu'avec l'aval des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*, aucune demande ne pouvant toutefois être faite si la faillite découle, selon le cas :
  - (i) de l'application du paragraphe 50.4(8) de la *Loi sur la faillite et l'insolvabilité*,
  - (ii) du rejet — effectif ou présumé — de sa proposition par les créanciers ou le tribunal ou de l'annulation de celle-ci au titre de cette loi.

1997, ch. 12, art. 124.

#### Nomination du contrôleur

**11.7 (1)** Le tribunal qui rend une ordonnance sur la demande initiale nomme une personne pour agir à titre de contrôleur des affaires financières ou autres de la compagnie débitrice visée par la demande. Seul un syndic au sens du paragraphe 2(1) de la *Loi sur la faillite et l'insolvabilité* peut être nommé pour agir à titre de contrôleur.

**TAB 2**

**CITATION:** Target Canada Co. (Re), 2015 ONSC 303  
**COURT FILE NO.:** CV-15-10832-00CL  
**DATE:** 2015-01-16

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** 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 TARGET CANADA CO., TARGET CANADA  
HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA  
PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO)  
CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA  
PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

**BEFORE:** Regional Senior Justice Morawetz

**COUNSEL:** *Tracy Sandler and Jeremy Dacks*, for the Target Canada Co., Target Canada  
Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp.,  
Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target  
Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the  
“Applicants”)

*Jay Swartz*, for the Target Corporation

*Alan Mark, Melaney Wagner, and Jesse Mighton*, for the Proposed Monitor,  
Alvarez and Marsal Canada ULC (“Alvarez”)

*Terry O’Sullivan*, for The Honourable J. Ground, Trustee of the Proposed  
Employee Trust

*Susan Philpott*, for the Proposed Employee Representative Counsel for employees  
of the Applicants

**HEARD and ENDORSED:** January 15, 2015

**REASONS:** January 16, 2015

**ENDORSEMENT**

[1] Target Canada Co. (“TCC”) and the other applicants listed above (the “Applicants”) seek relief under the *Companies’ Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the “CCAA”). While the limited partnerships listed in Schedule “A” to the draft Order (the “Partnerships”) are not applicants in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

- c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and
- d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

[8] The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the “breathing room” required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

[9] TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. (“NE1”), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

[10] TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC’s employees are not represented by a union, and there is no registered pension plan for employees.

[11] The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

[12] A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 – 150 people, described as “Team Members” and “Team Leaders”, with a total of approximately 16,700 employed at the “store level” of TCC’s retail operations.

[13] TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

[14] In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation’s Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

[15] TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC’s cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than \$2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC’s operations are not wound down, it is projected that they would remain unprofitable for at least 5

**TAB 3**

**CITATION:** Canwest Publishing Inc., 2010 ONSC 222  
**COURT FILE NO.:** CV-10-8533-00CL  
**DATE:** 20100118

**ONTARIO**

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

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,  
R.S.C. 1985, C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR  
ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST  
INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

COUNSEL: *Lyndon Barnes, Alex Cobb and Duncan Ault* for the Applicant LP Entities  
*Mario Forte* for the Special Committee of the Board of Directors  
*Andrew Kent and Hilary Clarke* for the Administrative Agent of the Senior  
Secured Lenders' Syndicate  
*Peter Griffin* for the Management Directors  
*Robin B. Schwill and Natalie Renner* for the Ad Hoc Committee of 9.25% Senior  
Subordinated Noteholders  
*David Byers and Maria Konyukhova* for the proposed Monitor, FTI Consulting  
Canada Inc.

**PEPALL J.**

**REASONS FOR DECISION**

**Introduction**

[1] Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the



- (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.

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

[54] I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

- (a) the size and complexity of the businesses being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

[55] There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum

**TAB 4**

**CITATION:** Lydian International Limited (Re), 2019 ONSC 7473  
**COURT FILE NO.:** CV-19-00633392-00CL  
**DATE:** 2019-12-24

**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 ARRANGMENT OF  
LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES  
CORPORATION AND LYDIAN U.K. CORPORATION LIMITED**

**Applicants**

**BEFORE:** Chief Justice Geoffrey B. Morawetz

**COUNSEL:** *Elizabeth Pillon, Sanja Sopic, and Nicholas Avis*, for the Applicants

*Pamela Huff*, for Resource Capital Fund VI L.P.

*Alan Merskey*, for OSISKO Bermuda Limited

*D.J. Miller*, for Alvarez & Marsal Canada Inc. proposed Monitor

*David Bish*, for ORION Capital Management

*Bruce Darlington*, for ING Bank N.V./ABS Svensk Exportkredit (publ)

**HEARD and DETERMINED:** December 23, 2019

**REASONS RELEASED:** December 24, 2019

**ENDORSEMENT**

**Introduction**

[1] Lydian International Limited (“Lydian International”), Lydian Canada Ventures Corporation (“Lydian Canada”) and Lydian UK Corporation Limited (“Lydian UK”, and collectively, the “Applicants”) apply for creditor protection and other relief under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”). The Applicants seek an initial order, substantially in the form attached to the application record. No party attending on the motion opposed the requested relief.

the Applicants, A & M and A & M's counsel, in respect of the CCAA proceedings (the "Administration Charge").

[44] Section 11.52 of the CCAA provides the ability for the court to grant the Administration Charge.

[45] The recently enacted s. 11.001 of the CCAA limits the requested relief on this motion, including the Administration Charge, to what is reasonably necessary for the continued operation of the Applicants during the Initial Stay Period. The Sellers Affidavit outlines the complex issues facing the Applicants.

[46] In *Canwest Publishing Inc.*, (Re), 2010 ONSC 222, 63 C.B.R.(5th) 115, Pepall J. (as she then was) identified six non-exhaustive factors that the court may consider in addition to s. 11.52 of the CCAA when determining whether to grant an administration charge. These factors include:

- (a) the size and complexity of business being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the monitor.

[47] It seems to me that the proposed restructuring will require extensive input from the professional advisors and there is an immediate need for such advice. The requested relief is supported by A & M.

[48] I am satisfied that the Administration Charge in the limited amount of US \$350,000 is appropriate in the circumstances and is reasonably necessary for the continued operation of the business at this time.

### **D & O Charge**

[49] The Applicants also seek a charge over the property in favour of their former and current directors in the limited amount of \$200,000 (the "D & O Charge").

[50] The Applicants maintain Directors' and Officers' liability insurance (the "D & O Insurance") which provides a total of \$10 million in coverage.

[51] The D & O Insurance is set to expire on December 31, 2019.

**TAB 5**

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

THE HONOURABLE ) FRIDAY, THE 8TH  
JUSTICE MCEWEN ) DAY OF MARCH, 2019  
)  
)



IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **JTI-MACDONALD CORP.**

**SECOND AMENDED AND RESTATED INITIAL ORDER**

**THIS APPLICATION**, made by JTI-Macdonald Corp. (the "**Applicant**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

**ON READING** (i) the affidavit of Robert McMaster sworn March 8, 2019 and the exhibits thereto (the "**McMaster Affidavit**"); (ii) the affidavit of Robert McMaster sworn March 28, 2019 and the exhibits thereto; (iii) the affidavit of Robert McMaster sworn April 1, 2019 (the "**Comeback Affidavit**"); (iv) the affidavit of William E. Aziz sworn April 1, 2019; (v) the pre-filing report dated March 8, 2019 (the "**Pre-Filing Report**") of Deloitte Restructuring Inc. ("**Deloitte**") in its capacity as the proposed monitor of the Applicant; (vi) the first report of Deloitte, in its capacity as Monitor of the Applicant (the "**Monitor**") dated March 28, 2019; and (vii) the second report of the Monitor dated April 1, 2019, and on being advised that JTI-Macdonald TM Corp. and JT Canada LLC Inc., the secured creditors who are likely to be affected by the charges created herein (the "**Secured Creditors**") were given notice, and on

9. **THIS COURT ORDERS** that the Applicant is authorized to complete outstanding transactions and engage in new transactions with the members of the JTI Group and to continue, on and after the date hereof, to buy and sell goods and services, and to allocate, collect and pay costs, expenses and other amounts from and to the members of the JTI Group, including without limitation in relation to finished, unfinished and semi-finished materials, personnel, administrative, technical and professional services, and royalties and fees in respect of trademark licences (collectively, all transactions and all inter-company policies and procedures between the Applicant and any member of the JTI Group, the “**Intercompany Transactions**”) in the ordinary course of business or as otherwise approved by the Monitor. All Intercompany Transactions in the ordinary course of business between the Applicant and any member of the JTI Group, including the provision of goods and services from any member of the JTI Group to the Applicant, shall continue on terms consistent with existing arrangements or past practice or as otherwise approved by the Monitor.

10. **THIS COURT ORDERS** that the Applicant shall remit, in accordance with legal requirements, or pay (whether levied, accrued or collected before, on or after the date of this Order):

- (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;
- (b) all Sales & Excise Taxes required to be remitted by the Applicant in connection with the Business; and

- (c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicant.

11. **THIS COURT ORDERS** that the Applicant is authorized to post and to continue to have posted cash collateral, letters of credit, performance bonds, payment bonds, surety bonds, guarantees and other forms of security from time to time, in an aggregate amount not exceeding \$18 million (the “**Bonding Collateral**”), to satisfy regulatory or administrative requirements to provide security that have been imposed on it in the ordinary course and consistent with past practice in relation to the collection and remittance of federal excise taxes and customs and import duties and federal, provincial and territorial tobacco taxes, whether the Bonding Collateral is provided directly or indirectly by the Applicant as such security, and the Applicant is authorized to post and to continue to have posted surety bonds with Chubb Insurance Company of Canada (f/k/a ACE INA Insurance) and any other issuers of Bonding Collateral as security therefor.

12. **THIS COURT ORDERS** that the Canadian federal, provincial and territorial authorities entitled to receive payments or collect monies from the Applicant in respect of Sales & Excise Taxes are hereby stayed during the Stay Period (as defined below) from requiring that any additional bonding or other security be posted by or on behalf of the Applicant in connection with Sales & Excise Taxes or any other matters for which such bonding or security may otherwise be required.



such other practices as may be agreed upon by the supplier or service provider and each of the Applicant and the Monitor, or as may be ordered by this Court.

#### **NON-DEROGATION OF RIGHTS**

24. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicant. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

#### **SALES AND EXCISE TAX CHARGE**

25. **THIS COURT ORDERS** that the Canadian federal, provincial and territorial authorities that are entitled to receive payments or collect monies from the Applicant in respect of Sales & Excise Taxes shall be entitled to the benefit of and are hereby granted a charge (the “**Sales and Excise Tax Charge**”) on the Property, which charge shall not exceed an aggregate amount of \$127 million, as security for all amounts owing by the Applicant in respect of Sales & Excise Taxes. The Sales and Excise Tax Charge shall have the priority set out in paragraphs 46 and 48 herein.

#### **PROCEEDINGS AGAINST DIRECTORS AND OFFICERS**

26. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicant with respect to any claim against the directors or officers that arose before the date hereof and that relates to any

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

46. **THIS COURT ORDERS** that the priorities of the Administration Charge, the Directors' Charge, the Sales and Excise Tax Charge and the Court-Appointed Mediator Charge (collectively, the "Charges" and each individually, a "Charge"), as among them, shall be as follows:

First – Administration Charge (to the maximum amount of \$3 million) and the Court-Appointed Mediator Charge (to the maximum amount of \$1 million), *pari passu*;

Second — Directors' Charge (to the maximum amount of \$4.1 million); and

Third – Sales and Excise Tax Charge (to the maximum amount of \$127 million).

47. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

48. **THIS COURT ORDERS** that each of the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges, encumbrances and claims of secured creditors, statutory or otherwise (collectively, the "Encumbrances") in favour of any Person in respect of such Property, save and except for

- (a) purchase-money security interests or the equivalent security interests under various provincial legislation and financing leases (that, for greater certainty, shall not include trade payables);

**TAB 6**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

THE HONOURABLE )  
JUSTICE MCEWEN ) TUESDAY, THE 12TH  
 ) DAY OF MARCH, 2019  
 )



IN THE MATTER OF THE *COMPANIES' CREDITORS  
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF IMPERIAL TOBACCO CANADA  
LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED  
(the "Applicants")

**SECOND AMENDED AND RESTATED INITIAL ORDER**

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING (i) the affidavit of Eric Thauvette sworn March 12, 2019 and the exhibits thereto (the "**Thauvette Affidavit**"), (ii) the affidavit of Nancy Roberts sworn March 12, 2019, and (iii) the pre-filing report dated March 12, 2019 (the "**Monitor's Pre-Filing Report**") of FTI Consulting Canada Inc. ("**FTI**") in its capacity as the proposed Monitor of the Applicants, and on hearing the submissions of counsel for the Applicants, BAT (as defined herein), FTI and the Honourable Warren K. Winkler, Q.C. in his capacity as proposed Court-Appointed Mediator (as defined herein), and on reading the consent of FTI to act as the Monitor,

**SERVICE**

1. THIS COURT ORDERS that the time for service and filing of the Notice of Application and the Application Record is hereby abridged and validated so that this Application

### **SALES AND EXCISE TAX CHARGE**

25. THIS COURT ORDERS that the Canadian federal, provincial and territorial authorities that are entitled to receive payments or collect monies from the Applicants in respect of Sales & Excise Taxes (including for greater certainty the Canada Border Services Agency) shall be entitled to the benefit of and are hereby granted a charge (the “**Sales and Excise Tax Charge**”) on the Property, which charge shall not exceed an aggregate amount of \$580 million, as security for all amounts owing by the Applicants in respect of Sales & Excise Taxes, after taking into consideration any Bonding Collateral posted in respect thereof. The Sales and Excise Tax Charge shall have the priority set out in paragraphs 45 and 47 hereof.

### **PROCEEDINGS AGAINST DIRECTORS AND OFFICERS**

26. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations.

### **DIRECTORS’ AND OFFICERS’ INDEMNIFICATION AND CHARGE**

27. THIS COURT ORDERS that the Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicants after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director’s or officer’s gross negligence or wilful misconduct.

28. THIS COURT ORDERS that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the “**Directors’ Charge**”) on the Property, which charge shall not exceed an aggregate amount of \$16 million, as security for the indemnity provided in paragraph 27 of this Order. The Directors’ Charge shall have the priority set out in paragraphs 45 and 47 herein.

**TAB 7**

**CITATION:** JTI-Macdonald Corp., Re, 2019 ONSC 1625  
**COURT FILE NO.:** CV-19-615862-00CL  
**DATE:** 2019/03/12

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**- COMMERCIAL LIST**

**RE:**           **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**

**BEFORE:**   Hainey J.

**COUNSEL:** *Robert I. Thornton, Leanne M. Williams, Rachel Bengino and Mitch Grossell*, for the Applicant

*Scott A. Bomhof and Adam M. Slavens*, for Respondents JT Canada LLC, and PWC, in its capacity as Receiver of JTI-MacDonald TM

*Pamela L.J.Huff, Linc A. Rogers and Christopher Burr*, for the Proposed Monitor, Deloitte Restructuring Inc.

**HEARD:**     March 8, 2019

**ENDORSEMENT**

**Background**

[1]     On March 8, 2019 JTI-Macdonald Corp. (“JTIM” or “Applicant”) sought an Initial Order pursuant to *The Companies Creditors Arrangement Act* (“CCAA”). I granted the Initial Order and endorsed the record as follows:

I am satisfied that this application should be granted today on the terms of the attached Initial Order. There shall be a sealing order on the terms of para. 59 of the Initial Order. I will provide written reasons for my decision to grant this order in due course. The comeback motion referred to in para. 50 shall be on April 4, 2019 at 10 a.m. in this Court.

[2]     These are my Reasons.

**Facts**

[3]     As a result of a judgment of the Quebec Court of Appeal released on March 1, 2019 in a class proceeding (“Quebec Class Action”), JTIM and two other defendants are liable for

[22] I am satisfied that the directors' charge should be approved to ensure the ongoing stability of JTIM's business during the CCAA proceedings. The directors and officers have a great deal of institutional knowledge and experience and JTIM requires their continued management of its business. To ensure that the officers and directors remain with JTIM during the CCAA proceedings they require the protection of the directors' charge. The proposed charge of \$4.1 million will only be available to the extent that the directors' and officers' insurance is not available if a claim is made against them. The Proposed Monitor is of the view that the directors' charge is reasonable and appropriate.

#### *Tax Charge*

[23] JTIM is also seeking a third-ranking super-priority charge in the amount of \$127 million in favour of the Canadian federal, provincial and territorial authorities that are entitled to receive payments and collect money from JTIM with respect to sales taxes and excise taxes and duties. I am satisfied that this tax charge should be granted so that JTIM's directors and officers do not become personally liable for these taxes. Further, the Proposed Monitor is of the view that the tax charge is reasonable and appropriate.

#### **Is it appropriate to allow the payment of certain pre-filing and post-filing amounts?**

[24] In *Cinram International Inc., Re*, 2012 ONSC 3767 Morawetz J. (as he then was) concluded at Para. 68 that the court should consider the following factors in deciding whether to authorize the payment of pre-filing obligations:

- (a) whether the goods and services were integral to the business of the applicants;
- (b) the debtors' need for the uninterrupted supply of the goods or services;
- (c) the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities were appropriate; and
- (d) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

[25] JTIM's business is expected to remain cash-flow positive during these CCAA proceedings so that it will have sufficient cash to meet its pre-filing and post-filing obligations. JTIM's operations depend on timely and continuous supply from its suppliers. Maintaining its operations as a going concern is in the best interests of all of JTIM's stakeholders. The Proposed Monitor supports JTIM's intentions to pay its employees, trade creditors, royalty payments, interest, payments, previous obligations and other disbursements in the ordinary course of its business. I agree and adopt the Proposed Monitor's reasons for supporting these pre-filing and post-filing payments as set out at paras. 65-72 of the Report of the Proposed Monitor dated March 8, 2019.

#### **Should Blue Tree Advisors be appointed as CRO?**

[26] According to JTIM, it requires the proposed Chief Restructuring Officer, William Aziz, to successfully complete its contemplated restructuring plan. Mr. Aziz has the experience and



**TAB 8**

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

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**FACTUM OF THE APPLICANTS**

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**March 12, 2019**

**OSLER, HOSKIN & HARCOURT LLP**

P.O. Box 50, 1 First Canadian Place  
Toronto, ON M5X 1B8

Deborah Glendinning (LSO# 31070N)

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John A. MacDonald (LSO# 25884R)

Michael De Lellis (LSO# 48038U)

Tel: (416) 362-2111

Fax: (416) 862-6666

Lawyers to the Applicants,

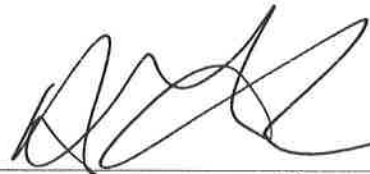
Imperial Tobacco Canada Limited and  
Imperial Tobacco Company Limited

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.<sup>106</sup>

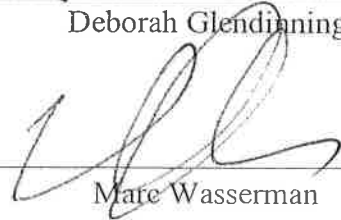
**PART IV -NATURE OF THE ORDER SOUGHT**

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

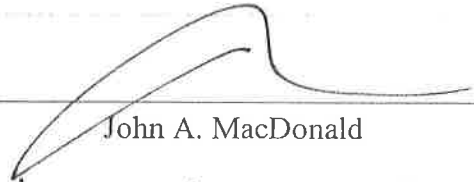
ALL OF WHICH IS RESPECTFULLY SUBMITTED:



Deborah Glendinning



Marc Wasserman



John A. MacDonald



Michael De Lellis

<sup>106</sup> Thauvette Affidavit, paras. 169-170.

**TAB 9**

**CITATION:** Imperial Tobacco Canada Limited, et al, Re, 2019 ONSC 1684  
**COURT FILE NO.:** CV-19-616077CL  
**DATE:** 20190315

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** 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

**BEFORE:** McEwen J.

**COUNSEL:** *Deborah Glendinning, Marc Wasserman, John A. MacDonald, and Michael De Lellis*, for the Applicants

*David Byers and Maria Konyukhova*, for the British American Tobacco p.l.c, B.A.T. Industries p.l.c., and British American Tobacco (Investments) Limited

*Jay Swartz, Robin Schwill, and Natasha MacParland*, for the Proposed Monitor, FTI Consulting Canada Inc.

*Jonathan Lisus and Matthew Gottlieb*, for the Proposed Tobacco Claimant Representative

**HEARD:** March 12, 2019

**ENDORSEMENT**

[1] On March 12, 2019 I granted the Initial Order, as amended, with reasons to follow. I am now providing those reasons.

**Background**

[2] Imperial Tobacco Canada Limited (“ITCAN”) and its subsidiary Imperial Tobacco Company Limited (“ITCO”) (together, the “Applicants”) seek an Initial Order for a stay of all existing and prospective proceedings pursuant to s. 11.02(1) of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “CCAA”), primarily so that they can effect a global resolution of multiple claims that have been brought or may be brought against ITCAN and related companies in Canada. They also seek the same relief on behalf of their related companies.

[3] The timing of this Application stems from the recent judgment of the Quebec Court of Appeal in *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358 (the “Quebec Appeal Judgment”), in which the Applicants and co-defendants were found liable for damages totalling approximately \$13.5 billion. Based on the filed record, enforcement of the Quebec Appeal Judgment would likely spell the end of the Applicants’

Interim Order so that he, along with others, can begin a claims process. It is also reasonable to allow him to retain the independent counsel requested and provide for a charge of \$1 million.

[17] It is reasonable that the Administration and Tobacco Claimant Coordinator Charges rank as first charges *pari passu* given their importance.

[18] The Directors' and Officers' Charge sought should also be approved to ensure that the Applicants enjoy ongoing stability during these CCAA proceedings.

[19] The directors and officers reasonably insist that a charge be put in place. I agree with their concerns. They also have significant knowledge and experience. The Applicants and related companies require that the directors and officers can continue on with the management of the businesses.

[20] The proposed charge of \$16 million, which stands second in priority to the aforementioned Administration and Tobacco Claim Coordinator Charges, is also reasonable.

[21] Last, insofar as the charges are concerned, I am also satisfied that the charge concerning Sales and Excise Taxes in the maximum amount of \$580 million is also reasonable as a third charge. It is important that this charge be granted so that the directors and officers do not face personal liability for the taxes. I reviewed the Applicants' record and I am satisfied that the amount is fair and reasonable.

[22] All of the charges are supported by FTI.

[23] In addition to the above specific comments, I am further satisfied that the remaining terms of the proposed Interim Order ought to be granted. The Applicants will be carrying on business during the CCAA proceedings. The filed materials demonstrate that the Applicants and their affiliated companies expect that the Applicants will continue to carry on their business in a profitable fashion and be able to meet both their pre-filing and post-filing obligations. It is in the best interests of all stakeholders to allow for the payment of these obligations.

[24] BAT, the BAT Affiliates, and FTI all support the Applicants' position, including their intention and ability to meet their current payables in the ordinary course of conducting business.

[25] For all of the reasons above, the Application was granted and the Interim Order was signed, as amended.

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**McEwen J.**

**Date:** March 15, 2019