

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

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

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

Applicant

**RESPONDING FACTUM OF JTI-MACDONALD CORP.**

January 24, 2025

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**PART I - INTRODUCTION<sup>1</sup>**

1. JTIM wants to bring this restructuring to a successful conclusion. To do that, a CCAA plan that is fair, reasonable, and workable is required. The M&M Plan is not fair, reasonable or workable.
2. The M&M Plan could be amended to make it fair, reasonable and workable by: (a) amending section 5.2 to clarify the allocation among the Tobacco Companies is as set out in section 5.6 of the M&M Plan, (b) allocating the Working Capital Carve Out equally among the Tobacco Companies, and (c) allowing JTIM to pay its royalty arrears to TM prior to closing as required by the CCAA. These, along with some other drafting points (certain consensual tax and release tweaks and amendment to the acceleration concept) would make the M&M Plan fair, reasonable and workable.
3. The rights of a set of unsecured claimants do not extend so far as to usurp the rights and obligations of a debtor and the commercial judgment of its board of directors to consider and act in the best interests of the debtor's stakeholders generally, including: (a) its secured creditor, (b) its pensioners and employees, and (c) its customers and suppliers. If a group of unsecured creditors wants to run the business of a debtor without regard for the debtor's duties and obligations, they must convince a Court to appoint a receiver and manager. The CCAA is not a back door through which they may do indirectly that which they cannot do directly. There is no precedent for forcing a debtor to perpetually operate on terms and

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<sup>1</sup> Capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the Affidavit of William E. Aziz sworn January 20, 2025 ("**Aziz Affidavit**"), Responding Motion Record of JTI-Macdonald Corp. dated January 20, 2025 ("**RMR**"), Tab 1, p. 4 (Case Center [A1070; A90](#) - [A1225; A245](#)) or the First Amended and Restated Court-Appointed Mediator's and Monitor's CCAA Plan of Compromise and Arrangement in respect of JTI-Macdonald Corp. dated December 5, 2024 ("**M&M Plan**").

conditions imposed by creditors unless those terms and conditions are agreed to by the debtor itself.

4. The global settlement of Tobacco Claims contemplated by the M&M Plan requires JTIM to continue operating profitably in the ordinary course for decades. However, the terms imposed on JTIM in the M&M Plan may, in fact, lead to an outcome where JTIM is not supported by its multinational group and can no longer operate in Canada profitably, or at all. This could lead to the loss of hundreds of jobs in Canada, the loss of business relationships for suppliers of JTIM, the loss of billions of dollars in tax revenues for the Provinces, Territories, and the Federal Government, and the loss of the benefit of the bargain the Claimants hope to realize.

## **PART II - OVERVIEW**

5. Pursuant to the Sanction Protocol Order, on January 15, 2025, the Monitor filed a motion returnable on January 29, 2025, for a Sanction Order that, among other things, sanctions the M&M Plan.<sup>2</sup>
6. JTIM opposes the Sanction Order for the following reasons:
  - (a) **The M&M Plan is Unworkable**<sup>3</sup>

Section 5.2 of the M&M Plan says that the allocation issue among the Tobacco Companies remains unresolved, a statement with which JTIM disagrees because

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<sup>2</sup> Draft JTIM Sanction Protocol Order at para. 9, Motion Record of the Monitor dated January 15, 2025 (“**Sanction Order MRM**”), Tab 3, p. 84-85 (Case Center [E2344](#); [E84](#) - [E2345](#); [E85](#)).

<sup>3</sup> Aziz Affidavit at paras. 40-46, RMR, Tab 1, pp. 17-20 (Case Center [A1083](#); [A103](#) - [A1086](#); [A106](#)).

the M&M Plan provides for an allocation of the Annual Contributions.<sup>4</sup> RBH says it wants a re-allocation of the amounts payable under the M&M Plan based on several different re-allocation theories.<sup>5</sup> Such theories were not the basis of prior negotiations and could negatively impact the Claimants. Unless there is certainty on this key commercial term of the settlement, the M&M Plan is unworkable. JTIM requires many intercompany services provided by its affiliates to maintain its operations and profitability. If JTIM and its affiliates do not support the M&M Plan, and refuse to implement or operate under the terms of the M&M Plan, the results expected by the Claimants will not be achieved.

(b) **The M&M Plan Does Not Comply with the Statutory Requirements of the CCAA**

The M&M Plan requires JTI-Macdonald TM Corp. (“TM”) to subordinate its debt and security to the payment of the Global Settlement Amount to the unsecured, contingent, litigation claimants who become secured creditors under the M&M Plan.<sup>6</sup> The M&M Plan did not give TM a right to vote on the M&M Plan, either in its own class as the sole secured creditor, as should have happened, or at all. TM’s security interest would fall from a first-ranking secured charge to a subordinate charge behind billions of dollars of prior secured claims. The M&M Plan also purports to confiscate TM’s existing cash collateral of approximately \$1.6 billion and seeks to deliver that cash collateral to the same unsecured claimants, without

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<sup>4</sup> M&M Plan, Section 5.2.

<sup>5</sup> Aziz Affidavit at para. 42, RMR, Tab 1, pp. 18-19 (Case Center [A1084; A104](#) - [A1085; A105](#)).

<sup>6</sup> M&M Plan, s.5.14.

the consent or agreement of TM.<sup>7</sup> This treatment is a clear compromise of TM's legal rights and economic interests. Section 5 of the CCAA requires that secured creditors who are compromised must have a vote at a creditors' meeting, and section 6 of the CCAA states that a CCAA plan cannot be sanctioned unless the requisite majority of creditors in each class vote in favour of the CCAA plan.

Additionally, the M&M Plan violates section 11.01<sup>8</sup> of the CCAA because it does not permit TM to receive payment for the post-filing use of licensed property.<sup>9</sup> Instead, the M&M Plan requires TM to continue to allow JTIM to use its trademarks in the face of non-payment of post-filing royalties without its consent.

The terms of the M&M Plan also purport, without TM's consent, to compromise the ability of TM to receive principal and interest payments on intercompany loans during the Contribution Period, a period that is expected to last approximately 20 years.

(c) **The M&M Plan is Not Fair and Reasonable:**<sup>10</sup>

There are two reasons why the M&M Plan is not fair and reasonable: (i) the commercial uncertainty of section 5.2 of the M&M Plan is not fair and reasonable to any party, including the Claimants, and (ii) the M&M Plan unfairly ignores the secured creditor status of TM in favour of unsecured creditors, even permitting RBH and Imperial to pay persons, including related parties, for the use of post-filing licensed property, when JTIM is prohibited from making such payments. As

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<sup>7</sup> Aziz Affidavit at para. 15, RMR, Tab 1, p. 6 (Case Center [A1074; A94](#)).

<sup>8</sup> CCAA, [s.11.01\(a\)](#).

<sup>9</sup> Aziz Affidavit at paras. 28-39, RMR, Tab 1, pp. 14-17 (Case Center [A1080; A100 -A1083; A103](#)).

<sup>10</sup> Aziz Affidavit at paras. 20-46, RMR, Tab 1, pp. 12-20 (Case Center [A1078; A98 - A1086; A106](#)).

a result, the Monitor declined to conclude that the M&M Plan is fair and reasonable to either JTIM or TM.

### **PART III - THE ISSUE AND ARGUMENT**

#### **Issue: The Court Cannot Sanction the M&M Plan**

7. The sole issue addressed in this factum is whether the Court should grant the Sanction Order sanctioning the M&M Plan in its current form. For the reasons discussed below, the Court cannot grant the Sanction Order because it fails the recognized legal test in that: (a) the M&M Plan is not workable, (b) the M&M Plan does not strictly comply with the statutory requirements of the CCAA, and (c) the M&M Plan is not fair and reasonable (it is noteworthy that even the Monitor does not conclude that the M&M Plan is fair and reasonable to JTIM and TM). The existence of any one of these reasons is fatal to the Sanction Order on its own. The existence of all three reasons dictates that the Court must decline to grant the Sanction Order.

#### **A. The Legal Test to Sanction a CCAA Plan**

8. When considering whether the Court should exercise its discretion to approve and sanction a CCAA Plan, the Court should consider the following:
  - (a) if there has been strict compliance with all statutory requirements of the CCAA;
  - (b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done that is not authorized by the CCAA; and
  - (c) the plan must be fair and reasonable.<sup>11</sup>

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<sup>11</sup> *Laurentian University of Sudbury*, [2022 ONSC 5645](#) at para. 23 (“*Laurentian*”).

9. The Court has also previously refused to approve a proposed CCAA plan because it was unworkable.<sup>12</sup> This factor mirrors comments made by Chief Justice Morawetz from the bench leading up to the hearing in respect of the Meeting Order where he stated that a CCAA plan must be “fair, reasonable and workable”.<sup>13</sup>
10. When considering the Meeting Order, the Court held that the applicable test sets a low bar at that stage of the proceeding and held that it was “unable to conclude that the plans were doomed to fail”.<sup>14</sup> The Court noted that the outstanding issues could be categorized as “solvable”. Now, the Court is faced with the motion for the Sanction Order and the outstanding issues have not been “solved”. The M&M Plan remains aspirational and incapable of implementation from a practical perspective.

**B. The M&M Plan is Not Workable**

11. In *Canadian Red Cross Society*, the Court declined to allow a proposed CCAA plan of compromise or arrangement to move forward because it was unworkable.<sup>15</sup> While CCAA plans do not have to be perfect<sup>16</sup>, the M&M Plan goes well beyond imperfection. It is unworkable.
12. The M&M Plan is not workable for three reasons. First, section 5.2 of the M&M Plan creates unacceptable commercial uncertainty to each of the Tobacco Companies and, in JTIM’s view, all other stakeholders. The section states, incorrectly, that “the issue of allocation of the Global Settlement Amount as between the Tobacco Companies in the

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<sup>12</sup> *Red Cross* at para. [34](#).

<sup>13</sup> Statement of Chief Justice Morawetz during the case conference held on September 25, 2024.

<sup>14</sup> *Imperial Tobacco Limited*, [2024 ONSC 6061](#) at para. [51](#).

<sup>15</sup> *Red Cross* at para. [31](#).

<sup>16</sup> *Laurentian* at paras. [31](#) and [36](#).



three CCAA Proceedings remains unresolved”.<sup>17</sup> This is erroneous because the M&M Plan already provides for an allocation of the Global Settlement Amount among the Tobacco Companies, by virtue of the annual payment of the same percentage of Net After-Tax Income by each Tobacco Company.<sup>18</sup>

13. Second, the M&M Plan includes an acceleration concept that is inconsistent with having Annual Contributions calculated based on the Net After-Tax Income of each of the Tobacco Companies.
14. Third, JTIM is part of an integrated global corporate group that relies on other members of the Tobacco Company Group to operate its business and maintain profitability. Unless there is a CCAA plan that is agreed to by JTIM and supported by its Tobacco Company Group, as a practical matter, JTIM’s continued operations and profitability will be seriously jeopardized without the continued support of the Tobacco Company Group, and the Claimants may never realize the benefit of the bargain contemplated by the M&M Plan.

***Unworkability of Section 5.2 of the M&M Plan***

15. Section 5.2 of the M&M Plan states that the allocation issue as among the Tobacco Companies remains unresolved.<sup>19</sup> The only allocation issue remaining unresolved is the allocation of the \$750 million working capital carve out (the “**Working Capital Carve Out**”). By suggesting that some other, additional re-allocation may be imposed, the section introduces commercial uncertainty into the M&M Plan that is not acceptable to JTIM. As

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<sup>17</sup> M&M Plan, Section 5.2.

<sup>18</sup> M&M Plan, Section 5.6 (Annual Contributions)

<sup>19</sup> Aziz Affidavit at para. 40, RMR, Tab 1, pp. 17-18 (Case Center [A1083; A103](#) - [A1084; A104](#)); M&M Plan, section 5.2.

a result, JTIM will not implement the M&M Plan with this term included, rendering the M&M Plan unworkable.

16. The M&M Plan already provides for an allocation of the Global Settlement Amount among the Tobacco Companies. The Monitor agrees with this conclusion and suggests that such allocation method represents the only viable way forward that is affordable to all of the Tobacco Companies that has been presented for consideration.<sup>20</sup>
17. This effectively requires the entire legal Canadian tobacco industry to pay an annual percentage of its net profits after tax until the Global Settlement Amount is paid in full.<sup>21</sup> The current methodology to calculate Annual Contributions works because it is based on each Tobacco Company's ability to pay.<sup>22</sup>
18. RBH wants a re-allocation of the amounts payable under the M&M Plan so that the amounts paid by each Tobacco Company would be different to what is currently stated in the M&M Plan. Any such re-allocation is unacceptable to JTIM.
19. RBH's position changes the business terms of the global settlement underlying the CCAA plans and was not the basis of prior negotiations as understood by JTIM.<sup>23</sup> This is unacceptable to JTIM and is not beneficial for the Claimants. If there was a re-allocation such that each Tobacco Company was responsible for a specific amount, this may permit one or more Tobacco Companies to pay off its share of liability and exit the settlement

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<sup>20</sup> Twenty-Second Report at para. 47, Sanction Order MRM, Tab 2, p. 62 (Case Center [E2322; E62](#)).

<sup>21</sup> Aziz Affidavit at para. 41, RMR, Tab 1, p. 18 (Case Center [A1084; A104](#)).

<sup>22</sup> Aziz Affidavit at para. 46, RMR, Tab 1, pp. 19-20 (Case Center [A1085; A105](#) - [A1086; A106](#)).

<sup>23</sup> Aziz Affidavit at para. 43, RMR, Tab 1, p. 19 (Case Center [A1085; A105](#)).

earlier than the other Tobacco Companies. Once one Tobacco Company is no longer bound by the terms of the CCAA plans, the competitive dynamic between the Tobacco Companies is altered. The Tobacco Company no longer subject to the settlements could be in a position to undertake commercial activities that would reduce the profitability of the other Tobacco Companies still subject to the settlement, leading to those Tobacco Companies becoming less profitable.<sup>24</sup> The end result is a longer period of time before the Global Settlement Amount would be paid in full, if at all.

20. The workability of the M&M Plan can be addressed by either deleting section 5.2 of the M&M Plan in its entirety or revising it such that it clarifies that the Working Capital Carve Out is the only remaining allocation issue. The Monitor also concludes that “[i]n the Monitor’s view, addressing the uncertainty arising from the allocation issue is a significant consideration in the workability of the JTIM CCAA Plan. If the parties do not agree on allocation, or allocation is not otherwise *settled*, there is an implementation risk.” (emphasis added)<sup>25</sup>

***Acceleration Concept Is Unworkable***

21. The M&M Plan requires an acceleration of amounts owing by a Tobacco Company if certain triggering events occur. Under the M&M Plan, the Annual Contributions are not able to be determined until the annual Net After-Tax Income is known for each Tobacco Company. As such, the existence of an acceleration concept is not able to be calculated and therefore unworkable.<sup>26</sup> This could be remedied by, for example, calculating an accelerated

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<sup>24</sup> Aziz Affidavit at paras. 44-45, RMR, Tab 1, p. 19 (Case Center [A1085; A105](#)).

<sup>25</sup> Twenty-Second Report at paras. 45-46, Sanction Order MRM, Tab 2, p. 62 (Case Center [E2322; E62](#)).

<sup>26</sup> M&M Plan, Sections 11.1(h) and 13.11.

amount using the average historical Annual Contributions of the relevant Tobacco Company.

***The M&M Plan Does Not Work Without JTIM and its Tobacco Company Group's Continued Support***

22. JTIM's Tobacco Company Group does not support the M&M Plan in its current form for the reasons identified herein. JTIM is counterparty to approximately 28 intercompany arrangements with its affiliates.<sup>27</sup> These intercompany arrangements include the supply of raw materials used in JTIM's manufacturing process, global IT network and related services (including the use of the licensed technology system SAP), legal and regulatory services, human resources services, and other functional group services.<sup>28</sup>
23. The continued supply of intercompany services is critical to JTIM's operations and ongoing profitability in the ordinary course. For example, JTIM uses SAP as its enterprise resource planning software. If JTIM no longer had access to SAP, JTIM would immediately be unable to manufacture and distribute products until it found an alternative solution, which would cost a significant amount of money and could take years.<sup>29</sup>
24. With this backdrop, the Court must consider the feasibility of plan implementation. The Monitor identifies this as an implementation risk given that the Contribution Period may extend for 15 to 20 years or more.<sup>30</sup>

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<sup>27</sup> Aziz Affidavit at para. 47, RMR, Tab 1, p. 20 (Case Center [A1086; A106](#)).

<sup>28</sup> Aziz Affidavit at para. 47, RMR, Tab 1, p. 20 (Case Center [A1086; A106](#)).

<sup>29</sup> October Aziz Affidavit at para. 47, Aziz Affidavit at Exhibit "C", RMR, Tab 1, p. 76 (Case Center [A1142; A162](#)).

<sup>30</sup> Twenty-Second Report at para. 42, Sanction Order MRM, Tab 2, p. 62 (Case Center [E2321; E61](#)).

25. The M&M Plan requires JTIM to make a significant Upfront Contribution that the Claimants require to satisfactorily address their allocation issues. In addition, the M&M Plan requires JTIM to continue to be profitable for decades so that it can continue contributing to the Global Settlement Amount. For this to occur, JTIM relies on: (a) TM for the continued use of the trademarks owned by TM,<sup>31</sup> and (b) the Tobacco Company Group that provides broad intercompany support and services to JTIM's operations.<sup>32</sup>
26. Without the support of JTIM's parent and other affiliates, JTIM's profitability will be severely reduced, and it is likely that JTIM would become significantly less profitable or even non-profitable.<sup>33</sup> Without parental group support, the M&M Plan would quickly become unworkable, and the Claimants would not receive the benefit of their anticipated bargain.
27. Furthermore, if the M&M Plan is not implemented, the CCAA plans of RBH and Imperial are not capable of being implemented because cross-implementation is a condition precedent to each of the CCAA plans and such conditions are not permitted to be waived by any person, including the Mediator and the Monitors.<sup>34</sup>

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<sup>31</sup> Aziz Affidavit at para. 29, RMR, Tab 1, pp. 14-15 (Case Center [A1080; A100](#) - [A1081; A101](#)).

<sup>32</sup> Aziz Affidavit at paras. 47-48, RMR, Tab 1, p. 20 (Case Center [A1086; A106](#)); October Aziz Affidavit at paras. 46-47, Aziz Affidavit at Exhibit "C", RMR, Tab 1, pp. 75-76 (Case Center [A1141; A161](#) - [A1142; A162](#)).

<sup>33</sup> Aziz Affidavit at para. 48, RMR, Tab 1, p. 20 (Case Center [A1086; A106](#)).

<sup>34</sup> M&M Plan, ss.19.3(h); Imperial M&M Plan, ss. 19.3(h); RBH M&M Plan, ss. 19.3(g).

**C. There Has Not Been Strict Compliance with All Statutory Requirements**

***Section 11.01 of the CCAA Requires Post-Filing Payments***

28. Pursuant to the Trademark Agreement, TM granted to JTIM a non-exclusive, worldwide license to use TM's trademarks in connection with the manufacturing, distribution, advertising and sale of the licensed products for the remuneration set out in that agreement.<sup>35</sup> Notwithstanding the Trademark Agreement, and section 11.01 of the CCAA, JTIM, alone among the Tobacco Companies, has been prohibited from making post-filing royalty payments since March 18, 2019.<sup>36</sup>
29. On March 15, 2019, the Quebec Class Action Plaintiffs brought a motion seeking to prohibit the payment of principal, interest and royalties by JTIM to TM. On March 19, Justice McEwen issued an Endorsement temporarily suspending the payment of interest and royalties pending the return of the comeback hearing or further order of the Court.<sup>37</sup>
30. At the comeback hearing, the Court referred the interest and royalty payment issue to the Mediator for resolution.<sup>38</sup> The Mediator was not prepared to address the issue of the payment of royalty obligations as a discrete matter at the beginning of the mediation. This issue remains outstanding and unresolved. JTIM has not made any royalty payments for over five years.<sup>39</sup>

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<sup>35</sup> Aziz Affidavit at para. 29, RMR, Tab 1, p. 14 (Case Center [A1080; A100](#)).

<sup>36</sup> Aziz Affidavit at para. 28, RMR, Tab 1, p. 14 (Case Center [A1080; A100](#)).

<sup>37</sup> Aziz Affidavit at para. 31, RMR, Tab 1, p. 15 (Case Center [A1081; A101](#)); Endorsement of Justice McEwen dated March 19, 2019, Aziz Affidavit at Exhibit "E", RMR, Tab 1, pp. 121-133 (Case Center [A1187; A207](#) - [A1195; A215](#)).

<sup>38</sup> Aziz Affidavit at para. 32, RMR, Tab 1, pp. 15-16 (Case Center [A1081; A101](#) - [A1082; A102](#)).

<sup>39</sup> Aziz Affidavit at para. 33, RMR, Tab 1, p. 16 (Case Center [A1082; A102](#)).

31. Prohibiting TM from receiving payment from JTIM of royalties for licensed property is contrary to section 11.01 of the CCAA, which provides:

**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. (emphasis added)

32. In *Sproule v Nortel Networks Corporation*, the Court of Appeal held:

Parliament has carved out defined exceptions to the court's ability to impose a stay. For example, s. 11.3(a)<sup>40</sup> prohibits a stay of payments for goods and services provided after the initial order, so that while the company is given the opportunity and privilege to carry on during the CCAA restructuring process without paying its existing creditors, it is on a pay-as-you-go basis only.<sup>41</sup>

33. The M&M Plan does not comply with the statutory requirements of the CCAA because it does not permit JTIM to pay post-filing royalties to TM prior to payment of the unsecured, contingent, pre-filing litigation claimants. This is contrary to section 11.01 of the CCAA.<sup>42</sup>
34. The suspension of royalty payments was an interim order pending final judicial determination or resolution in the mediation.<sup>43</sup> The M&M Plan does not allow these

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<sup>40</sup> Current CCAA, [s.11.01\(a\)](#).

<sup>41</sup> [2009 ONCA 833](#) at para. 34.

<sup>42</sup> Although JTIM can make such payments using residual cash on hand following the payment of its Upfront Contribution and Annual Contributions, it is unknown whether there will be sufficient cash to do so, especially considering the ambiguity imposed by virtue of section 5.2 of the M&M Plan. This restriction is on JTIM alone, and not the other Applicants, which creates an inherent unfairness in the terms of the M&M Plan.

<sup>43</sup> Endorsement of Justice McEwen dated March 19, 2019, Aziz Affidavit at Exhibit "E", RMR, Tab 1, pp. 121-133 (Case Center [A1187](#); [A207](#) - [A1195](#); [A215](#)).

amounts to be paid in the ordinary course.<sup>44</sup> In effect, the M&M Plan turns a temporary restraint into a permanent injunction, contrary to section 11.01 of the CCAA.

***The M&M Plan Does Not Comply with Section 5 or 6 of the CCAA***

35. Pursuant to the TM Debentures in the principal amount of \$1.2 billion, JTIM is indebted to TM in the aggregate amount of approximately \$1.8 billion as of December 31, 2024.<sup>45</sup> Due to the suspension of interest payments during the CCAA proceeding, JTIM owes TM approximately \$650 million of accrued and unpaid interest. This secured debt ranks in priority to all of the unsecured litigation claims that are intended to be settled under the M&M Plan.
36. The CCAA does not grant unsecured creditors enhanced priority over secured creditors.<sup>46</sup> Such a result would undermine the objectives of the CCAA, and prejudice secured creditors. In *Windsor Machine*, Justice Morawetz (as he then was) held: “[i]n my view, it is essential, in a court supervised process, to give due consideration to the priority rights of secured creditors.” Unfortunately, due consideration to the priority rights that TM has over the unsecured contingent claimants has not been given in the M&M Plan.
37. The M&M Plan (as voted on by the Claimants) acknowledges the status of TM’s secured claim.<sup>47</sup> In this CCAA proceeding, the Monitor issued an opinion that TM holds a valid

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<sup>44</sup> Aziz Affidavit at para. 39, RMR, Tab 1, p. 17 (Case Center [A1083; A103](#)).

<sup>45</sup> Aziz Affidavit at para. 21, RMR, Tab 1, p. 12 (Case Center [A1078; A98](#)). For a complete history of the transactions resulting in the TM Debentures, please see Responding McMaster Affidavit at paras. 10-24, Aziz Affidavit at Exhibit “F”, RMR, Tab 1, pp. 138-144 (Case Center [A1204; A224 - A1210; A230](#)).

<sup>46</sup> *Windsor Machine & Stamping Limited (Re)*, [2009 CanLII 39771 \(ON SC\)](#) at para. 43.

<sup>47</sup> M&M Plan, s.5.14.



security interest in the assets of JTIM.<sup>48</sup> Furthermore, the 2004 Monitor also issued an opinion confirming the validity of the security interest held by TM.<sup>49</sup>

38. Section 5 of the CCAA requires a secured creditor who is subject to a compromise or arrangement to participate in a meeting of a class of similar creditors, as classified in accordance with section 22 of the CCAA, to consider and vote on the proposed compromise or arrangement.<sup>50</sup> The M&M Plan is in contravention of section 5 of the CCAA because it does not provide TM with the opportunity to vote on the M&M Plan, either in a separate class as the sole secured creditor, or at all, even though it is clearly (and significantly) affected by the M&M Plan.
39. Notwithstanding that TM is not given an opportunity to vote on the M&M Plan, section 20.1 of the M&M Plan attempts to bind TM to the M&M Plan.<sup>51</sup> This is in contravention of section 6 of the CCAA that requires creditors be given the opportunity to vote on a CCAA plan before the Court can sanction it and bind all creditors, whether secured or unsecured.<sup>52</sup>
40. The M&M Plan requires TM to enter into a subordination agreement that subordinates its debt and security behind billions of dollars owing to the Affected Creditors under the M&M Plan.<sup>53</sup> This will only be done if there is a consensual CCAA plan. It is not an

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<sup>48</sup> [Second Report](#) at para. 49.

<sup>49</sup> Responding McMaster Affidavit at para. 21, Aziz Affidavit at Exhibit “F”, RMR, Tab 1, p. 142 (Case Center [A1208: A228](#)); [Second Report](#) at para. 49.

<sup>50</sup> CCAA, [s.22](#).

<sup>51</sup> M&M Plan, s. 20.1.

<sup>52</sup> CCAA, [s.6\(1\)](#).

<sup>53</sup> M&M Plan, s.5.14.

answer, as the Monitor suggests, that TM is an Unaffected Creditor because the TM Subordination Agreement is a condition precedent to implementation of the M&M Plan and, as the Monitor acknowledges, the M&M Plan permits that condition to be waived with the consent of the Mediator and the Monitor.<sup>54</sup>

41. If TM does not subordinate its debt, it would then be in a position to exercise its security against JTIM and realize on the \$1.6 billion in cash collateral. This would frustrate the terms of the M&M Plan, which estimates that JTIM will contribute approximately \$1.581 billion of its cash-on-hand to the Affected Creditors as part of the Upfront Contribution.<sup>55</sup> As a practical matter, waiving the subordination condition is antithetical to closing on the M&M Plan. The cash-on-hand cannot be used twice.
42. The proposed TM Subordination Agreement also restricts any payments by JTIM in respect of outstanding principal or interest on the intercompany debt and restricts payment of the current royalty arrears to the residual profit held by JTIM after payment of the Annual Contribution going forward rather than payment on or before closing of the restructuring, as should happen.<sup>56</sup>
43. Pursuant to the M&M Plan, JTIM is required to pay 85% of its Net After-Tax Income as an Annual Contribution. As set out in the Twenty-Second Report, the Monitor estimates that the residual profit JTIM will have after payment of the Annual Contribution is

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<sup>54</sup> Twenty-Second Report at para. 52, Sanction Order MRM, Tab 2, p. 64 (Case Center [E2324; E64](#)).

<sup>55</sup> M&M Plan, s. 16.1.

<sup>56</sup> TM Subordination Agreement, Schedule “I” to the M&M Plan.

approximately \$25 million per year.<sup>57</sup> Interest under the TM Debentures continues to accrue at approximately \$91 million annually.<sup>58</sup> Accordingly, JTIM will not have sufficient residual income in any year to pay the annual amounts accruing under the TM Debentures, much less the approximately \$623 million in accrued and outstanding interest on an intercompany debt that is already owing.

44. In *Re Doman Industries Ltd.*, the Court held that the senior secured noteholders were affected by a proposed CCAA plan because, among other things, a section in the CCAA plan purported to bind the senior secured noteholders by deeming them to have waived all defaults under the underlying loan agreements (even though they were classified as unaffected). Referencing *Menegon v. Philip Services Corp.*, the Court held that the secured creditors could not be bound by the provision of the CCAA plan because they were not given an opportunity to vote.<sup>59</sup> In *Re Doman Industries*, the Court held it was inappropriate to authorize the calling of a creditors' meeting to consider the plan when the Court would refuse to sanction it on the basis that it purports to bind parties who were not given an opportunity to vote on it.<sup>60</sup>
45. In *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.*, the B.C. Court of Appeal held that one objective of the CCAA is to have the pain of the compromise equitably shared without facilitating a confiscation of rights.<sup>61</sup>

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<sup>57</sup> Twenty-Second Report at para. 53, Sanction Order MRM, Tab 2, pp. 64-65 (Case Center [E2324; E64 - E2325; E65](#)).

<sup>58</sup> Twenty-Second Report at para. 53, Sanction Order MRM, Tab 2, pp. 64-65 (Case Center [E2324; E64 - E2325; E65](#)).

<sup>59</sup> *Re, Doman Industries Ltd. (Trustee of)*, [2003 BCSC 376](#) ("*Doman*") at para. 9.

<sup>60</sup> *Doman* at para. 9.

<sup>61</sup> *Skeena Cellulose Inc. v Clear Creek Contracting Ltd.*, [2003 BCCA 344](#) at para. 39, citing *Sammi Atlas Inc., Re*, [1998 CanLII 14900 \(ON SC\)](#).

46. TM's interests have been disregarded in the process and in the formulation of the M&M Plan. Instead, the M&M Plan purports to confiscate approximately \$1.6 billion of cash collateral without TM's input by attempting to erroneously, but conveniently, classify TM as an Unaffected Creditor.
47. The purported classification of TM in the M&M Plan as an Unaffected Creditor is not legally or economically true. Unless the M&M Plan is amended to classify TM in its own class as the sole affected secured creditor of JTIM and TM is given a right to vote, the M&M Plan cannot be sanctioned because it does not comply with the statutory requirements of the CCAA, specifically section 5. For this reason alone, the M&M Plan cannot be sanctioned.
48. Finally, in the context of considering whether there has been compliance with all statutory requirements, the Twenty-Second Report of the Monitor states:
- “However, as noted above, fairness of the treatment of TM as an Unaffected Creditor was not addressed by the Court at the hearing for the Meeting Order but deferred until the Sanction Hearing.”<sup>62</sup>
49. In making these remarks, the Monitor does not conclude that the M&M Plan satisfies the statutory requirements set out in sections 5 and 6 of the CCAA.

#### **D. The M&M Plan is Not Fair and Reasonable**

##### ***The Legal Framework***

50. The Court has held that the analysis of what constitutes fair and reasonable is highly contextual and should be guided by Parliament's recognition that reorganization, if

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<sup>62</sup> [Second Report](#) at para. 56(a).

commercially feasible, is in most cases preferable, economically and socially, to liquidation.<sup>63</sup>

51. The sanctioning of a CCAA plan is not a “rubber stamp”.<sup>64</sup> It is one that involves the exercise of discretion and is not mandatory.<sup>65</sup> The Court’s role when considering a Sanction Order involves the consideration of many factors, including (a) whether the claims were properly classified, and (b) whether the requisite majorities of creditors approved the plan. It also requires a Court to consider whether minorities have been adequately treated in the process.<sup>66</sup>

52. Further, the Court should consider the relative degrees of prejudice that would flow from granting or refusing to grant the relief sought and whether the plan represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available.<sup>67</sup> This should include the relative prejudice to the debtor.<sup>68</sup>

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<sup>63</sup> *Canadian Airlines Corp. (Re)*, [2000 ABQB 442](#) at paras. [94-95](#) (“*Canadian Airlines*”).

<sup>64</sup> *Canadian Airlines* at para. [96](#).

<sup>65</sup> *229531 B.C. Ltd., Re*, [1989 CanLII 2823 \(BC CS\)](#) at para. [16](#).

<sup>66</sup> *Canadian Airlines* at paras. [97-110](#).

<sup>67</sup> *Laurentian* at para. [31](#). See also *Canadian Airlines* at para. [3](#).

<sup>68</sup> When deciding whether to order a meeting of creditors for the purposes of voting on a plan, courts have repeatedly deemed the interests of the debtor company to be relevant. See *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re*, [1998 CanLII 14907 \(ON SC\)](#) at para. [37](#) (“*Red Cross*”); *Delta 9* at para. [15](#); *Kerr Interior Systems Ltd. (Re)*, [2011 ABQB 214](#) at para. [29](#) (“*Kerr*”), citing *First Treasury Financial Inc. v Congo Petroleums Inc.*, [1991 CanLII 8338 \(ON SC\)](#).

***Royalty Payments Inconsistent and Unfair When Compared to RBH and Imperial***

53. As described above, JTIM has been prohibited from making any royalty payments to TM since March 2019. In contrast, Imperial and RBH have been permitted to pay their respective royalty payments to related parties during their respective CCAA proceedings.<sup>69</sup>
54. It is estimated that RBH has been permitted to make approximately \$143 million in royalty payments during the CCAA proceedings and Imperial has been permitted to make approximately \$269 million in royalty payments during the CCAA proceedings.<sup>70</sup>
55. In contrast, JTIM has been forced to accrue approximately \$94 million of unpaid royalties (including interest).<sup>71</sup> Further, section 5.14 of the M&M Plan requires TM to enter into the TM Subordination Agreement that permits payment of any arrears of royalty and licence fees accrued before the Plan Implementation Date solely from JTIM's share of the Net After-Tax Income and any amounts released from the Supplemental Trust Account.<sup>72</sup>
56. There is no justifiable reason why the M&M Plan unfairly prejudices JTIM's affiliates as compared to RBH and Imperial. Both of those tobacco companies have been permitted to continue paying hundreds of millions of royalties to their affiliates while JTIM has not.

***Incorrect Classification of TM as an Unaffected Creditor***

57. As confirmed by Chief Justice Morawetz, one consideration of the fair and reasonableness of a CCAA Plan is whether all creditors have been correctly classified in the M&M Plan.<sup>73</sup>

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<sup>69</sup> Aziz Affidavit at para. 34, RMR, Tab 1, p. 16 (Case Center [A1082; A102](#)).

<sup>70</sup> Aziz Affidavit at para. 37, RMR, Tab 1, p. 17 (Case Center [A1083; A103](#)).

<sup>71</sup> Aziz Affidavit at para. 38, RMR, Tab 1, p. 17 (Case Center [A1083; A103](#)).

<sup>72</sup> M&M Plan, Section 5.14.

<sup>73</sup> *Laurentian University* at para. 24.

For the reasons provided at paragraphs [37] to [49] of this Factum, TM is incorrectly classified as an Unaffected Creditor in the M&M Plan, notwithstanding that its rights and interests are clearly affected.

***The Monitor Does Not Conclude the M&M Plan is Fair and Reasonable to JTIM or TM***

58. As part of the sanction hearing process, it is customary for the Monitor to report to the Court on its professional opinion that a plan is fair and reasonable in the circumstances. This opinion is important to the Court because the Monitor is an independent and impartial party, acting as “the eyes and the ears of the court” throughout the proceedings.<sup>74</sup> As the Supreme Court of Canada observed in the *Callidus* decision, the core of the Monitor’s role includes providing an advisory opinion to the Court as to the fairness of any proposed plan of arrangement and on orders sought by the parties.<sup>75</sup>
59. RBH and Imperial’s Monitors have concluded their respective CCAA plans are fair, reasonable, and workable for RBH and Imperial, and have chosen to report on that position at this point in the proceeding.<sup>76</sup> However, JTIM’s Monitor has **not** concluded that the M&M Plan is fair, reasonable and workable for JTIM and TM.<sup>77</sup> This is a significant factor that should be taken into consideration by the Court. Moreover, the Court must consider that JTIM (and TM) are in different positions compared to RBH and Imperial due to factors such as royalty non-payment, the existence of secured debt, and the required subordination agreement.

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<sup>74</sup> 9354-9186 *Québec Inc v Callidus Capital Corp*, [2020 SCC 10](#) at para. 52 (“*Callidus*”), citing *Ernst & Young Inc. v Essar Global Fund Limited*, [2017 ONCA 1014](#) at para. 109.

<sup>75</sup> *Callidus* at para. 52.

<sup>76</sup> [Twentieth Report of the Monitor](#) dated October 25, 2024 at para. 88; [Nineteenth Report of the Monitor](#) dated October 25, 2024 at para. 93.

<sup>77</sup> [Eighteenth Report of the Monitor](#) dated October 26, 2024 at para. 13.

60. The Monitor opines that the M&M Plan is fair and reasonable to the Affected Creditors only.<sup>78</sup> There is no other conclusion available because the Affected Creditors unanimously support the M&M Plan.<sup>79</sup> However, the Monitor does not state that the M&M Plan is fair and reasonable to either JTIM or TM.
61. In the context of an ongoing restructuring that will require the debtor company to continue to operate profitably for decades, a CCAA plan must be fair and reasonable to the debtor in addition to its creditors. Otherwise, the remedial purpose of the CCAA has failed by not taking into consideration the interests of the debtor.
62. Instead, the Monitor has identified several implementation risks associated with the M&M Plan and suggests that modifications can be made to the M&M Plan to alleviate such critical implementation risks.<sup>80</sup> JTIM agrees with this proposition, and that an alternative CCAA plan, amended to resolve JTIM's key issues, can resolve these implementation risks while still being fair and reasonable to the Affected Creditors.

**E. Sanctioning the M&M Plan is Contrary to Public Policy**

63. As the Ontario Court of Appeal explained in *Stelco*, the Court's role in a restructuring is to "establish the boundaries of the playing field and act as a referee in the process".<sup>81</sup> Conversely, it is the role of the debtor to develop a plan of compromise that a sufficient percentage of creditors will accept, and that the Court will approve.<sup>82</sup> The debtor's role is

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<sup>78</sup> Twenty-Second Report at para. 59, Sanction Order MRM, Tab 2, p. 68 (Case Center [E2328; E68](#)).

<sup>79</sup> Twenty-Second Report at para. 59, Sanction Order MRM, Tab 2, p. 68 (Case Center [E2328; E68](#)).

<sup>80</sup> Twenty-Second Report at para. 62, Sanction Order MRM, Tab 2, p. 69 (Case Center [E2329; E69](#)).

<sup>81</sup> *Stelco Inc. (Bankruptcy), Re*, [2005 CanLII 8671 \(ON CA\)](#) at para. 44 ("*Stelco*").

<sup>82</sup> *Stelco* at para. 44.



integral in this process. Debtors are charged with considering a broader range of interests than are creditors. Only the debtor, through its board, is charged with considering, and protecting to the extent possible, the interests of vulnerable groups such as pensioners, employees, customers and suppliers.<sup>83</sup> The directors must attempt to protect such stakeholders from the tyranny of a creditor CCAA double-majority.

64. It would be contrary to public policy to allow creditors to usurp the role that a debtor must play in the restructuring of an operating company.
65. Further, while the Court, in the course of acting as referee, is empowered to exercise the broad discretion afforded to it under section 11 of the CCAA, its discretion is “not open-ended and unfettered”.<sup>84</sup> In other words, the discretion granted to the Court under section 11 does not allow it to impose commercial terms upon a debtor to which the debtor, and its board of directors, do not agree. The Courts have long held that their role is to interpret contracts, not to re-write (or make) contracts between parties.<sup>85</sup>
66. In the October Endorsement, the Court directed the Monitors, in collaboration with the Mediator, “to develop plans that, after due consideration by all three Applicants and the creditors, will have the best opportunity to be considered fair and reasonable to all three Applicants and to their creditors” (emphasis added).<sup>86</sup> The October Endorsement did not

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<sup>83</sup> *Peoples Department Stores Inc (Trustee of) v Wise*, [2004 SCC 68](#) at paras. [42-43](#); *BCE Inc v 1976 Debentureholders*, [2008 SCC 69](#) paras. [38-40](#).

<sup>84</sup> *Stelco* at para. [44](#).

<sup>85</sup> See, e.g. *Sattva Capital Corp. v. Creston Moly Corp.*, [2014 SCC 53](#) and *Corner Brook (City) v. Bailey*, [2021 SCC 29](#), regarding the interpretation of contracts; and *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, [2007 SCC 55](#), at para. [34](#), citing *Pacific National Investments Ltd. v. Victoria (City)*, [2004 SCC 75](#) regarding re-writing contracts.

<sup>86</sup> *Imperial Tobacco Canada Limited*, [2023 ONSC 5449](#) at para. [20](#) (“**October Endorsement**”).

go so far as to direct the Monitors to put forward a CCAA plan that was not supported by the Tobacco Companies. Instead, the Monitors were directed to develop CCAA plans for due consideration by the Tobacco Companies and the creditors. This is consistent with the Court's role as a referee, not a participant, in supervising the proceeding.

67. The mandate given to the Mediator and the Monitors by Chief Justice Morawetz did not remove the requirement that a debtor must also approve of the proposed CCAA plan. Putting forward the M&M Plan without JTIM's approval is inconsistent with court officers acting as referees, not participants, in the restructuring process. This culminated in the submission made by counsel to the Mediator and counsel to two of the Monitors in their reply factum filed in support of the Meeting Order that stated: "a debtor company has no necessary role to play in approving any plan of compromise or arrangement under [the CCAA]". Although the reply factum cited sections 4 and 5 of the CCAA, and the *SM Group* CCAA proceeding in support, the citations do not stand for this extraordinary statement. It is JTIM's submissions that such statement is inconsistent with the remedial purpose of the CCAA and it does not form any part of the restructuring law of Canada.
68. If this plan is sanctioned over the objection of the debtor company, it would put a chill on the restructuring industry in Canada. A long-term operating restructuring plan has never been imposed on an objecting debtor with competent management. Such an unprecedented result, having been driven by a mediator-turned-arbitrator under terms imposed unilaterally by the supervising judge, would be a factor that any debtor with an option to restructure elsewhere would consider in choosing a forum for a main restructuring proceeding.

**PART IV - RELIEF REQUESTED**

69. For all of the foregoing reasons, it is respectfully requested that this Honourable Court dismiss the Monitor's motion at this time.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 24<sup>th</sup> day of January, 2025.



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**SCHEDULE “A”  
LIST OF AUTHORITIES**

**Cases**

1. 229531 *B.C. Ltd.*, *Re*, [1989 CanLII 2823 \(BC CS\)](#).
2. 9354-9186 *Québec Inc v Callidus Capital Corp*, [2020 SCC 10](#).
3. *BCE Inc v 1976 Debentureholders*, [2008 SCC 69](#).
4. *Canadian Airlines Corp. (Re)*, [2000 ABQB 442](#).
5. *Canadian Red Cross Society/Société canadienne de la Croix-Rouge*, *Re*, [1998 CanLII 14907 \(ON SC\)](#).
6. *CannTrust Holdings Inc., et al. (Re)*, [2021 ONSC 4408](#).
7. *Delta 9 Cannabis Inc (Re)*, [2024 ABKB 657](#).
8. *Ernst & Young Inc. v Essar Global Fund Limited*, [2017 ONCA 1014](#).
9. *First Treasury Financial Inc. v Cango Petroleums Inc.*, [1991 CanLII 8338 \(ON SC\)](#).
10. *Imperial Tobacco Canada Limited*, [2023 ONSC 5449](#).
11. *Kerr Interior Systems Ltd. (Re)*, [2011 ABQB 214](#).
12. *Laurentian University of Sudbury*, [2022 ONSC 5645](#).
13. *Peoples Department Stores Inc (Trustee of) v Wise*, [2004 SCC 68](#).
14. *Re, Doman Industries Ltd. (Trustee of)*, [2003 BCSC 376](#).
15. *Re: Canwest Global Communications Corp.*, [2010 ONSC 4209](#).
16. *Sammi Atlas Inc., Re*, [1998 CanLII 14900 \(ON SC\)](#).
17. *Skeena Cellulose Inc. v Clear Creek Contracting Ltd.*, [2003 BCCA 344](#).
18. *Sproule v Nortel Networks Corporation*, [2009 ONCA 833](#).
19. *Stelco Inc. (Bankruptcy)*, *Re*, [2005 CanLII 8671 \(ON CA\)](#).
20. *Windsor Machine & Stamping Limited (Re)*, [2009 CanLII 39771 \(ON SC\)](#).

I certify that I am satisfied as to the authenticity of every authority.

Date: January 24, 2025



Signature

**SCHEDULE “B”  
RELEVANT STATUTES**

***Companies’ Creditors Arrangement Act***

**Opening Proviso**

An Act to facilitate compromises and arrangements between companies and their creditors.

**Compromise with unsecured creditors**

**4** Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

**Compromise with secured creditors**

**5** Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

**General power of court**

**11** Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

**Rights of suppliers**

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

**(a)** prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

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

**Company may establish classes**

**22 (1)** A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

**Factors**

**(2)** For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

- (a)** the nature of the debts, liabilities or obligations giving rise to their claims;
- (b)** the nature and rank of any security in respect of their claims;
- (c)** the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
- (d)** any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

**Related creditors**

**(3)** A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT<sup>1</sup> ACT*, R.S.C. 1985, c. C-36, AS AMENDED

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

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

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

Proceeding commenced at Toronto

**RESPONDING FACTUM OF JTI-MACDONALD CORP.**

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