

**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.**

(the “Applicant”)

**FACTUM OF PRICEWATERHOUSECOOPERS INC., IN ITS CAPACITY AS  
RECEIVER OF JTI-MACDONALD TM CORP.**

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**TO: THE COMMON SERVICE LIST**

## **PART I - OVERVIEW**

1. The TM Receiver<sup>1</sup> objects to the sanctioning of the proposed plan.
2. The plan contravenes the CCAA. It is conditional on—and premised upon—a subordination of TM’s security and a conscription of TM’s trademarks. But TM has not consented to subordination and—absent changes to the plan—will not consent. In short, the plan is unworkable and unfit for sanction. The parties should be sent back to the negotiating table.
3. TM is the largest secured creditor of the debtor, JTIM, with principal and interest owing of more than \$1.8 billion. TM also owns many of the trademarks used in JTIM’s business.
4. The plan acknowledges the validity of TM’s security and classifies TM as an unaffected creditor. TM was therefore not given a vote on the plan. But TM is “unaffected” in name only. Instead, the plan expressly compromises TM’s secured claims. The plan confiscates cash collateral of nearly \$1.6 billion that is subject to TM’s security. It strips TM of its rights as a secured creditor. Moreover, the plan requires TM to continue supplying intellectual property to JTIM indefinitely with no guarantee of payment. Without TM’s consent, the plan seeks to convert TM from a secured creditor and trademark licensor into an unsecured creditor and unpaid trademark supplier, with no enforceable contractual rights.
5. None of this can be achieved without TM’s agreement. The Monitor acknowledges that it cannot seek to compel TM to subordinate. It argues that TM is not an affected creditor because any subordination would be voluntary and alludes to the possibility that the Monitor could simply waive the subordination condition. This is no answer. First, there is no evidence that the Monitor

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<sup>1</sup> PricewaterhouseCoopers Inc. in its capacity as Receiver of JTI-Macdonald TM Corp.

will seek to waive or that the Court would approve a waiver. Second, even without subordination, the plan conscripts TM's property and affects its rights. Finally, the plan and the settlement depend on subordination and cannot work without it: TM's security and royalty rights will limit JTIM's ability to make contributions to the settlement. The plan as it stands is not fair and reasonable. It cannot be implemented successfully.

6. These problems are not new. The TM Receiver has voiced these concerns since the plan was released in October 2024. The plan has moved forward on the assumption that subordination was a "solvable problem" that would be solved before now. Indeed, this Court previously recognized that the plan is "premised on [TM] agreeing to subordinate its claim. It is open to the parties to negotiate such a subordination."<sup>2</sup> But the relevant terms of the plan and the terms of the subordination are unchanged. The problem remains unsolved. This sanction hearing is premature.

7. The TM Receiver, however, remains ready and willing to solve these problems. For the avoidance of doubt, TM currently objects to the Plan and the JTIM Subordination Agreement because:

- (a) Section 5.2 of the plan creates uncertainty by providing that the allocation issue is "unresolved". TM will not subordinate until TM and the affiliated corporate group are satisfied that this uncertainty has been addressed and there is no risk that there is a future re-allocation that impacts JTIM's obligations under the plan;
- (b) JTIM has been prohibited from paying royalties to TM since March 2019. These royalties now stand in arrears of approximately \$94 million. Under the proposed

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<sup>2</sup> Endorsement of Morawetz J., dated October 31, 2024, [\*Imperial Tobacco Limited\*](#), 2024 ONSC 6061 (the "**October 31 Endorsement**").

plan, JTIM will never be able to make up these arrears, while JTIM's competitors have been entitled to pay royalties to their affiliates throughout these proceedings; and

- (c) The JTIM Subordination Agreement (as defined below) provides that TM must continue to license its trademarks to JTIM indefinitely and may not enforce any remedies if JTIM fails to pay royalties under the parties' trademark agreements. In ordinary commercial circumstances, TM would not supply its trademarks until JTIM's royalty arrears were paid in full and it could enforce its rights.

8. Unless it is confirmed that (i) section 5.2 of the plan has been deleted and the allocation of the \$750 million working capital retention has been resolved to the satisfaction of TM's corporate group, and (ii) TM is paid the Accrued Royalties (as defined below) prior to plan implementation, then TM will not be in a position to consent to enter into a subordination agreement.

9. Absent these changes to the plan, there can be no subordination agreement and no workable plan. The Court should not sanction a Plan that cannot be implemented. The parties' time is better spent in a boardroom instead of a courtroom. This Court should send the parties back to mediation to solve these problems.

## **PART II - SUMMARY OF FACTS**

### **A. Background**

10. TM is not a debtor. It is not party to any of the class action litigation involving JTIM. It is not a party to these CCAA proceedings.

11. While TM is a wholly-owned subsidiary of JTIM, the Applicant has not exercised control over TM since 2015—four years before the CCAA proceedings—when TM was placed into receivership.<sup>3</sup>

12. TM owns many of the trademarks used in JTIM’s tobacco business, including key cigarette brands. TM licenses these trademarks to JTIM under a Trademark License Agreement dated October 8, 1999, as amended from time to time (the “**Trademark Agreements**”).<sup>4</sup> At the commencement of these CCAA proceedings, the Applicant owed TM approximately \$1 million under the Trademark Agreements, which amount has now grown to approximately \$94 million in arrears since 2019 (the “**Accrued Royalties**”).<sup>5</sup>

13. TM is also JTIM’s largest secured creditor. JTIM owes TM the principal amount of \$1.2 billion under ten secured convertible debentures (the “**TM Debentures**”),<sup>6</sup> plus arrears of approximately \$623 million that have accrued during these proceedings as a result of payments being suspended.<sup>7</sup> The TM Debentures are secured by a first charge on the assets of JTIM (the “**TM Security**”).<sup>8</sup> The Monitor has obtained a legal opinion that the TM Security is valid and enforceable,<sup>9</sup> and the Plan expressly acknowledges the validity of the TM Security.<sup>10</sup>

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<sup>3</sup> Affidavit of William Aziz, dated January 20, 2025 (“**Aziz Affidavit**”), JTIM Responding Motion Record (“**JTIM MR**”), Tab 1, [para. 22](#).

<sup>4</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 28](#).

<sup>5</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 38](#).

<sup>6</sup> Aziz Affidavit, JTIM MR, Tab 1, [para. 21](#).

<sup>7</sup> Aziz Affidavit, JTIM MR, Tab 1, Exhibit “C”, Affidavit of William Aziz dated October 24, 2024, at [para. 35](#).

<sup>8</sup> Aziz Affidavit, JTIM MR, Tab 1, [para. 23](#).

<sup>9</sup> Twenty-Second Report of the Monitor (“**Twenty-Second Report**”), Monitor’s Motion Record dated January 15, 2025 (“**Sanction Order MRM**”), Tab 2, at [para. 49](#).

<sup>10</sup> 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 (the

14. TM depends on payments under the Trademark Agreements and the TM Debentures to fund its own expenses. TM has significant ongoing expenses, including tax obligations to the Canada Revenue Agency and Revenue Québec.<sup>11</sup>

### **B. Appointment of TM Receiver**

15. TM is currently under the management and supervision of the TM Receiver.<sup>12</sup> In April 2015, JT Canada LLC Inc. demanded repayment of certain secured indebtedness owing to it from TM. TM went into default because it was unable to make the payment. Accordingly, JT Canada LLC Inc. appointed the TM Receiver in July 2015.<sup>13</sup> Following the appointment of the TM Receiver, all directors of TM resigned.<sup>14</sup> JTIM exercises no control over TM. The TM Receiver is TM's sole directing mind.

### **C. The Initial Order & Suspension of Interest and Royalties**

16. JTIM obtained an Initial Order under the CCAA on March 8, 2019. Subparagraphs 8(c) and (d) of the Initial Order provided that the Applicant would be permitted to continue making payments of royalties under the Trademark Agreements and interest under the TM Debentures.<sup>15</sup>

17. On March 15, 2019, the QCAPs filed a motion to suspend payments of interest and royalties under subparagraphs 8(c) and (d) of the Initial Order pending the Comeback Hearing.<sup>16</sup>

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“Plan”) [section 1.1](#), Definition of “[Unaffected Claim](#)” – (i). See also Twenty-Second Report, Sanction Order MRM, Tab 2, at [para. 52](#).

<sup>11</sup> Aziz Affidavit, JTIM MR, Tab 1, Exhibit “C”, Affidavit of William Aziz dated October 24, 2024, at [para. 36](#).

<sup>12</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 22](#).

<sup>13</sup> Aziz Affidavit, JTIM MR, Tab 1, Exhibit “D”, Affidavit of Robert McMaster dated March 8, 2019, at [para. 15](#).

<sup>14</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 22](#).

<sup>15</sup> Aziz Affidavit, JTIM MR, Tab 1, Exhibit “A” Initial Order, at [subparas. 8\(c\) and \(d\)](#).

<sup>16</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 31](#).

This Court issued an endorsement suspending all payments of interest and royalties pending the Comeback Hearing or further order (the “**March 2019 Endorsement**”).<sup>17</sup>

18. On March 28, 2019, the QCAPs served a further motion seeking to vary the Initial Order to prohibit the payment of interest and royalties by JTIM to TM.<sup>18</sup> The Monitor filed a report supporting the continued payment of interest and royalties and obtained a legal opinion confirming the validity of the TM Security in Nova Scotia, Ontario, Alberta, British Columbia and Quebec.<sup>19</sup>

19. Following the Comeback Hearing, this Court granted an Amended and Restated Initial Order, as further amended April 25, 2019.<sup>20</sup> The Amended and Second Amended Initial Orders both preserved paragraphs 8(c) and (d) of the Initial Order, and therefore expressly permitted the continuing payment of interest and royalties, contrary to the March 2019 Endorsement. Faced with this uncertainty, TM requested time to schedule a motion for the resumption of royalty payments, but the Court referred the issue to the Mediator, and the Mediator was not prepared to address the issue of royalties as a discrete matter at that time.<sup>21</sup>

20. JTIM has complied with the March 2019 Endorsement. TM has not sought payment of post-filing royalties while these issues were being negotiated. However, TM has never waived its right to receive these amounts.

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<sup>17</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 31](#); [Endorsement of McEwen J. dated March 19, 2019](#), JTIM MR, Tab 1, [Exhibit “E”](#) (the “**March 2019 Endorsement**”).

<sup>18</sup> Aziz Affidavit, JTIM MR, Tab 1 at [para. 32](#).

<sup>19</sup> [Second Report of the Monitor](#) dated April 1, 2019, at [para. 23](#), JTIM Responding Motion Record returnable October 31, 2024, Tab 1, [Exhibit “F”](#).

<sup>20</sup> Aziz Affidavit, JTIM MR, Tab 1, [Exhibit “A”](#).

<sup>21</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 33](#).

#### **D. The Accrued Interest**

21. As noted above, at the commencement of the CCAA proceedings, JTIM was indebted to TM in the principal amount of approximately \$1.2 billion under the TM Debentures.<sup>22</sup> JTIM has made no payments of interest to TM since the March 2019 Endorsement.<sup>23</sup> The total accrued and unpaid amount of interest under the TM Debentures is approximately \$623 million (the “**Accrued Interest**”). Interest continues to accrue on the TM Debentures at a rate of approximately \$10.9 million per month (including default interest).<sup>24</sup>

#### **E. The Accrued Royalties**

22. JTIM has made no payments of royalties to TM since the March 2019 Endorsement.<sup>25</sup> The total accrued and unpaid amount under the Trademark Agreements is approximately \$94 million (the “**Accrued Royalties**”). The Accrued Royalties continue to grow at a rate of approximately \$1.7 million per month (including interest on unpaid royalties).<sup>26</sup>

#### **F. The Plan**

23. The basic framework of the Plan is set out in the Monitor’s Report. The following summarizes provisions relevant to TM’s objection on this motion.

##### **1. Upfront Contributions**

24. The Plan requires each Tobacco Company to make an immediate Upfront Contribution equal to its cash on hand, less a carve-out of \$750 million to be divided between the Tobacco

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<sup>22</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 21](#).

<sup>23</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 33](#).

<sup>24</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 21](#).

<sup>25</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 28](#).

<sup>26</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 38](#).



Companies.<sup>27</sup> JTIM's current cash on hand is approximately \$1.6 billion.<sup>28</sup> This amount is cash collateral subject to the TM Security. The Tobacco Companies have not determined how to allocate the \$750 million carve-out as among themselves.<sup>29</sup>

## **2. The Contribution Security & Impact on Net After-Tax Income**

25. JTIM's Contribution obligations under the Plan will severely restrict JTIM's free cash in any given year. Under section 5.11, amounts remaining after JTIM's Contributions are referred to as "Net After-Tax Income" or "Residual Net After-Tax Income".<sup>30</sup> Only after its Contributions are completed in any given year would JTIM be permitted to deal freely with its Net After-Tax Income.<sup>31</sup> As discussed below, this means JTIM would only be entitled to make payments of Accrued Royalties, Accrued Interest, go-forward interest, and principal on the TM Debentures out of its remaining Net After-Tax Income in any given year.

26. JTIM's Contributions to the Global Settlement Amount are to be secured by a "Contribution Security" granted in favour of the "Collateral Agent".<sup>32</sup> The Contribution Security charges all of JTIM's present and after acquired assets.

27. The Monitor's Report makes clear that JTIM's restricted Net After-Tax Income will prevent JTIM from satisfying virtually all of its go-forward obligations owing to TM, a secured creditor, while ordinary creditors are to be paid in the normal course. According to the Monitor,

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<sup>27</sup> Referred to as the "Working Capital Carve Out". Twenty-Second Report, Sanction Order MRM, Tab 2, at [para. 26](#).

<sup>28</sup> Aziz Affidavit, JTIM MR, Tab 1 at [para. 15](#).

<sup>29</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 19\(a\)](#).

<sup>30</sup> Plan, [section 5.6](#). The JTIM Subordination Agreement at paragraph [1\(r\)](#) includes the additional defined term "[Residual Net After-Tax Income](#)".

<sup>31</sup> Plan, [section 5.11](#).

<sup>32</sup> Plan, [section 5.13](#).

JTIM's average Net After-Tax Income in the first 5 years of the Plan will be only \$25 million, while the Accrued Interest and Accrued Royalties total nearly \$700 million, and annual interest on the TM Debentures alone will be \$91 million.<sup>33</sup> In the Monitor's words: "From the above, it is apparent that, after Annual Contributions are made by JTIM towards the Global Settlement Amount, the satisfaction of all amounts owed to [TM] could not occur in the Ordinary Course of Business under the JTIM CCAA Plan without accommodations from [TM]" (emphasis added).<sup>34</sup>

28. Put simply, JTIM will not have enough cash at any point in the foreseeable future to satisfy ongoing interest obligations, much less to pay Accrued Interest or Accrued Royalties. The \$700 million of Accrued Interest and Accrued Royalties currently outstanding will not be repaid. As the Monitor acknowledges, this gives rise to "serious workability issues...unless the [TM Receiver] agrees to subordinate [TM's] position."<sup>35</sup>

### **3. The JTIM Subordination Agreement**

29. In addition to the Contribution Security Agreement, article 5.14 of the Plan would require TM to enter into a "JTIM Subordination Agreement,"<sup>36</sup> subordinating the TM Security and deferring the exercise of any recourses until the Global Settlement Amount has been paid in full.

30. TM was not invited to negotiate or provide its consent for the JTIM Subordination Agreement, which is simply attached as Schedule "I" to the Plan.<sup>37</sup> TM does not consent to the JTIM Subordination Agreement.

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<sup>33</sup> Twenty-Second Report, Sanction Order MRM, Tab 2, at [para. 53](#).

<sup>34</sup> Twenty-Second Report, Sanction Order MRM, Tab 2, at [para. 53](#).

<sup>35</sup> Twenty-Second Report, Sanction Order MRM, Tab 2, at [para. 53](#).

<sup>36</sup> Plan, [section 5.14](#) and [Schedule "I"](#).

<sup>37</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 15](#).

31. The JTIM Subordination Agreement is highly prejudicial and goes beyond merely subordinating the TM Security. The JTIM Subordination Agreement would require TM to continue licensing trademarks to JTIM indefinitely without any right to require payment or exercise its remedies under the TM Debentures or Trademark Agreements. Paragraph 3 provides:

Subject to the provisions of this Agreement, the Subordinate Creditor [TM] hereby acknowledges and agrees not to require or receive from the Debtor [JTIM] any payments of amounts (including principal, interest or fees) owed under or in respect of the Subordinate Creditor Obligations<sup>38</sup> nor to exercise any Enforcement Action against the Debtor until the Debtor has irrevocably and indefeasibly paid in full in cash all of the Senior Creditor Obligations.<sup>39</sup>

32. In addition to controlling JTIM's future use of Net After-Tax Income in any given year, subparagraph 5(b) of the JTIM Subordination Agreement would prohibit JTIM from paying the Accrued Royalties except out of residual Net After-Tax Income in future years.<sup>40</sup> As the Monitor notes, JTIM's future Net After-Income will likely never be sufficient to pay the Accrued Royalties.

33. Even more concerning, the Plan reiterates this restriction at section 5.15 which appears to restrict the payment of Accrued Royalties regardless of whether TM delivers the JTIM Subordination Agreement or not. Similarly, regardless of whether TM delivers the JTIM Subordination Agreement, any other Intercompany Claims due from JTIM to TM at the Effective Time may only be repaid out of JTIM's Net After-Tax Income available to JTIM in each year.<sup>41</sup>

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<sup>38</sup> Defined broadly at paragraph [1\(aa\)](#) to include all indebtedness of JTIM to TM, including under the TM Debentures and the Trademark Agreements.

<sup>39</sup> Defined broadly at paragraph [1\(v\)](#) to include all of the obligations of JTIM under the Plan, including the obligation to make the Annual Contributions, among other payments.

<sup>40</sup> Plan, [section 5.14\(c\)](#).

<sup>41</sup> Plan, [section 5.16](#).

34. In addition to these restrictive terms, the JTIM Subordination Agreement goes further to block all payments in certain cases. Under paragraph 8 of the JTIM Subordination Agreement, JTIM is prohibited from making any payments to TM if the Collateral Agent initiates a “Standstill Period”, blocking all payments of interest and royalties until JTIM’s Contributions have been paid in full or the Collateral Agent acknowledges the default is cured. Even after a Standstill Period ends, there is no provision for payment of any of the debts accrued during the Standstill Period.

35. After eliminating TM’s right to receive—and restricting JTIM’s ability to pay—royalties under the Trademark Agreements, the JTIM Subordination Agreement requires TM to continue providing the trademarks to JTIM for the duration of the Contribution Period:

**6. Right to use the Trademarks.** The Debtor shall have the right to use the trademarks licensed under the Trade Mark License Agreement until the Debtor has irrevocably and indefeasibly paid in full its share of the Global Settlement Amount.

36. The combined effect of paragraphs 3, 5, 6, and 8 of the JTIM Subordination Agreement is to force TM to continue supplying trademarks to JTIM, which has no obligation to—and likely cannot—pay. TM has no ability to enforce the terms of its agreements, nor to stop providing its trademarks in the event of default. Put simply, the Plan conscripts TM’s trademarks for JTIM’s private use, indefinitely.

#### **4. Voting Rights & Meeting Order**

37. On October 17, 2024, the Monitors and the Mediator brought a joint motion for a Meeting Order. The TM Receiver objected on the basis that the Plan could not be sanctioned.<sup>42</sup>

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<sup>42</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 10](#).

38. The proposed Plan provided that, in order to be approved, it must receive the affirmative vote of the required majority of the “Affected Creditor Class.” The Affected Creditors are defined to include the QCAPs, the Pan-Canadian Claimants, Provinces and Territories, and other stakeholders. The “Affected Creditors” did not include TM.

39. Instead, TM was artificially listed as an “Unaffected Creditor” disentitled from voting, attending the creditors meeting, or receiving distributions under the Plan.<sup>43</sup> The TM Receiver argued that TM’s claims were “affected” on the face of the Plan, and that TM’s classification as an “Unaffected Creditor” was an attempt to circumvent the CCAA voting rules.

40. The TM Receiver’s objection was rejected, and the creditors meeting was scheduled for December 12, 2024.<sup>44</sup> In its October 31 Endorsement, this Court held that the Plan was “premised on [TM] agreeing to subordinate its claim. It is open to the parties to negotiate such a subordination.” With the exception of certain perfunctory meetings, TM’s concerns have not been addressed, and the Plan has not been amended in any meaningful way.

41. As a result of its classification as an “Unaffected Creditor”, TM was not invited to the creditors meeting. On December 6, the TM Receiver requested an invitation to the creditors meeting. The Monitor responded that TM would be permitted to attend as a “guest”, with no right to address the voting parties, nor to ask questions.<sup>45</sup>

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<sup>43</sup> Plan, [section 3.6](#).

<sup>44</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 11](#).

<sup>45</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 12](#); Aziz Affidavit, JTIM MR, Tab 1, [Exhibit “B”](#), Letter of Linc Rogers dated December 10, 2024.

### PART III - ISSUES

42. The only issue is whether the Plan should be sanctioned under the CCAA.

43. Section 6 of the CCAA provides that a compromise or arrangement “may be sanctioned by the court” if it has achieved the requisite double majority vote. In order to determine whether the plan should be approved, the court applies the following criteria:<sup>46</sup>

- (a) there must be strict compliance with all statutory requirements;
- (b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
- (c) the plan must be fair and reasonable.

44. The TM Receiver submits that the Plan fails on all three criteria but, at its most basic, contravenes core principles of fairness and reasonableness. Ultimately, the court must ask whether the plan “treats creditors equally in their opportunities to recover, consistent with their security rights, and whether it does so in as non-intrusive and as non-prejudicial a manner as possible.”<sup>47</sup> The goal is to determine whether the plan represents a fair and reasonable compromise that is consistent with the purpose and objectives of the CCAA.<sup>48</sup> This Plan does not.

### PART IV - LAW AND ARGUMENT

45. The Plan is fatally flawed. While there is clearly a public interest in achieving a global resolution of tobacco claims, the Plan offends core principles of fairness and reasonableness. It is

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<sup>46</sup> *Laurentian University of Sudbury, Re.*, 2022 ONSC 5645, [at para. 23](#).

<sup>47</sup> *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.*, 2003 BCCA 344, [at para. 39](#).

<sup>48</sup> *Re Canwest Global Communications Corp.*, 2010 ONSC 4209, [at para. 19](#), citing *Re Canadian Airlines Corp.*, 2000 ABQB 442, [at para. 60](#), leave to appeal denied, 2000 ABCA 238, leave to appeal to S.C.C. refused July 12, 2001.

not saved by the support of the Monitors, the Mediator, or the vote of certain select creditors at a creditors' meeting. The Plan should not be approved by this Court as it currently stands.

**A. The Plan is not fair and reasonable**

46. The Plan's treatment of TM—JTIM's largest secured creditor—is neither fair nor reasonable. The relevant standard is whether the plan “treats creditors equally in their opportunities to recover, consistent with their security rights, and whether it does so in as non-intrusive and as non-prejudicial a manner as possible” (emphasis added).<sup>49</sup> Even if perfection is not the standard,<sup>50</sup> this Plan falls far short of achieving the required standard of “as non-intrusive and as non-prejudicial a manner as possible.” The Plan—and the process by which it has been developed—has come unmoored from the guideposts established by the CCAA.

**1. The Plan is unworkable**

47. This Court should not sanction an unworkable plan.<sup>51</sup> Since October 2024, the Monitor has recognized the problems in the Plan but described them as “solvable.” Yet none of the key issues have been solved. As it stands, the TM Receiver has made it clear that it will not enter into the JTIM Subordination Agreement if the Plan is sanctioned in its current form. Accordingly, a key condition precedent to Plan Implementation will not be met. In the Monitor's own words, these concerns now raise “serious workability issues” with respect to TM.<sup>52</sup>

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<sup>49</sup> *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.*, 2003 BCCA 344, [at para. 39](#).

<sup>50</sup> *AbitibiBowater Inc. (Re)*, 2010 QCCS 4450, [at para. 33](#).

<sup>51</sup> *Re 229531 B.C. Ltd.*, [1989] B.C.W.L.D. 641, *Re Canadian Airlines Corp.*, 2000 ABQB 442, *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178.

<sup>52</sup> Twenty-Second Report, Sanction Order MRM, Tab 2, [at para. 53](#).

48. TM’s consent is necessary to Plan Implementation, both legally and practically. Section 19.3 of the Plan provides that TM’s consent to the JTIM Subordination Agreement is a condition precedent to Plan Implementation. Nonetheless, the Monitor recognizes that TM does not have to agree to subordination: “[t]he inclusion of a plan condition for [TM] to subordinate does not in itself make [TM] ‘affected’ by the JTIM CCAA Plan because the condition is not binding on [TM], [TM] is not compelled to subordinate its position, and the condition may be waived.”<sup>53</sup> This Court rightly remarked in its October 31 Endorsement that the Plan is “premised on [TM] agreeing to subordinate its claim.” From legal perspective, the requirement for TM’s consent is clear.

49. From a practical perspective, for as long as TM refuses the JTIM Subordination Agreement, there are two paths forward, neither of which is workable.

50. First, under section 19.3 of the Plan, the Monitor and Mediator may waive a condition precedent to Plan Implementation. This is no answer. There is no evidence that the Monitor intends to pursue a waiver—or that it would even consider it. The Monitor and Mediator would require court approval, on notice to the Impacted Claimants, to waive a “material Plan Implementation Condition” like the JTIM Subordination Agreement, and there is a significant likelihood that waiver would be opposed. It defies logic that the Monitor would, on the one hand, be willing to waive subordination but, on the other hand, insist on subordination as a term of the Plan.

51. Second, even if the Monitor and Mediator agree to waive the JTIM Subordination Agreement and successfully obtain court approval, the Plan depends on TM’s subordination for its basic functioning. Without subordination, TM would continue to have all its remedies as a secured creditor, including the right to enforce its security over the cash collateral and other assets

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<sup>53</sup> Twenty-Second Report, Sanction Order MRM, Tab 2, at [para. 52](#).



of JTIM. TM's priority would prevent JTIM from paying both Upfront Contributions and Annual Contributions, and JTIM would ultimately be unable to make sustainable contributions to the Global Settlement Amount.

52. Similarly, if TM does not enter into the JTIM Subordination Agreement, it will be entitled to exercise all of its remedies against JTIM under the Trademark Agreement. JTIM is currently in arrears under the Trademark Agreement and cannot pay these arrears under the Plan. Sections 5.15 and 5.16 of the Plan effectively prohibit payment of the Accrued Royalties. Upon non-payment, TM would be entitled to enforce payment under the Trademark Agreement or terminate it. Waiving the subordination condition does nothing to solve this. This is not a workable Plan.

53. Put another way, TM's support is not only a condition precedent under the text of the Plan, is also a practical and financial requirement if JTIM is to carry on as a viable contributor to the Global Settlement Amount.

54. Again, the TM Receiver supports a global resolution and would consent to a form of subordination in the right circumstances, but until those circumstances are realized, TM is entitled to the protections of its status as a secured creditor and owner of valuable intellectual property.

## **2. The Plan is unfair because it treats similar stakeholders differently**

55. These CCAA proceedings are unprecedented in several respects, not least because they involve the simultaneous restructuring of three competing companies. While JTIM's proposed Plan is distinct from those of the other Tobacco Companies, the plans are inextricably intertwined.

It is a condition precedent of each plan that the plans of the other two Tobacco Companies be sanctioned by this Court.<sup>54</sup>

56. In this context, the fairness analysis must include consideration of how the various Tobacco Company Groups are treated. If they are treated differently, there must be some rational basis for the difference, rooted in the policy objectives of the CCAA. The reconfiguration of the competitive balance within the Canadian tobacco industry cannot be a valid objective of the CCAA. On the contrary, if the result is to reduce the relative competitiveness of the JTI Group disproportionately to the other Tobacco Company Groups, then the result is contrary to the CCAA objective of allowing a viable business to emerge. Likewise, if there is no reasoned justification, it cannot be reasonable.

57. As noted above, the Plan prevents TM from collecting the Accrued Royalties in the amount of approximately \$94 million.<sup>55</sup> Neither of the other Tobacco Companies face this problem. Both Imperial and RBH have been permitted to pay their post-filing royalties and licensing obligations to related parties during these CCAA proceedings:

- (a) RBH licenses trademarks from Philip Morris Global Brands Inc. (“**PMI**”). Prior to these CCAA proceedings, RBH paid approximately \$25 million in annual royalties to a PMI affiliate, and \$4 million annually to other third parties.<sup>56</sup>
- (b) Imperial paid its parent, British American Tobacco (“**BAT**”) between 3% and 5% of its annual net sales revenue for sales of certain brands owned by BAT.

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<sup>54</sup> Plan, [section 19.3 \(a\)-\(d\)](#).

<sup>55</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 38](#).

<sup>56</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 35](#).

Immediately prior to these CCAA proceedings, Imperial paid approximately \$46.8 million per year to BAT.<sup>57</sup>

58. During these CCAA proceedings, RBH and Imperial have likely paid up to \$143 million and \$269 million in royalties, respectively, to affiliates.<sup>58</sup> Nothing in the RBH or Imperial plans would interfere with those payments on an ongoing basis.

59. Similarly, neither RBH nor Imperial are subject to the threat of a Standstill Period, which is unique to the proposed JTIM Subordination Agreement.

60. The difference in treatment between the JTI Group, on one hand, and Imperial and RBH on the other, has no evidentiary support. There is no evidence of a rational connection to the purposes of the CCAA, nor to any restructuring objective in these proceedings—or even a purported explanation. Prohibiting JTIM from paying its Accrued Royalties adds nothing to the Plan. It is patently unreasonable and manifestly unfair.

61. In addition to treating the Tobacco Companies differently, the Plan’s method of achieving that differential treatment offends the policy of the CCAA. The CCAA recognizes the rights of licensors of property to receive timely payment for licensed property during a restructuring. This policy is sufficiently important to be a limitation on the generally broad discretion of a CCAA court under section 11:

**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; [...] [emphasis added]

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<sup>57</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 36](#).

<sup>58</sup> Aziz Affidavit, JTIM MR, Tab 1, at [para. 37](#).

62. Section 11.01(a) is intended to protect unpaid stakeholders who permit the CCAA debtor to continue as a going concern during its restructuring.<sup>59</sup> The provision recognizes that a stay of proceedings under the CCAA should never be used to enforce the continuous supply of goods or services without payment for current deliveries.<sup>60</sup> The Court of Appeal has held that “while the [debtor] 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>61</sup> A deferral of payment for ongoing services has the effect of imposing new payment terms that are different from those agreed between the parties.<sup>62</sup> In this case, it is not a mere deferral; it is an effective bar.

63. As discussed above, the Initial Order dated March 9, 2019, expressly permitted payments of intercompany debt and royalties at paragraphs 8(c) and (d). Justice McEwen suspended payments of intercompany royalties “pending the Comeback Hearing or further order” and, after that Comeback Hearing, this Court issued an Amended Initial Order and a Second Amended Initial Order, both of which expressly preserved paragraphs 8(c) and (d).

64. Under the Plan these will never be paid. As the Monitor notes, JTIM’s Net After-Tax Income will be insufficient to pay the Accrued Royalties, and there is no provision in the Plan for such amounts to be paid before Plan Implementation. If JTIM is only permitted to pay the Accrued Royalties out of Net After-Tax Income, then the effect is that TM will not be permitted to pay the Accrued Royalties at all. TM will be deprived of funds that it was entitled to receive under the

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<sup>59</sup> *Quest University Canada (Re)*, 2020 BCSC 921, [at para. 45](#).

<sup>60</sup> *Royal Bank of Canada v. Cow Harbour Construction Ltd.*, 2012 ABQB 59, [at para. 17](#).

<sup>61</sup> *Sproule v. Nortel Networks Corporation*, 2009 ONCA 833, [at para. 34](#).

<sup>62</sup> *Quest University Canada (Re)*, 2020 BCSC 921, [at para. 93](#).

Second Amended Initial Order, but which have been suspended in good faith pending the Mediation process.

65. It is unfair and unreasonable to expect that TM would deliver the JTIM Subordination Agreement, which requires TM to continue licensing the trademarks to JTIM for the duration of the Contribution Period, without guarantee of payment, without receiving the Accrued Royalties, and without recourse in the event of non-payment.

### **3. The Plan affects TM without granting TM a vote**

66. Furthermore, the Plan is unfair and unreasonable because it affects TM without allowing TM to vote. This violates the statutory requirements of the CCAA and should alone be sufficient to deny Plan sanction.

67. As the Supreme Court of Canada recognized in *Callidus*, section 6(1) of the CCAA provides that a plan of arrangement is only binding “on each class of creditors that participated in the vote.”<sup>63</sup> This rule recognizes the basic statutory bargain at the heart of the CCAA: that in return for permitting the debtor to reorganize its affairs, Parliament has granted affected creditors a vote.<sup>64</sup> Where an arrangement is not offered to a particular creditor or class of creditors, their rights remain

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<sup>63</sup> [\*9354-9186 Québec inc. v. Callidus Capital Corp.\*](#), 2020 SCC 10, [at para. 57](#). See also [\*Delta 9 Cannabis Inc \(Re\)\*](#), 2024 ABKB 657; [\*Re Doman Industries Ltd. \(Trustees of\)\*](#), 2003 BCSC 376; [\*Menegon v. Philip Services Corp.\*](#) [1999] O.J. No. 4080; [\*Olympia & York Developments Ltd. v. Royal Trust Co.\*](#), (1993) 12 O.R. (3d) 500 (Ont. Gen. Div.).

<sup>64</sup> [\*Menegon v. Philip Services Corp.\*](#) [1999] O.J. No. 4080, at para. 38.

unaffected, and they maintain the right to be paid in full.<sup>65</sup> A CCAA vote does not bind non-voters to the plan. Any non-voting creditor must remain unaffected by a CCAA plan.

68. TM’s classification as an “Unaffected Creditor” is artificial. The Plan labels TM as “Unaffected” with one hand, while confiscating its property and rights with the other. TM is affected in at least four ways.

69. First, the Plan requires JTIM to pay all of its cash on hand (approximately \$1.6 billion), less deductions, as an Upfront Contribution immediately upon the Plan Implementation Date. That amount of \$1.6 billion is cash collateral subject to the TM Security. Canadian courts have repeatedly held that a Plan cannot effect a confiscation of rights in this way.<sup>66</sup>

70. It is patently unfair to require a secured creditor, without its consent, to relinquish roughly \$1.6 billion of cash collateral to unsecured creditors. It is wholly impermissible to do so without providing them a vote.

71. The public interest in achieving a global resolution is strong, but the CCAA does not provide for resolution at all costs. The Plan—and the manner by which it has been imposed by the Monitor and Mediator—undermines the principles of certainty and predictability at the heart of the system of secured credit. As the Supreme Court of Canada has observed, “[personal property security] regimes have been implemented to increase certainty and predictability in secured

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<sup>65</sup> *Olympia & York Developments Ltd. v. Royal Trust Co.*, (1993) 12 O.R. (3d) 500 (Ont. Gen. Div.); see also Richard McLaren and Sabrina Gherbaz, *Canadian Commercial Reorganization: Preventing Bankruptcy*, Ch. 6, § 6:11.

<sup>66</sup> *Re 229531 B.C. Ltd.*, [1989] B.C.W.L.D. 641; *Olympia & York Developments Ltd. v. Royal Trust Co.*, (1993) 12 O.R. (3d) 500 (Ont. Gen. Div.).

transactions through the creation of a coherent system of priorities...the benefits of such certainty...are intended to accrue to the health of the economy in general.”<sup>67</sup>

72. Second, even if TM refuses to deliver the JTIM Subordination Agreement, the Plan affects TM by restricting JTIM’s ability to repay the Accrued Royalties and the Accrued Interest. TM’s claims are nominally “Unaffected Claims” and section 3.7 of the Plan provides that Unaffected Claims shall be paid by JTIM in the normal course of operations as and when they become due, subject to section 5.16. But Section 5.14 of the Plan states that JTIM may only pay Accrued Royalties from its share of the Net-After Tax Income and Tax Refunds and section 5.16 of the Plan provides that JTIM may only repay any Intercompany Claim outstanding and due by JTIM as at the Effective Time from its share of the Net-After Tax Income and Tax Refunds. The Plan specifies that Intercompany Claims “includes all arrears of royalty and license fees as well as principal and interest due on loans made by any member of JTIM’s Tobacco Company Group to JTIM.” These two provisions effectively subordinate TM’s rights with respect to the Accrued Royalties and Accrued Interest whether or not TM delivers the JTIM Subordination Agreement.

73. Third, according to the Monitor’s calculations, the Plan ensures that TM will never be paid the Accrued Royalties or Accrued Interest. Since JTIM is only permitted to pay the Accrued Royalties and Accrued Interest out of Net After-Tax Income, and JTIM’s Net After-Tax Income will be insufficient to cover ongoing interest and royalty obligations, there is no possibility that JTIM will ever be able to pay the Accrued Royalties or Accrued Interest. Under the JTIM Subordination Agreement and section 14 of the draft Sanction Order, TM would not be entitled to

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<sup>67</sup> [\*Royal Bank of Canada v. Sparrow Electric Corp.\*, \[1997\] 1 S.C.R. 411, at para. 21.](#)

exercise any remedies in respect of JTIM's ongoing default. This represents a confiscation of over \$700 million, again, without a vote.

74. Fourth, the Plan affects TM as a "Material Subsidiary" by, among other things, requiring TM to guarantee JTIM's obligations under the Contribution Security Agreement, and to conduct its business pursuant to the covenant at section 11.1(g).<sup>68</sup>

75. Taken as a whole, the Plan confiscates rights and imposes obligations on TM whether or not TM delivers the JTIM Subordination Agreement. None of this is permissible without permitting TM to vote, or without TM's consent.

76. The Monitor appears to argue that the third-party releases granted under the Plan are sufficient consideration for the compromise of TM's rights. It is not open to the Monitor to dictate the price of TM's agreement—indeed it has conceded it cannot compel it. The CCAA grants no authority to impose contracts on third parties. It is ultimately a question for TM's commercial judgment whether the releases are worth the loss of \$1.6 billion in cash collateral, among the other sacrifices TM is required to make under the Plan.

77. Similarly, the fact that the Creditors Meeting was conducted in accordance with the Meeting Order does not cure the fundamental conflict between the Plan and the CCAA. The TM Receiver objected to the Meeting Order on the basis that the Plan would not be capable of sanction because TM's rights were being affected without a corresponding right to vote on the plan. This Court granted the Meeting Order based on its discretionary assessment that further negotiations

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<sup>68</sup> See section [12.4](#) of the [Plan](#) in conjunction with section 11.1 of the Contribution Security Agreement, [Schedule "E"](#) to the Plan.



would resolve TM's position before the Meeting.<sup>69</sup> They did not. As the Monitor notes, "the 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>70</sup> The Sanction Hearing is now here and nothing has changed: the Plan purports to bind a non-voting, objecting secured creditor and confiscate valuable intellectual property rights.

78. This Court should similarly reject the Monitor's submission that there is no viable alternative to the proposed Plan, for two reasons. First, there is no evidence that the Monitor has considered any alternatives at all. Since September 2023,<sup>71</sup> the work of developing a plan has been assigned to the Monitor and the Mediator. There is no evidence that other alternatives were explored or ruled out in the mediation.

79. Second, as discussed above, the Monitor's response to TM's "serious workability concerns" is to suggest that a key condition precedent could be waived. If the Monitor is satisfied that the Plan can proceed without the JTIM Subordination Agreement, then Plan should be amended now to achieve a less prejudicial and less intrusive approach. On the other hand, if the JTIM Subordination Agreement is an essential component of Plan Implementation, the Monitor should work with TM to resolve TM's objections.

80. These are serious concerns. The Plan is opposed by both the CCAA Applicant and its largest secured creditor. If the Plan is sanctioned in its current form, TM will refuse to subordinate

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<sup>69</sup> October 31 Endorsement, [at para. 49](#).

<sup>70</sup> Twenty-Second Report, Sanction Order MRM, Tab 2, at [para. 56\(a\)](#).

<sup>71</sup> Order of Morawetz J. dated September 27, 2023, JTIM Motion Responding Motion Record returnable October 31, 2024, Tab 1, [Exhibit "B"](#).

its security, which will impede implementation even if the Monitor is able to obtain a waiver of the condition precedent. The Plan is simply not workable and not ready for implementation.

### **PART V - RELIEF SOUGHT**

81. For all of the reasons outlined above, the Plan in its current form is unfair, unreasonable, and contrary to the provisions of the CCAA. TM respectfully requests that the Sanction Order be denied and the parties ordered to return to mediation.

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




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## SCHEDULE A

### LIST OF AUTHORITIES

1. [\*AbitibiBowater Inc. \(Re\)\*](#), 2010 QCCS 4450
2. [\*Delta 9 Cannabis Inc \(Re\)\*](#), 2024 ABKB 657
3. [\*Laurentian University of Sudbury, Re.\*](#), 2022 ONSC 5645
4. [\*Menegon v. Philip Services Corp.\*](#) [1999] O.J. No. 4080
5. [\*Olympia & York Developments Ltd. v. Royal Trust Co.\*](#), (1993) 12 O.R. (3d) 500 (Ont. Gen. Div.)
6. [\*Quest University Canada \(Re\)\*](#), 2020 BCSC 921
7. [\*Re 229531 B.C. Ltd.\*](#), [1989] B.C.W.L.D. 641
8. [\*Re Canadian Airlines Corp.\*](#), 2000 ABQB 442
9. [\*Re Canwest Global Communications Corp.\*](#), 2010 ONSC 4209
10. [\*Re Doman Industries Ltd. \(Trustees of\)\*](#), 2003 BCSC 376
11. [\*Royal Bank of Canada v. Cow Harbour Construction Ltd.\*](#), 2012 ABQB 59
12. [\*Royal Bank of Canada v. Sparrow Electric Corp.\*](#), [1997] 1 S.C.R. 411
13. [\*Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.\*](#), 2003 BCCA 344
14. [\*Sproule v. Nortel Networks Corporation\*](#), 2009 ONCA 833
15. [\*Uti Energy Corp. v. Fracmaster Ltd.\*](#), 1999 ABCA 178
16. [\*9354-9186 Québec inc. v. Callidus Capital Corp.\*](#), 2020 SCC 10

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

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

Proceeding commenced at TORONTO

**FACTUM OF  
PRICEWATERHOUSECOOPERS INC., IN  
ITS CAPACITY AS RECEIVER OF JTI-  
MACDONALD TM CORP.**

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