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

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

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

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

Applicant

# RESPONDING FACTUM OF THE TM RECEIVER

October 29, 2024

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**TO:** **THE COMMON SERVICE LIST**

## PART I - OVERVIEW

1. The TM Receiver[1] objects to the Monitor's motion for a meeting order. The CCAA Plan attached as Schedule "B" to the Monitor's Notice of Motion dated October 17, 2024 (the "**M&M Plan**") should not be submitted to creditors for a vote.

2. Despite classifying JTI-Macdonald TM Corp ("**TM**" or "**JTI-TM**") as an "Unaffected Creditor", the M&M Plan expressly compromises TM's $1.8 billion secured claim against the Applicant, confiscates its collateral, and strips TM of its rights as a secured creditor without granting TM a right to vote. The M&M Plan requires TM to continue supplying valuable intellectual property to the Applicant indefinitely and with no guarantee of payment, in violation of TM's contractual arrangements with the Applicant. None of this is permitted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 (the "**CCAA**") without TM's consent, and TM does not consent.

3. Put simply, TM is "Unaffected" in name only. In reality, the M&M Plan:

(a) Compels TM to enter into a new contract, the JTIM Subordination Agreement, exclusively for the purpose of subordinating TM's secured interest;

(b) Requires TM to continue supplying valuable trademarks to the Applicant for the duration of the Contribution Period (as defined in the M&M Plan), whether or not payment is made, while significantly impairing the Applicant's ability to pay; and

(c) Impairs TM's ability to collect post-filing royalties that have accrued for over five years since they were first suspended by this Court on March 19, 2019.

[1] PricewaterhouseCoopers Inc. in its capacity as receiver of JTI-Macdonald TM Corp.

4. The M&M Plan cannot be sanctioned under the CCAA. By purporting to bind TM without permitting TM to vote, the M&M Plan carries out precisely the kind of confiscation that Canadian courts have long condemned. The Plan effectively converts TM from a secured creditor into an unsecured creditor, and potentially unpaid supplier.

5. The Plan is flawed and severely prejudicial to TM. Even before the commencement of these proceedings, TM was put into receivership for defaults under its existing debt obligations. TM depends on payments of interest and royalties from the Applicant to meet its own obligations. These payments have been suspended for the duration of the CCAA process and currently stand in arrears of approximately $700 million while TM has continued to supply its intellectual property to the Applicant during its reorganization. TM has been forced to borrow money to satisfy its own significant obligations, including large monthly tax installments.

6. These CCAA proceedings have lasted nearly five years. The inherent flaws in the Plan will only prolong them further. A plan that purports to bind non-voting creditors cannot be approved at a sanction hearing and should not be submitted to creditors for a vote.[2] As this court has previously observed, voting on an unsanctionable plan amounts to little more than a "waste of time and money."[3] In this case, it also risks delaying important relief for claimants, who have already endured nearly five years of negotiation.

7. If TM is to be treated as an "Unaffected Creditor" disentitled from voting, it cannot be bound by the M&M Plan. The M&M Plan is contrary to the CCAA and doomed to failure at a sanction hearing.

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[2] *Doman Industries Ltd., Re*, 2003 BCSC 376, at para. 8.
[3] *Target Canada Co. (Re)*, 2016 ONSC 316, at para. 69.

## PART II - SUMMARY OF FACTS

### A. Background

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

9. As further detailed below, while TM is a wholly-owned subsidiary of the Applicant, the Applicant has not exercised control over TM since 2015—four years before the CCAA proceedings—when TM was placed into receivership and its board of directors subsequently resigned.[4]

10. TM owns many of the trademarks used in the Applicant's tobacco business. TM licenses these trademarks to the Applicant under a Trademark License Agreement dated October 8, 1999, as amended from time to time (the "**Trademark Agreements**").[5]

11. 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 $90 million in arrears since 2019.[6]

12. TM is also the Applicant's largest secured creditor. The Applicant owes TM approximately $1.2 billion, pursuant to ten secured convertible debentures (the "**TM Debentures**"), plus arrears of over $600 million that have accrued during these proceedings.[7] The TM Debentures are secured by a first charge on the assets of the Applicant (the "**TM Security**").

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[4] Affidavit of William Aziz sworn October 24, 2024 ("**Aziz Affidavit**"), at paras. 21-22. Responding Motion Record of JTI-Macdonald Corp. ("**JTIM RMR**") Tab 1, p. 6.
[5] Aziz Affidavit, at para. 26, JTIM MRM, Tab 1, p. 7.
[6] Aziz Affidavit, at paras. 26 and 35, JTIM MRM, Tab 1, pp. 7 and 10.
[7] Aziz Affidavit, at para. 21, JTIM MRM, Tab 1, p. 6.

13. 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.[8]

14. Despite the Quebec Class Action Plaintiffs' ("**QCAPs**") rhetoric on the issue,[9] there is no doubt that the TM Security created a valid and enforceable first charge. The Monitor has obtained a legal opinion that the TM Security is valid and enforceable,[10] and the M&M Plan assumes the validity of the TM Security.[11] At no point in over 25 years of litigation have the QCAPs sought to challenge the TM Security.

### B. Appointment of TM Receiver

15. TM is currently under the management and supervision of the TM Receiver.[12]

16. In April 2015, JT Canada LLC Inc. ("**JT ParentCo**") demanded repayment of certain secured indebtedness owing to it from TM. TM went into default because it was unable to make the payment. JT ParentCo appointed the TM Receiver in July 2015.[13]

17. Following the appointment of the TM Receiver, all directors of TM resigned.[14] The Applicant exercises no control over TM. The TM Receiver is TM's sole directing mind.

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[8] Aziz Affidavit, at para. 36, JTIM MRM, Tab 1, p. 10.
[9] Affidavit of André Lespérance sworn October 28, 2024.
[10] Second Report of the Monitor dated April 1, 2019, at para. 23, JTIM MRM, Tab 1, Exhibit "F", p. 8.
[11] *See* M&M Plan, section 1.1 Definition of "Unaffected Claim" – (i).
[12] Aziz Affidavit, at para. 10, JTIM MRM, Tab 1, p. 3.
[13] Aziz Affidavit, at para. 22, JTIM MRM, Tab 1, p. 6.
[14] Aziz Affidavit, at para. 22, JTIM MRM, Tab 1, p. 6.

18. Despite TM's separate corporate existence, the Plan continues to treat TM as a subsidiary under the Applicant's control, contrary to the "bedrock principle of corporate separateness" as recently reaffirmed by the Supreme Court of Canada.[15] TM has not been invited to participate in mediation for many years and has had no involvement in the development of the M&M Plan.[16]

### C. Royalty Deposit

19. The judgment of the Quebec Superior Court in the *Blais* and *Létourneau* Actions constituted an event of default by JTIM under the TM Debentures.[17]

20. In July 2017, the TM Receiver delivered a notice of default to JTIM with respect to JTIM's default under the TM Debentures and reserved all of TM's rights and remedies. In August 2017, TM agreed to forbear from exercising its rights and remedies pursuant to a forbearance letter.[18] That forbearance was subsequently amended from time to time until before the commencement of the CCAA proceedings.

21. In early 2018, in the context of a further forbearance, TM required JTIM to provide a deposit equal to 1.5 times the average monthly royalty payment under the Trademark Agreements (the "**Royalty Deposit**").[19] JTIM duly provided a deposit of $1.33 million. At the time of the Initial Order in these proceedings, the TM Receiver continued to hold the Royalty Deposit.

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[15] *Scott v. Golden Oaks Enterprises Inc.*, 2024 SCC 32, at para. 9.
[16] Aziz Affidavit, at para. 10, JTIM MRM, Tab 1, p. 3.
[17] Aziz Affidavit, at para. 23, JTIM MRM, Tab 1, p. 7.
[18] Aziz Affidavit, at para. 23, JTIM MRM, Tab 1, p. 7.
[19] Affidavit of Robert McMaster sworn March 8, 2019, para. 29, JTIM MRM, Tab 1, Exhibit "C", p. 11.

### D. The Initial Order

22. The Applicant 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.

23. 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.[20] This Court issued an endorsement suspending all payments of interest and royalties pending the Comeback Hearing (the "**March 2019 Endorsement**").[21]

24. On March 28, 2019, the QCAPs served a further motion, among other things, seeking to vary the Initial Order to prohibit the payment of interest and royalties by JTIM to TM.[22] JTIM took the position that it should be entitled to continue to pay its interest and royalty payments to TM as the security granted by JTIM to TM was valid and enforceable. 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.[23]

25. Following the Comeback Hearing, this Court granted an Amended and Restated Initial Order, as further amended April 25, 2019.[24] The amended order did not include any amendment to paragraphs 8(c) or (d) of the Initial Order and continued to permit payment of interest and royalties. The Court referred the issue of interest and royalty payments to the Mediator for

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[20] Aziz Affidavit, at para. 26, JTIM MRM, Tab 1, p. 7.
[21] Aziz Affidavit, at para. 27, JTIM MRM, Tab 1, p. 8; Endorsement of McEwen J. dated March 19, 2019, JTIM MRM, Tab 1, Exhibit "D".
[22] Aziz Affidavit, at para. 28, JTIM MRM, Tab 1, p. 8.
[23] Second Report of the Monitor dated April 1, 2019, at para. 23, JTIM MRM, Tab 1, Exhibit "F", at p. 8-9.
[24] Second Amended Initial Order dated April 25, 2019, JTIM MRM, Tab 1, Exhibit "A".

resolution.[25] However, as these issues have remained unresolved, JTIM has not made any interest or royalty payments to TM in over five years.[26]

26. On May 19, 2019, the TM Receiver wrote to the Monitor to advise that the TM Receiver intended to apply the Royalty Deposit against the accrued unpaid royalties.[27] The Monitor did not object. However, in June 2019, the QCAPs filed a motion seeking the return of the Royalty Deposit. The Court directed the issue to mediation. However, the Mediator was not prepared to address the issue of the Royalty Deposit, and the issue remains unresolved. At the time of writing, TM continues to hold the Royalty Deposit in the amount of $1.33 million.[28]

### E. The Accrued Interest

27. As noted above, at the commencement of the CCAA proceedings, the Applicant was indebted to TM in the amount of approximately $1.2 billion pursuant under the TM Debentures.[29] As a result of the March 2019 Endorsement, the Applicant has made no payments of interest to TM since the commencement of the CCAA proceedings.[30] As it stands, 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).[31]

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[25] Aziz Affidavit, at para. 31, JTIM MRM, Tab 1, p. 9.
[26] Aziz Affidavit, at para. 34, JTIM MRM, Tab 1, p. 10.
[27] Aziz Affidavit, at para. 32, JTIM MRM, Tab 1, p. 9.
[28] Aziz Affidavit, at paras. 32-33, JTIM MRM, Tab 1, p. 9.
[29] Aziz Affidavit, at para. 21, JTIM MRM, Tab 1, p. 6.
[30] Aziz Affidavit, at para. 34, JTIM MRM, Tab 1, p. 10.
[31] Aziz Affidavit, at para. 35, JTIM MRM, Tab 1, p. 10.

### F. The Accrued Royalties

28. At the time of the Initial Order, the Applicant owed TM approximately $1 million under the Trademark Agreements.[32] As a result of the March 2019 Endorsement, the Applicant has made no payments of royalties to TM since the commencement of the CCAA proceedings.[33] As it stands, the total accrued and unpaid amounts under the Trademark Agreements are valued at approximately $90 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).[34]

### G. The M&M Plan

29. The M&M Plan provides for a Global Settlement Amount of $32.5 billion to be funded by an initial "Upfront Contribution" from each Tobacco Company plus "Annual Contributions" calculated each year in accordance with a "Metric" until the Global Settlement Amount is reached (the "**Contribution Period**").[35]

#### 1. The Contribution Security

30. JTIM's Contributions[36] to the Global Settlement Amount are to be secured by a "Contribution Security" granted in favour of the "Collateral Agent".[37] The Contribution Security charges all of JTIM's present and after acquired assets to secure JTIM's obligation to make its Annual Contributions and other required Contributions. The Collateral Agent may have recourse

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[32] Aziz Affidavit, at para. 26, JTIM MRM, Tab 1, p. 7.
[33] Aziz Affidavit, at para. 35, JTIM MRM, Tab 1, p. 10.
[34] Aziz Affidavit, at para. 35, JTIM MRM, Tab 1, p. 10.
[35] Each as defined in the M&M Plan, sections 5.1-5.6.
[36] As defined in the M&M Plan, section 1.1.
[37] M&M Plan, section 5.13.

to the Contribution Security upon the occurrence of an Event of Default, which includes a wide range of possible defaults by JTIM.[38]

31. In brief summary, the amounts not included in JTIM's Contributions are referred to as "Net After-Tax Income".[39] Only after its Contributions are completed in any given year would JTIM be permitted to deal freely with its Net After-Tax Income. As discussed below, this means JTIM would only be entitled to make payments of Accrued Royalties, Accrued Interest, interest, and principal on the TM Debentures out of its remaining Net After-Tax Income in any given year.

### 2. The JTIM Subordination Agreement & Cash Restrictions

32. In addition to the Contribution Security Agreement, article 5.14 of the Plan requires TM to enter into a "JTIM Subordination Agreement."[40]

33. TM was not invited to negotiate or provide its consent for the JTIM Subordination Agreement, which is simply attached as Schedule "I" to the M&M Plan.[41] The M&M Plan presupposes TM's acquiescence. To be clear, at present, TM does not consent to the JTIM Subordination Agreement.

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[38] M&M Plan, section 5.13.
[39] M&M Plan, section 5.6. The JTIM Subordination Agreement at paragraph 1(r) includes the additional defined term "Residual Net After-Tax Income", meaning "in any given year (i) the amount of the Net After-Tax Income following payment by the Debtor of the Annual Contributions, and (ii) the amount of the Tax Refunds following payment of the Tax Refund Cash Payments, each as calculated in accordance with the Plan."
[40] M&M Plan, section 5.14 and Schedule "I".
[41] Aziz Affidavit, at para. 10, JTIM MRM, Tab 1, p. 3.

34. Absent a consensual CCAA plan, the terms of the JTIM Subordination Agreement are deeply problematic. The agreement eviscerates TM's rights under both the TM Security and the Trademark Agreements.

35. Under section 5.14 of the M&M Plan, at least 10 days before the Plan Implementation Date, TM is required to enter into the JTIM Subordination Agreement, subordinating the TM Security and deferring exercising any recourses until the Global Settlement Amount has been paid in full. As noted, this is a fully baked agreement in terms fully prescribed by the Monitor and Mediator. TM has no ability to negotiate or decline the JTIM Subordination Agreement. The M&M Plan attempts to use the authority of this Court to require TM to execute and deliver the JTIM Subordination Agreement.

36. As a starting point, the JTIM Subordination Agreement requires complete subordination. TM would relinquish all rights to receive any payments under the TM Debentures and the Trademark Agreements, including all rights in the event of non-payment. 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[42] 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.[43]

37. Under paragraph 5, JTIM would be permitted to pay go-forward royalties and license fees under the Trademark Agreements from the amounts generated from JTIM's ongoing operations.

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[42] Defined broadly at paragraph 1(aa) to include all indebtedness of JTIM to TM, including under the TM Debentures and the Trademark Agreements.

[43] 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.

TM could receive payments of principal and interest owing to TM under the TM Debentures, but these payments may only be made from its Net After-Tax Income and tax refunds.

38. In addition to controlling JTIM's future use of Net After-Tax Income in any given year, the M&M Plan would also prevent JTIM from paying the Accrued Royalties. Section 5.14(c) of the M&M Plan and paragraph 5(b) of the JTIM Subordination Agreement would prohibit JTIM from paying the Accrued Royalties at the Plan Implementation Date, and only but permit JTIM to pay the Accrued Royalties out of any available Net After-Tax Income in future years.[44] In other words, while TM is currently owed approximately $90 million in Accrued Royalties, JTIM would only be permitted to pay such Accrued Royalties gradually out of its remaining cash—if any—in future years. The M&M Plan reiterates this restriction at section 5.15.

39. Similarly, 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 after its Annual Contribution has been deposited in the Global Settlement Trust Account.[45]

40. But despite only allowing JTIM to pay the sums owing to TM under these restrictive terms—at JTIM's option, not obligation—the JTIM Subordination Agreement goes further to block all payment in certain cases. Under section 5.14 of the M&M Plan and paragraph 8 of the JTIM Subordination Agreement, JTIM is prohibited from making *any* payments if the Senior Creditor (i.e the Collateral Agent) sends a notice of default. This is referred to as a Standstill Period—and it blocks all payments of interest and royalties until the Senior Creditor has been paid

[44] M&M Plan, section 5.14(c).
[45] M&M Plan, section 5.16.

in full or the Senior Creditor acknowledges the default is cured. Even after the Standstill Period ends, there is no provision for payment of any of the debts accrued during the Standstill Period.

41. 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.

42. The combined effect of paragraphs 3, 5, 6, and 8 of the JTIM Subordination Agreement is to force TM to continue supplying valuable trademarks to JTIM, which has no obligation to pay for them for the duration of the Contribution Period. TM has no ability to enforce the terms of its agreement, or even to stop providing its trademarks, in the event of default. In effect, the M&M Plan conscripts the trademarks for JTIM's private use.

### 3. Voting Rights under the M&M Plan

43. The M&M Plan provides that, in order to be approved, it must receive the affirmative vote of the required majority of the Affected Creditor Class. The Affected Creditors include the QCAPs, the Pan-Canadian Claimants, each Province, each Territory, and the Ontario Flue-Cured Tobacco Growers' Marketing Board and Tobacco Producers.

44. TM is listed as an "Unaffected Creditor" under the M&M Plan and is therefore not entitled to vote. Section 3.6 of the M&M Plan specifically provides that no Unaffected Creditor, in respect of an Unaffected Claim, shall be entitled to vote on the M&M Plan, attend the creditors meeting,

or receive any distributions pursuant to the M&M Plan, subject to certain exceptions.[46] As discussed below, the classification of TM as an "Unaffected Creditor" completely incongruous with the true substance the M&M Plan.

## PART III - ISSUES

45. This motion requires the court to consider the following issues:

(a) Should the Meeting Order be granted?

(b) Could the M&M Plan be approved at a sanction hearing such that it is amenable to a vote of creditors?

46. The TM Receiver submits that the answer to both of these questions is no.

## PART IV - LAW AND ARGUMENT

### A. The M&M Plan cannot be sanctioned and should not be accepted for filing

47. The M&M Plan is fatally flawed. Even if it were to receive the support of the majority of Affected Creditors, it could not be approved by this Court. As this Court has previously observed, calling a vote on a plan with no prospect of approval will simply "result in a waste of time and money".[47] In this case, it will also further delay recovery for claimants who have endured nearly five years of mediation.

48. Section 4 of the CCAA permits–but does not require–the court to call a creditors' meeting. The court should refuse to order a creditors meeting if the proposed plan of arrangement could not

[46] M&M Plan, section 3.6.
[47] *Target Canada Co. (Re)*, 2016 ONSC 316, at para. 69.

be sanctioned by a court;[48] if the plan is contrary to the creditors' interests;[49] if the plan is doomed to fail;[50] or if there is no reasonable chance the debtor will be able to continue in business under the plan.[51] Canadian courts routinely decline to grant meeting orders where the proposed plan is likely to fail at a later stage.[52]

49. This cautious approach to holding the creditors' vote is particularly important where there are outstanding concerns about the voting scheme itself. As Pattillo J. observed in *CannTrust*: "A plan that cannot meet the sanction approval criteria at [the meeting] stage will result in a meeting order not being granted. This is particularly so, in my view, where the issue concerns the classification of creditors and whether a creditor has a right to vote on the plan, as here."[53]

50. In determining whether to exercise its discretion to submit the M&M Plan for a vote, this Court must consider the well-established test for plan approval articulated recently in *Laurentian*:[54]

(a) There must be strict compliance with all statutory requirements;

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[48] *Elan Corp v. Comiskey*, (1990) 1 O.R. (3d) 289 (ONCA); *U.S. Steel Canada Inc. (Re)*, 2017 ONSC 1967, at para.12; *Crystallex International Corp., Re*, 2013 ONSC 823, at para. 9; *Doman Industries Ltd., Re*, 2003 BCSC 376, at para. 8; *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re,* (1998) 81 ACWS (3d) 932, at para. 37.

[49] *Kerr Interior Systems Ltd. (Re)*, 2011 ABQB 214, at para. 29, citing *Re Avery Const. Co.*, [1942] 4 D.L.R. 558 (Ont. S.C.)

[50] *Kerr Interior Systems Ltd. (Re)*, 2011 ABQB 214, at para. 29, citing *Re Fracmaster*, 1999 ABQB 379, aff'd 1999 ABCA 178.

[51] *Kerr Interior Systems Ltd. (Re)*, 2011 ABQB 214, at para. 29, citing *First Treasury Financial Inc. v. Cango Petroleums Inc.*, (1991) 78 D.L.R. (4th) 230.

[52] *Target Canada Co. (Re)*, 2016 ONSC 316, at paras. 68-69; *ScoZinc Ltd. (Re)*, 2009 NSSC 163. See also *Inducon Development Corp. (Re)*, [1992] O.J. No. 8, at p. 7, *per* Farley J: "It is of course […] fruitless to proceed with a plan that is doomed to failure at a further stage."

[53] *CannTrust Holdings Inc. et. al. (Re)*, 2021 ONSC 4408, at para. 26.

[54] *Laurentian University of Sudbury, Re.,* 2022 ONSC 5645, at para. 23, citing *CannTrust Holdings Inc. et. al. (Re)*, 2021 ONSC 4408, at para. 13.

(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.

51. This test does not require the court to make a final determination as to whether the M&M Plan is fair and reasonable for the purposes of approval. However, if it is clear that a plan will not be approved on this test, it should not be submitted for a vote.

52. The M&M Plan fails on steps (b) and (c) of the *Laurentian* test. The M&M Plan clearly purports to do that which is not authorized by the CCAA when it compromises TM's claims while classifying TM as a non-voting "Unaffected Creditor". The M&M Plan further violates section 11.01 of the CCAA by requiring TM to provide trademarks to JTIM after plan implementation while eliminating TM's right to enforce payment, and by restricting JTIM's ability to pay the Accrued Royalties. Any of these individual flaws would be sufficient to deny plan approval.

### 1. TM is artificially classified as an "Unaffected Creditor"

53. The M&M Plan artificially classifies TM as an "Unaffected Creditor" in order to avoid permitting TM to vote. Yet the effect of the M&M Plan is clear. It forces TM to enter into the JTIM Subordination Agreement, and the JTIM Subordination Agreement materially affects TM's rights. TM is clearly "Affected". This Court should not approve a plan that permits the Monitor to do indirectly what it cannot do directly.

54. The CCAA is built on a statutory bargain. In return for permitting the debtor company to reorganize its affairs, affected creditors are granted a vote on the resulting plan of arrangement. As Blair J. (as he then was) explained in *Menegon*: "In Canadian insolvency proceedings under the CCAA […] it is the right to vote on the compromise or arrangement which the debtor company

proposes to make with them, which is the central counterpart, on the part of the creditors, to the debtors right to attempt to make that compromise or arrangement."[55]

55. A creditor's rights cannot be compromised under the CCAA unless the creditor has been given a right to vote in the appropriate class.[56] Tysoe J. (as he then was) expressed this clearly in *Doman*: "It would be inappropriate for me to authorize the calling of creditor meetings to consider the Reorganization Plan when I know that this Court would refuse to sanction it on the basis that it purports to bind parties who were not given the opportunity to vote on it." Where an arrangement is not offered to a particular creditor or class of creditors, their rights will generally remain unaffected by the plan, and they maintain the right to paid in full.[57]

56. These limitations reflect the core objective of the CCAA to "have the pain of the compromise equitably shared" without facilitating a "confiscation of rights".[58] The court must ask whether a CCAA plan of arrangement "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."[59]This is why, in the rare event that a plan of arrangement is approved over the objections of a secured creditor, the courts are careful to ensure that the secured creditor is either paid out in full,[60] or the secured creditor is treated as an unaffected creditor whose

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[55] *Menegon v. Philip Services Corp.*, [1999] O.J. No. 4080, at para. 38, *per* Blair J.
[56] *Doman Industries Ltd., Re,* 2003 BCSC 376, at para. 9; *Menegon v. Philip Services Corp.*, [1999] O.J. No. 4080, at para. 42, *per* Blair J, citing *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993) 12 O.R. (3d) 500 (Ont. Gen. Div.) at p. 510.
[57] Richard McLaren and Sabrina Gherbaz, *Canadian Commercial Reorganization: Preventing Bankruptcy*, Ch. 6, § 6:11.
[58] *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.*, 2003 BCCA 344, at para. 39, citing *Re Sammi Atlas Inc.*, (1998) 3 C.B.R. (4th) 171 (ONSC).
[59] *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.*, 2003 BCCA 344, at para. 39, citing *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993) 12 O.R. (3d) 500 (Ont. Gen. Div.).
[60] *Multidev Immobilia Inc. v. S.A. Just Invest*, [1988] R.J.Q. 1928 (QCCS).

claims are not compromised at all.[61] Neither occurs in this plan. Instead, the M&M Plan labels TM as "Unaffected" with one hand while confiscating its rights with the other.

57. The M&M Plan nominally distinguishes between "Affected Claims", which are compromised and entitled to vote, and "Unaffected Claims", which "are not compromised by the CCAA Plan and shall remain in full force and effect in accordance with their terms."[62]

58. The M&M Plan lists TM's Secured Claim as an "Unaffected Claim" but, in the same breath, indicates that it is affected by Section 5.14 (the JTIM Subordination Agreement):

> "Unaffected Claims" means, collectively
>
> […]
>
> (i) any Secured Claim that is not a Tobacco Claim, including the Secured Claim by JTI-TM against JTIM but provided that the JTI-TM Secured Claim shall be subordinated as described in Article 5, Section 5.14.

59. The M&M Plan affects TM and its security in at least two ways.

60. First, while the M&M Plan does not itself subordinate TM's claim, section 5.14 stipulates that TM "shall enter into a subordination agreement to subordinate its existing security over JTIM's assets, undertakings, and properties to the Collateral Agent and defer exercising any recourses until the Global Settlement Amount has been paid in full." This is a transparent attempt to circumvent the CCAA voting rules.

61. Section 5.14 of the M&M Plan is clearly intended to bind TM to the plan without giving TM a vote. If the 12 pages of the JTIM Subordination Agreement (attached as Schedule "I" to the

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[61] *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993) 12 O.R. (3d) 500 (Ont. Gen. Div.).
[62] M&M Plan, at section 3.7.

Plan) had been incorporated into the text of the Plan, there would be no question that TM held an "Affected Claim." The notion that TM can be 'ordered to volunteer' to subordinate its claim, absent its consent or a vote, offends the CCAA's promise of a vote to all affected creditors.

62. The second way that TM is affected is also replete with contradictions. Section 3.7 stipulates that Unaffected Claims shall be paid in the normal course. But then section 3.7 goes further by saying that this payment obligation is restricted by section 5.16, which expressly restricts TM's right to receive payments of Intercompany Claims.

63. The effect of the M&M Plan on TM is significant; it severely impairs TM's rights as a secured creditor. The M&M Plan subordinates all of TM's security in service of JTIM's Contribution obligations. The quantum of the settlement will surely be in the billions of dollars. There is no guarantee that JTIM's Net After-Tax Income any given year will be sufficient to pay amounts owing under the Trademark Agreements and TM Debentures, which will fall further into arrears and possible default. TM will not be permitted to enforce its security or take any other steps in response.

64. Combined with the Contribution mechanism under the M&M Plan, the JTIM Subordination Agreement will virtually ensure that TM receives reduced payments, if any, under the Trademark Agreements and TM Debentures, with no right to enforce the TM Security or otherwise take action to enforce or terminate those agreements. TM will be required to continue licensing valuable intellectual property to JTIM, with no recourse in the event of non-payment. The M&M Plan effectively converts TM from a secured creditor over an existing sum of cash into an unsecured creditor for anything that remains in the future.

65. The effect of the Standstill Period is especially pernicious. TM is not a party to the arrangements between the Collateral Agent and JTIM. It has no ability to affect JTIM's compliance with its Contribution obligations, nor is it party to the disputes between them. But under the JTIM Subordination Agreement, the mere *notice* that the Collateral Agent believes there is a default, stops all payments to TM, potentially indefinitely. Its intellectual property continues to be conscripted despite the non-payment.

66. None of this is permissible under the CCAA.

67. The QCAPs have filed a solicitors' affidavit purporting to impugn the TM Security based on the purported wrongfulness of its creation.[63] However, the QCAPs have never named TM in any of the underlying litigation.

68. In 2013, following the QCAPs first attempt to suspend payments to TM, Mongeon J.C.S. observed that the QCAPs had never named TM in the litigation, nor attempted to challenge the TM Security itself:

> The Plaintiffs have chosen to sue only JTIM and not the other members of the corporate group created in 1999 when JT purchased the non-US tobacco assets of R.J. Reynolds-Nabisco. The only corporation of that group presently before the Court is JTIM. Whatever the intent or effect of the integrated series of transaction set up to acquire the tobacco operations of RJRM by the JT group may have been, these integrated transactions are to be considered valid and opposable to the Plaintiffs unless attacked as being invalid and/or inopposable to the same Plaintiffs.

[63] Affidavit of André Lespérance sworn October 28, 2024.

69. It has now been nearly 11 years and the QCAPs have not challenged the validity, enforceability, or opposability of the TM Security, despite Mongeon's J.C.S. clear guidance. They cannot do so now by inference, absence of evidence, and bald allegations in a solicitors' affidavit.

70. Moreover, the Lespérance Affidavit's argument contravenes authority binding on this Court. The QCAPs claim that subordination is appropriate due to the purported—and unproven—wrongfulness of the TM Security. The Court of Appeal for Ontario held in *U.S. Steel* that such arguments were invalid; the doctrine of equitable subordination is not available under the CCAA.[64] This Court has no jurisdiction to re-arrange priorities because of a party's alleged misconduct. Even if this Court had such jurisdiction there is nothing in the record to permit this Court to find that the TM Security is invalid, much less to subordinate the TM Security on that basis.

71. The reality is more straightforward. TM holds a valid secured claim of over $1.8 billion. Absent TM's consent, that right cannot be confiscated.

### 2. The M&M Plan compels the TM Receiver to enter into a new contractual arrangement against TM's interest

72. Nothing in the CCAA permits this Court to impose the JTIM Subordination Agreement on TM against its will.

73. Section 5.14 of the M&M Plan requires TM, a non-debtor, to enter into the JTIM Subordination Agreement with the Applicant. This Court cannot impose a new contract on TM, nor can it re-write the terms of the TM Debentures, TM Security and Trademark Agreements in this way.

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[64] *U.S. Steel Canada Inc. (Re)*, 2016 ONCA 662.

74. The CCAA grants the court jurisdiction—but not unlimited jurisdiction—to permanently interfere with contractual rights. The CCAA provisions governing contractual rights are limited to the debtor's existing contractual relationships, including powers to permit the assignment[65] or disclaimer of contracts,[66] or to require a critical supplier to continue supplying the debtor.[67] Nothing in the CCAA authorizes the court to impose new or different contractual relationships on a non-debtor. If Parliament had intended to create such a power, it would have done so.

75. The Supreme Court of Canada has consistently held, in various contexts, that it is not the function of the court to rewrite a contract for the parties.[68] This rule is particularly important in complex commercial arrangements, where interference with any contractual right can have wide-ranging unintended consequences. Jones J. explored this point in *Bellatrix Exploration*, holding that "to allow a CCAA Court to find agreement that otherwise clearly fits within the definition of an [eligible financial contract] to not be an EFC, is to allow a CCAA Court to effectively rewrite that agreement. I do not understand a CCAA Court to have that authority."[69]

76. Similarly, in *Sino-Forest*, this Court declined to rewrite an insurance policy between an insurer and insured for legal fees incurred in defending a securities class action. While this Court acknowledged that "the amount paid on account of Defence Costs has had a significant impact on the proceeding", it declined to order a review of such costs on the basis that "the Plaintiffs are

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[65] CCAA, s. 11.3.
[66] CCAA, s. 32.
[67] CCAA, s. 11.4.
[68] See e.g. *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.
[69] *Bellatrix Exploration Inc.*, [2020] A.W.L.D. 1317, at para. 118, appeal dismissed for mootness, 2021 ABCA 148.

asking the court to rewrite the insurance contract so as to provide them with additional rights."[70] That is precisely what the Mediator and Monitor have attempted to do in this plan.

77. This Court must be particularly careful not to rewrite contracts involving ongoing obligations or continuing performance. The courts have consistently held that the CCAA does not allow a Court to re-write the terms of a contract to require the unpaid use of leased property. In *Quest University* and *Groupe Dynamite*,[71] both courts were asked to allow a commercial tenant to continue to have access to leased premises while suspending the tenant's obligation to pay the contractual rent amounts. In both cases, the Courts reached the same conclusion. Even in the extraordinary context of government-enforced closures which prevented the tenants from carrying on business from the leased premises, the CCAA does not permit the Court to rewrite contracts entered into before the commencement of the proceeding. In both cases, the courts held that as long as the debtor continued to use the leased or licensed property, it must pay the contractually agreed upon payments. As noted by Justice Fitzpatrick in *Quest University*:

> To allow this rent deferral would amount to the Court imposing different payment terms on Southern Star, which is inappropriate.[72]

78. To the extent the CCAA empowers courts to permanently interfere with contractual rights, it also imposes safeguards. Section 11.3(1), for example, provides that a contract may only be assigned to a party who consents to the assignment, demonstrating Parliament's intent that courts should not impose new contracts on unwilling third parties. Additionally, section 11.3(4) mandates

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[70] *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2015 ONSC 3161, at paras. 43-45.
[71] *Groupe Dynamite Inc. v. Deloitte Restructuring Inc.*, 2021 QCCS 3; *Quest University Canada (Re)*, 2020 BCSC 921.
[72] *Quest University Canada (Re)*, 2020 BCSC 921, at para. 93, citing *Allarco Entertainment Inc. (Re)*, 2009 ABQB 503.

that the Court may only exercise jurisdiction to permit an assignment if it "it is satisfied that all monetary defaults in relation to the agreement—other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation—will be remedied on or before the day fixed by the court."

79. In contrast, the express provisions of the JTIM Subordination Agreement, and the effect of sections 3.4 and 5.16 of the M&M Plan would require TM to (i) sign a document that subordinates its first-ranking security; (ii) covenant to continue allowing JTIM to use TM's trademarks while waiving its right to exercise remedies for existing and future non-payment of royalties; and (iii) provide that all existing financial defaults are waived, without providing any guarantee of payment of the significant financial defaults which have accrued prior to and during the CCAA proceeding.

80. In short, the Monitor asks this Court to re-write the agreements between TM and JTIM in a manner that is expressly and exclusively to the detriment of TM. Inserting the JTIM Subordination Agreement in a schedule to the M&M Plan does not change the substance of what is being sought: a mandatory injunction requiring TM to sign a document it had no role in negotiating, to which it does not now consent, and which drastically modifies TM's contractual arrangement with JTIM. Such a power would radically rebalance what courts could do to secured creditors through a CCAA plan.

### 3. The M&M Plan is contrary to section 11.01 of the CCAA

81. As noted above, TM owns the trademarks used by the Applicant in its tobacco business, for which TM is entitled to receive annual royalties. TM has not been paid royalties in over 5 years. These Accrued Royalties have reached approximately $90 million.

82. The M&M Plan purports to affect the Trademark Agreements and the Accrued Royalties in two ways:

(a) The M&M Plan would require TM to continue licensing valuable trademarks to JTIM on a permanent basis, without any recourse for JTIM's failure to make payment; and

(b) The M&M Plan would prohibit JTIM from paying the full amount of the Accrued Royalties at the time of plan implementation, instead restricting JTIM to pay the Accrued Royalties gradually over time from its Net After-Tax Income remaining after its Contribution in any given year.

83. The M&M Plan's treatment of the Trademark Agreements and the Accrued Royalties is contrary to section 11.01 of the CCAA. Section 11.01 of the CCAA protects the rights of licensors of property to receive payment for such property for as long as it is made available:

> **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; […]

84. Section 11.01(a) exists to protect unpaid stakeholders who permit the CCAA debtor to continue as a going concern during its restructuring.[73] 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.[74] In *Sproule v. Nortel Networks*, the Court of Appeal for Ontario 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."[75] As Fitzpatrick J. observed in *Quest University*, a deferral of payment

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[73] *Quest University Canada (Re)*, 2020 BCSC 921, at para. 45.
[74] *Royal Bank of Canada v. Cow Harbour Construction Ltd.*, 2012 ABQB 59, at para. 17.
[75] *Sproule v. Nortel Networks Corporation*, 2009 ONCA 833, at para. 34.

for ongoing services has the effect of imposing new payment terms that are different from those agreed between the parties.[76]

85. TM has provided the various trademarks needed by JTIM since the March 2019 Endorsement pending mediation of issues related to the payment of the royalties. As noted above, the March 2019 Endorsement was never formalized in the Amended and Restated Initial Order. However, in the interest of permitting JTIM to carry on business during the CCAA process, TM has continued to license its intellectual property to JTIM without receiving royalties in the hopes of achieving a global resolution. This was never intended to become a permanent arrangement.

86. The M&M Plan purports to convert a temporary suspension of royalties into a permanent impairment of TM's intellectual property rights. By requiring TM to provide the trademarks to JTIM for the duration of the Contribution Period with no guarantee of payment, the M&M Plan permanently conscripts TM's intellectual property for use by JTIM. If such conditions could not be imposed during the CCAA process under section 11.01, it is without precedent for this Court to impose such conditions permanently after the conclusion of the CCAA process.

87. Indeed, given that Parliament has restricted the authority of the court to require licencing during the pendency of the CCAA, the powers of the Court cannot be said to include the authority to make such an order in perpetuity after the CCAA ends.

## PART V - ORDER REQUESTED

88. The TM Receiver respectfully requests that Monitor's motion to approve the Meeting Order be denied.

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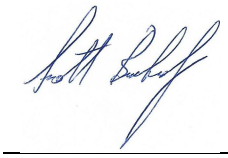
[76] *Quest University Canada (Re)*, 2020 BCSC 921, at para. 93.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 29th day of October, 2024.



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**SCHEDULE A**

**LIST OF AUTHORITIES**

1. *Bellatrix Exploration Inc.*, [2020] A.W.L.D. 1317
2. *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re*, (1998) 81 ACWS (3d) 932
3. *CannTrust Holdings Inc. et. al. (Re)*, 2021 ONSC 4408
4. *Crystallex International Corp., Re*, 2013 ONSC 823
5. *Doman Industries Ltd., Re*, 2003 BCSC 376
6. *Elan Corp v. Comiskey*, (1990) 1 O.R. (3d) 289 (ONCA)
7. *Groupe Dynamite Inc. v. Deloitte Restructuring Inc.*, 2021 QCCS 3
8. *Inducon Development Corp. (Re)*, [1992] O.J. No. 8
9. *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, 2007 SCC 55
10. *Kerr Interior Systems Ltd. (Re)*, 2011 ABQB 214
11. *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2015 ONSC 3161
12. *Laurentian University of Sudbury, Re.*, 2022 ONSC 5645
13. *Menegon v. Philip Services Corp.*, [1999] O.J. No. 4080
14. *Multidev Immobilia Inc. v. S.A. Just Invest*, [1988] R.J.Q. 1928 (QCCS)
15. *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993) 12 O.R. (3d) 500 (Ont. Gen. Div.)
16. *Quest University Canada (Re)*, 2020 BCSC 921
17. *Royal Bank of Canada v. Cow Harbour Construction Ltd.*, 2012 ABQB 59
18. *Scott v. Golden Oaks Enterprises Inc.*, 2024 SCC 32
19. *ScoZinc Ltd. (Re)*, 2009 NSSC 163
20. *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.*, 2003 BCCA 344
21. *Sproule v. Nortel Networks Corporation*, 2009 ONCA 833
22. *Target Canada Co. (Re)*, 2016 ONSC 316
23. *U.S. Steel Canada Inc. (Re)*, 2017 ONSC 1967

## SCHEDULE B
## RELEVANT STATUTES

***Companies Creditors' Arrangement Act, R.S.C 1985, c. C-36***

**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.

[…]

**11.3** (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

(3) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the

commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

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

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

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

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

Proceeding commenced at TORONTO

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