

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

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

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

Applicant

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

October 29, 2024

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**TO: THE COMMON SERVICE LIST**

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

1. JTIM wants to bring this restructuring to a successful conclusion. However, what is required is a CCAA plan that is fair, reasonable and workable. The CCAA plan before the Court cannot be implemented, legally or practically speaking, and it is therefore not workable. Accordingly, the CCAA plan before the Court has no reasonable prospect of success and it is doomed to fail.
2. The parties have made progress during the mediation; however, the Mediator and the Monitor are proceeding prematurely before all the crucial issues are resolved. The process should not be expedited at the risk of unworkability and failure. The parties must return to the negotiating table to resolve the handful of issues that remain. The remaining issues are known, focused, and despite what the Monitors say, are solvable. The conclusion of such negotiations do not need to cause undue delay.
3. To do otherwise will simply result in further delay than should be necessary and risks the failure of the progress that has been made to date. That is in no party's interest.

## **PART II - OVERVIEW<sup>2</sup>**

4. On October 17, 2024, the Monitor filed a motion returnable on October 31, 2024, for a Meeting Order to, among other things, (a) accept the filing of the Mediator and Monitor

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<sup>1</sup> Capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the [Affidavit of William E. Aziz](#) sworn October 24, 2024 (“**Aziz Affidavit**”), Responding Motion Record of JTI-Macdonald Corp. dated October 24, 2024 (“**JTIM RMR**”), Tab 1, p. 4 (Case Center [A489; A4](#)).

<sup>2</sup> Capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the [CCAA Plan of Compromise and Arrangement](#) dated October 17, 2024, filed by the Mediator and the collective Monitors as their plan

Plan of Compromise and Arrangement dated October 17, 2024 in respect of JTIM (the “**M&M Plan**”), (b) authorize the Monitor to call, hold and conduct a virtual meeting of the Affected Creditors to vote on the M&M Plan, (c) authorize the classification of Affected Creditors into a single class for the purpose of the Meeting and voting on the M&M Plan, and (d) authorize the Monitor to bring a motion for the Court to consider an order approving and sanctioning the M&M Plan if the M&M Plan is approved by the requisite majorities of Affected Creditors.

5. JTIM opposes the Meeting Order on the basis that: (a) negotiations in respect of the M&M Plan have not concluded, (b) the M&M Plan does not comply with the CCAA, (c) the M&M Plan is not fair or reasonable, and (d) the M&M Plan is unworkable. The M&M Plan in respect of JTIM has no reasonable prospect of success, and this Court should not grant the Meeting Order or accept the M&M Plan for filing for the following reasons:

- (a) **Commercial Negotiations Have Not Concluded**:<sup>3</sup> There are several commercial issues outstanding that have not been resolved or agreed to by JTIM, including those related to the economics of the settlement, the calculation of settlement payments, the treatment of unpaid royalties, the treatment of JTIM’s sole secured creditor, and mechanisms in the M&M Plan to provide JTIM with the release that it needs. It is not this Court’s role, nor the role of the Mediator or the Monitors, to impose commercial terms that have not been agreed to by an operational debtor.

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of compromise and arrangement (“**M&M Plan**”), Motion Record of the Monitor dated October 17, 2024 (“**MRM**”), Tab 1, p. 57 (Case Center [E443; E57](#)).

<sup>3</sup> Aziz Affidavit at para. 43, JTIM MRM, Tab 1, p. 15-16 (Case Center [A500; A15](#) - [A501; A16](#)).

- (b) **The M&M Plan Does Not Comply with the Statutory Requirements of the CCAA:** The M&M Plan purports to require the sole secured creditor of JTIM, JTI-TM, to subordinate its debt and security to the payment of the Global Settlement Amount to the currently unsecured litigation claimants.<sup>4</sup> The M&M Plan also purports to confiscate the existing cash collateral of approximately \$1.6 billion and purports to deliver that collateral to the unsecured claimants.<sup>5</sup> This treatment is a compromise of JTI-TM's interests. This is contrary to section 5 of the CCAA, which provides that secured creditors who are proposed to be compromised should be given the right to vote at a meeting. The M&M Plan does not give JTI-TM a right to vote on the M&M Plan, in its own class or at all. Additionally, the M&M Plan violates section 11.01 of the CCAA because it does not permit JTI-TM to receive payment for the post-filing use of licensed property before pre-filing unsecured claimants receive payment.<sup>6</sup> The M&M Plan purports to require JTI-TM to continue to allow JTIM to use its trademarks in the face of non-payment of post-filing royalties without its consent.
- (c) **The M&M Plan is Not Fair and Reasonable:**<sup>7</sup> RBH and Imperial have been permitted to pay related parties for the use of post-filing licensed property, but JTIM has been prohibited from doing so, and the M&M Plan does not resolve this unjustified inequity.<sup>8</sup>

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<sup>4</sup> M&M Plan, s.5.14, MRM, Tab 1, p.119-120 (Case Center [E505; E119 - E506; E120](#)).

<sup>5</sup> Aziz Affidavit at para. 10, JTIM MRM, Tab 1, p. 6 (Case Center [A491; A6](#)).

<sup>6</sup> *Companies' Creditors Arrangement Act*, [R.S.C. 1985, c. C-36](#), as amended, [s.11.01\(a\)](#) ("CCAA").

<sup>7</sup> Aziz Affidavit at paras. 38-42, JTIM MRM, Tab 1, p. 14 (Case Center [A499; A14](#)).

<sup>8</sup> Aziz Affidavit at paras. 38-42, JTIM MRM, Tab 1, p. 14 ([A499; A14](#)).

- (d) **The M&M Plan is Unworkable:**<sup>9</sup> Until there is agreement on the key commercial terms of a settlement, JTIM will not support or implement the M&M Plan. JTIM also requires various intercompany services provided by its affiliates to continue as currently provided to maintain its operations and profitability. The settlement contemplated by the M&M Plan requires continued profitable operations over a lengthy period of time. If JTIM and its affiliates do not support the M&M Plan, JTIM and its affiliates will refuse to implement or operate under the terms of the M&M Plan, rendering it unworkable.

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

#### **Issue: The Court should not grant the Meeting Order**

6. The sole issue addressed in this factum is whether the Court should grant the Meeting Order. For the reasons discussed below, the Court should **not** grant the Meeting Order. Instead, the Court should direct the mediation parties to return to the negotiating table in an effort to resolve the remaining issues and advance a plan of compromise or arrangement supported by all relevant parties.

#### **A. The legal test and limitations on discretion**

7. Notwithstanding that the granting of a Meeting Order is a procedural step in the CCAA process,<sup>10</sup> the Court must exercise its judicial discretion under the CCAA when considering whether to grant a Meeting Order.<sup>11</sup> This statutory discretion is found in sections 4 and 5

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<sup>9</sup> Aziz Affidavit at paras. 44-48, JTIM MRM, Tab 1, p. 19-20 (Case Center [A504: A19](#) - [A505: A20](#)).

<sup>10</sup> *Jaguar Mining Inc. (Re)*, [2014 ONSC 494 \(CanLII\)](#) at [para. 48](#).

<sup>11</sup> *Kerr Interior Systems Ltd. (Re)*, [2011 ABQB 214 \(CanLII\)](#) at [para. 28](#) (“*Kerr*”).

of the CCAA, which permit but do not require the Court to order a meeting of one or more classes of creditors.<sup>12</sup>

8. The threshold for the Court to permit the filing of a CCAA plan and order a meeting of creditors is low.<sup>13</sup> The Court has framed this threshold in two ways: (a) the debtor must establish that the proposed CCAA plan has a reasonable probability of success (which is not met if there is no reasonable chance the debtor will be able to continue in business),<sup>14</sup> and (b) whether or not the proposed CCAA plan is “doomed to failure”.<sup>15</sup>
9. The court should refuse to order a meeting if the proposed plan is contrary to the creditors’ interests,<sup>16</sup> or if the plan could not be sanctioned by a court.<sup>17</sup> Canadian courts routinely decline to grant meeting orders where the proposed plan is likely to fail at a later stage.<sup>18</sup>
10. This exercise of discretion under sections 4 and 5 of the CCAA must be considered in the context of the remedial purpose of the CCAA, which is to permit a debtor company to continue to carry on business and avoid the social and economic consequences of liquidation.<sup>19</sup> The CCAA’s purpose guides and limits the exercise of all judicial discretion under the CCAA, including the decision of whether to grant a meeting order.<sup>20</sup>

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<sup>12</sup> CCAA, ss. 4 and 5.

<sup>13</sup> *Target Canada Co. (Re)*, 2016 ONSC 316 (CanLII) at paras. 66-67 (“*Target*”).

<sup>14</sup> *ScoZinc Ltd (Re)*, 2009 NSSC 163 (CanLII) at para. 7 (“*ScoZinc*”); *Target*, at para. 68.

<sup>15</sup> *Philips Manufacturing Ltd. v Hong Kong Bank of Canada*, 1992 CanLII 2174 (BC CA) at para. 7.

<sup>16</sup> *Kerr*, at para. 29, citing *Re Avery Construction Co. Ltd.*, 1942 CanLII 352 (ON SC).

<sup>17</sup> *Elan Corp. v Comiskey (C.A.)*, 1990 CanLII 6979 (ON CA) (“*Comiskey*”).

<sup>18</sup> *Target*, at paras. 68-69; *ScoZinc* at para. 7. See also *Inducon Development Corp. (Re)*, 1991 CarswellOnt 219 at para. 16, per Farley J: “It is of course [...] fruitless to proceed with a plan that is doomed to failure at a further stage.”

<sup>19</sup> *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 (CanLII), [2010] 3 SCR 379 at para. 15.

<sup>20</sup> *Comiskey* at para. 64.

11. On the exercise of discretion, the Ontario Court of Appeal has held that although there may be several relevant factors applicable to a situation, the feasibility of the CCAA plan is a relevant and significant factor that must be considered.<sup>21</sup>
12. Notwithstanding the relatively low threshold to grant a Meeting Order, the threshold is not met because the M&M Plan cannot be implemented in the absence of a completed commercial deal and support by JTIM and its affiliates, for the reasons described in this factum. The M&M Plan has no reasonable chance of success and is doomed to fail in its current form.

**B. Critical unresolved commercial issues with the M&M Plan remain**

***Critical commercial issues with the M&M Plan***

13. The M&M Plan in its current form raises several critical commercial and legal issues that have not been agreed by JTIM. As set out previously, negotiations have not concluded, and these critical issues must be resolved before the M&M Plan moves forward. These critical issues include:

- (a) **Section 5.2:**<sup>22</sup> The inclusion of this provision in the M&M Plan is unacceptable. The M&M Plan already provides for an allocation of the Global Settlement Amount among the Tobacco Companies, which includes 100% of cash-on-hand on implementation (less the \$750 million working capital carve out) and the same

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<sup>21</sup> *Comiskey* at [para. 90](#).

<sup>22</sup> M&M Plan, s.5.2, MRM, Tab 1, p. 11 (Case Center [E500; E114](#)).

percentage (across all Applicants) of Net After-Tax Income until the Global Settlement Amount is paid in full.<sup>23</sup>

- (b) **The Metric:** There is a bias in favour of the Claimants in the Metric's methodology that unfairly includes proceeds from the disposition of assets while ignoring the price paid for such assets.<sup>24</sup>
- (c) **Basic Economics:** The fundamental economics of the M&M Plan, including the Global Settlement Amount and the percentage of Annual Contributions made each year by the Tobacco Companies, have never been agreed to by JTIM.<sup>25</sup>
- (d) **Suspension of Royalty Payments:** JTIM, alone among the Tobacco Companies, has been prohibited from making post-filing royalty payments (discussed in greater detail below).<sup>26</sup>
- (e) **JTI-TM's Security Interest:** JTIM has not been permitted to pay any amounts in respect of the secured debt owing to JTI-TM pursuant to the TM Secured Debentures (as defined and discussed in greater detail below), and the M&M Plan purports to subordinate such interest without JTI-TM's consent.<sup>27</sup>
- (f) **Tax Deduction Provisions:** There are negative economic consequences for JTIM and, indirectly, the Claimants, if there is a tax deduction dispute and JTIM is not

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<sup>23</sup> Aziz Affidavit at para. 43(a), JTIM MRM, Tab 1, p. 15-16 (Case Center [A500; A15](#) - [A501; A16](#)).

<sup>24</sup> Aziz Affidavit at para. 43(b), JTIM MRM, Tab 1, p. 16 (Case Center [A501; A16](#)).

<sup>25</sup> Aziz Affidavit at para. 43(e), JTIM MRM, Tab 1, p. 17 (Case Center [A502; A17](#)).

<sup>26</sup> Aziz Affidavit at para. 43(d), JTIM MRM, Tab 1, p. 17 (Case Center [A502; A17](#)).

<sup>27</sup> Aziz Affidavit at para. 43(c), JTIM MRM, Tab 1, p. 16 (Case Center [A501; A16](#)).



permitted to post 100% of the disputed amount to the CRA pending determination of the dispute. The M&M Plan does not adequately address this scenario.<sup>28</sup>

(g) **Quebec Court Approval:** Court approval of the settlement of the Quebec Class Actions is not a condition precedent to plan implementation.<sup>29</sup> It should be. As class actions are governed by provincial legislation, it is important for the Quebec court to approve the settlement of the Quebec Class Actions as a condition of the M&M Plan. This follows the preferred approach in other CCAA proceedings in which settlements in respect of class proceedings have been implemented.<sup>30</sup>

(h) **Quantum of Miscellaneous Claims Fund:** The purpose of this fund is to back-stop the release granted to the Tobacco Companies and the Tobacco Company Group in the M&M Plan.<sup>31</sup> This fund is required to respond to any Miscellaneous Claims, and the fund must be of a sufficient size to ensure the effectiveness of the release.<sup>32</sup>

14. JTIM requires further negotiation with respect to the issues identified above. Unless these issues are addressed in a manner satisfactory to JTIM, it cannot support and will not implement the M&M Plan, thereby rendering it unworkable.

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<sup>28</sup> Aziz Affidavit at para. 43(i), JTIM MRM, Tab 1, p. 18-19 (Case Center [A503; A18](#) - [A504; A19](#)) .

<sup>29</sup> Aziz Affidavit at para. 43(h), JTIM MRM, Tab 1, p. 18 (Case Center [A503; A18](#)).

<sup>30</sup> *McCarthy v. Canadian Red Cross Society*, [2001 CarswellOnt 2255](#) at para. 10.

<sup>31</sup> Aziz Affidavit at para. 43(g), JTIM MRM, Tab 1, p. 17-18 (Case Center [A502; A17](#) - [A503; A18](#)).

<sup>32</sup> Although the Monitors' reports on the meeting order state that the Miscellaneous Claims Fund can be increased to \$60 million, this concept has not been included in the publicly-filed M&M Plan, as of the date of this Factum.

### ***The role of the CCAA Court***

15. The role of the Court is supervisory in nature.<sup>33</sup> The Court should not attempt to impose commercial terms on a CCAA debtor that have not otherwise been agreed.
16. As the Ontario Court of Appeal explained in *Stelco*, the Court’s role in a restructuring is to “establish the boundaries of the playing field and act as a referee in the process”.<sup>34</sup> In contrast, it is the company’s role, and that of its stakeholders, to develop a plan of compromise that a sufficient percentage of creditors will accept, and the Court will approve.<sup>35</sup> The company’s role is integral in this process because the commercial terms of the plan must be acceptable to the company’s board of directors. Unlike the creditors, the company does not get to vote on its own plan.
17. Although the Court, in the course of acting as referee, is empowered to exercise the broad discretion afforded to it under section 11 of the CCAA, its discretion is “not open-ended and unfettered”, and it is “not entitled to usurp the role of the directors and management in conducting what are in substance the company’s restructuring efforts”.<sup>36</sup> In other words, the discretion granted to the Court under section 11 does not allow it to impose commercial terms upon a debtor to which the debtor, and its board of directors, do not agree.
18. The CCAA is “an Act to facilitate compromises and arrangements between companies and their creditors”.<sup>37</sup> In this proceeding, the Court has facilitated the development of the M&M

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<sup>33</sup> *Chef Ready Foods Ltd. v Hongkong Bank of Canada*, [1990 CanLII 529 \(BC CA\)](#) at [para. 10](#).

<sup>34</sup> *Stelco Inc. (Bankruptcy), Re*, [2005 CanLII 8671 \(ON CA\)](#) at [para. 44](#) (“*Stelco*”).

<sup>35</sup> *Stelco* at [para. 44](#).

<sup>36</sup> *Stelco* at [para. 44](#).

<sup>37</sup> CCAA ([opening proviso](#)).

Plan by directing the Monitors, in collaboration with the Mediator, “to develop plans that, after due consideration by all three Applicants and the creditors, will have the best opportunity to be considered fair and reasonable to all three Applicants and to their creditors”.<sup>38</sup>

19. Although the development of a plan of an operating and profitable debtor corporation by its Monitor and court-appointed Mediator is unprecedented,<sup>39</sup> JTIM reasonably assumed that it would have the opportunity to endorse the proposed plan (especially since it is not given an opportunity to vote on its own plan). This is not an unreasonable assumption because the October Endorsement specifically contemplates that the Applicants and the Claimants will have an opportunity to give due consideration to the plan developed by the Mediator and the Monitors.<sup>40</sup> This is consistent with the Court’s role as a referee in supervising the proceeding.
20. It cannot be the case that the Monitors and Mediator were empowered to impose whatever plan they wanted upon the Tobacco Companies. Such authority has to have been subject to implicit limits. Those limits should be defined by what is reasonable to the Applicant. In the exercise of JTIM’s business judgment, the M&M Plan goes beyond what JTIM believes is reasonable in respect of the issues identified herein.

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<sup>38</sup> *Imperial Tobacco Canada Limited*, [2023 ONSC 5449](#) at [para. 20](#) (“**October Endorsement**”).

<sup>39</sup> The Joint Factum of the Mediator and Monitors dated October 28, 2024, at para. 73, refers to two cases in which a court officer was empowered to advance a plan of compromise or arrangement in respect of a debtor corporation, *Arrangement relatif à 9323-7055 Québec inc.*, [2019 QCCS 5904](#), aff’d [2020 QCCA 659](#) and *Anvil Range Mining Corp.*, Re, [2001 CanLII 28449 \(ON SC\)](#) at [para. 9](#), per Farley J, aff’d [2002 CanLII 42003 \(ON CA\)](#). Both of these cases are distinguishable from the current proceedings as they involved liquidating debtor corporations in which either the board of directors had resigned or the secured creditor lost confidence in management. Accordingly, neither of these cases apply to the current facts.

<sup>40</sup> October Endorsement at [para. 20](#).

21. The Court has determined that a CCAA plan is akin to a contract between the debtor and its creditors that is sanctioned by the Court.<sup>41</sup> As such, it can be imposed on a minority of creditors, but there is no authority to impose it on an unwilling, operational debtor as the existence of consent is a fundamental element of a contract.
22. Granting a Meeting Order that is not supported by JTIM functions as an invasive and potentially destructive step in JTIM's CCAA proceeding that attempts to force a CCAA plan on JTIM contrary to its legitimate commercial concerns. The Court must decline to do this in favour of requiring the parties to conclude negotiations and present a CCAA plan consented to by JTIM for filing with the Court and consideration at a creditors' meeting.
23. Given the issues with the M&M Plan, the M&M Plan has no chance of being sanctioned. As Regional Senior Justice Morawetz (as he then was) held in *Target*, calling a creditors' meeting when a CCAA plan cannot be sanctioned "would only result in a waste of time and money".<sup>42</sup>

***JTIM and its affiliates do not support the M&M Plan***

24. Although significant progress has been made in JTIM's attempts to reach a global settlement, each of JTIM, its secured creditor (JTI-TM) and JTIM's Tobacco Company

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<sup>41</sup> *Re Canadian Red Cross*, [2002 CanLII 49603](#) at [para. 12](#), cited with approval by the Ontario Court of Appeal in *SFC Litigation Trust v. Chan*, [2019 ONCA 525](#) at [para. 57](#).

<sup>42</sup> *Target* at [para. 69](#).

Group do not agree to the current form of the M&M Plan and will not implement or support it.<sup>43</sup>

25. In the case of JTI-TM, the privately-appointed receiver of JTI-TM does not support the M&M Plan because the M&M Plan attempts to confiscate approximately \$1.6 billion of JTI-TM's cash collateral without JTI-TM's consent (notwithstanding it is purportedly characterized as an Unaffected Creditor in the M&M Plan).<sup>44</sup>
26. JTIM is counterparty to approximately 28 intercompany arrangements with its affiliates. These intercompany arrangements include the supply of raw materials used in JTIM's manufacturing process, global IT network and related services (including the use of the licensed technology system SAP), legal and regulatory services, human resources services, and other functional group services.<sup>45</sup>
27. The continued supply of intercompany services is critical to JTIM's operations and ongoing profitability in the ordinary course. For example, JTIM uses SAP as its enterprise resource planning software. If JTIM no longer had access to SAP, JTIM would immediately be unable to manufacture and distribute products until it found an alternative solution, which would cost a significant amount of money and could take years.<sup>46</sup>

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<sup>43</sup> Aziz Affidavit at paras. 11-12 and 44, JTIM MRM, Tab 1, p. 6 and 19 (Case Center [A491; A6](#) - [A492; A7](#) and [A504; A19](#)).

<sup>44</sup> Aziz Affidavit at para. 10, JTIM MRM, Tab 1, p. 6 (Case Center [A491; A6](#)); M&M Plan, s.1.1(i) MRM, Tab 1, p. 100-101 ([E486; E100](#) - [E487; E101](#))

<sup>45</sup> Aziz Affidavit at para. 46, JTIM MRM, Tab 1, p. 19 (Case Center [A504; A19](#)).

<sup>46</sup> Aziz Affidavit at para. 47 JTIM MRM, Tab 1, p. 20 (Case Center [A505; A20](#)).

28. With this backdrop, the Court must consider the feasibility of plan implementation, including that the plan requires JTIM to continue operating profitably in the ordinary course.
29. The M&M Plan requires JTIM to make a significant Upfront Contribution that the Claimants require to satisfactorily address their allocation issues. In addition, the M&M Plan requires JTIM to continue to be profitable for a lengthy period of time so that it can continue contributing to the Global Settlement Amount. For this to occur, JTIM relies on: (a) JTI-TM for the continued use of the trademarks owned by JTI-TM,<sup>47</sup> and (b) the Tobacco Company Group that provides broad intercompany support and services to JTIM's operations.<sup>48</sup>
30. Without the support of JTIM's parent and other affiliates, JTIM's profitability will be severely reduced, and it is likely that JTIM would become unprofitable.<sup>49</sup> The support of JTIM's parent and affiliates is vital to a successful restructuring. Without such support, the terms of the M&M Plan would quickly become unworkable, and the Claimants will not receive the benefit of their bargain.
31. A CCAA plan that is unworkable and unrealistic in the circumstances or that would thwart the debtor company's ability to operate its business should not be put to creditors for their consideration.<sup>50</sup>

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<sup>47</sup> Aziz Affidavit at para. 25-26, JTIM MRM, Tab 1, p. 10-11 (Case Center [A495: A10](#) - [A496: A11](#)).

<sup>48</sup> Aziz Affidavit at para. 46-47, JTIM MRM, Tab 1, p. 19-20 (Case Center [A504: A19](#) - [A505: A20](#)).

<sup>49</sup> Aziz Affidavit at para. 48, JTIM MRM, Tab 1, p. 20 (Case Center [A505: A20](#)).

<sup>50</sup> *Kerr* at [para. 29](#).

32. Furthermore, if JTIM's M&M Plan is not implemented, the CCAA plans of RBH and Imperial are not capable of being implemented because cross-implementation is a condition precedent to each of the CCAA plans that is not permitted to be waived by any person, including the Mediator and the Monitors.<sup>51</sup>

**C. The M&M Plan does not comply with the statutory requirements of the CCAA**

***Compromise of JTI-TM's debt and security without a corresponding vote on the M&M Plan***

33. JTI-TM is the sole secured creditor of JTIM pursuant to ten secured convertible debentures, in the aggregate principal amount of \$1.2 billion (the "**TM Secured Debentures**").<sup>52</sup> As of September 30, 2024, the aggregate amount due and owing under the TM Secured Debentures is approximately \$1.8 billion, including interest.<sup>53</sup> JTI-TM's security under the TM Secured Debentures has never been determined to be invalid or unenforceable.<sup>54</sup>
34. This secured debt ranks in priority to all the unsecured litigation claims being settled in the M&M Plan. In the context of a safeguard motion brought in the Quebec Class Actions, the Quebec Superior Court of Justice held that JTIM's obligation to repay its secured debts rank ahead of its obligation to pay any amount in the class actions.<sup>55</sup> Leave to appeal this decision was sought and denied. Further, the TM Secured Debentures are considered to be

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<sup>51</sup> JTIM M&M Plan, ss.19.3(h), MRM, Tab 1, p.185 (Case Center [E571; E185](#)); Imperial M&M Plan, ss. 19.3(h) (Case Center [E546; E163](#)); RBH M&M Plan, ss. 19.3(g) (Case Center [E478, E160](#)).

<sup>52</sup> Aziz Affidavit at para. 21, JTIM MRM, Tab 1, p. 9 (Case Center [A494; A9](#)).

<sup>53</sup> For a complete history of Japan Tobacco's acquisition, please see Affidavit of Robert McMaster sworn April 1, 2019 ("**McMaster Affidavit**") at paras. 10-24, Aziz Affidavit at Exhibit "E", p. 125-131 (Case Center [A610; A125 - A616; A131](#)).

<sup>54</sup> Aziz Affidavit at para. 21, JTIM MRM, Tab 1, p. 9 (Case Center [A494; A9](#)).

<sup>55</sup> *Quebec Council on Tobacco and Health v. JTI-Macdonald Corp.*, [2013 QCCS 6085](#) at [para. 91](#) ("**Mongeon Decision**").

valid and enforceable unless a determination is made that the TM Secured Debentures are invalid and not enforceable.<sup>56</sup>

35. In the Affidavit of André Lespérance sworn October 28, 2024 (the “**Lespérance Affidavit**”) served by counsel to the QCAPs in response to the Aziz Affidavit,<sup>57</sup> Mr. Lespérance says that the Riordan Judgment (as defined in the footnote below) provides additional context with respect to the TM Secured Debentures. However, Mr. Lespérance fails to mention that Justice Riordan and the Quebec Court of Appeal made these comments when considering other “appropriate circumstances” under article 1621 of the Quebec Civil Code, which sets out guidelines for an award of punitive damages in Quebec. In fact, Justice Riordan acknowledges in the below passage that no one has attacked the validity or legality of the TM Secured Debentures or the Recapitalization Transactions:

[1099] To be clear, no one has attacked the validity or the legality of the tax planning behind the Interco Contracts, or the contracts themselves, for that matter. That is not necessary for the point the Plaintiffs wish to score. Because something might be technically legal for tax purposes, something on which we give no opinion, does not automatically mean that it cannot be one of the “appropriate circumstances” that article 1621 obliges us to consider. (*emphasis added*).

...

[1102] Unless the Interco Contracts are overturned, something that is not the subject of the present files, JTM appears to be nothing more than a break-even operation.<sup>58</sup>

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<sup>56</sup> *Mongeon Decision* at [para. 97](#).

<sup>57</sup> Lespérance Affidavit (Case Center [F615: F1](#)).

<sup>58</sup> *Cécilia Létourneau v. JTI-Macdonald Corp., et. al* (May 25, 2015) Québec Superior Court (Class Action Division) N°: 500-06-000070-983 and *Conseil Québécois Sur Le Tabac et la Santé et. al v JTI-Macdonald Corp. et al.* (May 25, 2015) Québec Superior Court (Class Action Division) N°: 500-06-000076-980 ([Judgment of Justice Brian Riordan of the Superior Court of Quebec dated May 27, 2015](#)) (the “**Riordan Judgment**”).



36. Likewise, the Quebec Court of Appeal confirmed that it did not decide the question whether the TM Secured Debentures or the Recapitalization Transactions are valid and enforceable.<sup>59</sup>
37. In summary, the Quebec Superior Court of Justice (twice) and the Quebec Court of Appeal (once) have stated that the validity and enforceability of the TM Secured Debentures and the Recapitalization Transactions have not been attacked, and the decisions rendered do not opine on their validity and enforceability. Notwithstanding the collateral attack attempted in the Lespérance Affidavit, the Recapitalization Transactions have been in place for approximately 25 years and remain valid and enforceable.
38. The M&M Plan purports to classify JTI-TM as an Unaffected Creditor, although the secured nature of its claims is acknowledged.<sup>60</sup> The M&M Plan requires JTI-TM to enter into a subordination agreement that subordinates its debt and security to the Affected Creditors.<sup>61</sup> The proposed subordination agreement also restricts any payments by JTIM in respect of outstanding principal or interest on the debt and restricts payment of the current royalty arrears to the residual profit held by JTIM after payment of the Annual Contribution going forward and not before closing of the restructuring.
39. Section 5 of the CCAA requires a secured creditor (JTI-TM) subject to a compromise or arrangement to participate in a meeting of that class of similar creditors, as classified in

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<sup>59</sup> *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358 (CanLII) at para. 1158.

<sup>60</sup> M&M Plan, s.5.14, MRM, Tab 1, p.119-120 (Case Center [E505; E119](#) - [E506; E120](#)).

<sup>61</sup> M&M Plan, s.5.14, MRM, Tab 1, p.119-120 (Case Center [E505; E119](#) - [E506; E120](#)).

accordance with section 22 of the CCAA (i.e., secured creditors), to consider and vote on the proposed compromise or arrangement.<sup>62</sup> The M&M Plan is in contravention of section 5 of the CCAA because it does not provide JTI-TM the opportunity to vote on the M&M Plan in a separate class as a secured creditor, even though it is clearly (and significantly) affected by the M&M Plan.

40. In *Re Doman Industries Ltd.*, the Court held that the senior secured noteholders were affected by a proposed CCAA plan (even though they were classified as unaffected) and could not be bound by the provisions of the plan of compromise or arrangement because they were not given an opportunity to vote. In that case, the Court held it was inappropriate to authorize the calling of a creditors' meeting to consider the plan when the Court would refuse to sanction it on the basis that it purports to bind parties who were not given an opportunity to vote on it.<sup>63</sup>
41. The CCAA does not grant unsecured creditors enhanced priority over secured creditors.<sup>64</sup> Such a result would undermine the objectives of the CCAA and prejudice secured creditors. In *Windsor Machine*, Justice Morawetz (as he then was) held: “[i]n my view, it is essential, in a court supervised process, to give due consideration to the priority rights of secured creditors.”

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<sup>62</sup> CCAA, [s.22](#).

<sup>63</sup> *Doman Industries Ltd. (Trustee of)*, [Re](#), [2003 BCSC 376 \(CanLII\)](#) at [para. 9](#). (“*Domain Industries Ltd.*”).

<sup>64</sup> *Windsor Machine & Stamping Ltd (Re)*, [2009 CanLII 39771 \(ON SC\)](#) at [para. 43](#) (“*Windsor Machine*”).

42. Similarly, in *Ursel Investments Ltd., Re*, the Court identified several factors it must consider before ordering a creditors' meeting, one of which is that "the plan should embrace all parties, if possible, but particularly secured creditors" (emphasis added).<sup>65</sup>
43. The B.C. Court of Appeal reasoned that one objective of the CCAA is to have the pain of the compromise equitably shared without facilitating a confiscation of rights.<sup>66</sup>
44. JTI-TM was not a participant in the development of the M&M Plan and has not been invited to participate in the mediation for many years. Its interests have been disregarded in the process and in the formulation of the M&M Plan. Instead, the M&M Plan purports to confiscate approximately \$1.6 billion of cash collateral without JTI-TM's input by attempting to erroneously classify JTI-TM as an Unaffected Creditor.
45. The purported classification of JTI-TM in the M&M Plan as an Unaffected Creditor is not legally or economically true. Unless the M&M Plan is amended to classify JTI-TM in its own class as the sole affected secured creditor of JTIM, the M&M Plan cannot be sanctioned because it does not comply with the statutory requirements of the CCAA.

### ***Unpaid post-filing royalties in contravention of the CCAA***

46. Pursuant to the Trademark License Agreement dated October 8, 1999, as amended from time to time (as amended, the "**Trademark Agreement**"), JTI-TM granted to JTIM a non-exclusive, worldwide license to use JTI-TM's trademarks in connection with the

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<sup>65</sup> [1990 CanLII 7504 \(SK KB\)](#) at [para. 47](#).

<sup>66</sup> *Skeena Cellulose Inc. v Clear Creek Contracting Ltd.*, [2003 BCCA 344 \(CanLII\)](#) at [para. 39](#), citing *Sammi Atlas Inc., Re*, [1998 CanLII 14900 \(ON SC\)](#).

manufacturing, distribution, advertising and sale of the licensed products for the remuneration set out therein.<sup>67</sup> Notwithstanding the Trademark Agreement, and section 11.01 of the CCAA, JTIM, alone among the Tobacco Companies, has been prohibited from making post-filing royalty payments since March 18, 2019.<sup>68</sup>

47. On March 15, 2019, the Quebec Class Action Plaintiffs brought a motion seeking to prohibit the payment of principal, interest and royalties by JTIM to JTI-TM. The motion was heard on March 18, 2019, and on the following day, Justice McEwen issued an Endorsement suspending the payment of interest and royalties pending the return of the comeback hearing or further order of the Court.<sup>69</sup>
48. At the comeback hearing, the Quebec Class Action Plaintiffs sought to vary the Initial Order to prohibit the payment of interest and royalties. In response, JTIM took the position that it should be entitled to continue to pay its interest and royalty payments to JTI-TM.<sup>70</sup> The Monitor supported JTIM's position that it should be entitled to continue to pay the royalty payments under the Trademark Agreement.<sup>71</sup>
49. At the comeback hearing, the Court referred the interest and royalty payment issue to the Mediator for resolution.<sup>72</sup> The Mediator was not prepared to address the issue of the

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<sup>67</sup> Aziz Affidavit at para. 26, JTIM MRM, Tab 1, p. 10-11 (Case Center [A495; A10](#) - [A496; A11](#)).

<sup>68</sup> Aziz Affidavit at para. 27, JTIM MRM, Tab 1, p. 11 (Case Center [A496; A11](#)).

<sup>69</sup> Aziz Affidavit at para. 27, JTIM MRM, Tab 1, p. 11 (Case Center [A496; A11](#)); Endorsement of Justice McEwen dated March 19, 2019, Aziz Affidavit, Exhibit "D", JTIM MRM, Tab 1, p. 108 (Case Center [A593; A108](#)).

<sup>70</sup> Aziz Affidavit at paras. 28-29, JTIM MRM, Tab 1, p. 11-12 (Case Center [A496; A11](#) - [A497; A12](#)); McMaster Affidavit at para. 9, Aziz Affidavit at Exhibit "E", JTIM MRM, Tab 1, p. 125 (Case Center [A610; A125](#)).

<sup>71</sup> Aziz Affidavit at para. 30, JTIM MRM, Tab 1, p. 12 (Case Center [A497; A12](#)); Monitor's Second Report dated April 1, 2019 at para. 37, Aziz Affidavit at Exhibit "F", JTIM MRM, Tab 1, p. 160 (Case Center [A645; A160](#)).

<sup>72</sup> Aziz Affidavit at para. 31 and 33, JTIM MRM, Tab 1, p. 12 (Case Center [A497; A12](#)).

payment of royalty obligations as a discrete matter at the beginning of the mediation. This issue remains outstanding and unresolved. JTIM has not made any royalty payments for over five years.<sup>73</sup>

50. During their respective CCAA proceedings, RBH and Imperial have been permitted to pay their post-filing royalty and licensing obligations to related parties.<sup>74</sup> It is estimated that RBH has been permitted to make approximately \$140 million in royalty payments during the CCAA proceedings and Imperial has been permitted to make approximately \$260 million in royalty payments during the CCAA proceedings.<sup>75</sup> In contrast, approximately \$90 million in unpaid royalties and interest thereon are owing by JTIM to JTI-TM.<sup>76</sup>
51. Imposing a non-consensual restriction on such payments results in an unfair imbalance in treatment for JTIM and JTI-TM, as compared to the other Applicants.
52. Further, the non-payment of royalties for licensed property is contrary to section 11.01 of the CCAA, which provides:

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

- (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
- (b) requiring the further advance of money or credit.

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<sup>73</sup> Aziz Affidavit at para. 34, JTIM MRM, Tab 1, p. 13 (Case Center [A498; A13](#)).

<sup>74</sup> Aziz Affidavit at para. 38, JTIM MRM, Tab 1, p. 14 (Case Center [A499; A14](#)).

<sup>75</sup> Aziz Affidavit at para. 42, JTIM MRM, Tab 1, p. 14 (Case Center [A499; A14](#)).

<sup>76</sup> Aziz Affidavit at para. 35, JTIM MRM, Tab 1, p. 13 (Case Center [A498; A13](#)).

53. Rather than resolving these issues through mediation, the M&M Plan is in contravention of section 11.01 of the CCAA and circumvents the legal rights of JTI-TM by restricting JTIM from paying the unpaid post-filing royalties and interest accrued thereon since the commencement of these CCAA proceedings.
54. In *Sproule v. Nortel Networks Corporation*, the Court of Appeal held:
- Parliament has carved out defined exceptions to the court's ability to impose a stay. For example, s. 11.3(a)<sup>77</sup> prohibits a stay of payments for goods and services provided after the initial order, so that while the company is given the opportunity and privilege to carry on during the CCAA restructuring process without paying its existing creditors, it is on a pay-as-you-go basis only.<sup>78</sup>
55. When considering whether a CCAA plan has a reasonable chance of success, the Court will assess whether the CCAA plan in its current form could be sanctioned at a sanction hearing.<sup>79</sup> Among other components, the well-accepted sanction hearing test requires the Court to determine that there has been strict compliance with all statutory requirements.<sup>80</sup>
56. In its current form, the M&M Plan does not comply with the statutory requirements of the CCAA for two reasons: (a) the M&M Plan attempts to compromise JTI-TM's debt and security without providing JTI-TM with a vote pursuant to section 5 of the CCAA, which vote should be in its own class (as it has no commonality of interest with the other Affected Creditors, both before the plan is implemented and thereafter), and (b) the M&M Plan does

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<sup>77</sup> Current CCAA, [11.01\(a\)](#).

<sup>78</sup> [2009 ONCA 833 \(CanLII\)](#) at [para. 34](#).

<sup>79</sup> *Target* at [para. 68](#).

<sup>80</sup> *Target* at [para. 70](#).

not permit JTIM to pay post-filing royalties to JTI-TM prior to payment of the unsecured litigation creditors, contrary to section 11.01 of the CCAA.<sup>81</sup>

57. In *CannTrust Holdings*, parties raised concerns with the classification of creditors and whether a creditor has a right to vote on the plan. In this context, the Court held that the parties are encouraged to resolve issues with a CCAA plan prior to court approval of the meeting order.<sup>82</sup> In these circumstances, the remaining issues are resolvable, including the appropriate treatment and classification of JTI-TM as a secured creditor with an ability to vote on the plan. Without agreement on these critical issues, including JTI-TM's right to vote, in its own secured creditor class, JTIM and its Tobacco Company Group will not support or implement the M&M Plan.

**D. The M&M Plan is not fair and it is not reasonable**

58. The M&M Plan attempts to impose commercial terms that have never been agreed on: (a) an operational CCAA debtor, (b) its secured creditor, who is being asked to subordinate its interest without any compensation or even a vote on the M&M Plan, and (c) a multinational corporate group.
59. The process is improper, unfair, and violates the rights of JTIM, its secured creditor, and its affiliates. Under these circumstances, there is no reasonable prospect of the M&M Plan

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<sup>81</sup> Although JTIM can make such payments using residual cash on hand following the payment of its Upfront Contribution and Annual Contributions, it is unknown whether there will be sufficient cash to do so, especially considering the ambiguity imposed by virtue of section 5.2 of the M&M Plan. This restriction is on JTIM alone, and not the other Applicants, causes an inherent unfairness in the terms of the M&M Plan.

<sup>82</sup> *CannTrust Holdings Inc., et al. (Re)*, [2021 ONSC 4408](#) at [para. 26](#) ("*CannTrust Holdings*").

being implemented unless amendments are made to address the critical issues identified above.

60. As part of the sanction hearing process, it is customary for the Monitor to report to the Court on its professional opinion that a plan is fair and reasonable in the circumstances. This opinion is important to the Court because the Monitor is an independent and impartial party, acting as “the eyes and the ears of the court” throughout the proceedings.<sup>83</sup> As the Supreme Court of Canada observed in the *Callidus* decision, the core of the Monitor’s role includes providing an advisory opinion to the Court as to the fairness of any proposed plan of arrangement and on orders sought by the parties.<sup>84</sup>
61. RBH and Imperial’s Monitors have concluded their respective M&M Plans are fair, reasonable, and workable for RBH and Imperial, and have chosen to report on that position at this point in the proceeding.<sup>85</sup> However, JTIM’s Monitor has **not** concluded that the M&M Plan is fair, reasonable and workable.<sup>86</sup> This is a significant factor that should be taken into consideration by the Court. Moreover, the Court must consider that JTIM (and JTI-TM) are in different positions compared to RBH and Imperial due to factors such as royalties, secured debt, and the required subordination agreement.

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<sup>83</sup> 9354-9186 *Québec Inc v Callidus Capital Corp*, [2020 SCC 10 \(CanLII\)](#), [2020] 1 SCR 521 at para. 52, (“*Callidus*”) citing *Ernst & Young Inc. v Essar Global Fund Limited*, [2017 ONCA 1014 \(CanLII\)](#) at para. 109.

<sup>84</sup> *Callidus* at para. 52.

<sup>85</sup> [Twentieth Report of the Monitor](#) dated October 25, 2024 at para. 88; [Nineteenth Report of the Monitor](#) dated October 25, 2024 at para. 93.

<sup>86</sup> Eighteenth Report of the Monitor dated October 26, 2024 at para. 13 (Case Center [E1908; E1522 - E1909; E1523](#)).



## E. The Lespérance Affidavit

62. The Lespérance Affidavit makes certain statements in breach of the Court-Appointed Mediator Communication and Confidentiality Protocol Endorsement granted by the Court on May 24, 2019 (the “**Confidentiality Order**”).<sup>87</sup> The Confidentiality Order provides that all statements, discussions, offers made and documents produced by any of the parties in the course of the Mediation Process shall not be referred to in Court and shall not be admissible into evidence for any purpose.<sup>88</sup>
63. The statements made in paragraphs 13, 24, 28, 31, 32 and 35 in the Lespérance Affidavit were made as part of the mediation, are subject to the Confidentiality Order and are inadmissible (and the content of such statements are disputed by JTIM). The Supreme Court of Canada highlights the importance of settlement privilege in negotiations to encourage open discussions because parties know such discussions cannot be subsequently disclosed.<sup>89</sup> Settlement privilege is designed to promote honest and frank discussions between the parties, which can make it easier to reach a settlement.<sup>90</sup> Due to the disclosure of confidential negotiations part of the mediation, JTIM has brought a motion requesting the Court declare the offending paragraphs as inadmissible, and striking them from the record.

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<sup>87</sup> *JTI-Macdonald Corp. et al., (Re)*, (May 24, 2019) Ont. S.C.J. [Commercial List] Court File No.: CV-19-615862-00CL; CV-19-616077-00CL; CV-19-616779-00CL ([Endorsement of Justice McEwen](#)) (“**Confidentiality Order**”).

<sup>88</sup> Confidentiality Order at para. 3.

<sup>89</sup> *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at [para. 13](#).

<sup>90</sup> *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 (CanLII) at [para. 31](#).

64. The Lespérance Affidavit also states that JTI-TM's interests have not been ignored because the M&M Plan fully resolves issues related to interest and royalty payments by requiring JTI-TM to subordinate its debt and security, and accrued royalties to the Claimants.<sup>91</sup> However, the Lespérance Affidavit ignores that the M&M Plan is not consensual. JTIM and its secured creditor do not support the M&M Plan, including the proposed treatment of JTI-TM's interests under the M&M Plan.

#### **PART IV - RELIEF REQUESTED**

65. For all of the foregoing reasons, it is respectfully requested that this Honourable Court dismiss the Monitor's motion and direct the mediation parties to continue negotiations.

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

*Rebekah O'Hara*

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<sup>91</sup> Lespérance Affidavit at para 27, p. 6 (Case Center [F620; F6](#)).

**SCHEDULE “A”  
LIST OF AUTHORITIES**

**Cases**

1. *CannTrust Holdings Inc., et al. (Re)*, [2021 ONSC 4408 \(CanLII\)](#)
2. *Cécilia Létourneau v. JTI-Macdonald Corp., et. al* (May 25, 2015) Québec Superior Court (Class Action Division) N°: 500-06-000070-983 and *Conseil Québécois Sur Le Tabac et la Santé et. al v JTI-Macdonald Corp. et al.* (May 25, 2015) Québec Superior Court (Class Action Division) N°: 500-06-000076-980 ([Judgment of Justice Brian Riordan of the Superior Court of Quebec](#))
3. *Century Services Inc. v Canada (Attorney General)*, [2010 SCC 60 \(CanLII\)](#), [\[2010\] 3 SCR 379](#)
4. *Chef Ready Foods Ltd. v Hongkong Bank of Canada*, [1990 CanLII 529 \(BC CA\)](#)
5. *Doman Industries Ltd. (Trustee of), Re*, [2003 BCSC 376 \(CanLII\)](#)
6. *Elan Corp. v Comiskey (C.A.)*, [1990 CanLII 6979 \(ON CA\)](#)
7. *Imperial Tobacco Canada Limited*, [2023 ONSC 5449](#)
8. *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, [2019 QCCA 358 \(CanLII\)](#)
9. *Inducon Development Corp. (Re)*, [1991 CarswellOnt 219](#)
10. *Jaguar Mining Inc. (Re)*, [2014 ONSC 494 \(CanLII\)](#)
11. *JTI-MacDonald Corp. et al., (Re)*, (May 24, 2019) Ont. S.C.J. [Commercial List] Court File No.: CV-19-615862-00CL; CV-19-616077-00CL; CV-19-616779-00CL ([Endorsement of Justice McEwen](#))
12. *Kerr Interior Systems Ltd. (Re)*, [2011 ABQB 214 \(CanLII\)](#)
13. *McCarthy v. Canadian Red Cross Society*, [2001 CarswellOnt 2255](#)
14. *Philips Manufacturing Ltd. v Hong Kong Bank of Canada*, [1992 CanLII 2174 \(BC CA\)](#)
15. *Quebec Council on Tobacco and Health v. JTI-Macdonald Corp.*, [2013 QCCS 6085](#)

16. *Re Canadian Red Cross*, [2002 CanLII 49603](#)
17. *Sable Offshore Energy Inc. v. Ameron International Corp.*, [2013 SCC 37](#)
18. *ScoZinc Ltd (Re)*, [2009 NSSC 163 \(CanLII\)](#)
19. *SFC Litigation Trust v. Chan*, [2019 ONCA 525](#)
20. *Skeena Cellulose Inc. v Clear Creek Contracting Ltd.*, [2003 BCCA 344 \(CanLII\)](#)
21. *Sproule v Nortel Networks Corporation*, [2009 ONCA 833 \(CanLII\)](#)
22. *Stelco Inc. (Bankruptcy), Re*, [2005 CanLII 8671 \(ON CA\)](#)
23. *Target Canada Co. (Re)*, [2016 ONSC 316 \(CanLII\)](#)
24. *Union Carbide Canada Inc. v. Bombardier Inc.*, [2014 SCC 35 \(CanLII\)](#)
25. *Ursel Investments Ltd., Re*, [1990 CanLII 7504 \(SK KB\)](#)
26. *Windsor Machine & Stamping Ltd (Re)*, [2009 CanLII 39771 \(ON SC\)](#)
27. *9354-9186 Québec Inc v Callidus Capital Corp*, [2020 SCC 10 \(CanLII\)](#), [\[2020\] 1 SCR 521](#)

**SCHEDULE “B”  
RELEVANT STATUTES**

**Companies’ Creditors Arrangement Act**

**Opening Proviso**

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

**Compromise with unsecured creditors**

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

**Compromise with secured creditors**

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

**General power of court**

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

**Rights of suppliers**

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

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

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

**Company may establish classes**

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

### **Factors**

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

**(a)** the nature of the debts, liabilities or obligations giving rise to their claims;

**(b)** the nature and rank of any security in respect of their claims;

**(c)** the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

**(d)** any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

### **Related creditors**

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

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

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

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

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

Proceeding commenced at Toronto

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

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