Court File No.: 19-CV-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**

# FACTUM OF THE APPLICANT

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# FACTUM OF THE APPLICANT

## PART I - OVERVIEW

1. As a result of a Quebec Court of Appeal judgment released last Friday, JTI-Macdonald Corp. (the "**Applicant**" or "**JTIM**") and two other defendants are solidarily liable for damages in the amount of approximately $6.8 billion (approximately $13.5 billion including interest and an additional indemnity) (the "**QCA Judgment**"). If not stayed, enforcement of the QCA Judgment could destroy value for the Applicant's approximately 500 full time employees, 1,300 suppliers and its customers. It would impact approximately 28,000 retailers that sell JTIM products and approximately 790,000 consumers of its products. It would also jeopardize the federal and provincial taxes and duties in excess of $1.3 billion paid annually in connection with the Applicant's operations and products (of which $500 million per year is paid directly by the Applicant and another $800 million per year is paid by third parties and consumers).

2. Additionally, the Applicant is a defendant in significant health care cost recovery litigation (the "**HCCR Actions**") in each of the ten provinces, the claims of which are currently in excess of $500 billion, plus interest and costs.

3. As a result of the QCA Judgment and HCCR Actions (described further below), JTIM now seeks a collective solution for the benefit of all stakeholders. The requested stay under the CCAA will allow the Applicant to maintain the *status quo* of its operations and allow the Applicant time and a platform from which to attempt to achieve such a solution.

As such, JTIM now seeks protection from its creditors and other relief pursuant to an order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act*,[1] among other things:

(a) declaring the Applicant is a company to which the CCAA applies;

(b) granting a stay of proceedings against (i) the Applicant, and (ii) the Other Defendants with respect to the Pending Litigation, as defined and described herein;

(c) appointing Deloitte Restructuring Inc. (the "**Proposed Monitor**") as Monitor in these CCAA proceedings to monitor the Applicant's business and affairs;

(d) granting the Administration Charge, Directors' Charge and Tax Charge (each term as defined below, and collectively, the "**Charges**");

(e) authorizing the Applicant to pay its pre-filing and post-filing obligations in respect of suppliers, trade creditors, taxes, duties, employees (including outstanding and future pension plan contributions, other post-employment benefits and severance packages) and royalty payments and to pay post-filing interest on certain of its secured obligations in the ordinary course of business in order to minimize any disruption of the Applicant's business;

(f) approving the Engagement Letter dated April 23, 2018 (the "**CRO Engagement Letter**") appointing BlueTree Advisors Inc. as Chief Restructuring Officer ("**CRO**") of the Applicant;

(g) authorizing the Applicant to make an application for leave and, if successful, to appeal the QCA Judgment to the Supreme Court of Canada and preserve going concern value for all of its stakeholders as described in the Affidavit of Robert McMaster sworn March 1, 2019 (the "**McMaster Affidavit**"); and

(h) sealing Confidential Exhibit "1" of the McMaster Affidavit.

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[1] R.S.C. 1985, c. C-36 (the "**CCAA**").

## PART II - FACTS

4. Capitalized terms not otherwise defined herein are defined in the McMaster Affidavit. The facts of this Application are more fully described in the McMaster Affidavit.

5. Unless otherwise stated herein, monetary amounts are stated in Canadian dollars.

### The Applicant's Business, Operations and Corporate Structure

6. JTIM, its predecessor corporations and other business entities, have been manufacturers of tobacco products in Canada since 1858.[2] JTIM's products consist of cigarettes, fine cut tobacco, cigars and accessories under various trademarks and brand names throughout Canada and for export.[3] JTIM is a private company and is the third largest tobacco company in Canada.[4]

7. JTIM is a corporation continued under the *Canada Business Corporations Act* ("**CBCA**").[5] JTIM's management is conducted from its office in Mississauga, Ontario (the "**Head Office**"), including all functional areas regarding the sales and distribution of JTIM's products in Canada.[6] Most of the Applicant's senior management are located at the Head Office.[7] JTIM's products are either manufactured at a facility in Montreal, Quebec (the "**Plant**") or imported by JTIM.[8] Generally, JTIM sells its products to wholesalers who in turn sell to retailers who sell to customers. To a lesser degree, JTIM sells tobacco products directly to retailers and customers.[9]

8. JTIM is indirectly owned by Japan Tobacco Inc. ("**Japan Tobacco**"), which is a publicly listed company in Japan.[10] Following an amalgamation and corporate reorganization in

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[2] McMaster Affidavit at para. 3.
[3] McMaster Affidavit at para. 19.
[4] McMaster Affidavit at paras. 10 and 19.
[5] McMaster Affidavit at para. 10.
[6] McMaster Affidavit at para. 17.
[7] *Ibid*.
[8] McMaster Affidavit at para. 22.
[9] *Ibid*.
[10] McMaster Affidavit at para. 10.

2012, JTIM is the direct wholly-owned subsidiary of JTI Canada LLC Inc. ("**ParentCo**"), a Nova Scotia corporation and indirect subsidiary of Japan Tobacco.[11]

9. JTIM is the parent and sole shareholder of JTI-Macdonald TM Corp. ("**TM**"). TM owns many of the trademarks that JTIM has a right to use in its business pursuant to a Trademark License Agreement dated October 8, 1999 (as amended, the "**Trademark Agreement**").[12] As described below, TM is a secured creditor of JTIM.[13]

10. Further, JTIM is a party to numerous service and limited risk distribution agreements with related parties in respect of manufacturing, distribution, leaf sourcing and other agreements that are integral to its continued operations.[14]

**Secured Debt**

11. Pursuant to the Recapitalization Transactions as defined and described in detail in the McMaster Affidavit, TM is a secured creditor of JTIM.[15] JTIM is indebted to TM pursuant to various secured debentures that mature on November 18, 2024 (as amended, the "**TM Term Debentures**"). As at February 28, 2019, the amount outstanding and owing by JTIM to TM under the TM Term Debentures (including accrued interest) was approximately $1.18 billion.[16]

12. ParentCo granted a secured borrowing facility to JTIM in the principal amount of $70 million on June 25, 2015 to be used by JTIM to meet ordinary course payments (the "**Cash Flow Loan**").[17] The Cash Flow Loan is secured by a hypothec in respect of JTIM's moveable property located in the Province of Quebec.[18] Currently, no amounts are owing under the Cash Flow Loan.

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[11] McMaster Affidavit at para. 13.
[12] McMaster Affidavit at para. 14.
[13] *Ibid.*
[14] McMaster Affidavit at paras. 32 and 33.
[15] McMaster Affidavit at para. 46.
[16] McMaster Affidavit at para. 50.
[17] McMaster Affidavit at para. 54.
[18] McMaster Affidavit at para. 55.

13. Additionally, certain other related party suppliers are registered secured creditors pursuant to supply agreements and amendments.[19] As at December 31, 2018, the gross amount outstanding to these related party suppliers was approximately $54.6 million.[20]

**Ongoing Litigation**

***Class Action Judgment***

14. JTIM, among other tobacco companies in Canada, is a defendant in two class actions on behalf of tobacco smokers in the Province of Quebec (together, the "**Class Actions**").[21]

15. On June 1, 2015, the Quebec Superior Court released its judgment (the "**Judgment**") in the Class Actions, finding JTIM, Imperial Tobacco Canada Limited and Rothmans, Benson & Hedges Inc. (collectively, the "**Defendants**") solidarily liable for damages totalling approximately $15.5 billion of which JTIM was specifically liable for 13% of that amount (totalling approximately $2 billion).[22] The Defendants appealed the Judgment to the Quebec Court of Appeal (the "**QCA**"). However, the Defendants were unsuccessful in overturning the Judgment and, on March 1, 2019, the QCA released the QCA Judgment with respect to the appeal.

16. The QCA Judgment confirmed the Judgment in almost all respects, but revised certain dates related to the calculation of interest. The result is that the Defendants remain solidarily liable for damages in the aggregate amount of approximately $6.8 billion (approximately $13.5 billion with the revised interest dates and additional indemnity). JTIM is specifically liable for 13% of that amount, totalling approximately $1.75 billion, plus punitive damages in the amount of $12.5 million.[23] Although there is some uncertainty as to the timing of the enforceability of the QCA Judgment, it appears that JTIM has up to a maximum of 60 days from the date of the QCA Judgment to pay an

[19] McMaster Affidavit at para. 57.
[20] *Ibid*.
[21] McMaster Affidavit at para. 59.
[22] McMaster Affidavit at paras. 5 and 59.
[23] McMaster Affidavit at para. 59.

initial deposit of $145 million. JTIM intends to file an application for leave to appeal the QCA Judgment to the Supreme Court of Canada.[24]

***HCCR Actions***

17. As mentioned above, in addition to the QCA Judgment, JTIM is also a defendant in the HCCR Actions. This litigation is pursuant to provincial legislation enacted exclusively for the purpose of authorizing the provincial government to file a direct action against tobacco manufacturers to recoup the health-care costs the government has allegedly incurred and will incur, resulting from alleged "tobacco related wrongs".[25] The total potential quantum of damages claimed against the defendants in the HCCR Actions, including JTIM on a joint and several basis, is not yet known as some provincial plaintiffs have not specified the amounts of their claim. However, to date, a total of approximately $500 billion, plus interest and costs, has been claimed to be owing by all defendants in the five provinces that have specified amounts in their claims or that have been detailed in expert reports.[26] These claims are vastly in excess of the total value of the business of the Applicant and are likely vastly in excess of the value of the entire tobacco industry in Canada.[27]

18. The HCCR Actions have also been initiated against Reynolds Tobacco and R.J. Reynolds Tobacco International, Inc. (together, "**Reynolds**") as predecessors to JTIM. Japan Tobacco has indemnified Reynolds pursuant to a Purchase Agreement dated as of March 9, 1999 (as amended) as described in the McMaster Affidavit.[28] The status of the HCCR Actions is detailed in the McMaster Affidavit.

**The Applicant's Insolvency**

19. As at December 31, 2018, the Applicant's assets had a book value of approximately $1.9 billion.[29] As at December 31, 2018, the Applicant had non-contingent liabilities totalling

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[24] *Ibid.*
[25] McMaster Affidavit at para. 60.
[26] McMaster Affidavit at para. 7.
[27] *Ibid.*
[28] McMaster Affidavit at para. 61.
[29] McMaster Affidavit at para. 72.

approximately $1.4 billion.[30] As at the close of business on February 28, 2019, the Applicant had approximately $90 million in net available cash on hand, after allowing for known payments that were due on that day.[31]

20. The total secured and unsecured obligations of the Applicant, taking into account the QCA Judgment and contingent liabilities in the HCCR Actions and other pending litigation, greatly exceed the realizable book value of the Applicant's assets, even on a going concern basis.[32] But for the litigation claims, the Applicant is able to meet its ordinary course obligations as they become due.[33]

21. As a result of the QCA Judgment, the plaintiffs in the Class Actions (the "**Class Action Plaintiffs**") are or soon will be in a position to take enforcement steps against the Applicant.[34] Any such steps would have a harmful effect on the Applicant's business, to the detriment of all of its stakeholders. Accordingly, the Applicant is seeking protection from its creditors pursuant to the CCAA to obtain a stay and a period of stability within which to attempt to find a collective resolution.[35]

## PART III - THE LAW AND ANALYSIS

### A. This Court should grant protection to the Applicant under the CCAA.

22. The CCAA applies to a "debtor company" whose liabilities exceed $5 million. A "debtor company" is defined, *inter alia*¸ as a "company" that is "insolvent" or that has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.[36] A company incorporated by or under an Act of Parliament falls under the definition of "company" in the CCAA.[37]

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[30] McMaster Affidavit at para. 74.
[31] McMaster Affidavit at para. 71.
[32] McMaster Affidavit at para. 76.
[33] McMaster Affidavit at para. 75.
[34] *Ibid.*
[35] *Ibid*.
[36] CCAA, s. 2(1), and s. 3(1), R.S.C. 1985, c. B-3, s. 2 ("**BIA**")
[37] CCAA, s. 2(1).

23. The insolvency of a debtor is assessed at the time of the filing of the CCAA application. While the CCAA does not define "insolvent", the definition of "insolvent person" under the BIA is commonly referenced by the Court in assessing whether an applicant is a debtor company in the context of the CCAA. [38] The BIA defines "insolvent person" as follows: [39]

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (i) who is for any reason unable to meet his obligations as they generally become due,
>
> (ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

24. The tests for "insolvent person" under the BIA are disjunctive. A company satisfying either (i), (ii) or (iii) of the test is considered insolvent for the purposes of the CCAA.[40]

25. JTIM is incorporated pursuant to the CBCA and therefore, is a "company" within the meaning of the CCAA. JTIM does not have sufficient funds to satisfy the QCA Judgment, which is currently payable.[41] Accordingly, the Applicant is insolvent and therefore a "debtor company" to which the CCAA applies.

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[38] *Stelco Inc. (Re)*, 2004 CarswellOnt 1211 at para. 21-22 ("***Stelco***"), Applicant's Book of Authorities ("**Applicant's BOA**") at Tab 1.
[39] BIA, s. 2.
[40] *Stelco, supra* note 38 at para. 28, Applicant's BOA at Tab 1.
[41] McMaster Affidavit at para. 75.

## B. It is appropriate to grant the requested stay of proceedings.

### Stay of proceedings in favour of the Applicant

26. Pursuant to section 11.02 of the CCAA, a Court may make an order staying all proceedings in respect of a debtor company for a period of thirty (30) days, provided that the Court is satisfied that circumstances exist that make the order appropriate.[42]

27. Exercising discretionary authority to grant a stay pursuant to the CCAA must be informed by the purpose behind the CCAA, which should be construed broadly.[43] The purpose of the CCAA is, among other things, to maintain the *status quo* for the debtor company for a period while it consults with its stakeholders with a view to continuing operations for the benefit of both the debtor company and its creditors.[44]

28. As described above, the Applicant does not have the financial resources to pay the amount of the QCA Judgment. Any enforcement steps would cause irreparable harm to the business of the Applicant to the detriment of all its stakeholders. Therefore, it is appropriate for this Court to grant the requested stay of proceedings in favour of the Applicant.

### Stay of proceedings in favour of the Other Defendants, including Reynolds

29. The Applicant requests that this Court grant a stay of proceedings in favour of any person named as a defendant or respondent, including Reynolds (such persons, the "**Other Defendants**"), in respect of any and all actions, applications and other lawsuits existing at the time of the Initial Order in which the Applicant is a named defendant or respondent relating in any way whatsoever to a Tobacco Claim (as defined in the proposed Initial Order), including, without limitation, the Class Actions and the HCCR Actions (the "**Pending Litigation**").

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[42] CCAA, s. 11.02.
[43] *Re Stelco Inc.*, 2005 CarswellOnt 1188 (ONCA) at para. 44, Applicant's BOA at Tab 2; *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 at paras. 31 and 47, Applicant's BOA at Tab 3.
[44] *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 ("***Century Services***") at para. 60, Applicant's BOA at Tab 4.

30. This Court has the necessary discretion under s. 11 of the CCAA to impose a stay of proceedings with respect to non-applicant third parties.[45] The Court may exercise such jurisdiction "where it is important to the reorganization and restructuring process, and where it is just and reasonable to do so."[46]

31. The Courts have found it "just and reasonable" to extend the stay of proceedings to a non-applicant third party in a number of circumstances, including: (a) where it is important to the reorganization process; (b) relating to any liability or claim in respect of obligations and claims against the debtor company; and (c) where the balance of convenience favours extending the stay to the third party.[47]

32. In deciding to extend the stay to a non-applicant third party, Justice Hainey in *Pacific Exploration* considered the following non-exhaustive list of factors:[48]

(a) the business and operations of the third party was significantly intertwined and integrated with those of the debtor company;

(b) extending the stay to the third party would help maintain stability and value during the CCAA process;

(c) not extending the stay to the third party would have a negative impact on the debtor company's ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company;

(d) if the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant;

(e) failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;

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[45] *Pacific Exploration & Production Corp., Re*, 2016 ONSC 5429 at para. 26 ("***Pacific Exploration***"), Applicant's BOA at Tab 5.
[46] *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461 at para. 21 ("***Tamerlane***"), Applicant's BOA at Tab 6.
[47] *Cinram International Inc., Re*, 2012 ONSC 3767 at paras. 64-65 ("***Cinram***"), Applicant's BOA at Tab 7.
[48] See *Pacific Exploration*, *supra* note 45 at para. 26, Applicant's BOA at Tab 5.

(f) if the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the event of future breaches by the debtor company or breaches that are not related to the released claims; and

(g) the balance of convenience favours extending the stay to the third party.

33. Granting such a stay to the Other Defendants will allow the Applicant to attempt to effect a collective solution with respect to the HCCR Actions. Without the benefit of a stay, the stayed actions could potentially continue against the Other Defendants, preventing the Applicant's ability to reach a collective solution, especially as that would relate to Reynolds. This could cause significant economic harm for all stakeholders.

34. Further, Reynolds is named as a defendant in the HCCR Actions as it was the predecessor to JTIM at the relevant times. As the defence of Reynolds and JTIM are connected, it would be inequitable, and a potential disadvantage to the Applicant, to allow the actions to continue against Reynolds alone.

35. In consideration of the above factors, the balance of convenience favours granting the stay to the Other Defendants in connection with proceedings described herein.

**C. The Proposed Monitor should be appointed as Monitor as requested.**

36. Upon the granting of an Initial Order, section 11.7 of the CCAA requires that a trustee be appointed to monitor the debtor company's business and financial affairs. The Proposed Monitor has consented to act as monitor in these CCAA proceedings and is a trustee within the meaning of subsection 2(1) of the BIA.[49]

37. The Proposed Monitor is not subject to any of the restrictions as to who may be appointed as monitor set out in section 11.7(2) of the CCAA.

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[49] CCAA, s. 11.7.

## D. This Court should grant the Charges.

### Administration Charge

38. The Applicant requests this Court grant an Administration Charge in favour of the Applicant's counsel, the CRO, the Proposed Monitor and its legal counsel in the amount of $3 million (the "**Administration Charge**"). Section 11.52 of the CCAA provides the Court statutory jurisdiction to grant the Administration Charge:

> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
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> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
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> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> 11.52 (2) Priority – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.[50]

39. In *Canwest Publishing*, Justice Pepall considered section 11.52 of the CCAA and identified the following non-exhaustive list of factors the Court may consider when granting an administration charge:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

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[50] CCAA, s.11.52.

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.[51]

40. The Administration Charge is warranted and necessary and is appropriate in the circumstances, given that:[52]

(a) the proposed restructuring will require the extensive involvement of the professional advisors subject to the Administration Charge;

(b) the professionals subject to the Administration Charge have contributed, and will continue to contribute, to the restructuring of the Applicant;

(c) there is no unwarranted duplication of roles so the professional fees associated with these proceedings will be minimized;

(d) the Administration Charge will rank in priority to the Directors' Charge and the Tax Charge. The only secured creditors that will be affected by the Administration Charge are ParentCo, TM and certain other secured related party suppliers, each of which support the Applicant's application for CCAA protection and the granting of the Administration Charge; and

(e) the Proposed Monitor believes that the proposed quantum of the Administration Charge is reasonable.

**Directors' Charge and Tax Charge**

41. To ensure the ongoing stability of the Applicant's business during the CCAA proceedings, the Applicant requires the continued participation of its directors and officers who manage the business and commercial activities of the Applicant. The directors and officers of JTIM have considerable institutional knowledge and valuable experience.[53]

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[51] *Canwest Publishing Inc./Publications Canwest Inc.*, 2010 ONSC 222 at para. 54, Applicant's BOA at Tab 8.
[52] McMaster Affidavit at paras. 92-93.
[53] McMaster Affidavit at para. 94.

42. The Applicant requests this Court grant a second-ranking super-priority charge in favour of the Applicant's directors in the amount of $4.1 million (the "**Directors' Charge**"). The Directors' Charge protects the directors and officers against obligations and liabilities they may incur as directors and officers of JTIM after the commencement of the CCAA proceedings, except to the extent that the obligation or liability is incurred as a result of the director's or officer's gross negligence or wilful misconduct. The benefit of the Directors' Charge will only be available to the extent a liability is not covered by JTIM's D&O Insurance (as defined in the McMaster Affidavit).[54]

43. In addition to the Directors' Charge, the Applicant is seeking a third-ranking super-priority charge in favour of the Canadian federal, provincial and territorial authorities that are entitled to receive payments or collect monies from the Applicant in respect of sales taxes and excise taxes and duties in the amount of $127 million (the "**Tax Charge**"). The Tax Charge protects its beneficiaries from any exposure due to unpaid post-filing Taxes (as defined in the McMaster Affidavit); however, the charge has the collateral benefit of protecting the directors and officers as the non-payment of certain such Taxes attracts liability for the directors and officers pursuant to the various statutes under which the taxes are collected.[55]

44. Section 11.51 of the CCAA provides the Court with the statutory jurisdiction to grant the Directors' Charge in an amount the Court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it.[56] In addition, with respect to the Tax Charge, section 11 of the CCAA provides the Court with the statutory jurisdiction to grant any charge or order it deems necessary.

45. In approving a similar charge in *Canwest*, Justice Pepall applied section 11.51 of the CCAA and noted the Court must be satisfied with the amount of the charge and that it is

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[54] McMaster Affidavit at paras. 97 and 99.
[55] McMaster Affidavit at paras. 101-102.
[56] CCAA, section 11.51.

limited to obligations the directors and officers may incur after the commencement of the proceedings, so long as adequate insurance cannot be obtained at a reasonable cost.[57]

46. In *Jaguar Mining Inc., Re,* R.S.J. Morawetz (as he then was) stated that, in order to grant a Directors' Charge, the Court must be satisfied of the following factors:[58]

(a) notice has been given to the secured creditors likely to be affected by the charge;

(b) the amount is appropriate;

(c) the applicant could not obtain adequate indemnification insurance for the director at a reasonable cost; and

(d) the charge does not apply in respect of any obligation incurred by a director as a result of the director's gross negligence or wilful misconduct.

47. With respect to JTIM, the Directors' Charge and the Tax Charge are reasonable in the circumstances because: (i) as with the Administration Charge, the secured creditors affected by the Directors' Charge and the Tax Charge have received notice and are supportive of the requested CCAA proceedings and relief; (ii) the Proposed Monitor is of the view that the Directors' Charge and the Tax Charge are reasonable and appropriate in the circumstances;[59] (iii) the Applicant cannot be certain whether the insurance providers will deny coverage for various reasons, and the Applicant may not have sufficient funds available to satisfy any contractual indemnity should its directors and officers need to call upon such indemnities;[60] and (iv) the Directors' Charge does not secure obligations incurred by a director as a result of the directors' gross negligence or wilful misconduct.[61]

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[57] *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 at paras. 46 and 48 ("***Canwest***"), Applicant's BOA at Tab 9.
[58] *Jaguar Mining Inc., Re*, 2014 ONSC 494 at para. 45, Applicant's BOA at Tab 10.
[59] McMaster Affidavit at paras. 98 and 102.
[60] McMaster Affidavit at para. 99.
[61] McMaster Affidavit at para. 97.

## E. It is appropriate to allow payment of certain pre-filing and post-filing amounts.

**Pre-filing payments to suppliers, trade creditors and employees**

48. To ensure the continued operation of, and to limit disruption to, the Applicant's business, JTIM requests the Court's authority to continue to pay all of its suppliers, trade creditors (including intercompany trade payables), employees and license fees (including royalty payments as discussed below), in the ordinary course of business for amounts owing both before and after the filing of the proposed Initial Order.[62] This will ensure that the Applicant's business continues uninterrupted throughout these proceedings to preserve maximum value for the benefit of the Applicant's stakeholders.

49. The Court has frequently authorized an applicant to pay pre-filing suppliers where continued supply is integral to the business of the applicant,[63] even in the case of non-critical suppliers.[64] The Court's jurisdiction is not impaired by section 11.4 of the CCAA, which codifies the Court's authority to declare a person to be a critical supplier and to grant a charge on the debtor's property in favour of such critical supplier.

50. In authorizing the payment of pre-filing obligations, the Courts have considered the following factors:

(a) whether the goods and services were integral to the business of the applicants;

(b) the debtors' need for the uninterrupted supply of the goods or services;

(c) the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities were appropriate; and

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[62] McMaster Affidavit at para. 85.
[63] See *Index Energy Mills Road Corporation (Re)*, 2017 ONSC 4944 at paras. 26-32 ("***Index***"), Applicant's BOA at Tab 11; *Canwest, supra* note 57 at para. 41, Applicant's BOA at Tab 9; *Cinram, supra* note 47 at para. 68 of Schedule C, Applicant's BOA at Tab 7.
[64] *Futura Loyalty Group Inc., Re*., 2012 ONSC 6403, at para. 10 ("***Futura***"), Applicant's BOA at Tab12.

(d) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.[65]

51. In these unique circumstances, the Applicant's business is expected to remain cash-flow positive during these CCAA proceedings. As at the time of filing, the Applicant owes approximately $5 million to unrelated trade creditors and $36.5 million in respect of accruals and other liabilities including accruals for goods received before invoices in respect thereof are received.[66] JTIM's total third party ordinary course trade liabilities represent less than 0.30% of the total liabilities of JTIM as at December 31, 2018, including the QCA Judgment but excluding any other litigation claims.[67] This restructuring will be complicated enough without the addition of creditor claimants from 1,300 suppliers and relatively small trade creditors. The benefit to the estate of paying all of its pre-filing trade and employee obligations far outweighs the time and resources that would be required to stay such payment. The Applicant has sufficient cash to meet its pre-filing trade, pension and employee liabilities. Authorizing the Applicant to continue its operations in the ordinary course will maintain the value of its business for all the stakeholders.

52. The Applicant's operations depend on timely and continuous supply from its domestic and international suppliers. Maintaining JTIM's operations as a going concern and avoiding any unnecessary disruption to its business operations is in the best interests of all of JTIM's stakeholders, including the Class Action Plaintiffs.[68]

53. It is the Applicant's current expectation that its trade creditors and employees would not be affected by any proposed plan of compromise or arrangement that it may file in these proceedings.[69] Therefore, it would be inequitable to stay their payment, when there is no contemplation of their compromise.

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[65] *Re Cinram supra* note 47 at para. 37 and at paras. 66-71 of Schedule C, Applicant's BOA at Tab 7 and *Re SkyLink Aviation Inc.*, 2013 ONSC 1500 at para. 26 (Ont. S.C.J. [Commercial List]), Applicant's BOA at Tab 13.
[66] McMaster Affidavit at para. 64.
[67] McMaster Affidavit at para. 66.
[68] McMaster Affidavit at para. 85.
[69] McMaster Affidavit at para. 86.

54. Finally, the Court approved similar relief in the 2004 Initial Order granted in the 2004 CCAA Proceedings (as each term is defined in the McMaster Affidavit), that allowed the Applicant to pay all of its trade creditors in the ordinary course.[70] The Proposed Monitor supports the payment of these requested pre-filing amounts.[71]

**Royalty payments**

55. TM is the owner of many of the trademarks utilized by the Applicant. The Applicant's right to use such trademarks may be terminated by TM if the Applicant is unable to meet its payments under the Trademark Agreement. Without the use of these trademarks, the Applicant's business would rapidly deteriorate as the trademarks are used by the Applicant in association with its manufacturing, distribution, advertising and sale of its licensed products.[72]

56. R.S.J. Morawetz has authorized a debtor company to pay monthly pre-filing and post-filing royalty payments in order to keep these fundamental assets in good standing. Justice Morawetz recognized that these payments were an exchange of money for goods, "which could be properly characterized as a trade debt".[73]

57. Section 11.01 of the CCAA provides that a stay cannot prohibit a person from requiring immediate payment for the continued use of licensed property after the stay is granted.[74]

58. Pursuant to the Trademark Agreement, monthly royalty payments are payable by the Applicant to TM. The amount of the royalty payment varies with sales, but has historically been approximately $1 million per month.[75] It is within this Court's power to authorize the Applicant to pay the pre-filing and post-filing royalties owing to TM under

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[70] McMaster Affidavit at para. 84; *JTI-Macdonald Corp. (Re)*, ONSC (Commercial List) Court File No. 04-CL5530, Order of the Honourable Justice Farley dated August 24, 2004, at para. 16(h), Applicant's BOA at Tab 14.
[71] McMaster Affidavit at para. 86.
[72] McMaster Affidavit at para. 31.
[73] *Smoky River Coal Ltd., Re*, 2001 ABCA 209 at para. 36, Applicant's BOA at Tab 15; *Cline Mining Corp., Re*, 2014 ONSC 6998 at paras. 39-40, Applicant's BOA at Tab 16.
[74] CCAA, s. 11.01.
[75] McMaster Affidavit at para. 70.

the Trademark Agreement and it is appropriate to do so. The Proposed Monitor supports the continued payment of the requested royalty payment.[76]

**Secured interest payments**

59. The CCAA is remedial legislation and the Court should give the CCAA a broad and liberal interpretation so as to encourage and facilitate successful restructurings where possible.[77] The Courts have held that section 11 of the CCAA provides the courts with a broad and flexible authority, which is at their disposal in order to achieve the objective of the respective CCAA proceedings.[78]

60. JTIM seeks authorization to continue to pay the interest due and payable on its secured obligations owing to TM pursuant to the TM Term Debentures. Such relief is sought in light of the validity of the obligations owing to TM, which have been in place since 1999, and in light of the potential adverse tax and other consequences to its senior secured creditor if such payments were suspended.[79] The court has jurisdiction to grant such relief under section 11 of the CCAA.

61. Additionally, JT International Holdings B.V., a credit-worthy entity related to JTIM, has provided an undertaking to repay any post-filing interest received during the CCAA proceedings in the event this Court (or any applicable appellate court) finally determines that TM was not entitled to receive the post-filing interest payments.[80]

62. It is reasonable in the context of these CCAA proceedings to permit the Applicant to pay its post-filing interest payments on its secured obligations. The Proposed Monitor does not object to the payment of post-filing interest payments to TM pursuant to the TM Term Debentures.[81]

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[76] McMaster Affidavit at para. 86.
[77] *Re Lehndorff General Partners Ltd.*, 1993 CarswellOnt 183 at para. 5, Applicant's BOA at Tab 17.
[78] See *Century Services*, *supra* note 44 at para. 19, Applicant's BOA at Tab 4.
[79] McMaster Affidavit at para. 89.
[80] McMaster Affidavit at para. 90.
[81] McMaster Affidavit at para. 89.

63. For the foregoing reasons, the Applicant should be authorized to make the requested post-filing interest payments on its secured obligations.

## F. The CRO Engagement Letter should be approved and BlueTree Advisors Inc. should be appointed as CRO

64. The Applicant seeks an order approving the engagement of BlueTree Advisors Inc. as the CRO pursuant to the terms set out in the CRO Engagement Letter. The CRO Engagement Letter also sets out the compensation to be received by the CRO for its services to be provided throughout these CCAA proceedings.

65. The Court has held that the appointment of a CRO is appropriate as such expertise will assist the debtor in achieving the objectives of the CCAA.[82] The Court has the statutory jurisdiction to make any order appropriate in the circumstances pursuant to s. 11 of the CCAA.[83]

66. JTIM requires the CRO's expertise in order to successfully complete its contemplated restructuring plan. Given the size and complexity of the claims that the Applicant is seeking to restructure, the Applicant has determined it will benefit from the assistance of a professional CRO.

67. The proposed CRO, Mr. William Aziz, is very experienced and has the skills necessary to oversee and assist the Applicant's negotiations during the CCAA proceedings, which are likely to be complex. His expertise and qualifications of BlueTree Advisors Inc. in fulfilling such a role has been recognized in other CCAA proceedings.[84]

68. With the assistance of the CRO, management of the Applicant will be able to continue to focus on operations in the ordinary course and minimize disruption to its business,

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[82] *Walter Energy Canada Holdings, Inc., Re*, 2016 BCCS 107 at para. 35 ("***Walter Energy***"), Applicant's BOA at Tab 18.
[83] CCAA, s. 11.
[84] *Walter* Energy, *supra* note 82 at para. 33, Applicant's BOA at Tab 18.

ultimately maximizing value for its stakeholders. The Proposed Monitor has reviewed the CRO Engagement Letter and supports the appointment of the CRO.[85]

69. In addition to the approval of the CRO engagement, JTIM is seeking an order sealing the unredacted copy of the CRO Engagement Letter.

70. Subsection 137(2) of the *Courts of Justice Act* provides this Court with the statutory jurisdiction to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.[86] The Supreme Court of Canada set out the test for granting a sealing order in *Sierra Club of Canada v. Canada (Minister of Finance)* as follows:[87]

> A confidentiality order under Rule 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the rights of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which, in this context, includes the public interest in open and accessible court proceedings.

71. The CRO Engagement Letter sets out the terms of the CRO's engagement. If such commercially sensitive information were made available to the public, it could impair the CRO's ability to obtain market rates in other engagements. This Court has granted sealing orders with respect to CROs engagement letters in many prior cases.[88]

72. The salutary effects of sealing the CRO Engagement Letter outweigh any conceivable deleterious effects given that, in the ordinary course, this confidential information related to a private company outside of a CCAA proceeding would be kept strictly confidential.

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[85] McMaster Affidavit at para. 105.
[86] R.S.O. 1990, c. C-34, as amended, s. 137(2).
[87] 2002 SCC 41 at para. 53, Applicant's BOA at Tab 19.
[88] See for example *Victorian Order of Nurses for Canada (Re)*, 2015 ONSC 7371 at para. 28, Applicant's BOA at Tab 20.

**G. The Applicant should be authorized to continue its appeal of the QCA Judgment to the Supreme Court of Canada.**

73. The Applicant is seeking authority to continue its application for leave to appeal the QCA Judgment to the Supreme Court of Canada, despite the requested stay of proceedings against the Applicant.

74. Courts have confirmed that the stay of proceedings in the context of both a receivership proceeding and a BIA proposal (which are both substantially similar to the stay of proceedings afforded in the Initial Order) do not stay proceedings brought *by* a debtor company.[89] The debtor company (or receiver) is still able to continue to pursue the debtor's remedies.

75. In this case, the Applicant is cash flow positive and has successful business operations. Its insolvency is primarily due to the QCA Judgment. The Applicant wishes to exercise its right to appeal the QCA Judgment, while staying enforcement thereof and while considering its options for a viable solution for the benefit of all of its stakeholders.

76. Given the significance of the QCA Judgment, it is reasonable to permit the Applicant to continue its leave to appeal application to the Supreme Court of Canada.

## PART IV - RELIEF REQUESTED

77. For all of the foregoing reasons, the Applicant requests an Order substantially in the form of the draft Initial Order.

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[89] *Navionics Inc., Re*, 2005 NLTD 137 at para. 7, Applicant's BOA at Tab 21. Also see *Jema International Food Products v. Scholle Canada Ltd.*, 2013 ONSC 2270 at para. 65, Applicant's BOA at Tab 22. Also see *8527504 Canada Inc. v. Liquibrands Inc.*, 2014 ONSC 7015, at para. 20, Applicant's BOA at Tab 23.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 8th day of March, 2019.

Thornton Grout Finnigan LLP

**THORNTON GROUT FINNIGAN LLP**
Lawyers for the Applicant

Robert I. Thornton
Leanne M. Williams
Rebecca L. Kennedy

**SCHEDULE "A"**

**Authorities**

| TAB NO. | CASELAW |
|---|---|
| 1 | *Stelco Inc. (Re)*, 2004 CarswellOnt 1211 |
| 2 | *Re Stelco Inc.*, 2005 CarswellOnt 1188 (ONCA) |
| 3 | *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 |
| 4 | *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 |
| 5 | *Pacific Exploration & Production Corp., Re*, 2016 ONSC 54 |
| 6 | *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461 |
| 7 | *Cinram International Inc., Re*, 2012 ONSC 3767 |
| 8 | *Canwest Publishing Inc./Publications Canwest Inc.*, 2010 CarswellOnt 222 |
| 9 | *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 |
| 10 | *Jaguar Mining Inc., Re*, 2014 ONSC 494 |
| 11 | *Index Energy Mills Road Corporation (Re)*, 2017 ONSC 4944 |
| 12 | *Futura Loyalty Group Inc., Re.*, 2012 ONSC 6403 |
| 13 | *Re Skylink Aviation Inc.*, 2013 ONSC 1500 |
| 14 | *JTI-Macdonald Corp. (Re)*, ONSC (Commercial List) Court File No. 04-CL5530, Order of the Honourable Justice Farley dated August 24, 2004 |
| 15 | *Smoky River Coal Ltd., Re*, 2001 ABCA 209 |
| 16 | *Cline Mining Corp., Re*, 2014 ONSC 6998, 2014 CarswellOnt 18943 |
| 17 | *Re Lehndorff General Partners Ltd.*, 1993 CarswellOnt 183 |
| 18 | *Walter Energy Canada Holdings, Inc., Re*, 2016 BCCS 107 |
| 19 | *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 |
| 20 | *Victorian Order of Nurses for Canada (Re)*, 2015 ONSC 7371 |
| 21 | *Navionics Inc., Re*, 2005 NLTD 137 |

| TAB NO. | CASELAW |
|---|---|
| 22 | *Jema International Food Products v. Scholle Canada Ltd.*, 2013 ONSC 2270 |
| 23 | *8527504 Canada Inc. v. Liquibrands Inc.*, 2014 ONSC 7015 |

## SCHEDULE "B"

## Relevant Statutes

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

**Definitions**

2. In this Act, [...]

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

[…]

"trustee" or "licensed trustee" means a person who is licensed or appointed under this Act.

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

**Definitions**

**2.(1)** In this Act, […]

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies; […]

"debtor company" means any company that,

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or

(d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent.

**Application**

**3.(1)** This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

**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.

**11.02** (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

*Stays, etc. — other than initial application*

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

*Burden of proof on application*

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

*Restriction*

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

[…]

**Interim financing**

**11.2** (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

*Priority — secured creditors*

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

*Priority — other orders*

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

*Factors to be considered*

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

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

[…]

**Critical supplier**

**11.4** (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

*Obligation to supply*

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

*Security or charge in favour of critical supplier*

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person

declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

**Priority**

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

**Security or charge relating to director's indemnification**

**11.51** (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

*Priority*

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

*Restriction — indemnification insurance*

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

*Negligence, misconduct or fault*

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

**Court may order security or charge to cover certain costs**

**11.52** (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

*Priority*

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

[…]

**Court to appoint monitor**

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

*Restrictions on who may be monitor*

(2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

(a) if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(b) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

*Court may replace monitor*

(3) On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*, to monitor the business and financial affairs of the company.

*Courts of Justice Act*, R.S.O. 1990, c. C.43

**Sealing documents**

s. 137 (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

[…]

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.: 19-CV-615862-00CL

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

Proceedings commenced at Toronto

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