Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

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.**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED** AND **IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Applicants

REPLY FACTUM OF THE QUEBEC CLASS ACTION PLAINTIFFS

(Re: JTIM, JTI-TM and RBH Objections to the Sanction Orders
Returnable commencing January 29-31, 2025)

January 27, 2025

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TO: **THE COMMON SERVICE LIST**

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PART I – INTRODUCTION

1. The Quebec Class Action Plaintiffs (the "**QCAPs**") in the Quebec Class Actions hereby reply to the objections made by RBH and JTIM to the sanction of the three plans of compromise and arrangement put forth by the Court-Appointed Mediator and the Monitors, as amended (collectively, the "**M&M Plan**").[1]

2. The M&M Plan is a fair and reasonable resolution to the enormous liabilities of the Canadian tobacco industry resulting from their conspiracy to misinform the users of their products and their reprehensible conduct over a period of more than 50 years. This misconduct, the resulting grievous harm suffered by the Quebec victims, and the joint and several liability of the industry arising therefrom were set out in detail in the judgments of Justice Brian Riordan J.C.S. and the Quebec Court of Appeal which triggered the CCAA Proceedings in this matter.

3. For almost six years, the Claimants and the Tobacco Companies have participated in a carefully planned and thorough mediation process.[2] Throughout this process, the three Tobacco Companies have reiterated on numerous occasions that they continue to participate in the mediation in good faith and they have requested extensions of the stay of proceedings for more than five and a half years on that basis.

4. It is only since the Court-Appointed Mediator and Monitors produced the M&M Plan as directed by this Court that objections have been raised by RBH and JTIM in contradiction of positions and agreements previously made by them during the mediation process.

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[1] Where not defined herein, defined terms have the meanings ascribed to them in the M&M Plan.
[2] Affidavit of Philippe H. Trudel dated January 27, 2025 (the "**Trudel Affidavit**") at para. 11.

5. The objections of RBH and JTIM appear to be nothing other than an attempt to re-negotiate certain aspects of the allocation of payments to be made by the Tobacco Companies well after they had agreed upon a model of contributions on an industry-wide basis, including the contribution of all of their upfront cash (save only for a limited working capital carve-out) and the subordination by JTI-TM of its purported security.

6. Each of the Tobacco Companies is fully able to meet its obligations under the M&M Plan.[3] Their objections have nothing to do with the fairness, reasonableness or workability of the M&M Plan; rather, RBH and JTIM are trying to improve their respective positions as among the three Tobacco Companies, a strategy that this Court should reject and should not conflate with the approval and implementation of the M&M Plan.

7. If the Court would entertain the requests of RBH and JTIM, which respectfully it should not, this would take the process down a "rabbit hole" that could imperil the progress made in achieving the M&M Plan. It would open the door to countervailing claims such as the fact that JTIM did not deposit any security (suretyship) at the Quebec Court of Appeal and likely many others which, in our view, are irrelevant to the assessment of whether the M&M Plan is fair and reasonable as a whole, and workable.[4]

8. This reply factum will deal specifically with the main points raised in the objections.

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[3] Affidavit of William E. Aziz dated January 20, 2025 (the "**Aziz Affidavit**") at para. 46, in the Responding Motion Record of JTIM dated January 20, 2025, tab 1: "*The current methodology to calculate the Annual Contributions works because it is based on each Tobacco Company's ability to pay*". The Monitors also view the existing allocation mechanism as being affordable for each of the Tobacco Companies, as appears from the JTIM Monitor's Twenty-Second Report at para 64 and from the Notice of Motion of the RBH Monitor dated January 15, 2025, tab 1, para. 23.

[4] Trudel Affidavit at para. 12, 53.

PART II – BACKGROUND AND FACTS

9. The M&M Plan is the result of thousands of hours in hundreds of court-ordered mediation sessions.[5]

10. Term sheets were submitted jointly by the three Tobacco Companies to the Claimants,[6] which set forth the formal positions that the Tobacco Companies consistently put forward to the Claimants over a number of years.

11. In fact, these joint proposals consistently referenced a "global settlement" with the three Tobacco Companies, acting together, based on their ability to pay, and in respect of which each Tobacco Company would remain responsible to make annual contributions based on an agreed metric until the aggregate amount of the global settlement would be fully paid.

12. The M&M Plan was ultimately constructed on key principles accepted by all parties during the mediation, which essentially required that the global settlement be structured as a made-in-Canada, industry-wide resolution (the "**Foundational Building Blocks**"). Those Foundational Building Blocks were faithfully incorporated into the M&M Plan by the Court-Appointed Mediator and the Monitors. [7]

13. The M&M Plan that emerged is a remarkable achievement in the most complex restructuring in Canadian history. It should benefit from a presumption of fairness and reasonableness by the mere fact that it is the product of a balancing of interests performed by Court-appointed officers with no financial stake in the outcome.

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[5] *Imperial Tobacco Limited*, 2024 ONSC 6061 at para. 9. Trudel Affidavit at para. 11.
[6] Factum of the Imperial and RBH Monitors dated January 22, 2025 at para. 8.
[7] Trudel Affidavit at paras. 10-13.

PART III – ISSUES, LAW AND ARGUMENT

A. Fairness and reasonableness

14. In this Court's determination of fairness and reasonableness of the M&M Plan, it should not second-guess the business aspects thereof, and significant weight should be granted to:

    a. unanimous creditor approval, including by the victims of the Tobacco Companies;[8] and

    b. the fact the M&M Plan was prepared by the Court-Appointed Mediator and the Monitor, that they weighed the competing interests of the various stakeholders in doing so, and are presenting it as the best and only alternative to resolve this restructuring.[9]

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[8] See *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re*, 2000 CanLII 22488 at para. 25 (ON SC), in which the Court stated "*[24]… The huge majority of Transfusion Claimants opted to support the Plan, concluding that it represents the best possible outcome for them in the circumstances. [25] Although the Transfusion Claimants are not the type of "business" creditors normally affected by a CCAA arrangement,* ***they are the ones most touched by the events leading up to these proceedings and by the elements of the Plan. I see no reason why their voting support of the Plan should not receive the same—or more—deference as that normally granted to creditors by the Court*** *in these cases. The fact that the Plan has received such a* ***high level of support weighs very heavily in my consideration*** *of approval*" [Emphasis added] and *Lutheran Church Canada (Re)*, 2016 ABQB 419 at para. 144: "*[144] Dealing with the* ***important factor of the approval of the plans by the requisite double majority of creditors****, the Court in Re Muscletech Research & Development Inc., 2007 CanLII 5146 (ON SC), [2007] O.J. No. 695 at para 18 commented: It has been held that in determining whether to sanction a plan, the court must exercise its equitable jurisdiction and consider the prejudice to the various parties that would flow from granting or refusing to grant approval of the plan and* ***must consider alternatives available to the Applicants if the plan is not approved. An important factor to be considered by the court in determining whether the plan is fair and reasonable is the degree of approval given to the plan by the creditors. It has also been held that, in determining whether to approve the plan, a court should not second-guess the business aspects of the plan or substitute its views for that of the stakeholders who have approved the plan***" [Emphasis added]; and *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 4450 at paras. 34-35 [*AbitibiBowater*]: "*[34] Considering that a plan is, first and foremost, a compromise and arrangement reached, between a debtor company and its creditors, there is, indeed, a* ***heavy onus on parties seeking to upset a plan where the required majorities have overwhelmingly supported it. From that standpoint, a court should not lightly second-guess the business decisions reached by the creditors as a body****. [35] In that regard, courts in this country have held that the* ***level of approval by the creditors is a significant factor in determining whether a CCAA Plan is fair and reasonable****. Here, the majorities in favour of the CCAA Plan, both in number and in value, are very high. This indicates a significant and very strong support of the CCAA Plan by the Affected Unsecured Creditors of Abitibi*" [Emphasis added].

[9] *AbitibiBowater*, *ibid.* at paras. 36-37: "*[36] Likewise, in its Fifty-Seventh Report, the Monitor advised the creditors that their approval of the CCAA Plan would be a reasonable decision. He recommended that they approve the CCAA Plan then. In its Fifty-Eighth Report, the* ***Monitor reaffirmed its view that the CCAA Plan was fair and reasonable. The recommendation was for the Court to sanction and approve the***

B. Allocation under the M&M Plan is complete, fair and reasonable

15. The M&M Plan provides at section 5.2 that "*The issue of allocation of the Global Settlement Amount as between the Tobacco Companies in the three CCAA Proceedings remains unresolved*". The section was added just before the hearing to approve the Meeting Order, to address concerns raised at that time and to ensure that the allocation issue could be addressed, if the Court considered it necessary or relevant, at the Sanction Hearing.

16. In the view of the QCAPs, the allocation issue has nothing to do with sanction criteria. It is about what portion of the Global Settlement Amount will be contributed by each Tobacco Company and does not affect their payment obligations to creditors under the M&M Plan.

17. RBH opposes the sanction of the RBH M&M Plan on the basis of the allocation issue, arguing that, without an agreed-upon allocation of responsibility as among the Tobacco Companies, RBH would be required to contribute more to the Global Settlement Amount than the percentage of its liability determined by Justice Riordan or by its market share.[10] The essence of the objection of RBH is that each Tobacco Company should be responsible for a specific percentage of the amount to be paid to the Claimants and that the M&M Plan has the "unfair" consequence of costing RBH more than its fair share of responsibility.

CCAA Plan**. [37] **In a matter such as this one, where the Monitor has worked throughout the restructuring with professionalism, objectivity and competence, such a recommendation carries a lot of weight" [Emphasis added].

[10] Affidavit of Milena Trentadue dated January 20, 2025 (the "**Trentadue Affidavit**") at para. 20, in the Responding Motion Record of RBH dated January 20, 2025.

18. This position is disputed by the other two Tobacco Companies who assert that the M&M Plan, and the foundational underpinnings that preceded it, were always premised on this being an industry-based settlement that would be satisfied by the three Tobacco Companies based on their respective capacity to pay.

19. In fact, at the commencement of the mediation and throughout years of negotiations, the Tobacco Companies always negotiated as an industry, not as individual tobacco companies.[11] Nobody forced them to all file for CCAA protection or, once under CCAA protection, to negotiate together rather than separately.

20. The negotiations involved the exchange of several term sheets by the Tobacco Companies.[12] The term sheets presented by the Tobacco Companies to the Claimants during mediation were based on an industry contribution, not as a fixed amount or percentage for each Tobacco Company. In this regard, the affidavit of William Aziz, the CRO to JTIM, states:

> **RBH's position completely changes the business terms of the global settlement underlying the CCAA plans and was not the basis of prior negotiations as understood by JTIM**. Thus, such a position would effectively put the parties back to square one… Changing this to a different methodology threatens the viability of the Tobacco Companies, and so undermines the payment assurance that the Claimants have negotiated. **It would also be contrary to a fundamental principle of the negotiations as repeatedly stated by all the Tobacco Companies**.[13] [Emphasis added]

21. Similarly, Imperial asserted in its Aide Memoire dated January 20, 2025:

> 2. Article 5.2 was included in the CCAA Plan at first instance because Rothmans, Benson & Hedges Inc. ("RBH"), **very late in the process, sought to backtrack from the terms of the negotiated deal** – which include an internal and self-adjusting allocation formula – in an effort to reduce its own contribution obligations […]

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[11] Trudel Affidavit at para. 9.
[12] Factum of the Imperial and RBH Monitors dated January 22, 2025 at para. 8.
[13] Aziz Affidavit at paras. 42-46.

…

6. If this prescribed contribution formula were to be adjusted at this late stage, after the creditors have already voted unanimously in favour of the CCAA Plan, the economics of the CCAA Plan would be undermined**. Moreover, the self–levelling nature of the payments under the CCAA Plan, which formed the foundation of the CCAA Plan from the outset of the negotiation process, would be materially compromised**.

…

8. Accordingly, Imperial submits that there is no basis – pursuant to Article 5.2 or otherwise – for any order or direction in relation to issues of "allocation" under the CCAA Plan. **The terms of the CCAA Plan necessarily govern the Tobacco Companies' respective contributions to the Global Settlement Amount, and any variation of the CCAA Plan terms in this regard would have the effect of undermining the negotiated outcome that has been the subject of a protracted multi-party mediation**. [Emphasis added]

22. In the RBH materials, Ms. Trentadue invited this Court to consult the Court-Appointed Mediator about RBH's position in the mediation process:

13. Without disclosing the contents of the confidential mediation, I am advised by Peter Luongo (who was the Managing Director of RBH at the time of the initial CCAA filing) and Mindaugas Trumpaitis (who was the Managing Director of RBH after Mr. Luongo), that the Allocation Issue has been a significant issue for RBH throughout these CCAA proceedings.

14. **RBH would also be content for this Court to consult the mediator about RBH's position on allocation throughout the mediation process**.[14]

23. If the Court accepts RBH's invitation (which we do not think is necessary), the Court should also consult the several term sheets (and the Power Point presentations that accompanied them) submitted jointly by the three Tobacco Companies to the Claimants, which set forth the formal positions that the Tobacco Companies consistently put forward to the Claimants over a number of years.[15]

24. Regardless of any purported discussions that may have occurred during the mediation process among the Tobacco Companies and the Mediator (in which the Claimants,

[14] Trentadue Affidavit at paras. 13-14.
[15] Trudel Affidavit at para. 50.

including the QCAPs, were not involved), the Tobacco Companies always put forward joint proposals that were presented as an industry obligation, which was ultimately adopted as the foundation of the M&M Plan.[16]

25. RBH's reference to the percentages of liability determined in the Riordan J. Judgment as maintained by the Quebec Court of Appeal (collectively, the "**Class Action Judgments**") is misleading. Notwithstanding the apportionment of responsibility among the Tobacco Companies, they are all jointly and severally (solidarily) liable for the condemnation under the Class Action Judgments.

26. After the Quebec Court of Appeal judgment, no one forced RBH to act in lockstep with the other Tobacco Companies and submit itself to a CCAA process. It could have settled its liability to the QCAPs and continued to contest other litigation across the country. In that scenario, it would have preserved any purported right it may have had to seek contribution and indemnity from the other two Tobacco Companies (even though such right would be illusory faced with a trillion dollars of claims of other creditors against them).

27. However, once RBH opted for CCAA Proceedings, it necessarily accepted the likelihood, if not certainty, that all of its cash on hand as well as cash generated from operations during the CCAA process, would be contributed to the restructuring, or in the event of failure, to an ensuing bankruptcy.

28. Furthermore, once under CCAA Proceedings, nothing prevented RBH from submitting its own plan of arrangement to its creditors. It did not do so but rather opted to join

[16] Trudel Affidavit at para. 9, 12, 50-51.

forces with the other two Tobacco Companies to make global settlement offers.[17] At no time did any of those offers to, nor any of the discussions with, the Claimants ever contemplate an allocation methodology other than the one which is enshrined in the M&M Plan.[18]

29. RBH argues that, in the absence of the M&M Plan, it would be entitled to an apportionment of responsibility between it and the other Tobacco Companies.[19] In fact, in the absence of the M&M Plan (and there are no other plans possible at this time), RBH would be bankrupt, having not proposed a plan that was acceptable to its creditors.

30. The "true-up" proposal RBH is now proposing[20] was never part of any negotiations that the QCAPs were aware of over the 5 ½ year mediation process and were never part of any joint proposals made to the Claimants.[21] Injecting this new concept to the M&M Plan at this late stage would change the commercial terms understood by the parties, and adopted by the Court-Appointed Mediator and Monitors in their M&M Plan, and would put at risk the delicate balance which has been achieved in that plan.

31. The request of RBH for re-opening the allocation issue (which is really a reallocation issue) should be rejected. As stated above, the M&M Plan already provides for the contribution of all upfront cash held by each Tobacco Company (subject only to the working capital carve out) and the annual application of the Metric for subsequent

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[17] Trudel Affidavit at para. 51.
[18] Trudel Affidavit at para. 50.
[19] Factum of RBH dated January 24, 2025 at para. 27.
[20] Factum of RBH dated January 24, 2025 at para. 60(b).
[21] Trudel Affidavit at paras. 50-51.

annual contributions is self-regulating if the market shares of the Tobacco Companies change in the ensuing years.[22]

C. JTIM-TM as an Unaffected Creditor created for creditor-proofing

32. It is apparent that JTIM's objection to the sanction of the M&M Plan is primarily a negotiating position to counter the position adopted by RBH, as JTIM acknowledges that the workability of the M&M Plan "*can be addressed by either deleting section 5.2 of the M&M Plan in its entirety or revising it such that it clarifies that the Working Capital Carve Out is the only remaining allocation issue*".[23]

33. Consequently, the "issues" that JTIM itself raises in support of its objection to the requested Sanction Order may disappear if the Court determines that no reallocation between the Tobacco Companies is required and that the M&M Plan is a complete self-contained package. Regardless, the QCAPs will address the other arguments raised by JTIM in the present reply factum.

34. JTIM argues that the M&M Plan affects the rights of JTIM-TM without giving it the right to vote in its own class.[24] This argument made by both JTIM and JTI-TM was rejected by this Court before the Meeting Order was rendered.[25]

35. The Meeting Order authorized the classification of creditors into a single class of Affected Creditors,[26] which did not include JTI-TM, as JTI-TM's alleged claim is not

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[22] Trudel Affidavit at paras. 12-13, 53.
[23] Responding Factum of JTIM dated January 24, 2025 at para. 20.
[24] Aziz Affidavit at paras. 19(b-c) and 21-27.
[25] *Imperial Tobacco Limited*, 2024 ONSC 6061 at paras. 46-49.
[26] Meeting Order at para. 20.

being compromised. JTIM and JTI-TM did not appeal that Meeting Order and the voting question is now *res judicata*.

36. With respect to the fairness and reasonableness of the effect of the M&M Plan on JTI-TM, it is important to consider the following facts determined by the Quebec Superior Court and maintained by the Quebec Court of Appeal in the Class Action Judgments regarding inter-company transactions with the Japan Tobacco Inc. group (the "**TM Transactions**") in 1999, after the institution of the Quebec Class Actions in September and November of 1998:[27]

    a. JTIM was and still is a highly profitable $2 billion company with annual earnings from operations well in excess of $100 million and it did not and still does not have any (significant) long-term debt owed to any party at arm's length;[28]

    b. the Japan Tobacco group caused JTIM to transfer its trademarks valued at $1.2 billion to a new, previously-empty subsidiary, JTI-TM, in return for the latter's shares, and JTI-TM charges JTIM an annual royalty of approximately $10 million for the use of those trademarks, which is an artificial expense;[29]

    c. there is also a loan of $1.2 billion from JTI-TM to JTIM for which JTIM is charged $92 million a year in interest, although JTIM appears never to have retained any funds as a result of it;[30]

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[27] Trudel Affidavit at paras. 35-48.
[28] *Létourneau c. JTI-MacDonald Corp.*, 2015 QCCS 2382 at para. 1094 and Schedule J, paras. 2141(c, f).
[29] *Létourneau c. JTI-MacDonald Corp.*, 2015 QCCS 2382 at para. 1095. This artificial expense, according to JTI-TM now amounts to approximately $1.7 million monthly, including interest on unpaid royalties. Aziz Affidavit at para. 38.
[30] *Létourneau c. JTI-MacDonald Corp.*, 2015 QCCS 2382 at para. 1096.

d. JTI-TM is a wholly-owned subsidiary of JTIM, created for the sole purpose of holding the trademarks for tax and creditor-proofing purposes;[31]

e. for tax and/or creditor-proofing purposes, JTIM "parked" the trademarks in JTI-TM and "loaded" JTIM with debt through a circular exchange of cheques and complex inter-corporate transactions;[32]

f. the tangled web of loan, royalty and other contracts involving JTIM and JTI-TM is principally a **sham creditor-proofing exercise** undertaken after the institution of the Quebec Class Actions;[33]

g. those contracts represent a cynical, bad-faith effort by JTIM to avoid paying proper compensation to its customers whose health and well-being were ruined by its wilful conduct;[34] and

h. JTIM has been able to not pay huge sums of money to JTI-TM whenever it suited JTIM, such as in 2007 and 2008, when JTIM voluntarily stopped paying interest and royalties to JTI-TM while under previous CCAA protection, and from 2009 to 2012, when it temporarily amended its agreements with JTI-TM to reduce interest payments from approximately $100 million to approximately zero, and freed up funds to pay $150 million to the Quebec and federal governments to settle smuggling claims.[35] Although JTIM and JTI-TM argue

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[31] *Létourneau c. JTI-MacDonald Corp.*, 2015 QCCS 2382 at para. 1094 and Schedule J, para. 2141(d).
[32] *Létourneau c. JTI-MacDonald Corp.*, 2015 QCCS 2382 at para. 1094 and Schedule J, para. 2141(e).
[33] *Létourneau c. JTI-MacDonald Corp.*, 2015 QCCS 2382 at para. 1101.
[34] *Létourneau c. JTI-MacDonald Corp.*, 2015 QCCS 2382 at para. 1103.
[35] *Létourneau c. JTI-MacDonald Corp.*, 2015 QCCS 2382 at para. 1094 and Schedule J, para. 2141(g).

that the M&M Plan would postpone payments to JTI-TM, postponement of payments (and non-payment) is business as usual for those entities.

37. It is absurd for JTIM to characterize the M&M Plan as unfair and inequitable for interfering with its sham transactions, and to ask this Court to help keep those funds from its legitimate creditors.

38. While JTIM contests the M&M Plan on the grounds*, inter alia*, that its cash on hand is subject to security held by JTI-TM, it fails to recognize that the treatment of this asset was considered by the Quebec Court of Appeal as follows:

> [1158] …The mere fact that the contracts between JTM and other entities may be legal or valid for tax purposes, which is not for this Court to decide, does not lead to the conclusion that the Court cannot take them into account when assessing the company's actual assets.[36]

39. This holding was made in the context of the assessment by the Quebec Superior Court that the accumulated unpaid interest owed by JTIM to JTI-TM could be taken into account in determining the ability of JTIM to pay punitive damages.[37] This holding by the Quebec Court of Appeal can be applied equally to the obligation of JTIM to pay all upfront cash in accordance with the terms of the M&M Plan. If JTIM fails to comply with the terms of its M&M Plan, it will suffer the consequences. This is certainly not a reason to refuse to sanction the plan.

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[36] *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358 at para. 1158.
[37] *Létourneau c. JTI-MacDonald Corp.*, 2015 QCCS 2382 at para. 1102.

40. The doctrines of issue estoppel[38] and abuse of process[39] prevent JTIM from re-litigating the determinations made in the Class Action Judgments regarding the TM Transactions and other matters.

41. In March 2019, pending the comeback hearing or further order, this Court suspended the payment of principal, interest and royalty payments by JTIM to JTI-TM (the "**Suspension Order**").[40] The Suspension Order was not appealed.

42. In June 2019, after the QCAPs filed a motion to prevent JTI-TM's receiver from applying a deposit of $1.3 million in set-off against unpaid royalties (the "**Set-Off Issue**"), this Court deferred the Set-Off Issue to the Court-Appointed Mediator, "***without prejudice to the ability of the parties to return the issue to this Court if need be***".[41]

43. Since 2019, neither JTIM nor JTI-TM has sought an order from this Court to vary or terminate the Suspension Order or to adjudicate the Set-Off Issue, although nothing prevented them from doing so.[42] This demonstrates an acknowledgment by those

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[38] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 18, in which the Supreme Court of Canada stated: "*The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. …An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided*" and at paras. 24-25, 54; *Northland Bank (In Liquidation) v. Walters*, 1998 CanLII 2376 at para. 24 (BC SC), appeal dismissed, 1999 BCCA 175.

[39] *Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63 at paras. 35, 37-38: "*Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice*", and paras. 42-43, 47 and 51.

[40] Endorsement of Justice McEwen dated March 19, 2019 and unofficial transcript. Aziz Affidavit at para. 31 and its Exhibit E.

[41] Endorsement of Justice McEwen dated June 26, 2019. Trudel Affidavit at para. 21.

[42] Although Mr. Aziz alleges at para. 33 of the Aziz Affidavit that "*the Mediator was not prepared to address the issue of royalties as a discrete matter at that time*", the JTIM Monitor's Fifth Report actually stated that that issue "*is no longer being pursued as a discrete issue in the mediation*". See Trudel Affidavit at paras. 22-24 and exhibit B of the Trudel Affidavit at para. 21.

parties that the Suspension Order is well-founded and appropriate and that the Set-Off Issue would be resolved as part of the mediation.[43]

44. Despite JTIM's argument that the M&M Plan would prohibit JTI-TM from receiving payments for licensed property contrary to s. 11.01 of the CCAA,[44] that provision only limits the scope of orders made under s. 11 and 11.02 CCAA, whereas the M&M Plan would be sanctioned pursuant to s. 6 CCAA. The Suspension Order,[45] which is *res judicata*, was made pursuant to Rules 37.14(1) and 39.01(6) of the *Rules of Civil Procedure* (Ontario) due to a lack of full and fair disclosure by JTIM about the TM Transactions.

45. JTIM alleges that it owes JTI-TM approximately $1.8 billion of debt payments and $94 million of royalties, and that JTIM's Upfront Contribution under the M&M Plan is approximately $1.6 billion.[46] If JTIM's arguments were to be accepted, it would have no cash to contribute to the M&M Plan upon its sanction, yet it represented on multiple occasions that it has been negotiating in good faith and with due diligence.[47]

D. JTIM's threat of non-cooperation does not make the M&M Plan "unworkable"

46. JTIM and JTI-TM have sought to add another factor to the analysis, being their self-serving position that the M&M Plan is "unworkable" because JTIM and its affiliates will not support or implement the M&M Plan.[48]

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[43] Trudel Affidavit at para. 23.
[44] Factum of JTIM dated January 24, 2025 at para. 31.
[45] Endorsement of Justice McEwen dated March 19, 2019 and unofficial transcript.
[46] Aziz Affidavit at paras. 21, 24, 38.
[47] See for example the Factum of JTIM (Re: Stay Extension) dated October 29, 2024 at para. 14; and the Affidavit of William Aziz dated January 15, 2025 at para. 17(i) in the JTIM Motion Record (Re: Stay Extension) dated January 15, 2025, tab 2.
[48] Responding Factum of JTIM at paras. 22-26; Factum of JTI-TM at paras. 47-53.

47. All plans depend on the cooperation of those who would implement them and the M&M Plan is no exception. A debtor's threat not to comply with the terms of an otherwise feasible plan does not make that plan inherently unworkable or unsanctionable.[49] If such a threat was sufficient to sabotage the sanction of a CCAA plan, any debtor could easily and unilaterally prevent the sanction of any plan that was not proposed by it, despite having no right to vote.

48. Courts have often rejected creditors' arguments that they will vote against or not cooperate with any plan or restructuring, as their commercial interests may ultimately result in a different decision, especially in light of their previous behavior.[50] The fact that JTIM instituted CCAA proceedings and participated in almost six years of negotiations culminating in an M&M Plan that relies on JTI-TM's cooperation suggests that JTIM and its affiliates may cooperate if this Court sanctions the M&M Plan.[51]

49. After all, there is no practical alternative to the M&M Plan, and the additional indefinite negotiations proposed by JTIM and JTI-TM after almost six years of negotiations is not an option.[52] If a debtor fails to comply with the terms of a sanctioned plan, it will take the consequences.

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[49] In *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re*, 1998 CanLII 14907 (ON SC), the decision relied upon by JTIM at para. 11 of its Responding Factum on the issue of "workability", the Court noted at para. 31 that the "Lavigne Proposal" was "*a political and social solution*" and "*not something which either the debtor (the Red Cross) or the creditors (the Transfusion Claimants amongst them) have control over to make happen*", contrary to the present case in which JTIM and its affiliates simply threaten to not implement the M&M Plan.

[50] *CCAA and Sharp-Rite Technologies*, 2000 BCSC 122 at paras. 26-28; *Rio Nevada Energy Inc. (Re)*, 2000 CanLII 28206 at paras. 25 (AB KB); *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 at paras. 40-44.

[51] Trudel Affidavit at paras. 12-13.

[52] *Imperial Tobacco Limited*, 2024 ONSC 6061 at para. 35.

E. Consent of Tobacco Companies not required for sanction

50. Consent of a debtor is not required for the sanction of a compromise or arrangement under the CCAA, s. 6(1) of which requires only the stipulated majorities in number and value of voting creditors.

51. The CCAA does not provide the debtor company with any right to vote on plans, despite that plans may be proposed by non-debtor actors, such as creditors.

52. Section 6(1)(a) of the CCAA states that a sanctioned compromise or arrangement is binding not only on the creditors but also "*on the company*", establishing that the sanction is sought not only to bind dissenting creditors, but also the debtor.[53]

53. Although some decisions have likened a CCAA plan to a contract to apply the principles of contractual interpretation, judges have clarified that parties become bound to a CCAA plan not by mutual agreement but by law and court sanction.[54]

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[53] Section 6(1)(b) CCAA also extends the binding effect to "*the trustee in bankruptcy or liquidator and contributories of the company*", where applicable.

[54] See *Michaud c. Steinberg inc.*, 1993 CanLII 3991 at p. 23-24 (QC CA), in which Justice Delisle stated "*I do not see anything in clause 12.6 that justifies refusing to sanction the arrangement. However, I agree that this clause is susceptible of conveying a wrong message.* ***It is not further to a consent deemed to have been given by all the creditors that the arrangement produces the effects*** *enumerated in paragraphs a), b) and c) of this clause,* ***but rather****, on the one hand,* ***by the effect that the CCAA grants, in its section 6, to an arrangement sanctioned by the authority having jurisdiction*** *and, on the other hand, by the priority granted by the same statute, in its section 8, over any stipulation previously agreed to by the parties…It is true that an arrangement is an offer that, to be submitted to the authority having jurisdiction to sanction it, must be accepted by the creditors in the proportions required by the CCAA, but* ***it is not correct, with respect, to qualify the resulting legal situation as a "contract binding the parties". The consequence of the sanctioning of an arrangement is to render it enforceable by the sole effect of the law, not to make compulsory the stipulations flowing from a contract***" [Emphasis added]; *Cable Satisfaction International Inc. v. Richter & Associés Inc.*, 2004 CanLII 28107 at paras. 34-36 (QC CS), in which Justice Chaput approved an amended CCAA plan proposed by noteholders, against the wishes of the debtor company, stating: "*[34] The Contestation raises that the consent of Csii should have been obtained to the proposed amendment to the Plan, as a plan under the C.C.A.A. is to be considered a contract. [35]* ***That is not the case. As is provided in section 4 of the C.C.A.A., the arrangement or compromise is a proposal****. It is a plan of terms and conditions for the arrangement or compromise to be presented to the creditors for their consideration and eventual acceptance. [36]* ***In the case of Michaud, Delisle, J. commented that the binding force of the arrangement or compromise arises from the law itself through the sanction of the Court, and not from the effect of mutually agreed upon the terms as in a contract****…*" [Emphasis added], cited in *Re Calpine Canada Energy Limited (Companies' Creditors*

54. The approach adopted in those cases is consistent with s. 6(1)(a) of the CCAA, which:

    a. binds the debtor company to sanctioned plans; and

    b. binds all creditors to sanctioned plans, whether or not they voted in favour thereof.

55. This Court's directions to the Court-Appointed Mediator and Monitors to develop the M&M Plan, which were not appealed, did not require that the plans be agreed to by the Tobacco Companies, but that the plans "*will have the best opportunity to be considered to be fair and reasonable to all three Applicants and to their creditors*".[55]

56. RBH argues that its consent is required with respect to the determination of claims,[56] even as it admits that s. 20(1)(a)(iii) of the CCAA allows the Court to make such determination.

57. Having enjoyed almost six years of the benefits and protections of the CCAA at their own request, the Tobacco Companies must also bear the consequences of being CCAA debtors, which include the proposal and potential sanction of the M&M Plan.

58. The obligations that would be imposed on the Tobacco Companies by the M&M Plan are not as onerous as the obligations to which they are already subject by virtue of the Class Action Judgments, which have been held in abeyance for nearly six years

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Arrangement Act), 2007 ABQB 504 at para. 53; *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587 at para. 68 [*Metcalfe & Mansfield*], leave to appeal denied, 2008 CanLII 46997 (SCC); *Arrangement relatif à FormerXBC Inc. (Xebec Adsorption Inc.)*, 2023 QCCS 4975 at paras. 30-31, in which the Superior Court of Quebec cited the recognition of this principle by the Ontario Court of Appeal in Metcalfe & Mansfield: "*[31] The Court of Appeal recognizes that* ***the contractual reasoning has its limits since the plan is frequently imposed on an unwilling minority of creditors****. It however concludes that the minority is protected to some extent by the double majority rule.*" [Emphasis added]

[55] *Imperial Tobacco Canada Limited*, 2023 ONSC 5449 at para. 20.

[56] Factum of RBH dated January 24, 2025 at para. 54.

during the CCAA proceedings, to the benefit of the Tobacco Companies and to the prejudice of the QCAPs, many of whom have died while waiting for justice.[57]

59. If the M&M Plan receives the approval of this Court, the Tobacco Companies will be bound thereto as a matter of law. Any Tobacco Company that does not implement its M&M Plan, as was threatened by JTIM, will suffer the inevitable consequences.

60. Thus, JTIM's characterization of itself as an "*operational debtor*"[58] changes nothing; in the absence of a sanctioned M&M Plan, it cannot continue to operate.

61. CCAA courts have broad powers to render orders affecting debtor companies without their consent. By way of example, in *Re S.M. Group Inc.*[59], the Superior Court of Quebec granted a CCAA application made by creditors rather than the one submitted by the debtor group, and appointed a chief restructuring officer with broad additional powers to accomplish a restructuring without management interference.

62. Finally, in considering fairness, the Court should favour a result that is fair to the victims of the Tobacco Companies' egregious misconduct. The creditors unanimously consider the M&M Plan to be fair and reasonable and the Quebec victims who have suffered the horrors caused by the Tobacco Companies' faults have waited long enough for relief.

63. That one or more of the Tobacco Companies, which are obtaining the enormous financial benefit of compromising claims of about $1 trillion against them for a fraction

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[57] *Létourneau c. JTI-MacDonald Corp.*, 2015 QCCS 2382 at para. 1199.
[58] Aziz Affidavit at para. 20.
[59] (24 August 2018), Montreal, 500-11-055122-184 at paras. 1-2, 5, 44, 57-58 (QC SC).

of that amount, may feel that they are getting a worse deal than any other Tobacco Company should be of little concern to the Court in these circumstances.

PART IV – CONCLUSIONS

64. The Tobacco Companies have managed to delay their obligations throughout 21 years of civil litigation in Quebec, and almost six years of CCAA protection, including thousands of hours of mediation. In ordering provisional execution of the Class Action Judgments in 2015, Justice Riordan stated "*Class Members are dying…it is high time that the Companies started to pay for their sins*".[60]

65. In 2023, this Court directed the Court-Appointed Mediator and Monitors to prepare the M&M Plan, which need not be perfect, and observed that "*It is now time to move from observable activity to meaningful action*".[61]

66. CCAA protection is not intended to be used by insolvent companies as a permanent shield from their obligations. It provides temporary space for the proposal and approval of a plan, failing which CCAA protection ends.

67. Although they all knew in 2023 that the Court-Appointed Mediator and Monitors would propose a plan, knew the terms of the M&M Plan as it was being drafted, and knew the consequences of a failed CCAA proceeding, none of the Tobacco Companies proposed an alternative plan.

68. The M&M Plan is the only option that was proposed to creditors, and it is the only option that has been submitted for sanction by this Court.

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[60] *Létourneau c. JTI-MacDonald Corp.*, 2015 QCCS 2382 at paras. 1198-1200.
[61] *Imperial Tobacco Canada Limited*, 2023 ONSC 5449 at para. 21.

69. If this Court were to accept the positions of RBH and JTIM that the most fundamental aspects of the M&M Plan were prepared without their consent, it would also have to conclude that they have been *lying in the weeds* for years, accomplishing nothing during thousands of hours of mediation while representing to this Court that progress was being made, and benefitting from all of the advantages of CCAA protection with no objective other than to gain time by simply criticizing the restructuring efforts of the Court-Appointed Mediator, Monitors and Claimants.

70. The inescapable truth is that the M&M Plan was negotiated and prepared with the involvement of all of the Tobacco Companies, iteration by iteration. The Court-Appointed Mediator and Monitors faithfully incorporated in the M&M Plan the foundational principles that were accepted by all parties during the mediation, including by RBH and JTIM. Moreover, it represents the best and only possible solution that can be achieved in these CCAA Proceedings. If any better solution could have been negotiated and proposed to creditors, it would have been done by now.

71. The suggestion by JTIM and JTI-TM to return to the negotiating table to resolve issues as among themselves is simply another callous strategy to continue to delay the inevitable, while tobacco victims die.

72. It is disingenuous for JTIM and JTI-TM to paint JTI-TM as a victim of the M&M Plan, considering (i) prior joint proposals of the Tobacco Companies, (ii) the foundational agreements reached during the mediation process, (iii) the Suspension Order that has never been brought back before the Court or varied, (iv) the findings of the Quebec Courts that the TM Transactions were a sham, and (v) JTI-TM is an Unaffected Creditor whose alleged claims are not being compromised.

73. None of the objections made by RBH, JTIM or JTI-TM affects the ability of this Court to sanction the M&M Plan, which is fair, reasonable and workable and the only viable option for a successful CCAA restructuring.

74. Respectfully, the M&M Plan should be sanctioned by this Court.

January 27, 2025

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re*, 2000 CanLII 22488
2. *Lutheran Church Canada (Re)*, 2016 ABQB 419
3. *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 4450
4. *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44
5. *Northland Bank (In Liquidation) v. Walters*, 1998 CanLII 2376, appeal dismissed, 1999 BCCA 175
6. *Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63
7. *CCAA and Sharp-Rite Technologies*, 2000 BCSC 122 at paras. 26-28
8. *Rio Nevada Energy Inc. (Re)*, 2000 CanLII 28206 at paras. 25 (AB KB)
9. *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 at paras. 40-44
10. *Michaud c. Steinberg inc.*, 1993 CanLII 3991 (QC CA)
11. *Cable Satisfaction International Inc. v. Richter & Associés Inc.*, 2004 CanLII 28107 (QC SC)
12. *Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act)*, 2007 ABQB 504
13. *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587, leave to appeal denied, 2008 CanLII 46997 (SCC)
14. *Arrangement relatif à FormerXBC Inc. (Xebec Adsorption Inc.)*, 2023 QCCS 4975
15. *Re S.M. Group Inc.,* (24 August 2018), Montreal, 500-11-055122-184 (QC SC)

SCHEDULE "B"

TEXT OF STATUTES & REGULATIONS

***Companies' Creditors Arrangement Act*, RSC 1985 c C-36**

Compromises to be sanctioned by court

6 (1) If a **majority in number representing two thirds in value** of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, **the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding**

(a) **on all the creditors or the class of creditors**, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, **and on the company**; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

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.

Determination of amount of claims

20 (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(a) the amount of an unsecured claim is the amount

(i) in the case of a company in the course of being wound up under the Winding-up and Restructuring Act, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the

amount is to be **determined by the court** on summary application by the company or by the creditor; and

(b) the amount of a secured claim is the amount, proof of which might be made under the Bankruptcy and Insolvency Act if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, to be established by proof in the same manner as an unsecured claim under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

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**
IMPERIAL TOBACCO CANADA LIMITED AND **IMPERIAL TOBACCO COMPANY LIMITED** — **Court File No. CV-19-616077-00CL**
ROTHMANS, BENSON & HEDGES INC. — **Court File No. CV-19-616779-00CL**

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

REPLY FACTUM OF THE QUEBEC CLASS ACTION PLAINTIFFS
(Re: JTIM, JTI-TM and RBH Objections to the Sanction Orders Returnable commencing January 29-31, 2025)

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