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

JOINT REPLY FACTUM OF THE MEDIATOR & IMPERIAL & RBH MONITORS

Motions for Meeting Orders and Claims Procedure Orders
(Returnable October 31, 2024)

October 30, 2024

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PART I – INTRODUCTION[1]

1. The CCAA Plans are "not up for approval before [the Court] today".[2] Rather, the motions before the Court ask only that the Court take a "procedural step" toward its ultimate review of the CCAA Plans several months from now—assuming, of course, that the required double majority of Affected Creditors approve the CCAA Plans.[3] The Court's inquiry at this stage of the proceedings is thus limited to whether the CCAA Plans are capable of clearing the "rather low" hurdle of not being "doomed to fail".[4]

2. Despite the litany of objections advanced against the CCAA Plans by JTIM and its subsidiary JTI-Macdonald TM Corp. ("**JTI-TM**"), JTIM accepts that whatever lingering issues remain "are solvable".[5] That acknowledgment should be dispositive here. If this Court has approved a meeting order even where a critical stakeholder group is "firmly opposed to [a] plan as presently constituted", it most certainly should do so where the opposing stakeholder openly acknowledges the possibility of achieving a consensual resolution.[6]

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1 This Reply Factum is jointly filed by (i) the Honourable Warren K. Winkler, K.C., in his capacity as the Court-Appointed Mediator (the "**Court-Appointed Mediator**") in the above-captioned coordinated proceedings (the "**CCAA Proceedings**") under the Companies' Creditors Arrangement Act ("**CCAA**"); (ii) FTI Consulting Canada Inc. ("**FTI**") in its capacity as court-appointed monitor of Imperial Tobacco Canada Limited ("**ITCAN**") and Imperial Tobacco Company Limited (Collectively with ITCAN, "**Imperial**"); and (iii) Ernst & Young Inc. ("**EY**") in its capacity as monitor for Rothmans Benson & Hedges Inc. ("**RBH**"). Deloitte Restructuring Inc. ("**Deloitte**") in its capacity as monitor for JTI-Macdonald Corp. ("**JTIM**") does not join this Reply Factum. JTIM, ITCAN, and RBH are collectively referred to as "**Tobacco Companies**" or "**Applicants**". FTI, EY and Deloitte are collectively referred to as the "**Monitors**". Capitalized terms not defined herein have the meanings given to them in the Joint Factum of the Monitors filed on October 28, 2024 or the CCAA plan materials filed with the Court as part of the motion record.

2 *Stelco Inc., Re*, 2005 CanLII 36272 (ONSC) [*Stelco* ONSC 2005] at para. 7, aff'd 2005 CanLII 40140 (ONCA).

3 *Jaguar Mining (Re),* 2014 ONSC 494 at para. 48.

4 *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 3698 at para. 7; *U.S. Steel Canada Inc., Re*, 2017 ONSC 1967 at para. 12 [*US Steel* ONSC].

5 JTIM Responding Factum at para. 2.

6 *Stelco* ONSC 2005, *supra* at para. 7; see also *Philip's Manufacturing Ltd., Re*, 1992 CarswellBC 542 (CA) at para. 7 (applying "doomed to fail" test and rejecting creditor argument that it would not

3. After five years of intensive Mediation, the parties are on the cusp of achieving the long-sought consolidated, comprehensive pan-Canadian global settlement of the Tobacco Claims. Particularly in such circumstances, to borrow Justice Farley's words, "it is better to move forward than backwards, especially where progress is required."[7] The motions should be granted and all parties should move these cases toward a sensible conclusion.

PART II – ARGUMENT

A. The Concerns Raised by JTIM and JTI-TM Should Be Dealt with at the Sanction Hearings, Assuming Creditor Approval Is Received

4. JTIM and its related party JTI-TM argue that the CCAA Plans are doomed to fail principally because (i) the CCAA Plans may not be imposed on JTIM without its consent;[8] (ii) the CCAA Plans artificially classify JTI-TM as an Unaffected Creditor despite compelling it to subordinate its position as a secured creditor;[9] and (iii) the CCAA Plans are otherwise neither fair, nor reasonable, nor workable.[10] Although JTIM and JTI-TM are incorrect on each score, the Court should not delve into these issues at this phase of the proceedings because each of these objections should be dealt with as part of any sanction hearing, assuming the CCAA Plans command the support of the required double majority of Affected Creditors.

(i) *Although The Court May Impose Commercial Terms on an Operational CCAA Debtor, That Issue Should Not Be Dealt With Today*

5. Although the CCAA is "skeletal in nature" and "does not contain a comprehensive code that lays out all that is permitted or barred", it remains a statute.[11] And as with any statute, "[t]he first and cardinal principle of statutory interpretation is that one must look to the plain words of the

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facilitate any plan); *Can-Pacific Farms Inc., Re*, 2012 BCSC 760 at para. 8 (applying "doomed to fail" test and rejecting bank argument that it "will oppose any plan").

7 *Stelco* ONSC 2005, *supra* at para. 7.

8 JTIM Responding Factum at para. 21.

9 JTIM Responding Factum at para. 21; JTI-TM Receiver Responding Factum at para. 2.

10 JTIM Responding Factum at paras. 1, 61.

11 *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587 at para. 44.

provision".[12] A plain reading of section 6 of the CCAA forecloses JTIM's argument that the Court may not impose "commercial terms on a CCAA debtor that have not otherwise been agreed".[13]

6. Section 6 of the CCAA provides in relevant part:

> **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***; …

7. Simply put, where the required double majority of creditors have approved a plan and the court has sanctioned it, that plan is binding "on all the creditors … ***and on the company***"—regardless of the company's consent. JTIM concedes that, "[u]nlike the creditors, the company does not get to vote on its own plan".[14] And tellingly, JTIM points to nothing in section 6—or anywhere else in the statutory scheme—that would provide support for its assertion that any plan must be "consented to by JTIM".[15]

8. Instead, JTIM points to statements in *Stelco* to the effect that a supervising judge is "not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts".[16] But as JTIM concedes, those statements concerned a

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12 *R v. D.A.I.*, 2012 SCC 5 at para. 26.

13 JTIM Responding Factum at para. 15.

14 JTIM Responding Factum at para. 16.

15 JTIM Responding Factum at para. 22.

16 JTIM Responding Factum at para. 17, quoting *Stelco Inc. (Bankruptcy), Re* (2005), 75 O.R. (3d) 5 (CA) [*Stelco* March 2005 ONCA] at para. 44. Of course, *Stelco* was overturned in this respect by

supervising judge's authority ***under section 11*** of the CCAA—not under section 6.[17] The Court does not need to rely on its discretion under section 11 to sanction a plan. As a result, the question of the respective roles of a debtor company's board versus that of the Court never arises. Indeed, a debtor company has no necessary role to play in approving any plan of compromise or arrangement under section 6, because the CCAA is clear that any such plan could be introduced and then approved by creditors alone.[18]

9. The proposition advanced by JTIM that a plan requires the consent of the debtor company not only defies logic and common sense it is contrary to the purpose of the statute. Unsurprisingly then, there is authority for plans being approved over the objection of a debtor. In *Cable Satisfaction*, for example, the debtor insisted that "the consent of the debtor company must be obtained" as a predicate to the court being able to sanction the plan.[19] The court rejected that argument outright because, under the CCAA, the only requirement is for a plan "to be presented to the creditors for their consideration and eventual acceptance."[20] In another case, the court

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section 11.5 of the CCAA, adopted by Parliament in 2009. As Professor Sarra notes, section 11.5 "is a very helpful provision for the monitor and creditors to get the directors to focus on the *CCAA* proceeding, as the board operates in the shadow of this statutory language …". Dr. Janis P. Sarra, *Rescue! The Companies Creditors Arrangement Act*, 2d ed., p. 300.

17 JTIM Responding Factum at para. 17; see also *Stelco* March 2005 ONCA, *supra* at para. 44 (discussing "[w]hat the court does under s. 11").

18 See CCAA, ss. 4, 5; see also *Re Le Groupe SMI Inc, et al*, (24 August 2018), Montreal, Que SC 500-11-055122-184. For the same reason, JTIM's emphasis on the fact that the Court empowered the Monitors to develop the CCAA Plans under section 11 is thus a red herring, because the same plans could be withdrawn by the Monitors and introduced by any creditor without reliance on any section 11 discretion.

19 *Cable Satisfaction International Inc. v. Richter & Associés inc.*, 2004 CarswellQue 810 (SC) [*Cable Satisfaction*] at paras. 20, 34.

20 *Cable Satisfaction*, *supra* at para. 35. For the same reason, JTIM's reliance on previous statements from courts analogizing a plan to a contract goes too far. To be sure, principles of contractual interpretation can be helpful in interpreting plans. See, *e.g.*, *Canadian Red Cross/Société de la Croix-Rouge, Re*, 2002 CanLII 49603 (ONSC), at para. 13; *SFC Litigation Trust v. Chan*, 2019 ONCA 525, at paras. 57-58. But as the statutory language itself indicates, "a compromise or an arrangement is a ***propos[al]*** between a debtor company" and its creditors that is subsequently subject to creditor and court approval. See CCAA, ss. 4 & 5 (emphasis added), s. 6. As a result, the plan is rendered "enforceable by the sole effect of the law" and "it is not correct … to qualify the resulting legal situation as a 'contract binding the parties'." See *Steinberg Inc. c. Michaud*, 1993 CarswellQue 2055 (CA) at para. 84 (informal translation).

similarly rejected a debtor company's "unilateral move" to withdraw a plan it had proposed after the plan had obtained creditor approval.[21] The court determined that no objection could be heard from a debtor company to a creditor seeking the court's sanction of a plan that had secured the required creditor approval.[22]

10. As noted above, however, the Court should not delve into this debate at this point in the proceedings. JTIM agrees that the Court's power to proceed with a meeting order is an "exercise of discretion under sections 4 and 5 of the CCAA".[23] And this Court has previously granted a meeting order on the basis "that there has been no determination of … the jurisdiction to approve the Plan in its current form [and] whether the Plan complies with the CCAA".[24] The substantial public interest in moving these cases forward in a timely manner counsels in favour of the Court exercising its discretion to do the same here.[25]

(ii) *The JTI-TM Subordination Issue Should Not Be Dealt with at this Stage*

11. JTI-TM's receiver contends that JTI-TM "is not a party to these CCAA proceedings" and seeks to emphasize its separate corporate existence from JTIM.[26] Similarly, JTI-TM emphasizes that it is now under the control of a privately appointed receiver.[27] But these statements serve to obscure important context about the relationship between JTI-TM and the Applicant JTIM as it relates to the operation of the CCAA Plans.

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21 *Paris Fur Co. v. Nu-West Fur Corp.*, 1950 CarswellQue 23 (SC) [*Paris Fur*] at p. 2.

22 *Paris Fur*, *supra* at p. 2.

23 JTIM Responding Factum at para. 10.

24 *Sino-Forest Corp. (Re)*, 2012 ONSC 5011 at para. 2.

25 *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 40.

26 See JTI-TM Receiver Responding Factum at paras. 8, 18.

27 JTI-TM Receiver Responding Factum at para 17.

12. JTIM's Tobacco Company Group includes both its subsidiary JTI-TM and its parent JT Canada LLC Inc. ("**JT Parent**").[28] As is typical in CCAA proceedings, these related companies are beneficiaries of a release under the JTIM CCAA Plan.[29] That is, despite their purported corporate separateness, both JTI-TM and JT Parent are the beneficiaries of the JTIM CCAA Plan ***precisely because they are related parties of JTIM***. Furthermore, were they truly independent, such releases would not be necessary nor would they have been sought by JTIM.

13. What is more, although JTI-TM seeks to leave the impression that JTIM "exercises no control over" JTI-TM and that an independent party is now JTI-TM's "sole directing mind",[30] the reality is to the contrary. As JTI-TM concedes, JT Parent as JTI-TM's principal creditor appointed the private receiver that now manages JTI-TM's affairs.[31] And as a leading treatise explains, a private receiver "takes instructions from the security holder to whom the receiver is responsible and is ***clearly acting as the agent of the security holder***".[32] Thus, whatever protests JTI-TM makes in its factum, the bottom line is that a related company remains firmly in control of JTI-TM.

14. In such circumstances, JTI-TM cannot complain about the subordination of its secured debt owed by its own parent when it is receiving a significant benefit under the JTIM CCAA Plan based solely on its status as a related company. Indeed, JTI-TM cannot argue that the CCAA Plans are unfair because it is purportedly an independent, "non-debtor"[33] entity, while simultaneously benefiting by being released under the CCAA Plans as a related party of the debtor company.

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28 See JTIM CCAA Plan, s. 1.1 definition of "Tobacco Company Group".

29 See JTIM CCAA Plan, s. 1.1 definition of "Released Parties".

30 JTI-TM Receiver Responding Factum at para. 17.

31 JTI-TM Receiver Responding Factum at para. 16.

32 Bennett on Bankruptcy, 25th ed. (Toronto: LexisNexis Canada, 2023) at p. 932 (emphasis added).

33 See JTI-TM Receiver Responding Factum at para 73.

15. In any event, the Court should not tackle these issues—including the assertion by some Claimants that the inter-company debt transactions involving JTI-TM are a "sham"[34]—at this juncture. To the extent that resolution of the subordination issue is necessary for the implementation of the CCAA Plans' implementation, such issues are "properly addressed … by the creditors in the creditors' meeting or in the sanction hearing before the Court if a plan of arrangement is approved," as this Court has noted in a similar context.[35] In the Court-Appointed Mediator's and Imperial and RBH Monitors' view, the Court should do the same here.

(iii) *Concerns About Allocation, the Metric, and Other Matters Can Be Resolved at the Sanction Phase*

16. Finally, the host of other concerns raised by JTIM (and by RBH, with respect to the allocation) are all properly deferred until the sanction phase. As RBH acknowledges, the fact that the allocation issue remains unresolved does not "stand in the way of progressing these proceedings" with the Meeting Orders and Claims Procedure Orders.[36] JTIM's remaining concerns do not call for a contrary conclusion. Significantly, the issues raised by JTIM are readily distinguishable from other cases where the Court has rejected a plan for filing. For example, the JTIM CCAA Plan does not require a party to contravene a prior court order[37] or post-filing debtor-in-possession credit agreement.[38]

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34 See Affidavit of André Lespérance (October 28, 2024) at para. 16.

35 *U.S. Steel Canada Inc. (Re)*, 2016 ONSC 7899 at para. 73. Separately, JTI-TM's underlying argument regarding section 11.01 should be dismissed outright. By the very wording of section 11.01, that provision is limited to orders made under section 11 or 11.02. The provision of the CCAA that deals with the sanctioning of plans is section 6, not section 11, as discussed above. To the extent JTI-TM is challenging the five-year-old stay of its royalty payments, that argument is long foreclosed by JTI-TM's failure to challenge the stay and subsequent referral to mediation in a timely manner. Parties seeking either to vary or appeal a CCAA must act "post haste". *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550 at para. 56, aff'd 2019 ABCA 314, aff'd 2021 SCC 30. As this Court has admonished, "[l]ying in the weeds is not an option". *Air Canada, Re*, 2004 CarswellOnt 1843 (SC [Commercial List]), at para. 3.

36 RBH Responding Factum at para. 4.

37 *Target Canada Co., Re*, 2016 ONSC 316.

38 *Re Crystallex International Corporation*, 2013 ONSC 823 at para. 9.

PART III – CONCLUSION

17. After five years of intensive discussions, the end is now in sight. In the Court-Appointed Mediator and Imperial and RBH Monitors' respectful opinion, it is no time to relent. Thus, for the reasons stated above and in the Mediator and Monitors' Joint Factum, the Meeting Orders and Claims Procedure Orders should be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of October, 2024.

per
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SCHEDULE "A"

LIST OF AUTHORITIES

1. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10.
2. *Air Canada, Re*, 2004 CarswellOnt 1843 (SC [Commercial List]).
3. Bennett on Bankruptcy, 25th Edition, LexisNexis Canada, 2023.
4. *Cable Satisfaction International Inc. v. Richter & Associés inc.*, 2004 CarswellQue 810 (SC).
5. *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550.
6. *Canadian Airlines Corp. (Re)*, 2000 CanLII 28202 (ABKB).
7. *Canadian Red Cross/Société de la Croix-Rouge, Re*, 2002 CanLII 49603 (ONSC).
8. *Can-Pacific Farms Inc., Re*, 2012 BCSC 760.
9. *Jaguar Mining (Re)*, 2014 ONSC 494.
10. *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 3698.
11. *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587.
12. *Paris Fur Co. v. Nu-West Fur Corp.*, 1950 CarswellQue 23 (SC).
13. *Philip's Manufacturing Ltd., Re*, 1992 CarswellBC 542 (CA).
14. *Re Crystallex International Corporation*, 2013 ONSC 823.
15. *Re Le Groupe SMI Inc, et al*, (24 August 2018), Montreal, Que SC 500-11-055122-184.
16. *R v. D.A.I.*, 2012 SCC 5.
17. *SFC Litigation Trust v. Chan*, 2019 ONCA 525.
18. *Sino-Forest Corp. (Re)*, 2012 ONSC 5011.
19. *Steinberg Inc. c. Michaud*, 1993 CarswellQue 2055 (CA).
20. *Stelco Inc. (Bankruptcy), Re* (2005), 75 O.R. (3d) 5 (CA).
21. *Stelco Inc., Re*, 2005 CanLII 36272 (ONSC), aff'd 2005 CanLII 40140 (ONCA).
22. *Target Canada Co., Re*, 2016 ONSC 316.
23. *U.S. Steel Canada Inc. (Re)*, 2016 ONSC 7899.

24. *U.S. Steel Canada Inc., Re*, 2017 ONSC 1967.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

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

Compromise with unsecured creditors

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

Compromise with secured creditors

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

[…]

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.

[…]

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.

[…]

Stays, etc. — initial application

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 10 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.

[…]

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