

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

**RESPONDING MOTION RECORD OF THE CANADIAN CANCER**  
**SOCIETY**  
**(Returnable October 2, 2019)**

September 24, 2019

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**TO: THE COMMON SERVICE LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
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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**  
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AND IN THE MATTER OF A PLAN OF COMPROMISE  
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**tab 1**

Court File No. CV-19-615862-00CL  
Court File No. CV-19-616077-00CL  
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**ONTARIO**  
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Applicants

**NOTICE OF MOTION**  
**(CANADIAN CANCER SOCIETY)**  
**(RETURNABLE OCTOBER 2, 2019)**

The Canadian Cancer Society (the "CCS") will make a motion to Justice McEwen presiding over the Commercial List on October 2, 2019 at 10:00 a.m., or as soon thereafter as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

**PROPOSED METHOD OF HEARING:** The Motion is to be heard orally.

**THE MOTION IS FOR:**

1. An Order providing the following relief:
  - a. if necessary, abridging the time for service of this Notice of Motion and the Responding Motion Record and dispensing with service on any person other than those served;
  - b. permitting the continued participation of the CCS in these CCAA proceedings;
  - c. permitting the participation of the CCS in the mediation process in these CCAA proceedings; and
2. Such further and other relief as this Court may deem just.

**THE GROUNDS FOR THE MOTION ARE:**

3. At the hearing on June 26, 2019, the Court indicated that CCS would need to bring a motion and file materials to explain its interest in order to make further submissions going forward, and in order to participate in the mediation process, and that the same would also apply to anyone else without a financial interest. The Court also indicated in part that it wanted to ensure that there was authority for CCS to participate;
4. CCS has a direct financial interest in these CCAA proceedings, even though it is not a creditor;
5. The extent to which any settlement in these CCAA proceedings contains provisions to reduce tobacco use will in turn impact CCS financially in terms of financial resources that will need to be devoted to patient services, public education/information and research to

deal with tobacco-related cancer, thus diverting financial resources from other cancer priorities and from other individuals with cancer;

6. U.S. tobacco settlements have included public health measures to reduce tobacco use;
7. In addition to having a direct financial interest, CCS also has an interest in these CCAA proceedings as a "social stakeholder";
8. Case law under the *Companies' Creditors Arrangement Act* (the "CCAA") clearly recognizes the importance of the broader public interest, social stakeholders, and "other" interests besides traditional creditors in CCAA proceedings, and the sooner those "other" interests can be heard by the court in CCAA proceedings, the better;
9. CCS is a leader in tobacco control in Canada. It has extensive experience and expertise regarding tobacco control legislation. CCS also engages in public education/information and cessation programmes to reduce tobacco use;
10. CCS takes no position as to which claimant should receive which share of the "pie" in any settlement in these proceedings;
11. There are 17 health/tobacco control organizations from across Canada that have provided letters indicating that they do not intend to apply to participate in the CCAA proceedings and support CCS doing so;
12. CCS is not aware of any other health/tobacco control organization that intends to apply to participate in these proceedings;
13. CCS is in a position to help facilitate a settlement in these proceedings, should there be one, by advancing tobacco control measures for inclusion in a settlement to bridge the gap between the

more than \$500 billion sought by claimants and what the tobacco companies actually will pay;

14. The Honourable Warren K. Winkler is acting as the Court-Appointed Mediator;
15. The Initial Orders, as amended and restated, generally provide, among other things, the Court-Appointed Mediator with the mandate, as an officer of the Court, to mediate a global settlement of the tobacco claims;
16. To date, CCS has not participated in the mediation process but seeks to do so;
17. The provisions of the CCAA, including section 11, and the inherent and equitable jurisdiction of this Honourable Court;
18. Such further and other grounds as counsel may advise and this Court may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the Motion:

(List the affidavits or other documentary evidence to be relied on)

1. The Affidavit of Shawn Chirrey sworn September 24, 2019 and the documents attached thereto;
2. Such further and other materials as counsel may advise and this Honourable Court may permit.

September 24, 2019

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Lawyers for Canadian Cancer Society

TO: **COMMON SERVICE LIST**

**tab 2**

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

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

**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  
JTI-MACDONALD CORP.**

**AFFIDAVIT OF SHAWN CHIRREY  
(SWORN SEPTEMBER 24, 2019)**

I, Shawn Chirrey, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am Senior Manager, Analysis, of the Canadian Cancer Society ("CCS"), a Respondent in these proceedings. As such, I have personal knowledge of the matters contained in this Affidavit. To the extent that I refer to information that is not within my personal knowledge, I have stated the source of that information and believe it to be true.
2. This Affidavit is sworn in support of the motion by CCS for an order allowing CCS to continue to participate in the proceedings before the Court, and to participate in the mediation process facilitated by the Court-Appointed Mediator.
3. I am advised by counsel: that at the hearing on June 26, 2019, the Court indicated that CCS would need to bring a motion and file materials to explain its interest in order to make further submissions going forward, and in order to participate in the mediation process, and

that the same would also apply to anyone else without a financial interest; and that the Court indicated in part that it wanted to ensure that there was authority for CCS to participate. CCS is thus bringing this motion to explain its interest and the authorities.

4. CCS has a direct financial interest in the CCAA proceedings, though CCS is not a creditor. The extent that any settlement contains measures to reduce tobacco use will in turn impact CCS financially in terms of financial resources that will need to be devoted to patient services, public education/information and research to deal with tobacco-related cancer, thus diverting financial resources from other cancer priorities and from other individuals with cancer. In the U.S., tobacco settlements include public health measures to reduce tobacco use.
5. In addition to having a direct financial interest, CCS also has an interest in the CCAA proceedings as an important public health stakeholder.
6. CCS is in a position to help facilitate a settlement, should there be one, by advancing tobacco control measures for inclusion in a settlement to bridge the gap between the more than \$500 billion sought by claimants and what the tobacco companies actually will pay, and to ensure that such measures are effective.
7. To date, CCS has not participated in the mediation process facilitated by the Court-Appointed Mediator but seeks to do so.

#### **About CCS**

8. Founded in 1938, the Canadian Cancer Society is a non-profit charity and is the largest national voluntary health charity in Canada. The CCS mission is “the eradication of cancer and the enhancement of the quality of life of Canadians living with cancer.” CCS has approximately 100,000 volunteers as well as offices in 70 communities across Canada. CCS achieves its mission through patient services, public education/information, and research, as well as advocacy in relation to relevant public policy issues. CCS is the largest national charitable funder of cancer research in Canada. The CCS national headquarters is in Toronto.

9. For the fiscal year ending January 31, 2019, the CCS financial statements indicate that CCS had total expenditures of \$163.1 million, including \$52.6 million for patient services, public education/information and other programs; \$40.4 million for research; and \$3.0 million for advocacy. CCS has spent millions of dollars in these areas, and how CCS resources are spent in the future will depend on the progress to reduce tobacco use. Reducing the incidence of tobacco-caused cancer will make the limited resources of CCS more available to fight other types of cancer and to support other people living with cancer.
10. Tobacco use is the leading preventable cause of disease and death in Canada, killing more than 45,000 Canadians each year, including about 30% of all cancer deaths. Smoking causes not only lung cancer, but also at least 16 different types of cancer, as well as heart disease, stroke, emphysema, and many other types of diseases. While there has been significant progress to reduce smoking among adults and youth, there are still almost 5 million Canadians who smoke, representing 16% of the population (Canadian Community Health Survey, 2018). A large majority of smokers begin to smoke as teenagers or pre-teens, as reported by Health Canada.
11. CCS has been a leader in tobacco control in Canada and has been instrumental in many public policy measures that have been adopted despite tobacco industry opposition. CCS has extensive experience and expertise regarding tobacco control legislation, and has been involved in such legislation dating back to at least the 1960's. CCS also engages in public education/information and cessation programmes to reduce tobacco use. The tobacco control expertise of CCS has been recognized by governmental and nongovernmental bodies. Canada is recognized as a world leader in tobacco control.
12. CCS has also participated in the processes related to the international tobacco treaty, the *WHO Framework Convention on Tobacco Control*, ratified by 181 Parties including Canada.<sup>1</sup> Much of this participation has been through the international nongovernmental organization, the Union for International Cancer Control, of which CCS is a member.

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<sup>1</sup> Canada's ratification was supported by all 13 provinces and territories.

13. CCS has a genuine interest in any global settlement of the tobacco claims. CCS has the necessary knowledge, experience and expertise to participate in the mediation process. CCS is in a position to help facilitate a settlement, should there be one, by advancing tobacco control measures for inclusion in a settlement to bridge the gap between the more than \$500 billion sought by claimants<sup>2</sup> and what the tobacco companies actually will pay, and to ensure that such measures are effective.
14. CCS takes no position as to which claimant should receive which share of the “pie”. That will be for others to determine. CCS does support that the aggregate size of the “pie”, the total amounts paid by tobacco companies, be as substantial as possible.
15. CCS has intervened on its own or jointly with other health organizations on multiple occasions regarding the constitutionality of tobacco legislation, an indication of the interest and experience, including legal experience, of CCS on tobacco policy issues. I am advised by counsel that the interventions include:

1989 – Intervention in Federal Court of Canada to defend the constitutional validity of the federal tobacco advertising ban.

1994 – Intervention before the Supreme Court of Canada to oppose a tobacco industry motion to stay regulations requiring larger, more effective tobacco package health warnings.

1994-1995 – Intervention before the Supreme Court of Canada to defend the constitutional validity of the federal tobacco advertising ban.

1995 – Intervention before the Ontario Court (General Division) and Ontario Court of Appeal to defend the Ontario ban on tobacco sales in pharmacies.

2004-2005 – Intervention before Supreme Court of Canada to defend the constitutional validity of Saskatchewan legislation banning the visible display of tobacco products at point of purchase.

1997-2007 – Intervention by CCS before the Quebec Superior Court, Quebec Court of Appeal and Supreme Court of Canada to defend the constitutional validity of federal tobacco advertising and promotion restrictions, and larger, picture-based package health warnings. The Supreme Court unanimously (9:0) upheld the

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<sup>2</sup> The amounts of more than \$500 billion or more than \$600 billion were cited in tobacco company motion materials for the stay extension motion heard June 26, 2019.

legislation in its entirety. As part of Superior Court proceedings, CCS participated in the pre-trial discovery process, and also intervened opposing an application by tobacco companies to stay implementation of new package health warnings.

16. There are 17 health/tobacco control organizations that have provided letters indicating that they do not intend to apply to participate in the CCAA proceedings and support CCS doing so. These letters, reproduced in Exhibit "A" to my Affidavit, are from the following organizations:

Action on Smoking and Health  
Campaign for a Smoke-Free Alberta  
Campaign for Justice on Tobacco Fraud  
Canadian Cardiovascular Society  
Canadian Lung Association  
Canadian Public Health Association  
Clean Air Coalition of British Columbia  
Coalition québécoise pour le contrôle du tabac  
Council for a Smoke-free P.E.I.  
Diabetes Canada  
Heart & Stroke Foundation  
Manitoba Tobacco Reduction Alliance  
Newfoundland and Labrador Alliance for the Control of Tobacco  
Ontario Campaign for Action on Tobacco  
Physicians for a Smoke-Free Canada  
Saskatchewan Coalition for Tobacco Reduction  
Smoke-Free Nova Scotia

17. CCS is not aware of any other health/tobacco control organization that intends to apply to participate in the CCAA proceedings. I am advised by counsel that there has never been an intervention in a tobacco court proceeding in Canada by a health/tobacco control organization that has not been either by CCS on its own or by CCS jointly with other organizations.

**CCS role in tobacco medicare cost recovery lawsuits and class actions**

18. CCS has for decades supported tobacco class actions and provincial government medicare cost recovery lawsuits, as well as other product liability claims against the tobacco industry. CCS has supported provincial legislation that has facilitated such lawsuits, including testifying before provincial legislative committees, and has urged that provinces file

tobacco medicare lawsuits. CCS has attended court hearings in many of these cases in multiple provinces, and before the Supreme Court of Canada, regarding various pre-trial issues. I am advised by counsel: that in 1997, CCS spoke publicly at the announcement by B.C. Premier Glen Clark and Minister of Health Joy MacPhail that BC would be the first province to file a tobacco medicare claim; and that in 1999, CCS organized a national meeting in Montreal for lawyers to encourage litigation against the tobacco industry.

11

### **The U.S. tobacco medicare lawsuit settlement experience**

19. Medicare cost recovery lawsuits in Canada are inspired by the U.S. experience, which included 1997 and 1998 individual state tobacco medicare settlements in Mississippi, Florida, Texas, and Minnesota; a Master Settlement Agreement for 46 states, the District of Columbia and US territories; and a 1997 Proposed Resolution that was not in the end implemented. Information about the U.S. settlements is publicly available.
20. The U.S. settlements included compensation, with an estimated US\$245.5 billion to be payable to state governments over 25 years. The settlements also included public health tobacco control measures, thus illustrating how tobacco control measures could be included in a Canadian settlement. It should be recognized that the tobacco control measures in the U.S. settlements were agreed to in a different context, a context that was in the U.S. and that was more than 20 years ago.
21. A summary prepared by CCS of public health measures in the U.S. tobacco settlements provides an outline of such measures. This summary is reproduced in Exhibit "B" to my Affidavit, and states that tobacco control measures in the various U.S. settlements include:
  - Establishing and funding a new independent foundation to do tobacco control (American Legacy Foundation, now called Truth Initiative).
  - Marketing restrictions (eg restrictions on billboards, sponsorship, branded merchandise, cartoon characters, product placement in entertainment media).
  - Public disclosure of/ access to more than 40 million pages of previously secret tobacco industry documents.
  - Restrictions on lobbying, including the dissolution of the lobbying group the Tobacco Institute, and of the "research" organizations, the Council for Tobacco Research and the Council for Indoor Air Research.

- Ban on initiating most new legal challenges to existing laws of states (or of municipalities or other state political subdivisions).
- A “look back” provision requiring industry to pay monetary penalties if reductions in youth use do not reach specified targets.

**CCS role in the CCAA proceedings to date**

22. I am advised by counsel that counsel for CCS has attended the entirety of all hearings in the CCAA proceedings to date subsequent to the initial orders (April 4, 5, and 25, 2019; May 14, 2019; and June 26, 2019), and has appeared on the record for all these hearings except for the first two days of the comeback hearing.
23. I am advised by counsel that: on April 11, 2019, counsel for CCS filed a notice of appearance; on April 25, 2019, CCS made oral submissions in support of the motion by the Attorney General of Ontario for a partial lifting of the stay to be able to continue pre-trial proceedings in the Ontario lawsuit; on June 13, 2019, pursuant to the Professional Fees Disclosure Orders of May 16, 2019, CCS made a request to each of the Monitors to receive this information, and CCS has subsequently received such information; that on June 24, 2019, CCS filed a responding motion record in response to the motions for a stay extension, taking the position that the proposed length of the stay extension was too long.
24. I am advised by counsel that at no time did any party object to any of this participation by CCS.
25. Tobacco products are highly addictive. Tobacco products kill when used exactly as the manufacturer intends. The societal goal in Canada is not to maintain tobacco sales, but to reduce sales as quickly as possible and thus prevent disease and save lives. There should not be “business as usual” with 45,000 Canadians continuing to die each year.
26. The potential for a settlement under the CCAA that has weak public health measures is of fundamental concern to CCS.
27. Tobacco companies want to maximize tobacco sales and prevent sales declines. CCS wants to minimize tobacco sales. The ultimate objective is to have a tobacco-free society. Health

Canada's objective is to reduce tobacco use to less than 5% by 2035. Tobacco is only legal by historical accident. If tobacco were proposed to be a new product today given what is known about the health consequences, tobacco would never be allowed on the market.

28. In its factum on the application for an initial order, Imperial Tobacco recognized that there are stakeholders that are not creditors: "At the conclusion of this proceeding, it is anticipated that the Applicants' business will be preserved, consistent with the objectives of the CCAA, for the benefit of their employees and other stakeholders, such as retirees, customers, landlords, suppliers, wholesalers, retailers and taxing authorities."<sup>3</sup>
29. If employees whose interests are aligned with the tobacco company can be considered stakeholders, then there can also be public health stakeholders whose interests are not aligned with tobacco companies.
30. The tobacco industry raises a concern about jobs for its employees. But when a person dies from smoking, including many people in their 40s and 50s, the person loses not only their job and but also their life. A family may be left without a breadwinner because a parent is dead, and there is no possibility of the parent ever finding a new job.
31. It should be noted that Imperial Tobacco no longer has any cigarette factories in Canada. All or most of Imperial Tobacco's cigarette manufacturing is done in Mexico and is exported to Canada.
32. The tobacco companies say they are expressing concern for their customers, smokers. However, most smokers want to quit, intend to quit, and wish they had never started. When the customers of tobacco companies contract cancer, CCS is there to help these individuals. The tobacco companies are not.
33. Measures in a settlement to reduce tobacco use will benefit the health of tobacco class action members, and will benefit public health in all provinces. All provincial governments

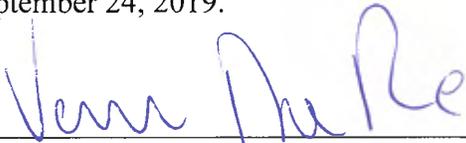
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<sup>3</sup> Initial Order Factum of ITCAN and ITCO, March 12, 2019, para. 7.

have an objective to reduce tobacco use in order to not only to reduce disease and death, but also to reduce health care costs, the underlying reason behind the provincial lawsuits.

- 34. CCS seeks to be able to continue to participate in the CCAA proceedings before the Court, and to participate in the mediation process, given its financial interest, and given its role as an important public health stakeholder.
- 35. CCS's distinct perspective and unique expertise lies in its public health perspective and tobacco control expertise. Allowing CCS to participate would provide a different and valuable perspective beyond those offered by the tobacco claimants in the mediation process.

**SWORN BEFORE ME** at the City of Toronto, in the Province of Ontario on September 24, 2019.



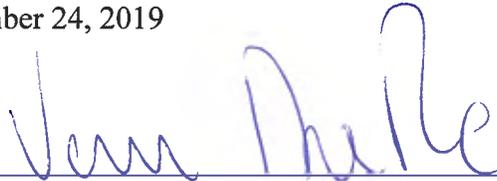
Commissioner for Taking Affidavits

Vern DaRe



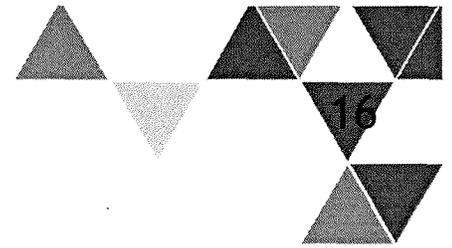
SHAWN CHIRREY

This is Exhibit "A" referred to in the Affidavit of Shawn Chirrey sworn September 24, 2019

A handwritten signature in blue ink, appearing to read "John M. Helle". The signature is written in a cursive style with a large, prominent loop at the end.

---

*Commissioner for Taking Affidavits (or as may be)*



September 8, 2019

To Whom It May Concern:

I am writing regarding the proceedings in Ontario Superior Court under the *Companies Creditors' Arrangement Act* regarding Imperial Tobacco Canada Ltd. (court file No. CV-19-616077-00CL), Rothmans, Benson & Hedges Inc. (court file No. CV-19-616779-00CL), and JTI-Macdonald Corp. (court file No. CV-19-615862-00CL).

Action on Smoking & Health does not intend to bring a motion before the Court to seek to participate in the proceedings, and supports the Canadian Cancer Society bringing a motion to the Court to be able to participate in the proceedings before the Court, and to participate in the mediation process that has been authorized by the Court regarding the tobacco companies.

The proceedings have significant implications for the health of Canadians and therefore we believe that the Canadian Cancer Society should be allowed to actively participate on behalf of interested health organizations.

Sincerely,

Les Hagen  
Executive Director

September 20, 2019

To Whom It May Concern:

I am writing regarding the proceedings in Ontario Superior Court under the *Companies' Creditors Arrangement Act* regarding Imperial Tobacco Canada Ltd. (court file No. CV-19-616077-00CL), Rothmans, Benson & Hedges Inc. (court file No. CV-19-616779-00CL), and JTI-Macdonald Corp. (court file No. CV-19-615862-00CL).

The Campaign for a Smoke-Free Alberta does not intend to bring a motion before the Court to seek to participate in the proceedings, and supports the Canadian Cancer Society bringing a motion to the Court to be able to participate in the proceedings before the Court, and to participate in the mediation process that has been authorized by the Court regarding the tobacco companies.

Sincerely,



Kristyn Berry  
Board Member

# CAMPAIGN FOR JUSTICE ON TOBACCO FRAUD 18

## CAMPAGNE POUR OBTENIR JUSTICE FACE À LA FRAUDE DU TABAC

September 23, 2019

Ontario Superior Court

**To Whom it may concern**

**Re: Canadian Cancer Society participation in proceedings  
under the *Companies' Creditors Arrangement Act***

The Campaign for Justice on Tobacco Fraud has had a longstanding interest in litigation related to the provincial lawsuits over alleged fraud by major tobacco interests as well as in the landmark Quebec class action decisions over the harm to smokers caused by tobacco industry misbehaviour. We regret that the provinces have been prevented from taking their lawsuits to trial.

Our strong interest in tobacco-related litigation has been expressed over several years in research, polling and in letters to provincial and territorial premiers and attorneys general. Our letter to attorney generals associated with the launch of the Campaign for Justice on Tobacco Fraud was endorsed by over 150 medical officers of health, professors of medicine, public health and law and by senior executives of national and regional health organizations.

You will therefore understand our interest in the proceedings in the Ontario Superior Court under the *Companies' Creditors Arrangement Act* (CCAA) regarding Imperial Tobacco Canada Ltd. (court file No. CV-19-616077-00CL), Rothmans, Benson & Hedges Inc. (court file No. CV-19-616779-00CL), and JTI-Macdonald Corp. (court file No. CV-19-615862-00CL).

In the unfortunate absence of trials over the industry's alleged misbehaviour and, as a concerned party, we would welcome the opportunity to participate in discussions arising out of tobacco company filings under Canada's bankruptcy legislation. However, in light of the Canadian Cancer Society's decision to attempt to be part of the CCAA deliberations, the Campaign for Justice on Tobacco Fraud has decided that our interests would be served by CCS involvement in the mediation underway.

Therefore, we fully support the Canadian Cancer Society request through its motion to the Court for the Society to be able to participate in the proceedings.

The Canadian Cancer Society has a substantial interest in the outcomes of the deliberations. For decades, the CCS has been working to reduce the morbidity and mortality caused by tobacco industry predation and has spent millions of dollars confronting tobacco industry-caused disease. Given this background, we urge the court to respond positively to the CCS motion.

The Campaign for Justice on Tobacco Fraud is a non-profit health organization incorporated under the Canada Not-for-profit Incorporations Act. The CJTF supports litigation against the tobacco industry that has the potential to lead to public health benefits and changed industry behaviour. Its overall mission is to reduce the disease and death caused by tobacco industry products.

Sincerely,

A handwritten signature in black ink, appearing to read 'Garfield Mahood', written in a cursive style.

Garfield Mahood, OC  
President



**Canadian Cardiovascular  
Society**

*Leadership. Knowledge. Community.*

**Société canadienne  
de cardiologie**

*Leadership. Knowledge. Community.*

20

**President/Président**

Andrew Krahn

September 16, 2019

**Vice-President /**

**Vice-président**

Marc Ruel

To Whom It May Concern:

**Past President /**

**Présidente sortante**

Catherine Kells

**Secretary/Secrétaire**

Peter Guerra

**Treasurer/Trésorier**

Rodney Zimmermann

**Member at large /**

**Membre d'office**

Martin Gardner

I am writing regarding the proceedings in Ontario Superior Court under the Companies' Creditors Arrangement Act regarding Imperial Tobacco Canada Ltd. (court file No. CV-19-616077-00CL), Rothmans, Benson & Hedges Inc. (court file No. CV-19-616779-00CL), and JTI-Macdonald Corp. (court file No. CV-19-615862-00CL). The Canadian Cardiovascular Society does not intend to bring a motion before the Court to seek to participate in the proceedings, and supports the Canadian Cancer Society bringing a motion to the Court to be able to participate in the proceedings before the Court, and to participate in the mediation process that has been authorized by the Court regarding the tobacco companies.

**Chief Executive Officer/**

**Chef de la direction**

Carolyn Pullen

Yours truly,

Carolyn Pullen, BNSc, RN, PhD  
Chief Executive Officer/Chef de la direction  
Canadian Cardiovascular Society / Société canadienne de cardiologie

To Whom It May Concern:

I am writing regarding the proceedings in Ontario Superior Court under the *Companies' Creditors Arrangement Act* regarding Imperial Tobacco Canada Ltd. (court file No. CV-19-616077-00CL), Rothmans, Benson & Hedges Inc. (court file No. CV-19-616779-00CL), and JTI-Macdonald Corp. (court file No. CV-19-615862-00CL). The Canadian Lung Association does not intend to bring a motion before the Court to seek to participate in the proceedings, and supports the Canadian Cancer Society bringing a motion to the Court to be able to participate in the proceedings before the Court, and to participate in the mediation process that has been authorized by the Court regarding the tobacco companies.

Yours truly,

Terry Dean



President and CEO,  
The Canadian Lung Association



CANADIAN  
PUBLIC HEALTH  
ASSOCIATION

ASSOCIATION  
CANADIENNE DE  
SANTÉ PUBLIQUE

10 September 2019

**Re: Court File Nos. CV-19-616077-00CL, CV-19-616779-00CL, and CV-19-615862-00CL**

To whom it may concern:

On behalf of the Canadian Public Health Association, I am writing in regard to the proceedings in Ontario Superior Court under the *Companies' Creditors Arrangement Act* regarding Imperial Tobacco Canada Ltd. (court file No. CV-19-616077-00CL), Rothmans, Benson & Hedges Inc. (court file No. CV-19-616779-00CL), and JTI-Macdonald Corp. (court file No. CV-19-615862-00CL). The Canadian Public Health Association does not intend to bring a motion before the Court to seek to participate in the proceedings, and supports the Canadian Cancer Society bringing a motion to the Court to be able to participate in the proceedings before the Court, and to participate in the mediation process that has been authorized by the Court regarding the tobacco companies.

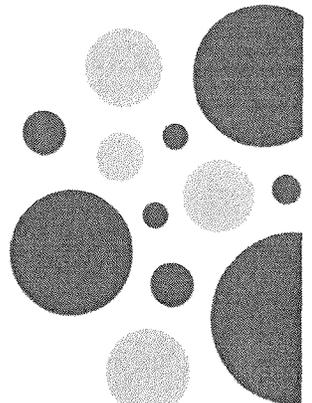
Sincerely,

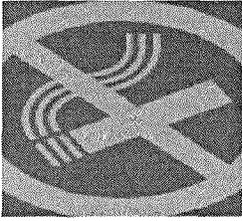
Ian Culbert  
Executive Director

cpha.ca  
404-1525 Carling Avenue  
Ottawa, Ontario K1Z 8R9

1525, avenue Carling, bureau 404  
Ottawa (Ontario) K1Z 8R9

613-725-3769





# Clean Air COALITION

BRITISH COLUMBIA

ADVOCATES FOR A SMOKE-FREE BRITISH COLUMBIA

September 19, 2019

Canadian Cancer Society  
116 Albert Street, Suite 500  
Ottawa, Ontario  
K1P 5G3

To Whom It May Concern:

The Clean Air Coalition of BC is writing regarding the proceedings in Ontario Superior Court under the *Companies' Creditors Arrangement Act* regarding Imperial Tobacco Canada Ltd. (court file No. CV-19-616077-00CL), Rothmans, Benson & Hedges Inc. (court file No. CV-19-616779-00CL), and JTI-Macdonald Corp. (court file No. CV-19-615862-00CL).

The coalition does not intend to bring a motion before the Court to seek to participate in the proceedings, and supports the Canadian Cancer Society bringing a motion to the Court to be able to participate in the proceedings before the Court, and to participate in the mediation process that has been authorized by the Court regarding the tobacco companies.

Sincerely,

A handwritten signature in black ink, appearing to be 'J. Boomer'. The signature is fluid and cursive, with a large loop at the end.

Jack Boomer  
Director



COALITION QUÉBÉCOISE  
POUR LE CONTRÔLE DU TABAC

1001, blvd de Maisonneuve Ouest, bureau 420, Montréal, QC, H3A 3C8 • 514-598-5533 • coalition@cqct.qc.ca • @CoalitionTabac

Monday, September 23<sup>rd</sup> 2019

**Re: Motion to intervene by the Canadian Cancer Society**

To whom it may concern:

I am writing regarding the proceedings in Ontario Superior Court under the *Companies' Creditors Arrangement Act* regarding Imperial Tobacco Canada Ltd. (court file No. CV-19-616077-00CL), Rothmans, Benson & Hedges Inc. (court file No. CV-19-616779-00CL) and JTI-Macdonald Corp. (court file No. CV-19-615862-00CL).

The Coalition québécoise pour le contrôle du tabac supports the Canadian Cancer Society in bringing a motion to the Court in order to be able to participate in the proceedings before the Court and to participate in the mediation process that has been authorized by the Court regarding the tobacco companies.

Yours truly,

Flory Doucas  
Codirector  
514-515-6780 / fdoucas@cqct.qc.ca

# Council for a Smoke-Free P.E.I.

1 Rochford St., Ste. 2  
Charlottetown, P.E.I.

25  
CLAs 202

phone/fax: (902) 368-7281

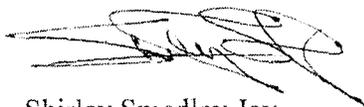
September 11, 2019

To Whom It May Concern:

I am writing regarding the proceedings in Ontario Superior Court under the *Companies' Creditors Arrangement Act* regarding Imperial Tobacco Canada Ltd. (court file No. CV-19-616077-00CL), Rothmans, Benson & Hedges Inc. (court file No. CV-19-616779-00CL), and JTI-Macdonald Corp. (court file No. CV-19-615862-00CL).

The Council For a Smoke-Free P.E.I. does not intend to bring a motion before the Court to seek to participate in the proceedings, and supports the Canadian Cancer Society bringing a motion to the Court to be able to participate in the proceedings before the Court, and to participate in the mediation process that has been authorized by the Court regarding the tobacco companies.

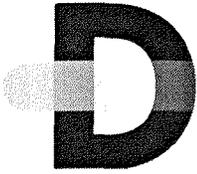
Sincerely,



Shirley Smedley Jay  
President

---

Association of Nurses of PEI; Canadian Cancer Society, P.E.I. Division; Dental Association of P.E.I.;  
Dept. of Education; Dept. of Health & Social Services; Heart & Stroke Foundation of P.E.I.;  
Medical Society of P.E.I.; P.E.I. Home & School Federation; P.E.I. Lung Association; Provincial Allied Youth;  
Public Health Nursing; Community Members-at-Large



September 19, 2019.

To Whom It May Concern:

I am writing regarding the proceedings in Ontario Superior Court under the *Companies' Creditors Arrangement Act* regarding Imperial Tobacco Canada Ltd. (court file No. CV-19-616077-00CL), Rothmans, Benson & Hedges Inc. (court file No. CV-19-616779-00CL), and JTI-Macdonald Corp. (court file No. CV-19-615862-00CL). Diabetes Canada does not intend to bring a motion before the Court to seek to participate in the proceedings, and supports the Canadian Cancer Society bringing a motion to the Court to be able to participate in the proceedings before the Court, and to participate in the mediation process that has been authorized by the Court regarding the tobacco companies.

Yours truly,

A handwritten signature in cursive script that reads "Russell Williams".

Russell Williams  
Senior Vice President, Mission  
Diabetes Canada

1300 - 522 University Avenue, Toronto, ON, M5G 2R5  
Call us: 1-800-BANTING (226-8464)  
Diabetes.ca

Charitable Number: 11883 0744 RR0001

**DIABETES  
CANADA**



September 20, 2019

To Whom It May Concern:

I am writing regarding the proceedings in Ontario Superior Court under the *Companies' Creditors Arrangement Act* regarding Imperial Tobacco Canada Ltd. (court file No. CV-19-616077-00CL), Rothmans, Benson & Hedges Inc. (court file No. CV-19-616779-00CL), and JTI-Macdonald Corp. (court file No. CV-19-615862-00CL). The Heart & Stroke does not intend to bring a motion before the Court to seek to participate in the proceedings, and supports the Canadian Cancer Society bringing a motion to the Court to be able to participate in the proceedings before the Court, and to participate in the mediation process that has been authorized by the Court regarding the tobacco companies.

Yours truly,

A handwritten signature in black ink that reads "Lesley James".

Lesley James  
Senior Manager, Policy  
Heart & Stroke  
[Lesley.james@heartandstroke.ca](mailto:Lesley.james@heartandstroke.ca)  
613-691-4066

**MANTRA**

MANITOBA TOBACCO REDUCTION ALLIANCE INC.

192 Goulet Street, Winnipeg, Manitoba R2H 0R8  
P: 204.784.7030 / F: 204.784.7039admin@mantrainc.ca  
www.mantrainc.ca

September 9, 2019

To Whom It May Concern:

I am writing regarding the proceedings in Ontario Superior Court under the Companies' Creditors Arrangement Act regarding Imperial Tobacco Canada Ltd. (court file No. CV-19-616077-00CL), Rothmans, Benson & Hedges Inc. (court file No. CV-19-616779-00CL), and JTI-Macdonald Corp. (court file No. CV-19-615862-00CL).

The Manitoba Tobacco Reduction Alliance (MANTRA) does not intend to bring a motion before the Court to seek to participate in the proceedings, however, MANTRA and its Board of Directors supports the Canadian Cancer Society bringing a motion to the Court to be able to participate in the proceedings before the Court, and to participate in the mediation process that has been authorized by the Court regarding the tobacco companies.

Thank you in advance for your consideration of this support for this important public health issue.

Yours truly,



---

John McDonald  
Executive Director



---

Rani Chatterjee – Mehta  
MANTRA Chairperson  
Assistant Registrar – Quality Assurance  
College of Pharmacists of Manitoba



September 9, 2019

ACT is an alliance  
of government  
and non-government  
partners  
committed to the  
significant reduction  
of tobacco use in  
Newfoundland and  
Labrador.

29 Rowan Street  
St. John's, NL  
A1B 2X2

T: (709) 753-0079  
F: (709) 753-0109  
www.actnl.com

To Whom It May Concern:

I am writing regarding the proceedings in Ontario Superior Court under the *Companies' Creditors Arrangement Act* regarding Imperial Tobacco Canada Ltd. (court file No. CV-19-616077-00CL), Rothmans, Benson & Hedges Inc. (court file No. CV-19-616779-00CL), and JTI-Macdonald Corp. (court file No. CV-19-615862-00CL). The Newfoundland and Labrador Alliance for the Control of Tobacco (ACT) does not intend to bring a motion before the Court to seek to participate in the proceedings, and supports the Canadian Cancer Society bringing a motion to the Court to be able to participate in the proceedings before the Court, and to participate in the mediation process that has been authorized by the Court regarding the tobacco companies.

Yours truly,

Kevin Coady  
ACT Executive Director

Life is even better smoke free.



20 September 2019

To Whom It May Concern:

I am writing regarding the proceedings in Ontario Superior Court under the Companies' Creditors Arrangement Act regarding Imperial Tobacco Canada Ltd. (court file No. CV-19-616077-00CL), Rothmans, Benson & Hedges Inc. (court file No. CV-19-616779-00CL), and JTI-Macdonald Corp. (court file No. CV-19-615862-00CL). The Ontario Campaign for Action on Tobacco does not intend to bring a motion before the Court to seek to participate in the proceedings, and supports the Canadian Cancer Society bringing a motion to the Court to be able to participate in the proceedings before the Court, and to participate in the mediation process that has been authorized by the Court regarding the tobacco companies.

Yours truly,

Michael Perley  
Director

**Founding Agencies**

Canadian Cancer Society  
Ontario Division

Heart and Stroke  
Foundation of Ontario

Non-Smokers' Rights  
Association

Ontario Medical Association

**Supporting Agencies**

Association of Local  
Public Health Agencies

Cancer Care Ontario

Ontario Association of  
Child and Adolescent  
Psychiatrists

Ontario Association of  
Naturopathic Doctors

Ontario Federation of Home  
and School Associations

Ontario Physical and Health  
Education Association

Ontario Public Health  
Association

Ontario Tobacco  
Research Unit

Physicians for a  
Smoke-Free Canada

Registered Nurses  
Association of Ontario

The Ontario College  
of Family Physicians

150 Bloor Street West  
Suite 900  
Toronto, Ontario  
M5S 3C1

T: 416.340.2992  
F: 416.340.2995

email: [ocacat@oma.org](mailto:ocacat@oma.org)  
[www.ocacat.org](http://www.ocacat.org)



**Board of Directors**

**President:**

Atul Kapur, MD, FACEP,  
FRCPC  
Ottawa

**Vice-Presidents:**

David Esdaille, MD,  
CCFP  
Ottawa

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FRCPC  
Ottawa

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Montreal

Andrew Pipe, MD  
Ottawa

Fernand Turcotte, MD,  
Quebec

**Staff:**

Cynthia Callard  
Neil Collishaw

September 22, 2019

To Whom It May Concern:

I am writing regarding the proceedings in Ontario Superior Court under the Companies' Creditors Arrangement Act regarding Imperial Tobacco Canada Ltd. (court file No. CV-19-616077-00CL), Rothmans, Benson & Hedges Inc. (court file No. CV-19-616779-00CL), and JTI-Macdonald Corp. (court file No. CV-19-615862-00CL).

Physicians for a Smoke-Free Canada does not intend to bring a motion before the Court to seek to participate in the proceedings, and supports the Canadian Cancer Society bringing a motion to the Court to be able to participate in the proceedings before the Court, and to participate in the mediation process that has been authorized by the Court regarding the tobacco companies.

Yours truly,

Cynthia Callard  
Executive Director



SASKATCHEWAN  
COALITION  
FOR TOBACCO  
REDUCTION

September 10, 2019

To Whom It May Concern:

I am writing regarding the proceedings in Ontario Superior Court under the *Companies' Creditors Arrangement Act* regarding Imperial Tobacco Canada Ltd. (court file No. CV-19-616077-00CL), Rothmans, Benson & Hedges Inc. (court file No. CV-19-616779-00CL), and JTI-Macdonald Corp. (court file No. CV-19-615862-00CL). The Saskatchewan Coalition for Tobacco Reduction does not intend to bring a motion before the Court to seek to participate in the proceedings, and supports the Canadian Cancer Society bringing a motion to the Court to be able to participate in the proceedings before the Court, and to participate in the mediation process that has been authorized by the Court regarding the tobacco companies.

Yours truly,

Jennifer May, President  
Saskatchewan Coalition for Tobacco Reduction.

1231 8 St E, Saskatoon, SK S7H 0S5  
306-343-9511



200-6331 Lady Hammond Road  
B3K 2S2  
Halifax, Nova Scotia  
Email: [executivedirector@smokefreens.ca](mailto:executivedirector@smokefreens.ca)

33

19/9/2019

To Whom It May Concern:

I am writing regarding the proceedings in Ontario Superior Court under the *Companies' Creditors Arrangement Act* regarding Imperial Tobacco Canada Ltd. (court file No. CV-19-616077-00CL), Rothmans, Benson & Hedges Inc. (court file No. CV-19-616779-00CL), and JTI-Macdonald Corp. (court file No. CV-19-615862-00CL). Smoke Free Nova Scotia does not intend to bring a motion before the Court to seek to participate in the proceedings, and supports the Canadian Cancer Society bringing a motion to the Court to be able to participate in the proceedings before the Court, and to participate in the mediation process that has been authorized by the Court regarding the tobacco companies.

Yours truly,

Mohammed Al-Hamdani  
Executive Director  
Smoke Free Nova Scotia

This is Exhibit "B" referred to in the Affidavit of Shawn Chirrey  
sworn September 24, 2019

A handwritten signature in blue ink, appearing to read "Jesse Drake", is written above a horizontal line.

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*Commissioner for Taking Affidavits (or as may be)*

## Tobacco Control Measures Found in US Tobacco Settlement Agreements

Canadian Cancer Society

July 2019

### Introduction

In 1997 and 1998 in the US, there were a series of tobacco litigation settlements involving state governments and tobacco manufacturers:

Proposed Global Settlement, not in the end implemented	June 20, 1997	
Mississippi	July 2, 1997	
Florida	August 25, 1997	
Texas	January 16, 1998	
Minnesota	May 8, 1998	<a href="#">link</a>
Master Settlement Agreement (MSA), signed by 46 states, D.C. and U.S. territories	November 23, 1998	<a href="#">link</a>

The Proposed Global Settlement of June 20, 1997, agreed to by tobacco manufacturers, would have affected private class actions and individual lawsuits in addition to state medicare cost recovery lawsuits. This Proposed Settlement was not in the end adopted because Congress did not enact necessary legislation.

The U.S. state medicare settlements included compensation, with US\$245.5 billion payable to state governments over 25 years. The settlements also included tobacco control measures. It should be recognized that these tobacco control measures were agreed to in a different context, a regulatory context that was in the U.S. and that was more than 20 years ago.

This note provides an outline of tobacco control measures in the U.S. tobacco settlements. The listing is not exhaustive. Tobacco control measures in the settlements included:

- Establishing and funding a new independent foundation to do tobacco control (American Legacy Foundation, now called Truth Initiative).
- Marketing restrictions (eg restrictions on billboards, sponsorship, branded merchandise, cartoon characters, product placement in entertainment media).
- Public disclosure of/ access to more than 40 million pages of previously secret tobacco industry documents.
- Restrictions on lobbying, including the dissolution of the lobbying group the Tobacco Institute, and of the “research” organizations, the Council for Tobacco Research and the Council for Indoor Air Research.
- Ban on initiating most new legal challenges to existing laws of states (or of municipalities or other state political subdivisions).
- A “look back” provision requiring industry to pay monetary penalties if reductions in youth use do not reach specified targets.

### **Funding of Tobacco Control**

- Establishment of an independent charitable foundation to support reducing youth tobacco use and substance abuse and the prevention of diseases associated with tobacco use (American Legacy Foundation, now Truth Initiative, [www.truthinitiative.org](http://www.truthinitiative.org)) (MSA, s. VI(a)).
- Industry pays \$25 million per year for ten years to the Foundation; individual company payments to be based on market share (MSA, s. VI(b)).
- Industry also to pay about \$300 million per year for 5 years for a National Public Education Fund to be conducted by the Foundation; individual company payments to be based on market share (MSA, s. VI(c)).
- Foundation to have a Board of Directors comprised of 11 directors. The National Association of Attorneys General, the National Governors' Association and the National Conference of State Legislatures shall each select two directors. These 6 directors shall choose 5 additional directors, one of which shall have expertise in public health, and 4 of the additional directors shall have expertise in medical, child psychology or public health disciplines (MSA, s. VI(d)).
- The Foundation's activities to include:
  - Carry out a nationwide, sustained advertising and education program to counter youth tobacco use and educate consumers about the cause and prevention of diseases associated with tobacco use (MSA, s. VI(f)(1)).
  - Develop, disseminate and test the effectiveness of model advertising and education programs (MSA, s. VI(f)(2)).
  - Develop and disseminate criteria for effective cessation programs (MSA, s. VI(f)(4)).
  - Commission studies, fund research and publish reports on factors that influence youth smoking and substance abuse, and develop other youth prevention programs (MSA, ss. VI(f)(5)-(6)).
  - Track and monitor youth smoking and substance abuse with a focus on reasons for increases or failures to decrease tobacco and substance abuse rates and actions that can be taken (MSA, s. VI(f)(9)).
  - Provide grants to states and political subdivisions (MSA, s. VI(g)).
- In fiscal 2018, the Truth Initiative had expenditures of US\$111 million (C\$148 million).
- Note that in 2003 with American Legacy Foundation funds, the Legacy Tobacco Documents Library was established at the University of California, San Francisco, and is now called the Truth Initiative Tobacco Documents Library.

### Proposed Settlement

- Under the Proposed Settlement (Title VII), tobacco control funding was determined as follows (\$ million), with payments in perpetuity:

	Year 1	Year 2	Year 3	Year 4	Year 5+
mass media education campaign to be conducted by new independent foundation	500	500	500	500	500
cessation initiatives	1,000	1,000	1,000	1,000	1,500
youth tobacco reduction	125	125	125	225	225
FDA obligations/enforcement (including grants to states for enforcement)	300	300	300	300	300
Community action based on ASSIST program	75	75	100	125	125
research/development to reduce tobacco use	100	100	100	100	100
replace tobacco sponsorships with "Quit" theme*	75	75	75	75	75
Total	2,175	2,175	2,200	2,325	2,825

\*After 10 years, the \$75 million to replace tobacco sponsorships to be reallocated to mass media campaigns (50%), enforcement (25%) and community action (25%).

- Under the Proposed Settlement, there would also be a \$25 billion public health trust fund for tobacco-related medical research.

### Minnesota Settlement

- In the Minnesota Settlement, an independent public health foundation was established and funded through the settlement (Minnesota Settlement, s. II.C.). The foundation is called ClearWay Minnesota and is funded through 3% of the funding from the settlement. ClearWay Minnesota has continuously been in operation since being established in 1998. The total expenses in fiscal 2018 were US\$15.2 million (C\$20.3 million) with Minnesota having a population of 5.6 million. The Board of Directors includes members appointed by the state Governor, House Speaker, Senate Majority Leader and Attorney General respectively. The Board of Directors includes members with a public health background. See [www.clearwaymn.org](http://www.clearwaymn.org).
- The Minnesota Settlement (s. VIII.A) also included
  - \$102 million in a separate account to fund cessation programs in Minnesota, to be administered as ordered by the Court.

- \$100 million into a national research account (\$10 million per year for 10 years, with payments based on market share), with 70% envisioned for research grants related to eliminating youth tobacco use, and 30% for other tobacco control purposes, though the administrator of the national research account would have the discretion to change the allocation.
- Note that \$102 million cessation amount and the \$100 million research amount were later rolled into funding for ClearWay Minnesota.

#### **“Look Back” Provision**

Tobacco companies will be required to assume responsibility to reduce tobacco use by youth under age 18 through a “look back” provision (Proposed Settlement, Title II, App. V).

- Sets reduction targets of underage use, with industry to pay an \$80 million surcharge for each percentage point for which the target is not met. The youth prevalence reduction targets are:  
*Cigarettes: 5 yrs – 30% 7 yrs – 50%; 10 yrs and after – 60%;*  
*Smokeless Tobacco: 5 yrs – 25%; 7 yrs – 35%; 10 yrs and after – 45%*
- The \$80 million is based on the present value of the lifetime profit for a new youth smoker. The amount will be increased or decreased based on average profit per unit earned by the cigarette industry. The surcharge will be reduced to prevent double counting of persons whose smoking had already resulted in the imposition of a surcharge in previous years.
- Establishes an annual cap of \$2 billion on penalty payments for the cigarette industry, with proportionate amounts for the smokeless tobacco industry.
- Amounts received in surcharges shall be provided as grants to states and local government authorities to reduce youth tobacco use, with FDA able to withhold up to 10% for administration.
- Manufacturer may apply to FDA for abatement of up to 75% if company had fully complied with Act, had taken all reasonably available measures to reduce youth tobacco use and had not taken any action to undermine the achievement of required reductions.

(Note that the look back provision was strengthened in the bill of Senator John McCain.)

#### **Marketing Restrictions**

Marketing restrictions including restrictions or prohibitions on the following:

- Use of cartoon characters (MSA, s. III(b)).
- Billboards and transit ads, as well as other outdoor advertising not in direct proximity to a tobacco retailer (MSA, s. III(d)).
  - For billboards, states may place own messages discouraging tobacco use/exposure to tobacco smoke for remainder of industry’s billboard lease, at industry expense (MSA, s. III(d)(3)).
- Product placements in movies/entertainment media (MSA s. III(e)).
- Free samples (but not in adult-only facilities) (MSA, s. III(g)).
- Gifts to youth in exchange for proofs of purchase (MSA, s. III(h)).
- Branded merchandise (“brand-stretching”) (MSA, s. III(f), (i)).

- Brand borrowing, (i.e. using a non-tobacco brand, sports team, entertainment group or celebrity for tobacco branding, eg Rolls-Royce, Rolling Stones) (MSA, s. III(j)).
- Branded sponsorships (eg of sports and arts events/facilities) (MSA, s. III(c)).
- Direct and indirect targeting of youth (MSA, s. III(a)).
- Minimum pack size of 20 cigarettes to December 31, 2001, and not oppose legislation to this effect afterwards (MSA, s. III(k)).
- Industry agreements with third parties (eg media companies) prohibiting advertising discouraging tobacco use, exposure to tobacco smoke (MSA, s. III(d)(4)).

#### **Additional Marketing Restrictions**

(Proposed Settlement, Title I(A), App. VII)

- All marketing restrictions in 1996 FDA tobacco rule including regarding sponsorships, brand-stretching, brand borrowing, limiting ads to FDA specified permitted media, requiring permitted ads to be in black text on a white background (except in adult-only facilities and adult publications), providing non-tobacco items or gifts based on proofs of purchase (the FDA rule was not in effect due to litigation).
- Ban use of human images and cartoon characters in all tobacco advertising and packaging.
- Ban all outdoor advertising, including ads directed outside a retailer.
- Ban Internet advertising.
- Restrict advertising at point of sale.
- Ban payments for product placement in movies, TV programs and video games.

#### **Disclosure of Tobacco Company Documents**

- Tobacco manufacturers will place on a website at their expense all non-privileged documents and indices produced in state lawsuits, and maintain this website until June 30, 2010 (about 12 years). Minimum standards for indexing and search features on the website were specified. An electronic version of website content is to be provided to the National Association of Attorney Generals (MSA, s. IV, Exhibit I).
- Requires the industry to add all documents produced in future civil actions until June 30, 2010 (MSA, s. IV(e)).

#### **Disclosure provisions in Proposed Settlement** (App. VIII)

- Industry would establish and maintain at its expense a document depository in the Washington, D.C. area open to the public. Certain document indices shall be placed in depository in electronic and hard-copy form. No documents in the depository shall have any confidential designation of any kind.
- Tobacco manufacturers and trade associations to provide to the depository all documents provided on discovery as well as any additional documents discussing or referring to health research, addiction or dependency, safer/less hazardous cigarettes, studies of the smoking habits of minors and the relationship between advertising or promotion and youth smoking.

- There is a continuing disclosure obligation to provide all future research on health and safety of tobacco products to the FDA and, subject to legitimate trade secrets, to the document depository. The continuing disclosure to the document depository also applies to all documents from manufacturers and trade associations referring to the relationship between advertising and promotion and underage smoking.
- A process is established for judicial determination of legitimacy of claims of privileges or protections, including attorney-client privilege, and work product and trade secret protections. If a claim of privilege is not upheld and if the claimant did not have a good faith factual and legal basis for an assertion of privilege, then costs and attorneys' fees shall be assessed, and additional costs and sanctions may be imposed.
- All documents placed in the depository shall be deemed to be produced for any U.S. litigation.

#### Disclosure provisions in Minnesota Settlement

- The industry shall maintain at its expense the Minnesota Depository for 10 years. BAT shall maintain at its expense the Depository at Guildford, U.K. (or other alternative appropriate location) for a period of 10 years. All documents produced on discovery by the industry, and for which no privilege is claimed, shall be provided to the Depositories. The Depositories shall be open to the public (Minnesota Settlement, s. VII).
- At the end of 10 years, or sooner at the state's discretion, the documents in the Minnesota Depository shall be transferred to the State Archives (Minnesota Settlement, s. VII.E).
- Industry shall provide to the state for the Depository a copy of all CD-ROMs of documents that do not contain any privileged documents or information (Minnesota Settlement, s. VII.F).
- Continuing obligation on in industry to produce to the Depository all documents produced by industry in other US smoking and health litigation that are not privileged and not covered by a protective order (Minnesota Settlement, s. VII.G).
- Industry obligation, extending original discovery request, to produce documents in discovery pertaining to state legislation or executive action relating to tobacco Minnesota is extended beyond August 17, 1994 to date of settlement, May 8, 1998 (Minnesota settlement, s. IV.4.).

#### Suppressing Research

- Prohibits manufacturers from jointly contracting or conspiring to:
  - Limit information about the health hazards from the use of their products
  - Limit or suppress research into smoking and health
  - Limit or suppress research into the marketing or development of new products (MSA, s. III(q)).

### **Restrictions on Legal Challenges to Tobacco Control Laws**

- Ban on initiating new legal challenges to existing tobacco control laws of states, or of municipalities or other state political subdivisions, with some limited specified exceptions (MSA, s. V, Exhibit M).
- Ban on legal challenges on future legislative proposals or rules on certain specified tobacco control issues (MSA s. III(m), Exhibit F; Minnesota Settlement s.IV.A.1, Sched. B).

### **Restrictions on Lobbying**

- Dissolution of Tobacco Institute, Council for Tobacco Research, and the Council for Indoor Air Research (MSA, s. III(o)); (Proposed Settlement, Title I(G), App. IV, with provisions to dissolve TI and CTR).
- Require all records of these organizations that relate to any smoking and health litigation to be preserved (MSA, s. III(o)(4)).
- Provides regulation and oversight of any new trade organizations (MSA, s. III(p); Proposed Settlement, Title I(G), App. IV).
- The industry may not reconstitute the Council for Tobacco Research or its function in any form (Minnesota Settlement, s. VI).
- Industry will not lobby to weaken terms of settlement (MSA, s. III(m)(3)).
- Industry will not lobby to support or cause to be supported any diversion of settlement proceeds to any program or use that is neither tobacco-related nor health-related, including in any future legislative appropriation of settlement proceeds (MSA, s.III(n)).
- All lobbyists (and third parties engaging in lobbying on behalf of a manufacturer) will not support or oppose legislation or government action without the manufacturer's express authorization (Proposed Settlement, Title I(G)).
- Public disclosure of lobbying fees for lobbying at state or local level, and of payments to third parties if payment is in part to attend or participate at state or local government hearing in Minnesota in any way related to tobacco (Minnesota Settlement, s. IV.B.).
- Disclosure at request of Attorney General of any lobbying fees at state or local level (if state has no laws regarding disclosure of financial contributions regarding lobbying activities) (MSA, s.III (m)(B)).

### **Additional Measures**

(Proposed Settlement)

- Package health warnings in black and white covering top 25% of front and back of cigarette packages (Title I(B)).
- FDA authority regarding testing, reporting and disclosure of tobacco smoke constituents, including on packages (Title I(B)).
- Measures in FDA rule on youth access: minimum age 18; require photo identification of anyone under 27; require all sales to be face-to-face transactions; ban sales from opened packages; minimum cigarette package size of 20; ban free sampling (the FDA rule was not in effect due to litigation) (Title I(C)).
- Ban vending machines (Title I(C)).

- Ban self-service displays except in adult-only facilities (Title I(C)).
- Federal tobacco retail licence requirement, licensing fees, and suspension/revocation of licences for certain offences (Title I(D), App. II).
- FDA authority to make product standards and regarding product claims (Title I(E)).
- Provisions regarding ingredient disclosure to FDA and to public (Title I(F)).
- Establish a national rule under Occupational Safety and Health Administration authority to ban smoking in indoor buildings regularly entered by 10 or more individuals at least one day per week, with an exception for independently ventilated designated smoking areas. No employee shall be required to enter the designated smoking area while smoking is occurring. There would be an exemption for restaurants (but not “fast food” restaurants), bars, private clubs, hotel guest rooms, casinos, bingo parlors, tobacco merchants and prisons. (Title IV).

#### **Protection for whistleblowers**

- Provide whistleblowers in tobacco industry with maximum protection available under current federal statutes (Proposed Settlement, Title I(G)).

#### **“Most favoured nation” provision**

- If a later settlement with another state contained a better provision, than that provision would also be effective for the earlier settlement (Missouri Settlement, para. 7; Florida Settlement, s. IV; Texas Settlement, s. 16; Minnesota Settlement, s. III.D.; see also MSA, s. XVIII(b)).

#### **Enforcement of settlement**

- Provides court jurisdiction for implementation and enforcement (MSA, s. VII(a)).
- If the court issues an enforcement order enforcing the agreement (e.g. injunctive relief) and a party violates that order, the court may order monetary, civil contempt or criminal sanctions to enforce compliance with the enforcement order (MSA, s. VII(b),(c), Exhibit L, Model Consent Decree, s. VI(A)).
- Key public health provisions of the agreement are included in consent decrees to be filed in each state (MSA, Exhibit L, Model Consent Decree).
- Mandates payment to states of costs and attorney fees for violations of consent decree (MSA, Exhibit L, Model Consent Decree).
- Allows states access to company documents, records and personnel to enforce the agreement (MSA, s. VII(g)).
- For exports, each cigarette package shall have a visible indication that distinguishes the package from packages intended for sale in the US (MSA s. XVIII(ee)).

This summary has been prepared drawing on the settlement agreements, as well as other documents summarizing the settlements.

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.**

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**

PROCEEDING COMMENCED AT  
TORONTO

**RESPONDING MOTION RECORD OF THE  
CANADIAN CANCER SOCIETY (OCTOBER 2, 2019)**

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

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(Returnable October 2, 2019)

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**TO: THE COMMON SERVICE LIST**

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

**FACTUM OF THE CANADIAN CANCER SOCIETY**  
(Returnable October 2, 2019)

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**tab 1**

## FACTUM

### PART I - INTRODUCTION AND SUMMARY

1. The Canadian Cancer Society (“CCS”) brings this motion for an order for CCS to continue to participate in the proceedings before the Court, and to participate in the mediation process facilitated by the Mediator (as defined below).
2. CCS has attended all hearings in these proceedings since and including the comeback hearings. At the hearing on June 26, 2019, the Court indicated that CCS would need to bring a motion and file materials to explain its interest in order to make further submissions going forward, and in order to participate in the mediation process, and that the same would also apply to anyone else without a financial interest. The Court indicated in part that it wanted to ensure that there was authority for CCS to participate. CCS is thus bringing this motion to explain its interest and the authorities.
3. CCS has a direct financial interest in the CCAA proceedings, though CCS is not a creditor. The extent that any settlement contains measures to reduce tobacco use will in turn impact CCS financially in terms of financial resources that will need to be devoted to patient services, public education/information and research to deal with tobacco-related cancer, thus diverting financial resources from other cancer priorities and from other individuals with cancer. In the U.S., tobacco settlements include public health measures to reduce tobacco use.
4. In addition to having a direct financial interest, CCS also has an interest in the CCAA proceedings as a “social stakeholder”, an interest recognized in previous CCAA cases.

5. CCS is in a position to help facilitate a settlement, should there be one, by advancing tobacco control measures for inclusion in a settlement to bridge the gap between the more than \$500 billion sought by claimants and what the tobacco companies actually will pay, and to ensure that such measures are effective.

## **PART II - SUMMARY OF FACTS PERTINENT TO THIS MOTION<sup>1</sup>**

6. The Honourable Warren K. Winkler is acting as the Court-Appointed Mediator (the "**Mediator**") in these proceedings under the *Companies' Creditors Arrangement Act* (the "**CCAA**").
7. The Initial Orders under the CCAA, as amended and restated in these proceedings, generally provide, among other things, the Mediator with the mandate, as an officer of the Court, to mediate a global settlement of the tobacco claims.
8. To date, CCS has not participated in the mediation process but seeks to do so.

### **About CCS**

9. Founded in 1938, the Canadian Cancer Society is a non-profit charity and is the largest national voluntary health charity in Canada. The CCS mission is “the eradication of cancer and the enhancement of the quality of life of Canadians living with cancer.” CCS has approximately 100,000 volunteers as well as offices in 70 communities across Canada. CCS achieves its mission through patient services, public education/information, and research, as well as advocacy in relation to relevant public policy issues. CCS is the largest

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<sup>1</sup> The facts are derived from the Affidavit of Shawn Chirrey sworn September 24, 2019 “(Chirrey Affidavit”).

national charitable funder of cancer research in Canada. The CCS national headquarters is in Toronto.

10. For the fiscal year ending January 31, 2019, the CCS financial statements indicate that CCS had total expenditures of \$163.1 million, including \$52.6 million for patient services, public education/information and other programs; \$40.4 million for research; and \$3.0 million for advocacy. CCS has spent millions of dollars in these areas, and how CCS resources are spent in the future will depend on the progress to reduce tobacco use. Reducing the incidence of tobacco-caused cancer will make the limited resources of CCS more available to fight other types of cancer and to support other people living with cancer.
11. Tobacco use is the leading preventable cause of disease and death in Canada, killing more than 45,000 Canadians each year, including about 30% of all cancer deaths. Smoking causes not only lung cancer, but also at least 16 different types of cancer, as well as heart disease, stroke, emphysema, and many other types of diseases. While there has been significant progress to reduce smoking among adults and youth, there are still almost 5 million Canadians who smoke, representing 16% of the population (Canadian Community Health Survey, 2018). A large majority of smokers begin to smoke as teenagers or pre-teens, as reported by Health Canada.
12. CCS has been a leader in tobacco control in Canada and has been instrumental in many public policy measures that have been adopted despite tobacco industry opposition. CCS has extensive experience and expertise regarding tobacco control legislation, and has been involved in such legislation dating back to at least the 1960's. CCS also engages in public education/information and cessation programmes to reduce tobacco use. The tobacco

control expertise of CCS has been recognized by governmental and nongovernmental bodies. Canada is recognized as a world leader in tobacco control.

13. CCS has also participated in the processes related to the international tobacco treaty, the *WHO Framework Convention on Tobacco Control*, ratified by 181 Parties including Canada.<sup>2</sup> Much of this participation has been through the international nongovernmental organization, the Union for International Cancer Control, of which CCS is a member. The provisions of the Treaty apply to both national and provincial governments. Canada's ratification of the Treaty was supported by all 13 provinces and territories. The Preamble of the Treaty emphasizes, among other things, the special contribution of nongovernmental organizations and other members of civil society, such as CCS, to tobacco control efforts nationally and internationally and the vital importance of their participation in national and international tobacco control efforts. Also, Article 4, paragraph 7 of the Treaty, expressly provides that the "participation of civil society (i.e., CCS) is essential in achieving the objective of the Convention and its protocols".
14. CCS has a genuine interest in any global settlement of the tobacco claims. CCS has the necessary knowledge, experience and expertise to participate in the mediation process. CCS is in a position to help facilitate a settlement, should there be one, by advancing tobacco control measures for inclusion in a settlement to bridge the gap between the more

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<sup>2</sup> *WHO Framework Convention on Tobacco Control*, 21 May 2003, 2302 UNTS 229 (the "Treaty"), at Preamble, Article 4, para. 7, Article 12 (e) and Article 5.3 (our emphasis) including Guidelines for implementation of Article 5.3 (the "Guidelines"), at para. 13; Brief of Authorities of the Canadian Cancer Society dated September 24, 2019 ("BOA"), Tab 1.

than \$500 billion sought by claimants<sup>3</sup> and what the tobacco companies actually will pay, and to ensure that such measures are effective.

15. CCS takes no position as to which claimant should receive which share of the “pie”. That will be for others to determine. CCS does support that the aggregate size of the “pie”, the total amounts paid by tobacco companies, be as substantial as possible.
16. CCS has intervened on its own or jointly with other health organizations on multiple occasions regarding the constitutionality of tobacco legislation, an indication of the interest and experience, including legal experience, of CCS on tobacco policy issues. The interventions include:

1989 – Intervention in Federal Court of Canada to defend the constitutional validity of the federal tobacco advertising ban.<sup>4</sup>

1994 – Intervention before the Supreme Court of Canada to oppose a tobacco industry motion to stay regulations requiring larger, more effective tobacco package health warnings.<sup>5</sup>

1994-1995 – Intervention before the Supreme Court of Canada to defend the constitutional validity of the federal tobacco advertising ban.<sup>6</sup>

1995 – Intervention before the Ontario Court (General Division) and Ontario Court of Appeal to defend the Ontario ban on tobacco sales in pharmacies.<sup>7</sup>

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<sup>3</sup> The amounts of more than \$500 billion or more than \$600 billion were cited in tobacco company motion materials for the stay extension motion heard June 26, 2019.

<sup>4</sup> *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, 1989 CarswellNat 594 (FCTD) at paras. 1, 3, 5, 19, 21-23; BOA, Tab 2; rev'd in part [1990] 1 FC 90 (CA); BOA, Tab 3. The case in Federal Court did not in the end proceed to trial given that a different case brought by different tobacco companies proceeded in Quebec Superior Court.

<sup>5</sup> *RJR-Macdonald Inc. v. Canada (Attorney General)*, 1994 CarswellQue 120 (SCC) (headnote); BOA, Tab 4.

<sup>6</sup> *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 3 CarswellQue 119 (SCC) (headnote); BOA, Tab 5.

<sup>7</sup> *Rosen v. Ontario (Attorney General)*, 1995 CarswellOnt 4306 (Ont Ct Gen Div); BOA, Tab 6; aff'd 1996 CarswellOnt 89 (CA) (headnote); BOA, Tab 7.

2004-2005 – Intervention before Supreme Court of Canada to defend the constitutional validity of Saskatchewan legislation banning the visible display of tobacco products at point of purchase.<sup>8</sup>

1997-2007 – Intervention<sup>9</sup> by CCS before the Quebec Superior Court,<sup>10</sup> Quebec Court of Appeal<sup>11</sup> and Supreme Court of Canada<sup>12</sup> to defend the constitutional validity of federal tobacco advertising and promotion restrictions, and larger, picture-based package health warnings. The Supreme Court unanimously (9:0) upheld the legislation in its entirety. As part of Superior Court proceedings, CCS participated in the pre-trial discovery process, and also intervened opposing an application by tobacco companies to stay implementation of new package health warnings.<sup>13</sup>

17. There are 17 health/tobacco control organizations across Canada that have provided letters indicating that they do not intend to apply to participate in the CCAA proceedings and support CCS doing so.<sup>14</sup> CCS is not aware of any other health/tobacco control organization that intends to apply to participate in the CCAA proceedings. There has never been an intervention in a tobacco court proceeding in Canada by a health/tobacco control organization that has not been either by CCS on its own or by CCS jointly with other organizations.

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<sup>8</sup> *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 CarswellSask 162 (SCC) (headnote); BOA, Tab 8.

<sup>9</sup> *Rothmans, Benson & Hedges inc. v. Canada (Attorney General)*, 1997 CarswellQue 1521 (QCCS) (judgment on intervention); BOA, Tab 9.

<sup>10</sup> *J.T.I. Macdonald Corp. v. Attorney General of Canada*, 2002 CarswellQue 3403 (QCSC) (conclusions only); BOA, Tab 10.

<sup>11</sup> *JTI-MacDonald Corporation v Canada (Attorney General)*, [2005] J.Q. no 10915 (QCCA) (case summary); BOA, Tab 11.

<sup>12</sup> *JTI-Macdonald Corp. v. Canada (Attorney General)*, 2007 CarswellQue 5573 (SCC) (headnote); BOA, Tab 12.

<sup>13</sup> *Rothman's, Benson & Hedges inc. v. Canada (Attorney General)*, 2000 CarswellQue 1931 (QCSC); BOA, Tab 13.

<sup>14</sup> Exhibit "A" to Chirrey Affidavit.

### **CCS role in tobacco medicare cost recovery lawsuits and class actions**

18. CCS has for decades supported tobacco class actions and provincial government medicare cost recovery lawsuits, as well as other product liability claims against the tobacco industry. CCS has supported provincial legislation that has facilitated such lawsuits, including testifying before provincial legislative committees, and has urged that provinces file tobacco medicare lawsuits. CCS has attended court hearings in many of these cases in multiple provinces, and before the Supreme Court of Canada, regarding various pre-trial issues. In 1997, CCS spoke publicly at the announcement by B.C. Premier Glen Clark and Minister of Health Joy MacPhail that BC would be the first province to file a tobacco medicare claim. In 1999, CCS organized a national meeting in Montreal for lawyers to encourage litigation against the tobacco industry.

### **The U.S. tobacco medicare lawsuit settlement experience**

19. Medicare cost recovery lawsuits in Canada are inspired by the U.S. experience, which included 1997 and 1998 individual state tobacco medicare settlements in Mississippi, Florida, Texas, and Minnesota; a Master Settlement Agreement for 46 states, the District of Columbia and US territories; and a 1997 Proposed Resolution that was not in the end implemented.
20. The U.S. settlements included compensation, with an estimated US\$245.5 billion to be payable to state governments over 25 years. The settlements also included public health tobacco control measures, thus illustrating how tobacco control measures could be included

in a Canadian settlement. It should be recognized that the tobacco control measures in the U.S. settlements were agreed to in a different context, a context that was in the U.S. and that was more than 20 years ago.

21. A summary prepared by CCS of public health measures in the U.S. tobacco settlements provides an outline of such measures.<sup>15</sup> Tobacco control measures in the various U.S. settlements include:

- Establishing and funding a new independent foundation to do tobacco control (American Legacy Foundation, now called Truth Initiative).
- Marketing restrictions (eg restrictions on billboards, sponsorship, branded merchandise, cartoon characters, product placement in entertainment media).
- Public disclosure of/ access to more than 40 million pages of previously secret tobacco industry documents.
- Restrictions on lobbying, including the dissolution of the lobbying group the Tobacco Institute, and of the “research” organizations, the Council for Tobacco Research and the Council for Indoor Air Research.
- Ban on initiating most new legal challenges to existing laws of states (or of municipalities or other state political subdivisions).
- A “look back” provision requiring industry to pay monetary penalties if reductions in youth use do not reach specified targets.

#### **CCS role in the CCAA proceedings to date**

22. Counsel for CCS has attended the entirety of all hearings in the CCAA proceedings to date subsequent to the initial orders (April 4, 5, and 25, 2019; May 14, 2019; and June 26, 2019), and has appeared on the record for all these hearings except for the first two days of the comeback hearing.

23. On April 11, 2019, counsel for CCS filed a notice of appearance. On April 25, 2019, CCS made oral submissions in support of the motion by the Attorney General of Ontario for a

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<sup>15</sup> Exhibit "B" to Chirrey Affidavit.

partial lifting of the stay to be able to continue pre-trial proceedings in the Ontario lawsuit. On June 13, 2019, pursuant to the Professional Fees Disclosure Orders of May 16, 2019, CCS made a request to each of the Monitors to receive this information, and CCS has subsequently received such information. On June 24, 2019, CCS filed a responding motion record in response to the motions for a stay extension, taking the position that the proposed length of the stay extension was too long.

24. At no time did any party object to any of this participation by CCS.

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

25. CCS should be permitted to continue to participate in the CCAA proceedings because it has a financial interest in the outcome of a settlement. As noted, the extent of public health measures in any settlement will have a direct impact on tobacco use rates and consequently the incidence of cancer, which in turn affects the financial cost to CCS for its patient services, public education/information and research initiatives.
26. In addition to the direct financial interest of CCS, case law under the CCAA and commentary clearly also recognizes the importance of the broader public interest, social stakeholders and "other" interests besides traditional creditors in CCAA proceedings, and the sooner those "other" interests can be heard in CCAA proceedings, the better. Social stakeholders are entitled to participate in CCAA proceedings and their participatory rights apply at any stage of a CCAA proceeding.

27. Some commentators have noted the growing role of non-economic interests in CCAA proceedings.<sup>16</sup>

...broader societal interests have increasingly become an important factor in the judicial balancing of interests, particularly where the nature of the insolvent entity's business has implications on the society as a whole. [Buttery et. al]

The risks inherent the settlement of mass tort claims under the CCAA, therefore, affects potentially not only individual players but also the general public. [DaRe]

28. In *Canwest*, the Court listed the following factors, including the public interest, in deciding whether the CCAA plan was fair and reasonable: <sup>17</sup>

- (a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;
- (b) what creditors would have received on bankruptcy or liquidation as compared to the plan;
- (c) alternatives available to the plan and bankruptcy;
- (d) oppression of the rights of creditors;
- (e) unfairness to shareholders; and
- (f) *the public interest*.

29. The petitioners ("CMI Entities") in *Canwest* provided national television broadcasting services. The public interest was an important consideration for the Court: <sup>18</sup>

[The Plan] will ensure the continuation of employment for substantially all of the employees of the Plan Entities and will

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<sup>16</sup> Mary I A Buttery, H Lance Williams and Tijana Garvic, "TLC The Land Conservancy of Canada: The Evolution of the Role of 'Other' Interests in *Companies' Creditors Arrangement Act* Proceedings", in Janis P Sarra and Justice Barbara Romaine, eds, *Annual Review of Insolvency Law 2015* (Toronto: Carswell, 2016) 513 at 521 [Buttery et al]; BOA, Tab 14; and V W DaRe, "Risks Inherent in the Settlement of Tort Claims: Recent Direction from the Red Cross Case", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2008* (Toronto: Carswell, 2009) 355 at 357 [DaRe]; BOA, Tab 15.

<sup>17</sup> *Re Canwest Global Communications Corp*, 2010 CarswellOnt 5510 (Ont SCJ [Commercial List]) [*Canwest*] at 21 (emphasis added); BOA, Tab 16.

<sup>18</sup> *Ibid* at 26.

provide stability for the CMI Entities, pensioners, suppliers, customers and other stakeholders. In addition, the Plan will maintain for the general public broad access to and choice of news, public and other information and entertainment programming. Broadcasting of news, public and entertainment programming is an important public service, and the bankruptcy and liquidation of the CMI Entities would have a negative impact on the Canadian public.

30. In *Century Services*, the Supreme Court of Canada also recognized the importance of the broader public interest in the reorganization process:<sup>19</sup>

[T]he court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company... *In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed.*

31. The Supreme Court also emphasized that "the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority"<sup>20</sup> and that "judicial decision making under the CCAA takes many forms"<sup>21</sup>. Finally, the Supreme Court, in its reasons, cited *Canadian Airlines* and *Red Cross*, among other cases, as examples of restructurings that had implications for the broader community.

32. In *Canadian Airlines*, the petitioners were major Canadian airlines and broader societal interests were considered by the Court in finding the CCAA plan fair and reasonable:<sup>22</sup>

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<sup>19</sup>*Century Services Inc. v. Canada (A.G.); Ted Leroy Trucking Ltd., Re*, 2010 CarswellBC 3419 (SCC) [*Century Services*] at 60 (emphasis added); BOA, Tab 17.

<sup>20</sup> *Ibid* at 70.

<sup>21</sup> *Ibid* at 60.

<sup>22</sup> *Re Canadian Airlines Corp*, 2000 CarswellAlta 662 (ABQB) [*Canadian Airlines*] at 95, 174; BOA, Tab 18.

The economic and social impacts of a plan are important and legitimate considerations. Even in insolvency, companies are more than just assets and liabilities. The fate of a company is inextricably tied to those who depend on it in various ways. It is difficult to imagine a case where the economic and social impacts of a liquidation could be more catastrophic. It would undoubtedly be felt by Canadian air travellers across the country. The effect would not be a mere ripple, but more akin to a tidal wave from coast to coast that would result in chaos to the Canadian transportation system.

33. In *Anvil Range Mining*, which involved a concurrent CCAA proceeding and appointment of an interim receiver, Justice Blair (as he then was) stated:<sup>23</sup>

2 The Interim Receiver is supported in its recommendation by the secured creditors and by virtually all of the creditors except the Yukon Territorial Government ("YTG"). In other words, those with an 'economic' interest in the assets favour their immediate sale. The YTG and the United Steelworkers oppose the sale at the present time, however, or at least seek a postponement. They represent the 'social stakeholders' in the drama i.e. workers, and the Yukon public generally. Their concerns are jobs and the general public interest. The Faro Mine represents about 20% of the economy of the Yukon.

9 [...] The Court in its supervisory capacity has a broader mandate. In a receivership such as this one, which reaches well into the social and economic fabric of a territory, that mandate must encompass having an eye for the social consequences of the receivership too. These interests cannot override the lawful interests of secured creditors ultimately, but they can and must be weighed in the balance as the process works its way through.

34. In *Red Cross*, the Canadian Red Cross Society faced mass tort claims in the billions of dollars from individuals who had contracted diseases from contaminated blood products. The broader public interest in *Red Cross* of having a Canadian blood supply with integrity was a paramount consideration in the Court's decision to approve a sale and transfer of its

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<sup>23</sup>*Re Anvil Range Mining Corp.*, 1998 CarswellOnt 5319 (Ont. Gen. Div. [Commercial List] [*Anvil Range Mining*] at paras. 2, 9; BOA, Tab 19.

blood supply assets and operations to two new agencies before any restructuring plan was put to creditors: <sup>24</sup>

I conclude that the Red Cross is entitled to the relief it seeks at this stage, and orders will go accordingly. In the end, I come to these conclusions having regard in particular to the public interest imperative which requires a Canadian Blood Supply with integrity and a seamless, effective and relatively early transfer of blood supply operations to the new agencies; having regard to the interests in the Red Cross in being able to put forward a Plan that may enable it to avoid bankruptcy and be able to continue on with its non-blood supply humanitarian efforts; and having regard to the interests of the Transfusion Claimants in seeing the value of the blood supply assets maximized.

35. Professor Janis Sarra has commented on the *Red Cross* decision. She has written, among other things, that the proceeding illustrates that what is in the public interest in CCAA proceedings is not always apparent at the outset.<sup>25</sup> Regarding the adjournment of the asset sale motion for two weeks to give representative counsel some time to assess the proposed sale, she has also observed that:<sup>26</sup>

The Court's decision represented not only a balancing of the interests and prejudices *at that stage of the proceeding*, but also sent a message to Red Cross that the process must necessarily involve adequate notice and timely disclosure in order to make the *participation of the contingent creditors and other stakeholders meaningful*.

36. The *TLC The Land Conservancy of British Columbia* decision provides another example of a CCAA proceeding in which the broader public interest was engaged and heavily influenced the court's decision-making. TLC was a non-profit and charitable land trust. It was based in British Columbia. TLC's mission was to protect and educate the public about

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<sup>24</sup> *Re Canadian Red Cross Society/Societe Canadienne de la Croix-Rouge*, 1998 CarswellOnt 3346 (Ont. Gen. Div. [Commercial List]) [*Red Cross*] at 50; BOA, Tab 20.

<sup>25</sup> Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Carswell, 2013) at 162; BOA, Tab 21.

<sup>26</sup> *Ibid.* at 163. (our emphasis)

properties that have significant historical, cultural, scientific or scenic value.<sup>27</sup> The Court emphasized the importance of considering the broader stakeholders.<sup>28</sup> The support of several social stakeholders, including local governments, various preservation charities and community groups, were important considerations for the Court:<sup>29</sup>

It is not often the case that the court is aware of the specifics as to how these 'broader public interests' are affected by the *CCAA* proceedings or any proposed plan of arrangement. Usually, the major participants are the debtor and certain creditors. Certainly, it is evident here that TLC's directors and employees have worked tirelessly, sometimes in difficult circumstances, to move this matter forward to this point. Their passion and commitment to the land conservancy movement has been plain to see.

This is not one of those cases where the Court has to speculate about what those broader interests might entail. It is beyond dispute that in TLC's case, such broader interests were engaged and the Court has heard directly from many of those interests on the important issues raised during the course of these proceedings. The involvement of the Ecoforestry Institute Society and the Habitat Conservation Trust Foundation are but an example of community involvement in TLC's restructuring efforts. The Plan clearly discloses that many other community groups and societies were and remain involved in assisting in TLC's efforts while ensuring that TLC respects any trust requirements or other restrictions in relation to the properties. A key part of that involvement is the significant offer from the Nature Conservancy of Canada and the Nature Trust of British Columbia, whose mandate is the same or similar to that of TLC, but who are better situated to address the ongoing protection of the 28 important properties that they will receive.

Further, although technically creditors of TLC (regarding property taxes), many local government authorities, such as the City of Victoria, the Capital Regional District, the Cowichan Valley Regional District and the District of Tofino, remain involved in ensuring the protection and preservation of important ecological,

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<sup>27</sup> *Re TLC The Land Conservancy of British Columbia*, 2015 CarswellBC 1089 (BCSC) [*TLC*] at 8; BOA, Tab 22.

<sup>28</sup> *Ibid* at 63.

<sup>29</sup> *Ibid* at 64-68, 71.

heritage and cultural properties within their communities for the benefit of the public.

There are many other stakeholders or interested parties which I have not named, but which have been involved in this successful restructuring.

All of these stakeholders, including the creditors, have contributed and assisted, no doubt in varying degrees, in TLC's efforts and to its success in developing the Plan. The success achieved to date and any future success, as contemplated by the Plan, will not only be the success of TLC, but the success of them all.

37. Social stakeholders are entitled to participate in CCAA proceedings. That participation should be "meaningful" (borrowing from Professor Sarra's comments regarding *Red Cross*). These participatory rights apply at any stage of a CCAA proceeding. Full participation was welcomed and encouraged in *TLC* since it meant the Court didn't have to speculate on what the public interest might entail. Years before this decision, Professor Sarra, as noted above, wrote that it is not always apparent what is in the public interest in CCAA proceedings. As demonstrated in *TLC*, this problem was overcome by having the social stakeholders engaged from the outset of the CCAA proceeding.
38. The cases provide examples of how non-creditors or social stakeholders have participated in CCAA proceedings. In *TLC*, The Ecoforestry Institute Society and the Habitat Conservation Trust Foundation were each represented by counsel. In *Red Cross*, individual physicians were represented by counsel. In *Anvil Range Mining*, the United Steelworkers of America, Local 1051 and the Yukon Territorial Government were represented by counsel. In *Bloom Lake*, which involved mining interests, six First Nations were jointly

represented by counsel and were recognized as “social stakeholders” and entitled to make submissions.<sup>30</sup>

39. The current tobacco CCAA proceedings have far greater societal and public policy considerations than any or most any previous CCAA case. If ever there was a CCAA case for the meaningful participation or involvement of a social stakeholder, this is the case. Tobacco products are highly addictive and are the leading preventable cause of disease and death in Canada, killing 45,000 Canadians each year.
40. In most CCAA cases, the underlying product or service is desirable, such as blood supply or airlines. But here tobacco products kill when used exactly as the manufacturer intends. The societal goal in Canada is not to maintain tobacco sales, but to reduce sales as quickly as possible and thus prevent disease and save lives. There should not be “business as usual” with 45,000 Canadians continuing to die each year.
41. Imagine in the *Red Cross* case if, following a settlement, companies were still able to sell tainted blood, promote the use of tainted blood, and use a series of lobbying and other approaches to block, weaken or undermine government measures to curtail tainted blood. While such a scenario seems unthinkable, for tobacco the potential for a settlement under CCAA that has weak public health measures is of fundamental concern to CCS.
42. Tobacco companies want to maximize tobacco sales and prevent sales declines. CCS wants to minimize tobacco sales. The ultimate objective is to have a tobacco-free society. Health Canada’s objective is to reduce tobacco use to less than 5% by 2035. Tobacco is only legal

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<sup>30</sup> *Re Bloom Lake, g.p.l.*, 2015 CarswellQue 4072 (QSC) [*Bloom Lake*], at 87-89; BOA, Tab 23.

by historical accident. If tobacco were proposed to be a new product today given what is known about the health consequences, tobacco would never be allowed on the market.

43. In its factum on the application for an initial order, Imperial Tobacco recognized that there are stakeholders that are not creditors: “At the conclusion of this proceeding, it is anticipated that the Applicants’ business will be preserved, consistent with the objectives of the CCAA, for the benefit of their employees and other stakeholders, such as retirees, customers, landlords, suppliers, wholesalers, retailers and taxing authorities.”<sup>31</sup>
44. If employees whose interests are aligned with the tobacco company can be considered stakeholders, then there can also be public health stakeholders whose interests are not aligned with tobacco companies.
45. The tobacco industry raises a concern about jobs for its employees. But when a person dies from smoking, including many people in their 40s and 50s, the person loses not only their job but also their life. A family may be left without a breadwinner because a parent is dead, and there is no possibility of the parent ever finding a new job.
46. It should be noted that Imperial Tobacco no longer has any cigarette factories in Canada. All or most of Imperial Tobacco’s cigarette manufacturing is done in Mexico and is exported to Canada.
47. The tobacco companies say they are expressing concern for their customers, smokers. However, most smokers want to quit, intend to quit, and wish they had never started. When

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<sup>31</sup> Initial Order Factum of ITCAN and ITCO, March 12, 2019, para. 7.

the customers of tobacco companies contract cancer, CCS is there to help these individuals. The tobacco companies are generally not.

48. Measures in a settlement to reduce tobacco use will benefit the health of tobacco class action members, and will benefit public health in all provinces. All provincial governments have an objective to reduce tobacco use in order to not only to reduce disease and death, but also to reduce health care costs, the underlying reason behind the provincial lawsuits.
49. It is essential that CCS participate in the CCAA proceedings and the mediation process at an early stage and throughout the proceedings, well before a sanction hearing. In many respects, by the time of a sanction hearing it may be too late, given that a settlement would have been already reached among a large number of diverse parties.
50. Provincial Attorneys General have no monopoly on the public interest. Otherwise, there would never be a constitutional case in which intervener status would be granted. Moreover, Attorneys General may have perspectives that vary tremendously amongst each other and that are inconsistent. This is currently the case regarding federal government legislation concerning carbon pricing, and it has already been the case in these tobacco CCAA proceedings on a number of issues.
51. In a broad tobacco settlement, such as the current one contemplated under CCAA, the public health provisions in the settlement are public policy in nature that will have an affect similar to legislation (eg advertising restrictions in US settlements). It would simply be wrong for tobacco companies to be able to negotiate with governments measures akin to tobacco legislation without effective public health participation, and then to present these measures as almost a *fait accompli* at a sanction hearing. This significant element related

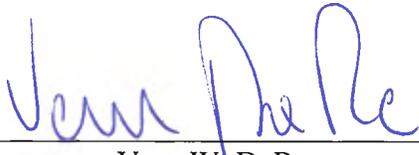
to public health/public policy measures in a tobacco settlement distinguishes these CCAA tobacco proceedings from almost all other CCAA cases.

52. CCS's participation in the mediation process will neither cause delay nor block the process. CCS can offer ideas, advice and recommendations, including on issues as they arise, but parties are free to accept or ignore such perspectives.
53. Based on the above commentary and case law, and all of the context, it is respectfully submitted that CCS should be able to continue to participate in the CCAA proceedings before the Court, and to participate in the mediation process, given its financial interest, and given its role as a public health social stakeholder.
54. CCS's distinct perspective and unique expertise lies in its public health perspective and tobacco control expertise. Allowing CCS to participate provides a different and valuable perspective beyond those offered by the tobacco claimants in the mediation process.

#### **PART IV - ORDER REQUESTED**

55. For the reasons set out above, CCS respectfully requests that the Court authorize CCS:
  - (a) to continue to participate in the CCAA proceedings before the Court; and
  - (b) to participate in the mediation process in these CCAA proceedings.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 24th day of September 2019.



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Vern W. DaRe



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Robert Cunningham

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Lawyers for Canadian Cancer Society

## SCHEDULE "A"

### LIST OF AUTHORITIES

1	<i>WHO Framework Convention on Tobacco Control</i> , 21 May 2003, 2302 UNTS 229 including Guidelines for implementation of Article 5.3
2	<i>Rothmans, Benson &amp; Hedges Inc. v. Canada (Attorney General)</i> , 1989 CarswellNat 594 (FCTD)
3	<i>Rothmans, Benson &amp; Hedges Inc. v. Canada (Attorney General)</i> [1990] 1 FC 90 (CA)
4	<i>RJR-Macdonald Inc. v. Canada (Attorney General)</i> , 1994 CarswellQue 120 (SCC) (headnote)
5	<i>RJR-MacDonald Inc. v. Canada (Attorney General)</i> , 1995 3 CarswellQue 119 (SCC) (headnote)
6	<i>Rosen v. Ontario (Attorney General)</i> , 1995 CarswellOnt 4306 (Ont Ct Gen Div)
7	<i>Rosen v. Ontario (Attorney General)</i> , 1996 CarswellOnt 89 (CA) (headnote)
8	<i>Rothmans, Benson &amp; Hedges Inc. v. Saskatchewan</i> , 2005 CarswellSask 162 (SCC) (headnote)
9	<i>Rothmans, Benson &amp; Hedges inc. v. Canada (Attorney General)</i> , 1997 CarswellQue 1521 (QCCS)
10	<i>J.T.I. Macdonald Corp. v. Attorney General of Canada</i> , 2002 CarswellQue 3403 (QCSC) (conclusions only)
11	<i>JTI-MacDonald Corporation v Canada (Attorney General)</i> , [2005] J.Q. no 10915 (QCCA) (case summary)
12	<i>JTI-Macdonald Corp. v. Canada (Attorney General)</i> , 2007 CarswellQue 5573 (SCC) (headnote)
13	<i>Rothman's, Benson &amp; Hedges inc. v. Canada (Attorney General)</i> , 2000 CarswellQue 1931 (QCSC)
14	Mary I A Buttery, H Lance Williams and Tijana Garvic, "TLC The Land Conservancy of Canada: The Evolution of the Role of 'Other' Interests in <i>Companies' Creditors Arrangement Act</i> Proceedings", in Janis P Sarra and Justice Barbara Romaine, eds, <i>Annual Review of Insolvency Law 2015</i> (Toronto: Carswell, 2016) 513
15	V W DaRe, "Risks Inherent in the Settlement of Tort Claims: Recent Direction from the Red Cross Case", in Janis P Sarra, ed, <i>Annual Review of Insolvency Law 2008</i> (Toronto: Carswell, 2009) 355
16	<i>Re Canwest Global Communications Corp</i> , 2010 CarswellOnt 5510 ( Ont SCJ [Commercial List])
17	<i>Century Services Inc. v. Canada (A.G.); Ted Leroy Trucking Ltd., Re</i> , 2010 CarswellBC 3419 (SCC)
18	<i>Re Canadian Airlines Corp</i> , 2000 CarswellAlta 662 (ABQB)

19	<i>Re Anvil Range Mining Corp.</i> , 1998 CarswellOnt 5319 (Ont. Gen. Div. [Commercial List])
20	<i>Re Canadian Red Cross Society/Societe Canadienne de la Croix-Rouge</i> , 1998 CarswellOnt 3346 (Ont. Gen. Div. [Commercial List])
21	Janis P. Sarra, <i>Rescue! The Companies' Creditors Arrangement Act</i> (Toronto: Carswell, 2013)
22	<i>Re TLC The Land Conservancy of British Columbia</i> , 2015 CarswellBC 1089 (BCSC)
23	<i>Re Bloom Lake, g.p.l.</i> , 2015 CarswellQue 4072 (QSC)

## **SCHEDULE “B”**

### **TEXT OF STATUTES**

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

#### **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.

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.**

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**

PROCEEDING COMMENCED AT  
TORONTO

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