

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

FACTUM

**(Motion for Advice and Directions Regarding Appointment of Representative
Counsel, Returnable December 6, 2019)**

December 4, 2019

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TO: **The Common Service List**

AND TO: **The Supplemental Service List**

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PART I - OVERVIEW & SUMMARY

1. This joint motion for advice and directions regarding the appointment of representative counsel is brought by: (i) FTI Consulting Canada Inc. ("**FTI**") in its capacity as court-appointed monitor of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited (together, "**Imperial**"); (ii) Ernst & Young Inc. ("**EY**") in its capacity as monitor for Rothmans Benson & Hedges Inc. ("**Rothmans**"); and (iii) Deloitte Restructuring Inc. ("**Deloitte**") in its capacity as monitor for JTI-Macdonald Corp. ("**JTIM**"). FTI, EY and Deloitte are hereinafter referred to as the "**Tobacco Monitors**". Imperial, Rothmans and JTIM are hereinafter referred to as the "**Applicants**".

2. The Tobacco Monitors bring this motion, as court-officers, to address a concern they have identified with respect to unrepresented claimants. This is a purely procedural motion. It does not confer, nor remove, any substantive rights. It does not in any way address the validity of claims

against the Applicants. Rather, the sole purpose of this motion is to provide representation for potential claimants on a pan-Canadian basis who are not represented within these Tobacco CCAA Proceedings.

3. The Tobacco Monitors seek Orders substantially in the form attached to the Joint Notice of Motion,¹ appointing The Law Practice of Wagner & Associates, Inc. ("**Wagners**"), an experienced class action litigation firm based in Halifax, Nova Scotia, as representative counsel (the "**Proposed Representative Counsel**") for the TRW Claimants (as defined below) in these Tobacco CCAA Proceedings.²

4. These Tobacco CCAA Proceedings are some of the most complex in the history of the CCAA due in large part to the number of tobacco-related legal actions, including uncertified class actions, currently brought against the Applicants and the number of potential tobacco-related claims currently unasserted or unascertained.

5. The multiplicity of actions commenced against the Applicants across Canada do not provide comprehensive representation for all individuals in these Tobacco CCAA Proceedings. Representation of all stakeholders will enable the Applicants to achieve the primary purpose of these Tobacco CCAA Proceedings, a pan-Canadian global settlement. Accordingly, it is necessary to appoint the Proposed Representative Counsel to ensure that any individuals that have asserted claims or who may be entitled to assert a claim for a Tobacco-Related Wrong (as defined below) (the "**TRW Claims**") are addressed in an efficient, timely and consistent manner under the exclusive jurisdiction of this Court.

¹ Joint Notice of Motion dated November 25, 2019, Schedules "A", "B" and "C" (the "**Draft Orders**").

² Terms not otherwise defined herein have the meaning ascribed to them in Appendix "1" of EY's Fourth Report of the Monitor, dated November 26, 2019; Appendix "A" of Deloitte's Sixth Report of the Monitor, dated November 26, 2019; and Appendix "A" of FTI's Sixth Report of Monitor, dated November 26, 2019.

6. As described below, the Proposed Representative Counsel will represent individuals with TRW Claims, to the extent they are not currently represented in the certified Quebec and British Columbia class actions, which includes: (i) various residual tobacco-related disease claims that fall outside a previously certified class definition; (ii) various tobacco-related disease claims that are currently the subject of uncertified class actions; and (iii) various tobacco-related disease claims for which no individual or class proceedings have been commenced.

7. Unless otherwise addressed, the number, complexity and interplay among the proceedings in which TRW Claims have been asserted would make the task of dealing with each proceeding overly burdensome on the Applicants, the Tobacco Monitors, the Court-Appointed Mediator and this Court.

8. The appointment of the Proposed Representative Counsel will ensure that vulnerable TRW Claimants receive effective representation in these Tobacco CCAA Proceedings, while also increasing efficiency and cost-effectiveness. The Proposed Representative Counsel will also increase TRW Claimants' access to justice in these Tobacco CCAA Proceedings to the benefit of all TRW Claimants, the Applicants and the Applicants' stakeholders, as discussed in this factum.

9. In these circumstances, the Tobacco Monitors respectfully submit that this Court has jurisdiction to appoint the Proposed Representative Counsel to represent the TRW Claimants in these Tobacco CCAA Proceedings, and that it is appropriate to do so.

PART II - SUMMARY OF FACTS

A. Tobacco CCAA Proceedings

10. In March 2019, each of the Applicants sought and obtained protection under the CCAA pursuant to Orders of the Ontario Superior Court of Justice (Commercial List) (as may have been amended and restated, the “**Initial Orders**”).³

11. Pursuant to the Initial Orders, the Honourable Warren K. Winkler, Q.C. was appointed as the Court-Appointed Mediator in each of the Tobacco CCAA Proceedings. The principal purpose of the ongoing Mediation is to effect a pan-Canadian global settlement of the tobacco-related claims currently or potentially facing the Applicants.

B. The Litigation Facing the Applicants

12. The litigation against the Applicants, currently stayed by their respective Initial Orders, consists of a patchwork of claims which have been advanced on behalf of various plaintiffs since as early as 1997.⁴

13. The Applicants are currently facing actions in every Province (but none of the Territories) arising from the enactment of special purpose provincial legislation creating a statutory claim in favour of the provincial governments to permit the recovery of health care costs incurred in connection with tobacco-related diseases. The alleged damages in these claims are estimated by the Provinces to be in the hundreds of billions of dollars in the aggregate. These provincial health care cost recovery claims are not TRW Claims and are not included in the Proposed Representative Counsel’s mandate.⁵

³ Appendix “1” of EY’s Fourth Report of the Monitor, dated November 26, 2019; Appendix “A” of Deloitte’s Sixth Report of the Monitor, dated November 26, 2019; and Appendix “C” of FTI’s Sixth Report of Monitor, dated November 26, 2019 (collectively referred to herein as the “**Appendix**”), at para. 9.

⁴ Appendix, at para. 9.

⁵ Appendix, at para. 10.

14. The Applicants are also currently facing a multitude of individual and class actions with respect to tobacco-related disease claims. The individual actions are discussed in Schedule “B3” to the Appendix. The class actions are further described below.

(i) Certified Class Actions

15. The Applicants are currently facing the following three certified class actions: (a) two Quebec class actions commenced in 1998, and (b) one British Columbia class action commenced in 2003 against just Imperial. In the two Quebec proceedings, the Quebec litigation plaintiffs have received judgments against the Applicants (the “**Quebec Judgment**”).⁶

16. Pursuant to the Quebec Judgment, the Applicants were found to be liable to the Quebec litigation plaintiffs for (i) causing throat cancer, lung cancer or emphysema in persons residing in Quebec who smoked at least 87,600 cigarettes before November 20, 1998 and were diagnosed with lung cancer, throat cancer or emphysema before March 12, 2012, and (ii) causing persons residing in Quebec who smoked upwards of 15 cigarettes a day during the period from September 30, 1998 to February 21, 2005 to become addicted to cigarettes.⁷

17. A class action has also been certified in British Columbia asserting a claim with respect to the improper marketing of “light” and “mild” branded products by Imperial. Such claim is currently limited to residents of British Columbia and others who have opted into the proceeding. No similar claims have been commenced against any of the other Applicants, or in any of the other provinces, other than Newfoundland and Labrador, where certification of a similar class was denied.⁸

⁶ Appendix, at para. 13.

⁷ Appendix, at para. 14.

⁸ Appendix, at para. 17.

18. Individuals participating in certified class actions may have other tobacco-related disease claims which are not included in the certified class definitions. These claims are TRW Claims which are included in the Proposed Representative Counsel's mandate.⁹

(ii) *Uncertified Class Actions*

19. Class actions have been commenced, but not certified, in Alberta, Manitoba, Nova Scotia and Saskatchewan seeking damages for tobacco-related diseases and a disgorgement of revenues or profits, among other things, but do not include all potential tobacco-related claims which could be asserted in those provinces.¹⁰

20. A class action has also been commenced, but not certified, in Ontario, seeking damages for tobacco-related diseases. These claims are more circumscribed than the uncertified proceedings commenced in the above-noted provinces as the proposed class is limited to smokers who have been diagnosed with chronic obstructive pulmonary disease, heart disease or cancer. No other tobacco-related disease claims have been asserted in this uncertified Ontario class action.¹¹

21. Similarly, two class actions have been commenced, but not certified, in British Columbia seeking damages in respect of heart disease and chronic respiratory disease, respectively. No other tobacco-related disease claims have been asserted in these uncertified British Columbia class actions. The claims brought in Ontario and British Columbia do not include all the potential tobacco-related claims which could be brought in such provinces.¹²

22. Notably, all of the above-noted uncertified class actions are at a preliminary stage; no substantive steps have been taken to advance the litigation, including with respect to certification of the classes. It is contemplated that the Proposed Representative Counsel would represent

⁹ Appendix, at para. 18.

¹⁰ Appendix, at para. 19.

¹¹ Appendix, at para. 20.

¹² Appendix, at para. 21.

TRW Claimants in Alberta, Manitoba, Nova Scotia, Saskatchewan, Ontario and British Columbia, which includes those who may fall within the proposed class definitions in the above-noted uncertified class actions.¹³

23. Three further class actions have been commenced, but not certified, in Ontario alleging that the Applicants improperly paid lower prices for tobacco leaf destined for exported duty-free products, as opposed to the higher domestic leaf price. The proposed class members are growers and producers in Ontario who sold tobacco through the Ontario Flue-Cured Tobacco Growers' Marketing Board pursuant to the terms of certain agreements during the period from January 1, 1986 to December 31, 1996 and are seeking damages for breach of contract. The Tobacco Monitors understand that plaintiff counsel in these actions has most recently taken the position with the Applicants that certification is not required; however, the Applicants dispute this position. No similar claims have been commenced in any of the other provinces. As these class actions are commercial in nature, they are not proposed to be represented by the Proposed Representative Counsel.¹⁴

(iii) No Class Actions Commenced

24. No class proceedings or individual proceedings have been commenced in New Brunswick, Newfoundland and Labrador, Prince Edward Island or any of the Territories with respect to any of the above-noted categories of potential claims.¹⁵

25. It is contemplated that the Proposed Representative Counsel would represent all TRW Claimants in these provinces and Territories.¹⁶

¹³ Appendix, at para. 22.

¹⁴ Appendix, at para. 12.

¹⁵ Appendix, at para. 23.

¹⁶ Appendix, at para. 24.

C. THE TRW CLAIMANTS

26. The Tobacco Monitors propose that the Proposed Representative Counsel will be appointed to represent: all individuals (including their respective successors, heirs, assigns, litigation guardians and designated representatives under applicable provincial family law legislation) who assert or may be entitled to assert a claim or cause of action as against one or more of the Applicants, the entities listed in Appendix “1” to this factum, or persons indemnified by such entities, in respect of Tobacco-Related Wrongs (as defined below) in Canada, or in the case of the Applicants, anywhere else in the world (the “**TRW Claimants**”).¹⁷

27. The TRW Claimants, as defined above, are individuals who assert or may be entitled to assert a claim or cause of action in respect of the following:

- (a) the development, manufacture, production, importation, marketing, advertising, distribution, purchase or sale of tobacco or any product made or derived from tobacco or containing nicotine that is intended for human consumption, including any component, part, or accessory of or used in connection with a tobacco product, including cigarettes, cigarette tobacco, roll your own tobacco, smokeless tobacco, and any other tobacco or nicotine delivery systems, and including materials, products and by-products derived from or resulting from the use of any tobacco products, but not including heat-not-burn tobacco products or vapour products (collectively, “**Tobacco Products**”);
- (b) the historical or ongoing use of or exposure to Tobacco Products; or
- (c) any representation in respect of Tobacco Products, including, without limitation, claims for contribution or indemnity, personal injury or tort damages, restitutionary

¹⁷ Appendix, at para. 25.

recovery, non-pecuniary damages or claims for recovery grounded in provincial consumer protection legislation,

but does not include the excluded claims set out in paragraph 28 below (the “**Tobacco-Related Wrongs**”).¹⁸

28. Excluded from the definition of TRW Claimants for the purposes of the relief sought herein, are any claims:

- (a) in any person’s capacity as a trade supplier, contract counterparty, employee, pensioner, or retiree;
- (b) captured by any of the following commercial class actions:
 - (i) *The Ontario Flue-Cured Tobacco Growers’ Marketing Board v. JTI-Macdonald Corp.*, Court File No. 64462 CP (London, Ontario);
 - (ii) *The Ontario Flue-Cured Tobacco Growers’ Marketing Board v. Rothmans, Benson & Hedges Inc.*, Court File No. 1056/10CP (London, Ontario); and
 - (iii) *The Ontario Flue-Cured Tobacco Growers’ Marketing Board v. Imperial Tobacco Canada Ltd.*, Court File No. 64757 CP (London, Ontario); or
- (c) captured by the following certified Quebec and British Columbia class actions:
 - (i) *Conseil québécois sur le tabac et la santé et al. v. JTI-Macdonald Corp. et al.*, Court File No. 500-06-000076-980 (Montreal, Quebec);
 - (ii) *Cécilia Létourneau et al. v. Imperial Tobacco Canada Ltd., et al.*, Court File No. 500-06-000070-983 (Montreal, Quebec); or

¹⁸ Appendix, at para. 25.

- (iii) *Kenneth Knight v. Imperial Tobacco Canada Ltd.*, Court File No. L031300 (Vancouver, British Columbia).¹⁹

PART III - ISSUE

29. The sole issue on this Motion is whether it is appropriate for this Court to appoint the Proposed Representative Counsel to represent the TRW Claimants in these Tobacco CCAA Proceedings.

PART IV - LAW & ARGUMENT

30. The Tobacco Monitors submit that this Court should appoint the Proposed Representative Counsel to represent the TRW Claimants in these Tobacco CCAA Proceedings for the following two reasons:

- (a) This Court has jurisdiction to appoint representative counsel; and
- (b) It is appropriate to appoint the Proposed Representative Counsel in the circumstances of these Tobacco CCAA Proceedings.

A. THIS COURT HAS JURISDICTION TO APPOINT THE PROPOSED REPRESENTATIVE COUNSEL

31. It is well established that Canadian Courts have jurisdiction to appoint representative counsel in insolvency proceedings pursuant to section 11 of the CCAA and Rule 10.01 of the *Rules of Civil Procedure*.²⁰

¹⁹ Appendix, at para. 26.

²⁰ See for example *Cash Store Financial Services, Re*, 2014 ONSC 4567 at para. 12 (S.C.J.), Book of Authorities dated December 4, 2019 (the "BOA"), Tab 6; *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 at paras. 10, 12 (S.C.J. [Commercial List]), BOA, Tab 13; *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 9398 at para. 14 (S.C.J. [Commercial List]), BOA, Tab 4; *Fraser Papers Inc., Re*, 2009 CarswellOnt 6169 at para. 7 (S.C.J. [Commercial List]), BOA, Tab 7; *League Assets Corp., Re*, 2013 BCSC 2043 at para. 70, BOA, Tab 10; *Quadriga Fintech Solutions Corp. (Re)*, 2019 NSSC 65 at paras. 5, 6, BOA, Tab 16; *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 at para. 35 (S.C.J.), BOA, Tab 20.

32. Section 11 of the CCAA grants a court broad discretion to “make any order that it considers appropriate in the circumstances”.²¹

33. More specifically, Rule 10.01(f) of the *Rules of Civil Procedure* permits courts to “appoint one or more persons to represent any person or class of persons who are ... unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served”, where it is “necessary or desirable” to do so.²²

34. Canadian Courts have relied on these provisions to appoint counsel to represent a broad range of claimants in complex CCAA proceedings.²³ Specifically, Canadian Courts have appointed counsel to represent class members and tort claimants in several CCAA proceedings, including:

- (a) *Cash Store Financial Services, Re* (class members in securities class actions);²⁴
- (b) *Montreal, Maine & Atlantic Canada Co., Re* (class members affected by train derailment in Lac-Mégantic);²⁵
- (c) *Poseidon Concepts Corp., Re* (class members from various class actions);²⁶
- (d) *Sears Canada Inc., Re* (class members in a franchising class action);²⁷
- (e) *Sino-Forest Corp.* (class members in securities class actions);²⁸

²¹ *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 11.

²² *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 10.01(f).

²³ See Appendix “2” to this Factum for a list of examples where representative counsel has been appointed in insolvency proceedings.

²⁴ *Cash Store Financial Services, Re*, 2014 ONSC 4567 (S.C.J.), BOA, Tab 6.

²⁵ *Montreal, Maine & Atlantic Canada Co., Re* (April 4, 2014), Doc. 450-11-000167-134 (Q.C.S.C.), BOA, Tab 11.

²⁶ *Poseidon Concepts Corp. Re* (May 31, 2013), Court File No. 1301-04364 (A.B.Q.B.), varied (December 17, 2014), BOA, Tab 15.

²⁷ *Sears Canada Inc., Re* (January 25, 2018), Court File No. CV-17-11846-00CL (S.C.J. [Commercial List]), BOA, Tab 17.

- (f) *Canadian Red Cross Society, Re* (blood transfusion claimants);²⁹
- (g) *Grace Canada Inc., Re* (Canadian Zonolite Attic Insulation claimants);³⁰ and
- (h) *Muscletech Research and Development Inc.* (tort claimants who used ephedra product).³¹

35. In the circumstances, this Court has jurisdiction to appoint representative counsel to represent TRW Claimants in these Tobacco CCAA Proceedings.³²

B. IT IS APPROPRIATE TO APPOINT THE PROPOSED REPRESENTATIVE COUNSEL

36. In assessing whether it is appropriate to appoint representative counsel, courts often consider the following non-exhaustive list of factors set out in *Canwest Publishing*: (i) the vulnerability and resources of the group sought to be represented; (ii) any benefit to the companies under CCAA protection; (iii) the facilitation of the administration of the proceedings and efficiency; (iv) any social benefit to be derived from representation of the group; (v) the avoidance of a multiplicity of legal retainers; (vi) whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and is

²⁸ *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2015 CarswellOnt 6975 (S.C.J. [Commercial List]), BOA, Tab 9.

²⁹ *Canadian Red Cross Society / Societe Canadienne de la Croix-Rouge, Re*, 1998 CarswellOnt 3346 at para. 52 (Gen. Div. [Commercial List]), leave to appeal refused 1998 CarswellOnt 5967 (C.A.), BOA, Tab 3.

³⁰ *Grace Canada Inc., Re* (February 8, 2006), Court File No. 01-CL-4081 (Ont. S.C.J. [Commercial List]). In subsequent proceedings, representative counsel in the Grace proceeding was held to have the authority to enter into a settlement extinguishing the litigation claims, subject to court approval. See *Grace Canada Inc., Re*, 2008 CarswellOnt 6284 at paras. 32–35 (S.C.J. [Commercial List]), BOA, Tab 8.

³¹ *Muscletech Research & Development Inc., Re*, 2006 CarswellOnt 720, (S.C.J. [Commercial List]), BOA, Tab 12.

³² See for example *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 9398 at para. 14 (S.C.J. [Commercial List]), BOA, Tab 4, where the Court states: “Dealing firstly with the representation component of the order, in my view, the order requested should be granted. I have jurisdiction under Rule 10 of the Rules of Civil Procedure and section 11 of the CCAA”.

prepared to act for the group seeking the order; (vii) the balance of convenience and fairness; and (viii) the position of other stakeholders (collectively, the “**Canwest Factors**”).³³

37. The applicability of each of the Canwest Factors to these Tobacco CCAA Proceedings is more fully discussed below.

(i) The TRW Claimants are a Vulnerable Group

38. Courts have established that the vulnerability and resources of the group that is proposed to be represented is an important factor that weighs in favour of the appointment of representative counsel.³⁴

39. The TRW Claimants are individuals located across the country, many of whom, without the Proposed Representative Counsel, may not have the resources or ability to effectively participate or advance their claims within these complex Tobacco CCAA Proceedings.

40. Further, it is well settled that until certification, proposed class members are not in a solicitor-client relationship with plaintiffs’ counsel.³⁵ In the present case, although class actions have been commenced in Alberta, Manitoba, Nova Scotia, Saskatchewan, Ontario and British Columbia, no substantive steps have been taken in those actions, including certification. As a result, the proposed class members in such actions are the TRW Claimants that remain unrepresented.

³³ *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 1328 at para. 21 (S.C.J. [Commercial List]), BOA, Tab 5. See also *Cash Store Financial Services, Re*, 2014 ONSC 4567 at para. 13 (S.C.J.), BOA, Tab 6; *Bridging Finance Inc. c. Béton Brunet 2001 Inc.*, 2017 QCCA 138 at para. 8, BOA, Tab 2; *League Assets Corp., Re*, 2013 BCSC 2043 at para. 72, BOA, Tab 10; *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 at para. 36 (S.C.J.), BOA, Tab 20; *Urbancorp Toronto Management Inc., Re*, 2016 ONSC 5426 at para. 11 (S.C.J. [Commercial List]), BOA, Tab 19.

³⁴ See for example *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 1328 at para. 21 (S.C.J. [Commercial List]), BOA, Tab 5; *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 9398 at para. 14 (S.C.J. [Commercial List]), BOA, Tab 4.

³⁵ *Pearson v. Inco Ltd.*, [2001] O.J. No. 4877 at para. 18 (S.C.J.), leave to appeal to Div. Ct. refused [2002] O.J. No. 2134 (S.C.J.), BOA, Tab 14.

41. In the circumstances therefore, the TRW Claimants are a particularly vulnerable group of stakeholders affected by these complex Tobacco CCAA Proceedings who will benefit from the appointment of the Proposed Representative Counsel.

(ii) The Applicants and their Stakeholders Will Benefit from the Appointment of the Proposed Representative Counsel

42. Canadian Courts will also consider whether the companies under CCAA protection will benefit from the appointment of representative counsel.³⁶

43. The Applicants have commenced these Tobacco CCAA Proceedings for the primary purpose of effecting a pan-Canadian global settlement. The Proposed Representative Counsel will enable the Applicants to achieve this goal by ensuring that the TRW Claimants are treated consistently and have an opportunity to participate in these Tobacco CCAA Proceedings in the following ways:

- (a) the Proposed Representative Counsel will receive and distribute (as appropriate), pertinent information relating to the Applicants and their financial circumstances, these Tobacco CCAA Proceedings and the Mediation;
- (b) the Proposed Representative Counsel will coordinate communication among and between the TRW Claimants, the Tobacco Monitors, the Court-Appointed Mediator and the three Applicants;
- (c) the Proposed Representative Counsel will represent the interests of the TRW Claimants for the purpose of all decisions which might affect their rights in the course of these Tobacco CCAA Proceedings and the Mediation, and if necessary, bring to the Court, the Court-Appointed Mediator or the Tobacco Monitors' attention any matters or legal arguments that need to be addressed; and

³⁶ *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 1328 at para. 21 (S.C.J. [Commercial List]), BOA, Tab 5.

- (d) the Proposed Representative Counsel will represent the TRW Claimants on matters related to any settlement or plan of compromise or arrangement which may be put forward by the Applicants.³⁷

44. This will fulfill the primary purpose of these Tobacco CCAA Proceedings by allowing the Applicants to have greater confidence when negotiating a pan-Canadian global settlement that affected interests have been adequately represented and to ensure consistency in the treatment of stakeholders with common interests.

45. In addition to the benefit of ensuring consistent and increased stakeholder participation in these Tobacco CCAA Proceedings, the Applicants and their stakeholders would benefit from the efficiencies to be gained by the appointment of the Proposed Representative Counsel, as further explained below.

(iii) The Appointment of the Proposed Representative Counsel Will Facilitate Efficiency and the Administration of the Proceedings

46. The appointment of the Proposed Representative Counsel will facilitate efficiency and the administration of these Tobacco CCAA Proceedings. Indeed, this benefit was most recently recognized in *Quadriga Fintech Solutions Corp. (Re)*, where the Court stated that the appointment of representative counsel “can make the proceeding more efficient and cost effective for all parties by providing a clear mechanism for communicating with the stakeholders”.³⁸

47. The task of identifying and communicating with thousands of unrepresented claimants with varying levels of resources and legal sophistication would be costly and administratively burdensome on the Applicants.

48. The Proposed Representative Counsel will act as a single point of contact among the TRW Claimants, the Applicants, the Tobacco Monitors, the Court and the Court-Appointed

³⁷ Appendix, at para. 38.

³⁸ *Quadriga Fintech Solutions Corp. (Re)*, 2019 NSSC 65 at para. 6, BOA, Tab 16.

Mediator for the purpose of service, communication and negotiating key steps in these Tobacco CCAA Proceedings and the Mediation, thereby reducing the administrative burden and improving the efficiency in connection therewith, to the benefit of the Applicants and their stakeholders.³⁹

(iv) The Appointment of the Proposed Representative Counsel Will Uphold Important Social Benefits, Including Access to Justice

49. These Tobacco CCAA Proceedings are particularly complex, as three separate tobacco enterprises, which comprise almost the entire legal tobacco industry in Canada, filed for CCAA protection at virtually the same time. Additionally, Imperial has sought relief in the US under Chapter 15 of the US Bankruptcy Code.

50. At this time, many of the TRW Claims are unascertained and unasserted and as such, many of the TRW Claimants may be unaware of these Tobacco CCAA Proceedings and/or the extent to which their rights may be compromised or altered in the Applicants' restructurings. Moreover, many of the TRW Claimants may lack the financial means or ability to engage meaningfully in these Tobacco CCAA Proceedings without the assistance of the Proposed Representative Counsel.⁴⁰

51. A representation order would promote access to justice by giving a strong and cohesive voice to the significant number of individuals with TRW Claims who, following the Applicants' CCAA filings, are at risk of having limited recourse against the Applicants.

52. The appointment of the Proposed Representative Counsel will also fulfil the objective of the CCAA: to facilitate restructurings. It is well recognized that the likelihood of a successful reorganization is enhanced when participants achieve common ground and all stakeholders are treated as fairly as the circumstances permit.⁴¹ This is an important objective that would be

³⁹ Draft Orders, Joint Notice of Motion dated November 25, 2019, at para. 7.

⁴⁰ Appendix, at para. 32.

⁴¹ *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at para. 22, BOA, Tab 18; *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at para. 50, BOA, Tab

advanced by the appointment of the Proposed Representative Counsel who will be able to ensure that the TRW Claimants are represented at the negotiating table and treated consistently and fairly in these Tobacco CCAA Proceedings.⁴²

(v) *The Appointment of the Proposed Representative Counsel Will Avoid a Multiplicity of Retainers*

53. The appointment of the Proposed Representative Counsel avoids the need for a multiplicity of retainers, as the TRW Claimants will not need to each engage counsel to advance individual claims. This will avoid fragmentation and duplication of efforts and resources, which further benefits the Applicants and their stakeholders.⁴³

(vi) *Representative Counsel Has Not Been Appointed For Those With Similar Interests to the TRW Claimants, and the Proposed Representative Counsel is Prepared to Act for the TRW Claimants*

54. Representative counsel has not already been appointed to represent individuals with similar interests to the TRW Claimants. As discussed above, the Proposed Representative Counsel will only represent individuals with TRW Claims to the extent they are not currently represented in the certified Quebec and British Columbia class actions or the Ontario Flue-Cured Tobacco Growers commercial class actions.

55. The Tobacco Monitors have met with Mr. Wagner and have been advised that Wagners is prepared to act for the TRW Claimants and represent their interests in these Tobacco CCAA Proceedings.⁴⁴ For the reasons that follow, the Tobacco Monitors submit that the Proposed Representative Counsel has the requisite experience and independence to effectively act for the TRW Claimants.

1; *Re Canadian Red Cross Society*, 1998 CarswellOnt 3346 at para. 45 (Gen. Div. [Commercial List]), leave to appeal refused 1998 CarswellOnt 5967 (C.A.), BOA, Tab 3.

⁴² Appendix, at paras. 43-45.

⁴³ Appendix, at paras. 40-42.

⁴⁴ Appendix, at para. 62.

(a) Experience

56. The Proposed Representative Counsel, Wagners, is based in Halifax, Nova Scotia and is known as one of Atlantic Canada's leading class action law firms. The nine lawyers at Wagners represent clients throughout Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and Labrador and across the country.⁴⁵

57. Raymond F. Wagner, Q.C. is the founder of Wagners with a well-established, exemplary reputation. With almost 40 years' experience, Mr. Wagner's legal practice has a primary focus on class actions, mass tort litigation, medical negligence and product liability. He has been involved in class action litigation since 2003, and is known for litigating complex, technical and novel issues within this sphere. Mr. Wagner has achieved significant settlements for his clients, including a settlement concerning historical institutional abuse at a Nova Scotian institution with a resolution based on restorative justice principles.⁴⁶

58. Mr. Wagner has acted as a member of consortiums of plaintiffs' counsel in a number of class actions which were national in scope. Mr. Wagner has appeared before numerous Courts across the country, including in the Atlantic Provinces, Ontario, Quebec, Saskatchewan and at the Federal Court and the Supreme Court of Canada.⁴⁷

59. Wagners has demonstrated expertise in class action and personal injury matters and therefore has the requisite experience to represent the TRW Claimants. In addition to this experience, Wagners also has the knowledge, support staff and infrastructure to fulfill the Proposed Representative Counsel's mandate and facilitate effective communication and information sharing among the TRW Claimants, the Applicants, the Tobacco Monitors, the Court and the Court-Appointed Mediator.

⁴⁵ Appendix, at para. 59.

⁴⁶ Appendix, at para. 60.

⁴⁷ Appendix, at para. 62.

(b) Independence

60. In these circumstances, the Tobacco Monitors are of the view that the independence of the Proposed Representative Counsel is critical to the effective, cohesive representation of the TRW Claimants.⁴⁸ Due to the number of counsel involved in the tobacco-related litigation, as well as these Tobacco CCAA Proceedings, many otherwise qualified counsel were conflicted.⁴⁹

61. Wagners has the requisite independence to act as the Proposed Representative Counsel in these Tobacco CCAA Proceedings and effectively represent the TRW Claimants. The Tobacco Monitors have been advised that Wagners is not, and has not, been involved in any tobacco-related litigation. The Tobacco Monitors have also been advised that Wagners is not conflicted and will take measures to ensure that no conflicts arise.⁵⁰

(vii) The Balance of Convenience and Fairness Favour the Appointment of the Proposed Representative Counsel

62. The appointment of representative counsel has been used in many Canadian insolvency proceedings to enable stakeholder groups to navigate and actively participate in complex CCAA proceedings.⁵¹

63. Given the complexity of these Tobacco CCAA Proceedings, it is essential that the TRW Claimants are represented by a single point of contact (with the requisite experience and independence) under the exclusive jurisdiction of this CCAA Court.

64. The appointment of the Proposed Representative Counsel will benefit not only the TRW Claimants by improving their access to justice, but also the Applicants and their stakeholders by reducing the administrative burden associated with these Tobacco CCAA Proceedings and improving the likelihood of a pan-Canadian global settlement.

⁴⁸ Appendix, at para. 57.

⁴⁹ Appendix, at para. 57.

⁵⁰ Appendix, at para. 63.

⁵¹ See Appendix "2" to this Factum for a list of examples where representative counsel has been appointed in insolvency proceedings.

65. For all of these reasons, the Tobacco Monitors respectfully submit that the balance of convenience and fairness weighs in favour of the appointment of the Proposed Representative Counsel.

(viii) The Position of the Applicants' Stakeholders

66. The Tobacco Monitors met with each of the Applicants and the Court-Appointed Mediator to discuss the appointment of the Proposed Representative Counsel. Each of them approved of and agreed with the appointment of the Proposed Representative Counsel.

67. The Tobacco Monitors also met with various of the Applicants' stakeholders from time to time to discuss the appointment of the Proposed Representative Counsel. The Tobacco Monitors have received support for the appointment of the Proposed Representative Counsel from certain of the consulted stakeholders. Others do not oppose the relief sought. At the time of filing this factum, the Tobacco Monitors have not been advised of any opposition to the relief sought herein.

PART V - ORDER REQUESTED

68. The Tobacco Monitors respectfully request that this Honourable Court grant the orders substantially in the form of the Draft Orders attached to the Joint Notice of Motion,⁵² appointing Wagners as representative counsel for the TRW Claimants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of December, 2019.

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⁵² Draft Orders, Joint Notice of Motion dated November 25, 2019, Schedules "A", "B" and "C".

**SCHEDULE “A”
LIST OF AUTHORITIES**

Case Name

1. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587, leave to appeal refused 2008 CarswellOnt 5432 (S.C.C.)
2. *Bridging Finance Inc. c. Béton Brunet 2001 Inc.*, 2017 QCCA 138
3. *Canadian Red Cross Society / Societe Canadienne de la Croix-Rouge, Re*, 1998 CarswellOnt 3346 (Gen. Div. [Commercial List]), leave to appeal refused 1998 CarswellOnt 5967 (C.A.)
4. *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 9398 (S.C.J. [Commercial List])
5. *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 1328 (S.C.J. [Commercial List])
6. *Cash Store Financial Services, Re*, 2014 ONSC 4567 (S.C.J.)
7. *Fraser Papers Inc., Re*, 2009 CarswellOnt 6169 (S.C.J. [Commercial List])
8. *Grace Canada Inc., Re*, 2008 CarswellOnt 6284 (S.C.J. [Commercial List])
9. *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2015 CarswellOnt 6975 (S.C.J. [Commercial List])
10. *League Assets Corp., Re*, 2013 BCSC 2043
11. *Montreal, Maine & Atlantic Canada Co., Re* (April 4, 2014), Doc. 450-11-000167-134 (Q.C.S.C.)
12. *Muscletech Research & Development Inc., Re*, 2006 CarswellOnt 720 (S.C.J. [Commercial List])
13. *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 (S.C.J. [Commercial List])

Case Name

14. *Pearson v. Inco Ltd.*, [2001] O.J. No. 4877 (S.C.J.), leave to appeal to Div. Ct. refused [2002] O.J. No. 2134 (S.C.J.)
15. *Poseidon Concepts Corp., Re* (May 31, 2013), Court File No. 1301-04364 (A.B.Q.B.), varied (December 17, 2014)
16. *Quadriga Fintech Solutions Corp. (Re)*, 2019 NSSC 65
17. *Sears Canada Inc., Re* (January 25, 2018), Court File No. CV-17-11846-00CL (S.C.J. [Commercial List])
18. *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60
19. *Urbancorp Toronto Management Inc., Re*, 2016 ONSC 5426 (S.C.J. [Commercial List])
20. *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 (S.C.J)

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

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.

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194**

Proceedings in which Order may be Made

10.01(1) In a proceeding concerning,

- (a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
- (b) the determination of a question arising in the administration of an estate or trust;
- (c) the approval of a sale, purchase, settlement or other transaction;
- (d) the approval of an arrangement under the *Variation of Trusts Act*;
- (e) the administration of the estate of a deceased person; or
- (f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served.

APPENDIX 1
LIST OF ENTITIES

1. Imperial Tobacco Services Inc., Imperial Tobacco Products Limited, Marlboro Canada Limited, Cameo Inc., Medallion Inc., Allan Ramsay and Company Limited, John Player & Sons Ltd., Imperial Brands Ltd., 2004969 Ontario Inc., Construction Romir Inc., Genstar Corporation, Imasco Holdings Group, Inc., ITL (USA) limited, Genstar Pacific Corporation, Imasco Holdings Inc., Southward Insurance Ltd., Liggett & Myers Tobacco Company of Canada Limited or entities related to or affiliated with them other than Imperial and the BAT Group (defined below) (collectively, the **“ITCAN Subsidiaries”**).
2. British American Tobacco p.l.c., B.A.T. International Finance p.l.c., B.A.T Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited or entities related to or affiliated with them other than Imperial and the ITCAN Subsidiaries (collectively, the **“BAT Group”**).
3. The entities currently or formerly related to or affiliated with JTIM (collectively, the **“JTIM Group”**).
4. Phillip Morris International Inc. and all entities related to or affiliated with it, other than Rothmans (collectively, the **“PMI Group”**).

APPENDIX 2
INSOLVENCY PROCEEDINGS IN WHICH REPRESENTATIVE COUNSEL WAS APPOINTED

Case Name

1. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (March 18, 2008), Court File No. 08-CL-7440 (Ont. S.C.J. [Commercial List])
2. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (April 15, 2008), Court File No. 08-CL-7440 (Ont. S.C.J. [Commercial List])
3. *Bridging Finance Inc. v. Beton Brunet 2001 Inc.*, 2017 QCCA 138
4. *Canadian Red Cross Society / Societe Canadienne de la Croix-Rouge, Re*, 1998 CarswellOnt (Gen. Div. [Commercial List]), leave to appeal refused 1998 CarswellOnt 5967 (C.A.)
5. *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 9398 (S.C.J. [Commercial List])
6. *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 1328 (S.C.J. [Commercial List])
7. *Cash Store Financial Services, Re*, 2014 ONSC 4567 (S.C.J.)
8. *Downing Street Financial Inc., In Trust v. Harmony Village Sheppard Inc.* (May 18, 2017), Court File No. CV-17-11669-00CL (Ont. S.C.J [Commercial List])
9. *Emmanuel Village Residence Inc. v. 1250 Weber Street East* (August 19, 2016), Court File No. CV-16-11424-CL (Ont. S.C.J. [Commercial List])
10. *First Leaside Wealth Management Inc.*, 2012 CarswellOnt 2559 (Ont. S.C.J. [Commercial List])
11. *Fraser Papers Inc., Re*, 2009 CarswellOnt 6169 (S.C.J. [Commercial List])
12. *Grace Canada Inc., Re* (February 8, 2006), Court File No. 01-CL-4081 (Ont. S.C.J. [Commercial List])

Case Name

13. *Harmony Village-Sheppard Inc.* (May 18, 2017), Court File No. CV-17-11669-00CL (Ont. S.C.J. [Commercial List])
14. *JCF Capital ULC v. Talon International Inc.* (November 9, 2016), Court File No. CV- 16-1 1573-00CL (Ont. S.C.J. [Commercial List])
15. *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2015 CarswellOnt 6975 (Ont. S.C.J. [Commercial List])
16. *League Assets Corp., Re*, 2013 CarswellBC 3408 (B.C. S.C.)
17. *Montreal, Maine & Atlantic Canada Co., Re* (April 4, 2014), Doc. 450-11-000167-134 (Q.C.S.C.)
18. *Muscletech Research & Development Inc., Re*, 2006 CarswellOnt 720, (S.C.J. [Commercial List])
19. *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 (S.C.J. [Commercial List])
20. *Peoples Trust Company v. Rose of Sharon (Ontario) Retirement Community* (April 11, 2013), Court File No. CV-11-9399-00CL (Ont. S.C.J. [Commercial List])
21. *Portus Alternative Asset Management Inc.* (October 14, 2005), Court File No. 05-CL-5792 (Ont. S.C.J. [Commercial List])
22. *Poseidon Concepts Corp. Re*, (May 31, 2013), Court File No. 1301-04364 (A.B.Q.B.), varied (December 17, 2014)
23. *Quadriga Fintech Solutions Corp. (Re)*, 2019 NSSC 65
24. *Re Edgeworth Properties Inc.* (November 10, 2011), Court File No. CV-11-9409-00CL (Ont. S.C.J.)
25. *Re MF Global Canada Co.* (November 14, 2011), Court File No. 207854-T (Ont. S.C.J.)

Case Name

26. *Re Nelson Financial Group Ltd* (June 15, 2010), Court File No. 10-8630-00CL (Ont. S.C.J. [Commercial List])
27. *Re Redstone Investment Corp.* (April 4, 2014), Court File No. CV-14-10495-00CL (Ont. S.C.J. [Commercial List])
28. *Sears Canada Inc., Re* (January 25, 2018), Court File No. CV-17-11846-00CL (Ont. S.C.J. [Commercial List])
29. *SecureCare Capital Inc.* (October 6, 2017), Court File No. 31-2278725 (Ont. S.C.J. [Commercial List])
30. *Superintendent of Financial Services v. Building & Development Mortgages Canada Inc.* (June 28, 2018), Court File No. No. CV-18- 596204-00CL (Ont. S.C.J.)
31. *Superintendent of Financial Services v. Textbook Student Suites* (January 24, 2017), Court File No. CV-16-11567-00CL (Ont. S.C.J.)
32. *Talon International Inc.* (November 9, 2016), Court File No. CV-16-11573-00CL (S.C.J. [Commercial List]), varied (March 30, 2017)
33. *Target Canada Co., Re*, 2015 ONSC 1028 (S.C.J.)
34. *Urbancorp Toronto Management Inc., Re*, 2016 ONSC 5426, (S.C.J. [Commercial List])
35. *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 (S.C.J.)
36. *WESTLB AG v. Rosseau Resort Development Inc.* (August 20, 2009), Court File No. CV-09-8201-00CL (Ont. S.C.J. [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.**

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

FACTUM
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