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.**

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Returnable on January 29, 2025

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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** 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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13	*RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC)
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16	*U.S. vs. Philip Morris USA Inc., et al*., U.S. District Court, Final Opinion, 2006
17	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)
18	Virginia Torrie and Vern W. DaRe, "The Participation of Social Stakeholders in CCAA Proceedings", *Annual Review of Insolvency Law 2019* (Toronto: Thomson Reuters, 2020)

TAB 11

ONTARIO

Superior Court of Justice – East Region
161 Elgin Street
Ottawa, Ontario K2P 2K1

ENDORSEMENT OF
CIVIL MOTION, APPLICATION OR CASE CONFERENCE

SHORT TITLE OF PROCEEDINGS: Meridian Credit Union Limited v. Garden Villa Retirement Residence Inc.

COURT FILE NO.: CV-23-00093034-0000

BEFORE: Justice C. Hackland

HEARD ON: October 26, 2023

COUNSEL:

Ian Klaiman for the plaintiff/applicant
No one appearing for defendant/respondent
Vern Dare, counsel for the Receiver BDO

RELIEF REQUESTED: Receivership Order

☑ **ORDER SIGNED** ☑ **ON CONSENT**

☐ **UNOPPOSED** ☐ **NOONE APPEARED**

☐ **ADJOURNED TO**

ENDORSEMENT:

I consider the draft Receivership order to be appropriate and warranted by the circumstances.
It also adequately provides for the" social stake holders", being the 50-60 residents of this senior citizen's home, see Vancouver Coastal Health Authority v. Seymour Health Centre Inc.
2023 BCSC 1158 . Receivership Order to issue as signed.

Justice C. T. Hackland
Hackland J.

Date: October 26, 2023

Hackland J.
Justice C. Hackland

TAB 17

TLC The Land Conservancy of Canada: The Evolution of the Role of "Other" Interests in *Companies' Creditors Arrangement Act* Proceedings

Mary I A Buttery, H Lance Williams and Tijana Gavric[*]

I. INTRODUCTION

The recent restructuring of TLC The Land Conservancy of British Columbia ("TLC") under the *Companies' Creditors Arrangement Act*[1] (*CCAA*) highlights the important role interests, other than those of creditors, have come to play in *CCAA* proceedings. While *Re TLC The Land Conservancy of British Columbia*[2] is certainly not the first case where a *CCAA* court has considered interests other than those of creditors, it is perhaps one of the clearest examples of the lengths courts will go to in order to protect broader societal interests.

II. BACKGROUND

TLC is a non-profit, charitable land trust located in British Columbia. Its mission is to protect and educate the public about properties that have significant historical, cultural, scientific or scenic value.[3] It achieves this goal by either acquiring, through sale or donation, properties that other individuals or agencies were unable to protect or conserve, or participating in the

* Mary I A Buttery, H Lance Williams and Tijana Gavric, DLA Piper (Canada) LLP. The authors acknowledge the assistance of Justin Wong, summer articled student, for his assistance with research for this article.

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

2 *Re TLC The Land Conservancy of British Columbia*, 2015 BCSC 656 [*Re TLC*].

3 *Ibid* at para 8.

formation of restrictive covenants for the subject properties. TLC was founded in 1996 and since then has preserved or protected over 250 properties, with many being transferred by TLC to other land trusts, or government agencies.

In 2013 TLC ran into significant financial difficulties, largely due to the fact that its portfolio of properties, numbering 50 at the time, and the administrative burden of the numerous covenants it held, could not be maintained on its income, funding, and donations.

III. TLC *CCAA* PROCEEDINGS

The Court noted that a *CCAA* filing became necessary because "TLC's desire to protect these properties appears to have overshadowed the needs to see that funding was secured to do so".[4] TLC filed for *CCAA* protection in October 2013 in an effort to permanently resolve its long-standing financial challenges. TLC commenced work with a land consultant to assess its properties and develop a plan for their care or their transfer that would be consistent with TLC's mandate, while recognizing its obligations to creditors.

Transfer of some of the properties was easy; there were ready buyers who would pay what the land consultant and the monitor considered commercially reasonable fair market value, while still preserving the property in a manner consistent with TLC's values. As the *CCAA* proceedings continued however, it became apparent that further property sales were going to be a problem for several reasons. First, a number of the properties were encumbered with restrictive covenants or were subject to potential trust claims. Second, if the properties were to be sold for a value consistent with their highest and best use, all of the creditors were likely to receive 100 cents per dollar of claim. However, the prospect of selling important historical and ecological properties to commercial parties, potentially for development, was an anathema to

4 *Ibid* at para 10.

TLC's fundamental purpose and was quickly ruled out as an option. The Court noted that TLC had the task of balancing the:

> ... competing goals of repaying its creditors and meeting its fundamental mandate of preserving and protecting important heritage and ecologically-sensitive properties.[5]

Uniquely, and fortunately for TLC, most of the creditors were also supporters of TLC and many were even donors.[6] These individuals and stakeholder groups communicated to TLC that their concern, first and foremost, was that the conservation goal of the particular properties, be it cultural, historical or ecological, be preserved before the creditors recovered payment of amounts owing to them. In other words, there was a clear indication to TLC that many creditors would be willing to forgo payment, or at least full payment, to preserve the properties.

The challenge for the Court, and the monitor, was that in regular *CCAA* proceedings, the monitor must opine and the court must be satisfied that the plan presents a better return to creditors than they would receive in bankruptcy.[7] However, TLC was adamant that its creditors were different and accordingly the result of any plan had to be as well. The Court noted that:

> The filing was unique in that TLC's circumstances were materially different than those of most insolvent entities that are attempting to deal with their creditors so as to stay in business. TLC's stated intention was to restructure its operations, assets and affairs to enable it to continue its conservation efforts and fulfill TLC's general purposes as a land trust in British Columbia.[8]

Accordingly, it became necessary for TLC to have some indication that its creditors would accept lesser payment, or an

5 *Ibid* at para 2.
6 *Ibid* at para 14.
7 *Northland Properties Ltd Excelsior v Life Ins Co of Can* (1989), 34 BCLR (2d) 122 (BCSC) at para 30. See also *Re Canadian Airlines Corp*, 2000 ABQB 442 at para 95 [*Canadian Airlines*].
8 *Re TLC*, *supra* note 2 at para 13.

increased risk of lesser payment, in exchange for preserving the properties. In conjunction with the monitor, TLC held an information session where it explained its plans and sought creditor support. The response from the meeting was highly positive.[9] It was followed by a "straw poll" of creditors for support.[10]

Based on that positive support from creditors, TLC was able to develop a plan of arrangement that sought to reach the balance between repayment of creditors and preservation of property. In the monitor's report to the Court regarding the plan, the monitor noted the unique characteristics of TLC's *CCAA* filing, including the fact that TLC's governing principles of land conservancy were in conflict with the commercial norms associated with the *CCAA*, such as maximizing the recovery to creditors in a restructuring. The monitor also noted that TLC's board of directors and management struggled to achieve a balance between the significant net equity in TLC's properties and the need to ensure those properties are sold in accordance with land conservancy principles. Notwithstanding the reality that TLC's plan of reorganization may not offer creditors more than they would receive in a liquidation, creditor support was overwhelmingly in favour of the plan both from secured and unsecured creditors.[11]

At the hearing for a sanction order to approve TLC's plan of arrangement, the Court extensively reviewed the facts surrounding TLC's insolvency and the test to be applied. In determining whether the plan was fair and reasonable, the Court reviewed the factors cited by the Ontario Superior Court of Justice in *Re Canwest Global Communications Corp.*[12] Those factors include:[13]

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9 *Ibid* at para 20.
10 *Ibid.*
11 *Ibid* at para 43.
12 *Re Canwest Global Communications Corp*, 2010 ONSC 4209 (Ont SCJ [Commercial List]) [*Canwest*].
13 *Ibid* at para 21.

(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.

The Court in *Re TLC* noted the overwhelming support of the creditors, and that:

> The endorsement of the Plan as fair and reasonable, by the substantial majority of creditors, remains important. This is so given the unique circumstances here where commercial considerations have clearly been overtaken by the broader wish to ensure that TLC remains a viable entity able to deal with its properties responsibly and in accordance with its mandate, and that even after completion of the property dispositions, TLC remains a viable member of the land conservation movement. Despite the considerable uncertainties as to whether TLC will be able to monetize its remaining interests and repay its debts, in whole or in part, the creditors are overwhelmingly in support.
>
> For this reason, the factors relating to alternatives, and what might be recovered in a bankruptcy and liquidation, are of less relevance here to the extent that one might even accurately assess what that might be in this case.[14]

The Court went on to note the importance of considering the broader stakeholders.[15] The support of the social stakeholders, being the environment, the local governments, various preservation charities and community groups, were important factors for the Court, which noted that:

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14 *Re TLC, supra* note 2 at paras 58 and 59.
15 *Ibid* at para 63.

> 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 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...
>
> Further, although technically creditors of TLC (regarding property taxes), many local government authorities ... remain involved in ensuring the protection and preservation of important ecological, heritage and cultural properties within their communities for the benefit of the public.[16]

The Court sanctioned the plan of arrangement,[17] finding that:

> 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.[18]

The Court's consideration of the broader social stakeholders illustrates that it was cognizant of TLC's community-based mandate and the fact that any plan of arrangement would largely be driven by non-economic considerations that would benefit the large constituency of TLC's supporters.

While the emphasis the Court placed on broader social stakeholders was largely driven by TLC's community-based mandate, the case is nonetheless illustrative of the willingness of courts to consider a broader constituency of interests.

Re TLC is the latest and most striking case in an evolving body of cases where courts have considered a broader constituency of interests.

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16 *Ibid* at paras 65-66.
17 *Ibid* at para 71.
18 *Ibid* at para 68.

IV. HISTORICAL OVERVIEW OF JUDICIAL CONSIDERATION OF "OTHER" INTERESTS UNDER THE *CCAA*

Some of the earliest examples of judicial consideration of "other" interests were cases where courts used the *CCAA* to interfere with the contractual rights of third parties, or non-creditors. One of the earliest cases where a stay order affected the rights of a third party was the 1997 decision of the Ontario Court of Justice in *Re T Eaton Co.*[19] In that case, the Court had previously pronounced an order (the "Order") that, *inter alia*, prevented tenants at retail shopping centres in which T Eaton Company Limited ("Eaton's") was an anchor tenant from terminating their leases during the restructuring period. Dylex operated retail stores in shopping centres of which Eaton's was one of the anchor tenants. Dylex brought an application seeking to vary the Order to permit it to exercise its rights under the leases to terminate or otherwise amend the terms of the leases if Eaton's ceased to operate its store in a shopping centre. The argument of Dylex was that the relationship between it and the landlords was outside of the *CCAA* proceedings as there was no contractual arrangement including Eaton's.

The Court found that if it were to grant the order Dylex was seeking, it would have to grant the same relief to other tenants in a similar position, which would seriously jeopardize Eaton's restructuring plan. Justice Houlden noted:

> Although I have considerable sympathy for the problem facing Dylex as a result of the closing of anchor stores by Eaton's, I must do all in my power to bring about a successful plan of compromise and arrangement. Eaton's has more than 15,000 full and part-time employees. It has sales of about $1,500,000,000 a year and the continuation of that source of business is of great importance to Eaton's suppliers.[20]

In dismissing Dylex's motion, the Court adopted the submissions set out in a factum submitted by another landlord, which noted that if Eaton's restructuring was not successful, the

19 *Re T Eaton Co* (1997), 46 CBR (3d) 293 (Ont Gen Div) [*Eaton*].
20 *Ibid* at para 5.

ensuing economic harm "could have a ripple effect throughout the local economies and cause further job loss".[21]

The *Eaton* case is significant in that the Court made a decision that altered the rights of a third party that had no relationship with the debtor company, based on the Court's finding that it was necessary to permit a successful restructuring. As noted by the Court of Appeal of Alberta in *Luscar Ltd v Smoky River Coal Limited*,[22] the Court in *Eaton* confirmed that "s 11 and the inherent jurisdiction of the Court" give courts the power "to make orders against non-creditor third parties when their actions would potentially prejudice the success of the plan".[23]

The Court in *Luscar* further confirmed that the language of the *CCAA* was broad enough to give judges the authority to permanently affect the contractual rights of third parties and that this interpretation was consistent with the remedial objectives of the statute.[24]

The *Eaton* and *Luscar* cases illustrate that courts will use the wide discretion afforded to them under the *CCAA* to fill in the gaps in the statute and fashion extraordinary remedies to facilitate the restructuring of insolvent entities. These remedies have often impacted the rights of non-creditors.

In other cases, courts have broadened their focus from the facilitation of restructurings, and fashioning remedies to that effect, to broader considerations of the effect of a proposed course of action on a wide constituency of interests, including non-economic interests. While the focus remains primarily on how restructurings benefit creditors, whose interests are generally paramount in *CCAA* proceedings, courts are increasingly considering the interests of other stakeholders. As noted by the Supreme Court of Canada:

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21 *Ibid* at para 7.
22 *Luscar Ltd v Smoky River Coal Limited*, 1999 ABCA 179[*Luscar*].
23 *Ibid* at para 58.
24 *Ibid* at para 60.

> ...the 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 ... 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.[25]

The Supreme Court of British Columbia made similar remarks in the 2004 decision, *Re Doman Industries et al*,[26] noting that:

> The interests of the broad constituency of stakeholders in taking reasonable steps to ensure the ongoing viability of the business will often outweigh the prejudice caused to parties having their contracts or other arrangements with the debtor company terminated and their consequential damage claim being included in the plan of arrangement.[27]

As the following *CCAA* decisions illustrate, 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.

One of the earliest cases where courts took note of broader societal factors was the 1992 decision of the Supreme Court of British Columbia in *Re Quintette Coal Ltd.*[28] In that case, the debtor company operated a coal mine. It was granted an initial stay of proceedings, which was subsequently extended. The company eventually sought an order sanctioning its plan of arrangement. In sanctioning the plan, the Court acknowledged the significance of the coal mine to the British Columbia economy, its importance to the people who lived and worked in the region and to the company's employees and their families. The Court also acknowledged "the general public's desire to see the negotiations end and the work begin".[29]

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25 *Eaton, supra* note 19 at para 60.
26 *Re Doman Industries et al*, 2004 BCSC 733.
27 *Ibid* at para 33.
28 *Re Quintette Coal Ltd* (1992), 68 BCLR (2d) 219 (BCSC).
29 *Ibid* at 246.

Broader societal interests played a pivotal role in the 1998 decision of the Ontario Court of Justice in *Re Canadian Red Cross Society/ Société Canadienne de la Croix-Rouge*[30] where the Court approved the sale of substantially all of the assets of the Canadian Red Cross Society before any restructuring plan was put to creditors. In that case, the Canadian Red Cross Society was facing $8 billion of tort claims from people who contracted diseases from contaminated blood products. The society sought and obtained a stay of proceedings with a view to putting forward a plan of arrangement and as part of a national process in which responsibility for the Canadian blood supply would be transferred from the Red Cross to two new agencies, which were to form a new national blood authority. Prior to putting forward a plan of arrangement to its creditors, the Canadian Red Cross Society sought, *inter alia*, court approval of the sale and transfer of its blood supply assets and operations to the two new agencies. The Court approved the sale having regard to the "public interest imperative which requires a Canadian blood supply with integrity"[31] and the interests in the Red Cross being able to put forward a plan that may enable it to avoid bankruptcy and continue with its non-blood supply humanitarian efforts.

The *Red Cross* decision is perhaps one of the clearest examples of the importance courts will attribute to non-economic interests in *CCAA* proceedings. The broader societal interest of having a Canadian blood supply with integrity was a paramount consideration in the Court's decision to approve a sale in circumstances where those with the largest economic stake in the process, namely the creditors, had not yet voted on a plan of arrangement. The decision was undoubtedly influenced by the fact that the Red Cross is a public entity with a public mandate and illustrates that restructuring debtors with broader-based public operations are grounded on a wider

30 *Re Canadian Red Cross Society/ Société Canadienne de la Croix-Rouge* (1998), 81 ACWS (3d) 932 (Ont Gen Div [Commercial List]) [*Red Cross*].

31 *Ibid* at para 50.

notion of community responsibility.[32] As noted by Kevin McElcheran:

> The *Red Cross* case utilized the *CCAA* as a mechanism to protect the broader public interest and to recognize the contribution made by the Red Cross to the community. Rather than place the continuity of the blood services provided by the Red Cross at the mercy of a creditor vote in a restructuring proceeding, the early sale put the purchaser in a position to provide hospitals and other medical institutions with an uninterrupted supply of blood products.[33]

Notably, the *Red Cross* decision pre-dated the 2009 enactment of section 36 of the *CCAA*, which codified the concept of a liquidating *CCAA* and authorized courts to approve asset sales outside of the ordinary course of an insolvent entity's business.

Broader societal interests are also an important consideration in assessing whether a proposed plan of arrangement is fair and reasonable. In the 2000 decision of the Court of Queen's Bench of Alberta in *Canadian Airlines*,[34] the Court considered social factors in assessing the fairness of the proposed plan of arrangement. In that case, the petitioners were major Canadian airlines who collectively employed over 16,000 employees. Following the granting of the initial stay of proceedings and subsequent extensions, they prepared a plan of arrangement, which was eventually approved by the requisite majority of their creditors. They brought a motion seeking the Court's sanction of their plan. In assessing the fairness of the plan, the Court noted that it could not limit its assessment to the effect of the plan on the direct participants but that it must also consider the business of the petitioners as a national and international airline employing over 16,000

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32 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: Thomson Carswell, 2009) at 369.

33 K McElcheran, *Commercial Insolvency Law in Canada* (Toronto: Butterworths, 2005) at 272-273.

34 *Canadian Airlines*, *supra* note 7.

people.[35] In finding that the plan was fair and reasonable, the Court noted:

> 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.[36]

The Ontario Superior Court of Justice also noted the effect on the public in approving a proposed plan of arrangement in *Canwest*.[37] The petitioners ("CMI Entities") were in the national television broadcasting business and sought court sanction of their plan of arrangement. In assessing the fairness and reasonableness of the plan, the Court noted that:

> [The Plan] will ensure the continuation of employment for substantially all of the employees of the Plan Entities and will 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.[38]

The Supreme Court of British Columbia noted the importance of considering a wide range of interests in its 2001 decision *Re Skeena Cellulose Inc.*[39] Skeena Cellulose Inc ("Skeena") operated sawmills and a pulp mill in northwestern British Columbia and was a large employer in the region. It was granted an initial 30-day stay of proceedings and subsequently sought an extension. In granting the extension, the Supreme Court of British Columbia noted that the consequences of

35 *Ibid* at para 171.
36 *Ibid* at para 174.
37 *Canwest, supra* note 12.
38 *Ibid* at para 26.
39 *Re Skeena Cellulose Inc*, 2001 BCSC 1423.

terminating the stay would have a drastic impact on northwestern British Columbia, and in particular the employees, contractors and suppliers of Skeena, as well as residents and property tax payers in the region.

Further, Skeena was a party to various replaceable logging contracts. As part of its restructuring plan, Skeena renewed some of those contracts and purported to terminate others. The contractors whose contracts Skeena sought to terminate brought a motion seeking an order restraining Skeena from terminating. Skeena's plan of arrangement was subsequently sanctioned by the Court and the Court accordingly dismissed the contractors' motion. The contractors appealed. On appeal, the British Columbia Court of Appeal characterized the issue as whether:

> ...the desirability of staving off a bankruptcy which could have disastrous consequences for many individuals, local governments and communities, supplant[s] considerations of fairness between the holders of replaceable logging contracts to which the debtor corporation is a party?[40]

In dismissing the appeal, the Court noted the importance of considering a wide range of interests beyond those of the contractors:

> ...the key to the fairness analysis, in my view, lies in the very breadth of that constituency and wide range of interests that may be properly asserted by individuals, corporations, government entities and communities. Here, it seems to me, is where the flaw in the appellants' case lies: essentially, they wish to limit the scope of the inquiry to fairness as between five evergreen contractors or as between themselves and Skeena, whereas the case-law decided under the CCAA, and its general purposes discussed above, require that the views and interests of the "broad constituency" be considered.[41]

V. PURPOSE OF THE *CCAA*

The increased willingness of courts to consider non-economic interests is rooted in the purpose of the *CCAA*.

40 *Skeena Cellulose Inc v Clear Creek Contracting Ltd*, 2003 BCCA 344 at para 4.

41 *Ibid* at para 60.

The *CCAA* is intended to facilitate the restructuring of an insolvent company such that it is able to continue operations for the benefit of all of its stakeholders. Its remedial purpose is well-established in the jurisprudence. As noted by the Supreme Court of Canada:[42]

> ...the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.
>
> ...
>
> Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs. Insolvency could be so widely felt as to impact stakeholders other than creditors and employees.

Further, "the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority".[43]

Given the skeletal nature of the *CCAA*'s legislative framework, *CCAA* decisions are often based on judicial discretion. As a result, "judicial decision making under the *CCAA* takes many forms".[44] The Supreme Court of Canada recognized 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.[45]

The *Re TLC* decision is the most recent example of a restructuring where the broader public interest was engaged and heavily influenced the court's decision-making.

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42 *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at paras 15 and 18.
43 *Ibid* at para 70.
44 *Ibid* at para 60.
45 *Ibid.*

VI. CONCLUSION

Regardless of how courts choose to exercise their discretion, such discretion must be "exercised in furtherance of the *CCAA*'s purposes".[46] As the above cases illustrate, the remedial purpose of the *CCAA* remains the primary consideration.

Despite the unique circumstances surrounding TLC's restructuring given its status as a not-for-profit organization, and the absence of purely commercial stakeholders, the Court's decision-making was an expression of the evolving decision-making under the *CCAA* rooted in the recognition of the diverse interests often involved. Although the interests and support of creditors remain of paramount importance, broader societal interests can play a significant role and influence the court's ultimate decisions, particularly where the insolvent company's restructuring has material non-economic implications for the broader community. *Re TLC* is part of an expanding line of cases and the authors believe it is not a "one off" but a sign of the growing importance of non-economic interests in *CCAA* proceedings.

46 *Ibid* at para 59.

TAB 18

The Participation of Social Stakeholders in *CCAA* Proceedings

Virginia Torrie and Vern W DaRe[*]

I. INTRODUCTION

The participation of social stakeholders or non-creditors in proceedings under the *Companies' Creditors Arrangement Act*[1] can raise many questions for courts. From the outset, courts may have difficulty identifying the members. If the social stakeholders are recgnized by the presiding judge, what are their participatory "rights", if any, under the *CCAA*? How do their interests or "rights", if any, compare with those of creditors under the *CCAA*? Do they prejudice or complement creditors' rights? Are they always subordinate to creditors' rights or can they trump those rights in some cases? Should they even be allowed to participate in *CCAA* proceedings, given that they have no fixed capital or economic claims? When should the court decide whether they can participate? What do they have to prove to the presiding judge in order to participate and does the onus or standard of proof vary depending on what stage in the *CCAA* proceedings approval is sought?

Unfortunately, the *CCAA* provides no roadmap. It is, after all, commercial legislation. Public interest is not the primary focus of the legislation and generally social stakeholders play a

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1 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended [*CCAA*].

secondary role to that of creditors. As Professor Janis Sarra astutely observed more than a decade ago, public interest under the *CCAA* is not a substantive objective.[2] Others have also noted that "one should not overstate the role of non-creditor stakeholders in restructuring proceedings."[3] Professor Wood writes that although courts may consider such stakeholder interests when deciding whether to permit restructuring proceedings to go ahead and when deciding whether the plan should be sanctioned by the court, the decision whether or not to accept the plan ultimately is one that is made by the creditors.[4] Some may even view social stakeholders or non-creditors as mere outliers who should not be at the *CCAA* table. For them, the *CCAA* is not the best forum for advancing public interest and social stakeholders should look elsewhere to advance their cause.

The issue of social stakeholders in *CCAA* proceedings has recently arisen in the context of the tobacco insolvencies. The tobacco wars have been raging for decades. While the leading battleground has been in the United States, Canada has also become a fertile source of class actions and provincial government medicare cost-recovery lawsuits against the tobacco companies in the billions of dollars. A common theme in all these battles has been the importance of public interests. Broader societal interests clearly come into play in the conflict.

The positions and tactics in this struggle are fairly entrenched. On the one hand, governments and health professionals argue that tobacco is highly addictive, deadly or

2 Janis P Sarra, *Creditor Rights and the Public Interest, Restructuring Insolvent Corporations* (Toronto: University of Toronto Press, 2003) [Sarra, Creditor Rights]. Instead of a substantive objective, public interest under the *CCAA* is a "short form" for the complex balancing of diverse interests that the court engages in determining claims and disputes that arise during a *CCAA* proceeding and in approving a plan, according to Professor Sarra.

3 Roderick J Wood, *Bankruptcy & Insolvency Law* (Toronto: Irwin Law Inc, 2009) at 314 [Wood].

4 *Ibid.*

cancer-producing and a burden on the health care system. They generally seek the recovery of health care costs, the reduction or elimination of tobacco use and the regulation of tobacco. On the other hand, tobacco companies argue that tobacco is a legal product, already highly regulated, maintains employment and creates a significant tax base. They generally wish to continue operating as a business of a legal product.

Given this "public" warfare, it is hardly surprising that the recent *CCAA* proceedings initiated by the tobacco companies[5] will involve striking references to the public interest.

More challenging is answering the questions raised above about the role of social stakeholders in *CCAA* proceedings. The Tobacco *CCAA* proceedings may provide some guidance. Early in the proceedings, the Court made it clear that any social stakeholder or non-creditor wishing to participate in the Tobacco *CCAA* proceedings would have to file motion materials to obtain the court's permission to participate in the proceedings. The Canadian Cancer Society brought such a motion and the Court's decision is discussed later in the paper.

We are of the view that social stakeholders are entitled to participate in *CCAA* proceedings. The identity of those social stakeholders will depend on the public interest affected by the particular *CCAA* filing. As to the timing and duration of that participation, we consider that the sooner that participation, the better, and that it should last the life of the *CCAA* filing, from the initial order to the sanction hearing to the completion

5 JTI-Macdonald Corp, Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited, and Rothmans, Benson & Hedges Inc. respectively filed under the *CCAA* in the following proceedings: *In the Matter of a Plan of Compromise or Arrangement of JTI-Macdonald Corp*, (Court File No CV-19-615862-00CL) [JTI *CCAA* proceedings]; *In the Matter of a Plan of Compromise or Arrangement of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited*, (Court File No CV-19-616077-00CL) [Imperial Tobacco *CCAA* proceedings]; and *In the Matter of a Plan of Compromise or Arrangement of Rothmans, Benson & Hedges Inc.*, (Court File No CV-19-616779-00CL) [Rothmans *CCAA* proceedings] (collectively, the "Tobacco *CCAA* proceedings").

or performance of the plan. Just because creditors ultimately vote on whether to accept or reject a *CCAA* plan should not diminish the participatory rights and interests of social stakeholders. Where those rights and interests either complement or do not prejudice the rights and interests of creditors in the *CCAA* proceeding, one would expect broader participatory rights for social stakeholders. Where those rights or interests of social stakeholders compete or conflict with, or prejudice the rights of creditors in the *CCAA* proceeding, one would expect restricted or limited participatory rights. Whether granted broad or limited participatory rights, social stakeholders play an important role in advancing the public interest in *CCAA* proceedings. One author has suggested that the public interest in insolvency law involves taking into account interests that society has regard for, which are wider than the interests of those parties directly involved in a particular case, the debtor and creditors.[6] Their interests often include non-financial interests. As for the onus to be met by social stakeholders to be heard in *CCAA* proceedings, we are of the view that the evidentiary burden should not be onerous, which approach would be conducive to having more voices, including non-creditors, at the *CCAA* table. Whether that burden or standard of proof will vary depending on the stage of the *CCAA* proceedings is an open question. It also may vary depending on the nature of the participatory rights of the social stakeholders in the *CCAA* proceeding.

As elaborated below, our position is arguably supported by several sources. Firstly, the tobacco settlement agreements in the United States clearly advanced the broader public interest and may be an important precedent for the Canadian Tobacco *CCAA* proceedings.[7] Secondly, there is already an increasing

6 Andrew Keay, "Insolvency Law: A Matter of Public Interest?" (2005) 51 *Northern Ireland Legal Quarterly* 509 at 533 [Keay].

7 Peter Pringle, "The Chronicles of Tobacco: An Account of the Forces That Brought the Tobacco Industry to the Negotiating Table" (1999) 25 *William Mitchell Law Review* 387 [Pringle]; Hubert H "Skip" Humphrey, III, "The Decision to Reject the June, 1997

number of decisions in which courts have highlighted the importance of public stakeholders in *CCAA* proceedings.[8] Thirdly, the importance of "other" interests in *CCAA* cases has been discussed previously in this Review[9] and elsewhere.[10]

What follows is a review of the treatment of social stakeholders under the *CCAA*. We then provide a brief review of the American experience and, in particular, how the tobacco settlement agreements in that country have advanced "other" interests and public interests. What precedent-value these tobacco settlement agreements may have for the Canadian Tobacco *CCAA* proceedings is also considered in

National Settlement Proposal and Proceed to Trial" (1999) 25 *William Mitchell Law Review* 397 [Humphrey].

8 Some of the Canadian cases recognizing "other" interests under the *CCAA* include *Re Canwest Global Communications Corp*, 2010 ONSC 4209 (Ont SCJ [Commercial List]) [*Canwest*] (national television broadcasting); *Re Canadian Airlines Corp*, 2000 ABQB 442 (Alta QB) [*Canadian Airlines*] (employees, directors, shareholders and Canadian air travellers); *Re Canadian Red Cross Society/Societe Canadienne de la Croix-Rouge* (1998), 81 ACWS (3d) 932 (Ont Gen Div [Commercial List]) [*Red Cross*] (a Canadian blood supply with integrity and a continuation of humanitarian efforts); *Re TLC The Land Conservancy of British Columbia*, 2015 BCSC 656 (BCSC) [*Re TLC*] (the protection or conservation of properties with significant historical, cultural, scientific or scenic value); and *Century Services Inc v Canada (AG); Ted Leroy Trucking Ltd, Re*, 2010 SCC 60 (SCC) [*Century Services*].

9 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 [Buttery et al]; 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 [DaRe].

10 For an overview of the advent of contemporary public interest considerations in *CCAA*s see Virginia Torrie, *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act* (Toronto: University of Toronto Press, forthcoming 2020) [Torrie], Chapter 6 "New Lenders, New Forms of Lending, and Stalled Bankruptcy Reforms: 1970s-1980s" and Chapter 7 "Purposive Interpretation and Pro-Active Judging: 1980s-1990s".

this article. We then turn our attention to Canadian tobacco litigation leading to the initiation of the Tobacco *CCAA* proceedings. These proceedings are then reviewed in the article.

II. SOCIAL STAKEHOLDERS

The Supreme Court of Canada has held that reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy and saving large numbers of jobs.[11] The Court recognized that insolvency could be so widely felt as to impact stakeholders other than creditors. The Court also observed that 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.[12]

One of the earlier cases illustrating the court's concern for the public interest and the diverse interests arising in insolvency was recognized in *Re Curragh Inc*, which was the first time that a Canadian court granted substantive rights to stakeholders beyond the value of their fixed capital claims.[13] The Court granted participation rights and substantive remedies in support of the interests of a First Nation Council, and to the territorial government in a representative capacity on behalf of Yukon miners.

In 1998, the successor to Curragh, Anvil Range, also filed for creditor protection under the *CCAA*. In the *Anvil Range* case, the Court expressly recognized the interests of "social stakeholders" in its exercise of judicial authority in the public

11 *Century Services, supra* note 8 at paras 15 and 18. See also discussion in Torrie, *ibid*, Chapter 9 "Formalizing a Modern 'Debtor-in-Possession' Restructuring Narrative".

12 *Century Services, ibid* at para 60.

13 *Re Curragh Inc*, 1994 CarswellOnt 2415 (Ont Gen Div [Commercial List]). Frederick Myers and Edward Sellers, "Recognition of Social Stakeholders in Canadian Insolvency Proceedings" (1999) 11 *Commercial Insolvency Reporter* 6 at 68.

interest.[14] The Court also allowed a concurrent *CCAA* proceeding and appointment of an interim receiver. On a motion to sell certain assets of Anvil Range, the Court found that the union and the Yukon territorial government were "social stakeholders" representing workers and the Yukon public, based on concerns about jobs and the general public interest.[15] The Court balanced the needs of the creditors with those of the social stakeholders in adjourning the sale motion for several months. Although recognizing the primacy of the former, Justice Blair (as he then was) weaved his famous "social fabric" passage in rendering his decision:[16]

> The court in its supervisory capacity has a broader mandate. In a receivership such as this one, which works 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.

Many *CCAA* cases have followed that social fabric concept, and acknowledge the importance of considering the interests of social stakeholders. In *Skydome Corp*, on seemingly little evidence, the Court adopted the above passage in *Anvil Range* in recognizing the interests of various social and economic stakeholders.[17]

In *Canwest*, the Court considered several factors, including the public interest, in assessing whether the *CCAA* plan was fair and reasonable.[18] The plan satisfied multiple claims or interests according to the Court.[19] It ensured continued employment for substantially all of the employees of the plan and would provide stability for debtor entities, pensioners, suppliers, customers and other stakeholders. The Court held that the plan also met

14 Sarra, Creditor Rights, *supra* note 2.
15 *Re Anvil Range Mining Corp*, 1998 CarswellOnt 5319 (Ont Gen Div [Commercial List]) at para 2 [*Anvil Range*].
16 *Ibid.*
17 *Re Skydome Corp* (27 November 1998), Blair J (Ont Gen Div).
18 *Canwest*, *supra* note 8 at para 21.
19 *Ibid* at para 26.

the public interest as it maintained general public access to, and choice of, news, public and other information and entertainment programming, an important public service that would have been negatively impacted by bankruptcy or liquidation.

In *Canadian Airlines,* broader societal interests were considered by the Court in finding the *CCAA* plan fair and reasonable.[20] The majority of creditors affected by the restructuring were employees and trade creditors. However, while they were keenly interested in the outcome, their legal claims were not compromised and they did not have a vote in the *CCAA* proceedings. The Court expressly recognized these broader interests, including the risk to the public. The Court held that even in insolvency, companies are more than just assets and liabilities, and that the fate of a company is inextricably tied to those who depend on it in various ways. While 16,000 employees did not have claims affected by the plan, the job dignity and job security protections negotiated for the benefit of workers should be considered in the sanction hearing. The Court held that in sanctioning a plan, weight should be given to strong creditor support, but that a number of other factors had to be considered, including the public interest. Justice Paperny famously characterized the *CCAA* sanction exercise as one that "widens the lens". She explained that the remedial objective of the *CCAA* "widens the lens" to balance a broader range of interests that includes creditors, shareholders, the company, employees and the public.[21] The failure of the airline would undoubtedly be felt by Canadian air travellers across the country, and 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 according to the Court.

In *Red Cross*, the Canadian Red Cross Society faced mass tort claims of $8 billion from individuals who had contracted

20 *Canadian Airlines*, *supra* note 8.at paras 95 and 174.
21 *Ibid* at para 95.

diseases from contaminated blood products. The 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 blood supply assets and operations to two new agencies before any restructuring plan was put to creditors.[22] The Court also took into account the public and private interest in allowing the transfusion claimants, as creditors, to be meaningfully involved and participating in the process. The *CCAA* process and approval of the sale of assets must be seen as fair and reasonable to the transfusion claimants whose interests lie at the heart of the process according to the Court. The interests of the transfusion claimants, although they were contingent interests by the type and quantum of their claims, were nevertheless recognized as valid by the Court. In this case, the Court observed that the very people whose claims from blood contamination injuries resulted in the *CCAA* application, and for whose benefit the result of the sale process was aimed, were left out of the process until after the *CCAA* proceedings were commenced.[23] Therefore, the Court granted an adjournment of two weeks to provide representative counsel with a reasonable opportunity to assess the proposed asset sale.

Professor Sarra has made several interesting observations regarding the *Red Cross CCAA* proceedings. She notes, for example, that the proceeding illustrates that what is in the public interest in *CCAA* proceedings is not always apparent.[24] Regarding the adjournment of the asset sale motion for two weeks to give representative counsel some time to assess the proposed sale, she also keenly observes that:[25]

> 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

22 *Red Cross, supra* note 8 at para 50. See also Buttery et al, *supra* note 9 at 522; and DaRe, *supra* note 9 at 358.

23 *Red Cross, ibid* at para 2.

24 Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Carswell, 2013) at 162 [Sarra, Rescue!].

25 *Ibid* at 163 (our emphasis).

> 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.*

In *Bloom Lake*, six First Nations were recognized as "social stakeholders" and entitled to make submissions in the proceedings.[26]

Finally, the *Re TLC* decision provides another example of a restructuring where the broader public interest was engaged and heavily influenced the court's decision-making.[27] TLC was a non-profit, charitable land trust based in British Columbia. Its mission was to protect and educate the public about properties that have significant historical, cultural, scientific or scenic value.[28] In other words, it had a community-based mandate.

At the hearing for a sanction order to approve TLC's plan of arrangement, the Court emphasized the importance of considering the broader stakeholders.[29] The support of the social stakeholders, including the environment, the local governments, various preservation charities and community groups, were important considerations for the Court in sanctioning the plan.[30] The Court observed that it is not often the case that the court is aware of the specifics as to how these broader public interest groups are affected by the *CCAA* proceedings or any proposed plan of arrangement. In most *CCAA* proceedings, the major participants are the debtor and certain creditors according to the Court. This was not one of those cases where the Court had to speculate about what those broader interests might entail. Social stakeholders were engaged from the outset. The Court heard directly from many of those public interest groups on the important issues raised during the course of the *CCAA* proceedings. The

26 *Re Bloom Lake gpl*, 2015 CarswellQue 4072 (CS Que) at 87-89 [*Bloom Lake*].
27 Buttery et al, *supra* note 9 at 526.
28 *Re TLC, supra* note 8 at para 8.
29 *Ibid* at para 63.
30 *Ibid* at paras 64-68, and 71.

involvement of the Ecoforestry Institute Society and the Habitat Conservation Trust Foundation were some of the social stakeholders participating in TLC's restructuring efforts. There were many other social stakeholders or interested parties which the Court did not name, but which were involved in the successful restructuring. The Court held that all of these stakeholders, including the creditors, contributed and assisted in TLC's efforts and to its success in developing the Plan.

III. GUIDING PRINCIPLES

What are some of the guiding principles regarding the participation of social stakeholders in *CCAA* proceedings that emerge from the case law and commentary?

(a) Social stakeholders are entitled to participate in *CCAA* proceedings. The *CCAA* "widens the lens" of the court to balance a broad range of interests beyond creditors and the debtor. The "social and economic fabric" of a community may be impacted by a *CCAA* filing and the broad, remedial mandate under the *CCAA* requires that these public interests be weighed in the balance as the *CCAA* process works its way through the various stages.

(b) The identity of the social stakeholders in the *CCAA* proceeding will depend on the public interest that is affected by the filing. As we noted above, one author has suggested that the public interest in insolvency law involves taking into account interests that society has regard for, and that are wider than the interests of those parties directly involved in a particular case, the debtor and creditors.[31] From the case law, some of these wider public interests have included Canadian air travellers, Canadian television viewers, Canadian

31 Keay, *supra* note 6.

blood supply users and the preservation of B.C. properties with significant historical, cultural, scientific or scenic value. A stakeholder that advances the public interest in a *CCAA* proceeding will likely be considered a social stakeholder.

(c) Social stakeholders are entitled to participate at any stage of a *CCAA* proceeding including the initial filing, during the proceedings, the sanction hearing and the development of the plan. This full participation was welcomed and encouraged in *Re TLC* since it meant the Court did not have to speculate on what the public interest might entail. Years before this decision, Professor Sarra noted that it is not always apparent what is in the public interest in *CCAA* proceedings.[32] As demonstrated in *Re TLC,* this problem was overcome by having the social stakeholders engaged from the outset of the *CCAA* proceedings. Also, in *Red Cross,* well before the sanction hearing and during the asset sale motion, the Court encouraged the participation of the contingent creditors and other stakeholders. The Court also noted that the contingent creditors or transfusion claimants, although central to the *CCAA* filing, were left out of the process until after the *CCAA* proceedings were commenced. In *Century Services*, the Supreme Court of Canada seemed to recognize that the public interest may arise at any stage of a *CCAA* restructuring when it held that on occasion the broader public interest may be a factor against which the decision of whether to allow a particular action will be weighed.

(d) The evidentiary burden or standard of proof on social stakeholders to participate in *CCAA* proceedings does not appear to be onerous. In *Skydome Corp*, on seemingly little evidence, the Court recognized the

32 Sarra, Rescue!, *supra* note 24.

interests of various social and economic stakeholders. In *Re TLC*, the Court recognized the *CCAA* participation of any stakeholder, community group or society related to the land conservation movement, or involved in the protection and preservation of important ecological, heritage and cultural properties within their communities for the benefit of the public. A low evidentiary threshold would certainly encourage the participation of social stakeholders and assist the court in its mandate of balancing interests since it would not have to speculate on what might be in the public interest. Whether that burden or standard of proof will vary depending on the stage of the proceedings is an open question. As discussed below, it may vary depending on the nature of the participatory rights being sought by the social stakeholders in the *CCAA* proceeding.

(e) What participatory rights social stakeholders may have or be entitled to in a *CCAA* proceeding depends on several factors. Certainly, there are limits. In *Anvil Range,* the Court held that public 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.[33] As pointed out above by Professor Wood, "one should not overstate the role of non-creditor stakeholders in restructuring proceedings".[34] For example, creditors ultimately decide whether or not to accept a *CCAA* plan. If social stakeholders sought to usurp the role of creditors by seeking leave of the court to vote on the plan, we suspect that such relief would be opposed by creditors, that they would have a high evidentiary burden or standard of proof to satisfy and that the court would not likely grant such participatory rights. At the

33 *Anvil Range, supra* note 15.
34 Wood, *supra* note 3.

same time, one should not understate the participatory rights of social stakeholders. Their most obvious rights are to be heard or considered at the sanction hearing as part of the court's mandate of balancing interests. "Meaningful"[35] participation by social stakeholders, however, is not limited to the sanction hearing and may arise at any stage of the *CCAA* proceeding. One would expect that the more their participation is aligned with the interests of creditors, the broader that participation may be; and the more it conflicts with or prejudices the rights of creditors in a *CCAA* proceeding, the more their participation will be opposed, restricted or limited. If the participatory rights of social stakeholders negatively affect the redistribution of value in the restructuring process, creditors may view their participation as prejudicial to the rights of creditors. However, if that participation has no bearing on the distribution of dividends to creditors or advances non-financial interests, there may be no opposition from creditors.

IV. AMERICAN EXPERIENCE WITH TOBACCO

Besides the guidance from Canadian cases and commentary, the American experience with tobacco litigation and settlement agreements is particularly insightful regarding the role of social stakeholders. This should come as no surprise. After all, "ground zero" of the tobacco wars is the United States.

The so-called three waves of tobacco litigation in that country are well documented.[36] The first wave consisted of personal injury lawsuits by individual smokers in the 1950s. The second wave of cigarette litigation, also composed of individual personal injury suits, started in the 1980s.

35 Borrowing that word from Professor Sarra, *supra* note 24.

36 See, Stephen E. Smith, "'Counterblasts' to Tobacco: Five Decades of North American Tobacco Litigation" (2002) 14 *Windsor Review of Legal and Social Issues* 1.

What the first and second wave had in common was that the tobacco industry had generally never lost a lawsuit for damages during that period, raising defenses such as contributory negligence and the individual responsibility of smokers. The third wave in the 1990s changed things, in that no longer was the tobacco litigation limited to individual claims by individual smokers. For the first time, the states sued the tobacco industry seeking wide-scale injunctive relief and recovery of the costs to the states for medical care for injured smokers.

Unlike the two earlier waves, the third wave of US tobacco litigation successfully led to settlement agreements with the tobacco industry. Much ink has been spilled on the topic.[37] Here we focus on the "public interest" components of the settlement agreements in the US tobacco litigation as a potential precedent for the treatment of social stakeholders in Canadian tobacco insolvencies.

From the outset, it should be kept in mind that medicare cost recovery lawsuits in Canada, as discussed in the next section, are largely inspired by the US experience. In the US, medicare cost recovery lawsuits by state governments resulted in settlements of approximately US $245.5 billion payable over 25 years; public disclosure of more than 35 million pages of previously secret tobacco industry documents; new marketing restrictions; an end to certain tobacco-funded groups such as the Tobacco Institute, the Center for Indoor Air Research and the Council for Tobacco Research; and the establishment of an

37 See, Michael V Ciresi, Roberta B Walburn and Tara D Sutton, "Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation" (1999) 25 *William Mitchell Law Review* 477 at 482-488 [Ciresi et al]; Clifford E Douglas, Ronald M Davis and John K Beasley, "Epidemiology of the third wave of tobacco litigation in the United States, 1994-2005" (2006), online: *BMJ* <http://tobaccocontrol.bmj.com/content/15/suppl_4/iv9>; and Richard Kluger, *Ashes to Ashes: America's Hundred-Year Cigarette War, the Public Health, and the Unabashed Triumph of Philip Morris* (Toronto: Vintage Books, 1997).

independent foundation and a new anti-smoking advocacy group to reduce smoking.[38]

In 1994, several states, beginning with Mississippi, sued the largest cigarette manufacturers on several grounds, including state consumer protection and antitrust laws, arguing that cigarettes contributed to health problems that resulted in significant costs to state health-care systems. In 1997 and 1998, four states (Mississippi, Minnesota, Florida and Texas) each reached settlement agreements to recover Medicaid and other health expenses resulting from smoking-caused illnesses.[39]

For example, in Minnesota, the case of *State of Minnesota v Philip Morris* was settled and led to the parties entering into the Minnesota Tobacco Settlement Agreement,[40] in which the state received approximately $6.1 billion over 25 years, and $200 million annually thereafter, in perpetuity. Under the Minnesota Settlement Agreement, the state received six one-time payments, which were distributed into three separate accounts: the Tobacco Use Prevention and Local Public Health Endowment, the Medical Education Endowment, and an Academic Health Center Account within the Medical Education Endowment. Also, Blue Cross and Blue Shield of Minnesota received an additional $469 million, which seeded the organization's Center for Prevention.

Beyond these payments, however, the Minnesota Settlement Agreement required the public disclosure of 35 million pages of internal tobacco industry documents,[41] which subsequently became the source of scientific articles, government reports and

38 Pringle, *supra* note 7; Humphrey, *supra* note 7; and Ciresi et al, *ibid.*

39 Pringle, *ibid*; Humphrey, *ibid*; and Ciresi et al, *ibid.*

40 See Settlement Agreement and Stipulation For Entry of Consent Judgment, *State ex rel Humphrey v Philip Morris Inc*, No C1-94-8565, 1998 WL 394331 (Minn Dist Ct 8 May 1998) [Minnesota Settlement Agreement]. For further information regarding the Minnesota Settlement Agreement, see <http://www.publichealth-lawcenter.org/topics/tobacco-control/tobacco-control-litigation/minnesota-litigation-and-settlement>.

41 *Ibid.*

policy debates across the US and globally, including to those that supported the Framework Convention on Tobacco Control, the first public health treaty negotiated under the World Health Organization.[42]

In June 1997, the major tobacco companies, facing lawsuits by other states, petitioned Congress for a global resolution. Congress failed to pass a global settlement agreement. However, the following year, the *Tobacco Master Settlement Agreement*[43] was entered into on 23 November 1998 between the four largest United States tobacco companies (Philip Morris Inc, RJ Reynolds, Brown & Williamson and Lorillard) and 46 states, four US territories, the Commonwealth of Puerto Rico, and the District of Columbia.

Under the MSA, the participating tobacco companies agreed to pay a minimum of $206 billion to the settling States over the first 25 years of the agreement. The MSA also established initial, annual and "strategic contribution" payments from participating tobacco companies to the settling States. Finally, settlement money was also designated for a tobacco prevention foundation and public education.

The US tobacco settlement agreements, including the MSA, advance certain public interests. Some of these include the following:

- Disclosure: the public disclosure of millions of pages of internal documents;

- Compensation: the payment of billions of dollars to States as compensation for health care recovery costs, thus benefiting taxpayers;

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42 "Parties to the WHO Framework Convention on Tobacco Control" (26 Feb 2015), online: *WHO* <http://www.who.int/fctc/signatories_parties/en>.

43 "Master Settlement Agreement" (1998), online (pdf): *National Association of Attorneys General* <https://www.publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf> [*MSA*].

- Health: the cessation of certain activities detrimental to public health (*ie*, the sale of tobacco to children) or the limitation of certain activities harmful to public health (*ie*, tobacco marketing);

- Education: the creation and funding of independent foundations to reduce smoking (*ie*, the National Public Education Foundation or the Truth Initiative) and new anti-smoking advocacy groups and the disbanding of less reliable, objective or accurate sources of education or information to the public (*ie*, tobacco-related organizations, such as the former Tobacco Institute, the Center for Indoor Air Research and the Council for Tobacco Research); and

- Enforcement and Remedies: the right to bring an action to enforce the settlement agreement and to be entitled to various remedies for any violations (*ie*, injunctive relief, damages).

Given the advancement of certain public interests pursuant to the US tobacco settlement agreements, including public health and public education, these agreements may be important precedents for any social stakeholders participating in the Canadian Tobacco *CCAA* proceedings.

V. BACKGROUND TO THE TOBACCO *CCAA* FILINGS

Several lawsuits against the major tobacco companies in Canada, in the billions of dollars, provided the backdrop to the *CCAA* filings. While the defendants in these lawsuits varied, including in some lawsuits the related and foreign parent companies (*ie*, Philip Morris International, Inc and British American Tobacco plc), the most common three defendants are JTI-Macdonald Corp ("JTI"), Imperial Tobacco Canada Ltd ("Imperial Tobacco") and Rothmans, Benson & Hedges Inc.

("Rothmans"). These lawsuits included class actions, government "Medicaid" actions and individual actions.

The most pressing of the class actions against JTI, Imperial Tobacco and Rothmans started in Quebec in two class actions on behalf of tobacco smokers in the Province of Quebec in 1998, known as the Letourneau action and the Blais action. These were originally filed in 1998 as separate actions, certified as class actions in 2005 and subsequently heard in the same trial (collectively, the "Quebec Class Actions"). On 27 May 2015, Justice Riordan of the Quebec Superior Court held in favour of the plaintiffs (the "Quebec plaintiffs") in the Quebec Class Actions, finding the defendants, JTI, Imperial Tobacco and Rothmans jointly or "solidarily" liable for damages totalling approximately $15.6 billion.[44]

The defendants appealed the judgment to the Quebec Court of Appeal, which upheld the judgment in almost all respects, subject to revising certain dates for the calculation of interest (the "Quebec judgment").[45] The result was that the defendants remained "solidarily" liable for damages in the aggregate amount of approximately $6.8 billion (approximately $13.5 billion with the revised interest dates). In the Tobacco *CCAA* proceedings, as discussed in the next section below, JTI and Rothmans, ultimately, were unsuccessful in obtaining the Court's permission to allow them to file an application for leave to appeal the Quebec judgment to the Supreme Court of Canada.[46] It bears noting that the stays imposed in the initial *CCAA* orders did not generally purport to stay the debtors. As is common in *CCAA* model initial orders, the initial stays in the Tobacco *CCAA* proceedings generally stayed creditor enforcement and did not prevent the debtors from applying

44 *Letourneau c JTI-MacDonald Corp*, 2015 QCCS 2382 (CS Que).

45 *Imperial Tobacco Canada ltee c Conseil quebecois sur le tabac et la sante*, 2019 QCCA 358 (CA Que).

46 *In the Matter of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, As Amended and In the Matter of a Plan of Compromise or Arrangement*, 2019 ONSC 2222 (Ont SCJ) [the "SCC Leave motion"].

for leave to appeal to the SCC. In fact, one of the initial orders had the additional relief of expressly permitting the debtor to apply for leave.

In addition to the Quebec Class Actions, other non-government plaintiffs have started similar proposed class actions against JTI, Imperial Tobacco and Rothmans in a number of provinces, including British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Nova Scotia. Most of these class actions are in the preliminary stages, and have not been certified.[47] Imperial Tobacco also faces a class action brought by Ontario tobacco growers in relation to certain alleged pricing practices of Imperial Tobacco, as well as other various individual actions in Nova Scotia, Ontario and Quebec.[48]

Finally, the governments of all ten Canadian provinces have initiated health-care cost recovery actions against JTI, Imperial Tobacco and Rothmans and certain of their affiliates (the "Government Medicaid Actions"). This litigation is pursuant to provincial legislation that authorizes the province to file a direct action against tobacco companies to recoup the health-care costs the government has allegedly incurred and will incur from alleged tobacco related wrongs.[49]

The Government Medicaid Actions are at different stages, although none has yet proceeded to trial. The British Columbia, New Brunswick and Ontario Medicaid Actions are the most advanced and are currently at the pre-trial discovery stage. In Ontario, the action has been on-going for approximately ten years and the Province is seeking approximately $330 billion in damages.[50] As discussed below, in the Tobacco *CCAA* proceedings, Ontario unsuccessfully

47 *Re Imperial Tobacco Canada Limited et al*, 2019 ONSC 1684 (Ont SCJ) at para 5 [Initial Reasons in Imperial Tobacco].

48 *Ibid.*

49 In Ontario, the governing legislation is the *Tobacco Damages and Health Care Costs Recovery Act*, 2009, SO 2009, C 13.

50 *In the Matter of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, As Amended and In the Matter of a Plan of*

sought an order to lift the stay in order to proceed with the Ontario Medicaid Action.[51]

With this backdrop, we can now turn to the *CCAA* filings by JTI, Imperial Tobacco and Rothmans. There are four general themes that the reader should keep in mind: (1) the scope of the stay; (2) the leave application before the SCC; (3) the lifting of the stay motion; and (4) the non-creditor's leave motion.

VI. THE TOBACCO *CCAA* PROCEEDINGS

1. Initial Reasons

i. JTI CCAA Proceedings

On 8 March 2019, JTI was granted an Initial Order by Justice Hainey ("Initial Reasons in JTI").[52] JTI sought protection from its creditors and additional relief, including a stay of proceedings against it and the other tobacco company defendants in the pending litigation, appointment of a monitor, and authorization to apply for leave to appeal the Quebec judgment to the Supreme Court of Canada.[53] As noted by Justice Hainey, JTI's stated rationale for seeking *CCAA* protection was as follows:[54]

> [JTI] wishes to seek a "collective solution" to the Quebec Judgment and the HCCR [health care cost recovery] Actions for the benefit of all of its stakeholders. It is for this reason that it seeks a stay of all proceedings in its application for an Initial Order pursuant to the *CCAA*.

Justice Hainey found that it was appropriate to grant *CCAA* protection to JTI, as it was an insolvent company with liabilities in excess of $5 million. The Quebec judgment alone amounted

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Compromise or Arrangement, 2019 ONSC 2611 (Ont SCJ) [Ontario Lift of Stay Motion].

51 *Ibid.*

52 *Re JTI-Macdonald Corp*, 2019 ONSC 1625 (Ont SCJ [Commercial List]) [Initial Reasons in JTI].

53 *Ibid* at para 7.

54 *Ibid* at para 6.

to $13.5 billion, and the court found that JTI did not have sufficient funds to satisfy its portion of this judgment.[55] The Court granted the request for a stay of proceedings under s 11.02, stating it was satisfied that this request was consistent with the *CCAA*'s purpose of maintaining the status quo for a period of time while the debtor consulted with creditors and stakeholders with a view to continuing operations.[56]

Two particularly interesting aspects of the JTI Initial Order are its extension to other defendants in the litigation in which JTI is a defendant and permission for JTI to continue its leave to appeal application to the Supreme Court of Canada. These features are interesting as they employ the architecture of the *CCAA* to advance JTI's stated objective of reaching a "collective solution" to the Quebec judgment and the HCCR actions, albeit through two distinct channels.

On the one hand, JTI is employing the *CCAA* to resolve a large debt stemming from a judgment in tort, similar to the earlier cases such as *Red Cross*. JTI obtained a stay for itself and the two other defendant tobacco companies subject to the Quebec judgment.

The ability of the court to extend a *CCAA* stay of proceedings to non-applicant third parties is not new. As stated by Newbould J in *Re Tamerlane Ventures Inc*:[57]

> Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, where it is just and reasonable to do so.

In response to such requests, courts will consider a number of factors enumerated in *Re Pacific Exploration & Production Corp*.[58] Justice Hainey considered these factors and was satisfied that granting the requested stay of proceedings to

55 *Ibid* at paras 3, 11.
56 *Ibid* at para 12.
57 *Re Tamerlane Ventures Inc*, 2013 ONSC 5461 (Ont SCJ [Commercial List]) at para 21, quoted in *ibid* at para 14.
58 *Re Pacific Exploration & Production Corp*, 2016 ONSC 5429 (Ont

the two other tobacco company defendants would allow JTI to attempt to arrive at a collective solution to the class Quebec judgment and HCCR actions.[59] Justice Hainey concluded that the balance of convenience favoured exercising his discretion under the *CCAA* to grant a stay of proceedings to the two other tobacco company defendants.[60] The request for this stay speaks to the collective nature of the proceedings against the tobacco companies and is consistent with their desire for a collective resolution.

While JTI's business is expected to remain "cash-flow positive" during *CCAA* proceedings, lending support to the view that the business could emerge from restructuring as a going-concern, the Court found that the large tort judgment threatens the company's ongoing commercial viability.[61] As noted by Justice Hainey, there are public policy reasons that may weigh in favour of preserving JTI's commercial viability, including the lives and livelihoods of its 500 employees, 1,300 suppliers, 28,000 retailers, 790,000 consumers of its products, and federal and provincial tax authorities which collect over $1.3 billion annually in connection with the company's operations.[62] These are "standard fare" public policy reasons in *CCAA* restructurings.[63]

SCJ [Commercial List]) at para 26, cited in Initial Reasons in JTI, *ibid* at para 15.

59 Initial Reasons in JTI, *ibid* at para 16.

60 *Ibid* at para 17.

61 *Ibid* at para 25.

62 *Ibid* at para 4.

63 See, for example, the Algoma insolvencies of 1991-1992 and 2001: Algoma Plan Sanctioning Hearing, 1992, *Algoma Steel corporation*, Court File Doc No B62191-A (Ont Ct [Gen Div]); *Algoma Plan Sanctioning Hearing*, [2001] OJ No 4630, Court File No 01-CL-4115 (Ont SCJ); Endorsement Order, 19 December 2001; *Re Algoma Steel Inc* (2002), 30 CBR (4th) 1 (Ont SCJ [Commercial List]). See discussion in Sarra, Creditor Rights, *supra* note 2 at 114-115 and Chapter 5 "Algoma Steel Corporation: Recognition of Human Capital Investments" at 157-180; Torrie, *supra* note 10 at Chapter 6 "New Lenders, New Forms of Lending, and Stalled Bankruptcy Reforms: 1970s-1980s", contrasting with the 1930s Algoma insolvency.

On the other hand, and in tandem with its restructuring proceedings, JTI sought authorization to continue its appeal to the Supreme Court of Canada in hopes that the court of last resort would overturn the Quebec judgment. The Quebec judgment, and other pending lawsuits, are the proverbial millstone around the neck of JTI's (and the other tobacco companies') commercial operations.

A decision by the SCC to overturn the Quebec judgment could serve as a strong precedent against the other lawsuits. In making its case for why it should be allowed to pursue its appeal to the Supreme Court of Canada, JTI again cited its positive cash flow and successful business operations:[64]

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

Thus, the JTI Initial Order simultaneously engages the *CCAA* to *restructure* (read: *settle*) and *appeal* the outstanding tort judgment from Quebec and related lawsuits which are coming down the pipeline. It is not unusual for a debtor company to seek to appeal a judgment or pursue litigation related to claims against it as the *CCAA* stay generally applies to creditors, rather than the debtor. The issue of leave to the SCC is discussed further below. Here, it is worth mentioning that subsection 20(2) of the *CCAA* seems to expressly contemplate such a situation by stating "the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes." "Other purposes" would presumably include appealing a claim arising from a judgment. As one of us has written, "[a]n historical analysis suggests that this provision simply provides a distinction between voting claims and admitting them as

64 *JTI Factum* dated 8 March 2019 in the JTI *CCAA* proceedings excerpted in Initial Reasons in JTI, *supra* note 52 at para 75.

legitimate claims in order for the *CCAA* to operate in a timely way".[65] Interestingly, subsection 20(2) has received almost no attention in reported cases, notwithstanding the fact it dates back to the original version of the statute and has thus been part of the *CCAA* for more than 80 years.[66]

ii. Imperial CCAA Proceedings

On 12 March 2019, Imperial Tobacco was granted an Initial Order under the *CCAA* by Justice McEwen ("Initial Reasons in Imperial Tobacco").[67] Imperial Tobacco Canada Limited ("ITCO") and Imperial Tobacco Company Limited ("ITCAN") (together referred to as "Imperial Tobacco") sought an Initial Order staying all existing and prospective proceedings pursuant to s 11.02 of the *CCAA*.[68]

Both companies are incorporated under the *Canada Business Corporations Act*, with ITCO being a privately held subsidiary of ITCAN.[69] The court found that their liabilities clearly exceeded $5 million as a result of the Quebec judgment and that Imperial Tobacco had insufficient funds with which to pay the more than $9 billion it owed under this judgment.[70] Imperial

65 Torrie, *supra* note 10, Chapter 5, "Efforts to Repeal the *Companies' Creditors Arrangement Act*: 1938-1952". Concerns about this particular section formed part of the impetus for a 1938 bill that would have repealed the *CCAA*.

66 We found only one reported case (from 2018) which mentions section 20(2), although it does not discuss the subsection in great detail: *Re 8640025 Canada Inc*, 2018 BCCA 93 (BCCA) at para 34. A second reported case references subsection 20(2), but this appears to be a typo as the subsection excerpted in the decision is actually subsection 20(1): *Re Nortel Networks Corporation*, 2018 ONSC 278 (Ont SCJ [Commercial List]) at para 124. The Houlden and Morawetz entry for this subsection is one sentence long, and simply restates the text of the provision with no further references to cases or commentary: LW Houlden and Geoffrey B Morawetz, N§146 – Debtor Right to Reserve Right to Contest Claim (Westlaw) (accessed 17 September 2019).

67 Initial Reasons in Imperial Tobacco, *supra* note 47.

68 *Ibid* at para 2.

69 *Ibid* at para 7.

70 *Ibid* at paras 3, 7-8.

Tobacco also sought and obtained relief on behalf of its related companies.[71]

A couple of additional interesting points arose in the Initial Reasons in Imperial Tobacco related to the public policy considerations at stake in the tobacco insolvencies.

First, Imperial Tobacco argued that going out of business would essentially eliminate the legal trade in tobacco, and thus run the risk that an illegal trade would spring up in its place.[72] Among other things, Imperial Tobacco argued this would leave various levels of governments without the substantial taxation revenue, of roughly $4 billion per year, that Imperial's legal trade in tobacco generates.[73]

Second, Justice McEwen stressed the importance of maintaining a level playing field for tobacco claimants as essential to a global resolution of all claims. This, in his Honour's view, was best achieved by using a general stay of proceedings to maintain the status quo while the parties made efforts to reach a compromise under the *CCAA*.

As with JTI, Imperial Tobacco's primary reason for seeking the stay was to "effect a global resolution of multiple claims that have been brought or may be brought against ITCAN and related companies in Canada."[74] Such a resolution is aimed at allowing the companies to continue in business as going concerns.

As noted by Justice McEwen, Imperial Tobacco would be carrying on business during *CCAA* proceedings "in a profitable fashion".[75] It is one very large liability, in the form of the

71 *Ibid* at paras 2, 10-12, citing *Re Tamerlane Ventures Inc*, 2013 ONSC 5461 (Ont SCJ [Commercial List]) and *Re Pacific Exploration & Production Corp*, 2016 ONSC 5429 (Ont SCJ [Commercial List].

72 Initial Reasons in Imperial Tobacco, *ibid* at para 4.

73 *Ibid.*

74 *Ibid* at para 2.

75 *Ibid* at para 23.

Quebec judgment and the pending lawsuits of a similar nature that threaten the business of the debtor companies.

In the Initial Reasons in Imperial Tobacco, Justice McEwen reiterated the standard public policy reasons that weigh in favor of facilitating corporate reorganization generally. The court specifically stated that enforcement of the large Quebec judgment would probably put Imperial Tobacco out of business.[76] The court held that this judgment therefore put the ongoing operations of the company in jeopardy, risking the jobs of its 466 full-time employees and 98 contract employees, who together earn roughly $70 million in wages per year.[77]

Justice McEwen granted the Initial Order, reiterating that the purpose of the *CCAA* is to maintain the status quo while the debtor company consults with its creditors and stakeholders in an effort to continue its operations.[78] He noted that this was in the best interests of Imperial Tobacco as well as its stakeholders, including employees, retirees, customers, landlords, suppliers, the provincial and federal governments, and contingent litigation creditors.[79]

In his reasons, Justice McEwen highlighted a role for the *CCAA* in terms of creating a "level playing field amongst the litigation claimants."[80] He pointed out that beyond the Quebec judgment, Imperial Tobacco faces over 20 large proceedings across Canada, including four actions in Ontario that claim damages of more than $330 billion.[81] These actions include:[82]

> government actions to recover healthcare costs incurred in connection with smoking related diseases; smoking and health class actions seeking damages on behalf of individuals; and a class action brought by Ontario tobacco growers in relation to certain pricing practices of ITCAN.

76 *Ibid* at para 3.
77 *Ibid* at para 4.
78 *Ibid* at para 9.
79 *Ibid* at para 9.
80 *Ibid* at para 9.
81 *Ibid* at para 5.
82 *Ibid.*

Most of these actions are in the preliminary stages. Thus, the Quebec judgment appears to be at the vanguard of a wave of litigation aimed at tobacco companies. Justice McEwen accepted Imperial Tobacco's arguments that an Initial Order under the *CCAA* "is necessary and reasonable as it seeks an overall solution with respect to the Quebec Appeal Judgment and other outstanding and potential proceedings."[83]

iii. Rothmans CCAA Proceedings

On 22 March 2018, Rothmans was granted an Initial Order by Justice Pattillo ("Initial Reasons in Rothmans").[84] Like JTI and Imperial Tobacco, Rothmans initiated *CCAA* proceedings to deal with the large debt produced by the Quebec judgment.

In its submission for an initial order under the *CCAA*, Rothmans sought a stay of all existing and prospective proceedings against it or any member of its group of companies (Philip Morris International Inc) that relate to or involved Rothmans or a tobacco claim of the kind that led to the Quebec judgment.[85] After considering the factors set out in *Re Pacific Exploration and Production Corp*, Justice Pattillo extended the stay of proceedings to these non-applicant third parties, reasoning that "the balance of convenience favours granting the stay to enable a global solutions to the claims."[86]

In his reasons granting the requested initial order, Justice Pattillo observed that Rothmans was incorporated under the *Canada Business Corporations Act* and carried on business in Ontario, where its head office was also located. The Quebec judgment rendered the company as insolvent under the balance sheet test: "the realizable value of its assets is less than its obligations due and accruing due, including contingent

83 *Ibid* at para 6.

84 Re Rothmans, Benson & Hedges Inc, Unofficial Transcribed Endorsement of Justice Pattillo (22 March 2019) Court File No CV-19-616779-00CL [Initial Reasons in Rothmans].

85 *Ibid* at 1.

86 *Ibid* at 2, citing 2016 ONSC 5429 at para 26.

liabilities."[87] Furthermore, the liability represented by the Quebec judgment clearly exceeded the $5 million threshold required to invoke the *CCAA*.

Justice Pattillo noted that Rothmans sought *CCAA* relief to carry on business while pursuing a global settlement with respect to the tobacco claims against it. A stay of proceedings under the *CCAA* would preserve the *status quo*, allow the company to continue to operate its business, and prevent prejudice to creditors.[88] Similar to Justice McEwen in the Initial Reasons in Imperial Tobacco, Justice Pattillo's reference to preventing "prejudice to creditors" highlights the potential issue around an uneven playing field for tobacco claimants based on the timing of their lawsuits, which lends support to devising a global resolution to all tobacco claims.

Justice Pattillo agreed with, and adopted the reasons of, Justices Hainey and McEwen in the Initial Reasons in JTI and Initial Reasons in Imperial Tobacco, respectively, and granted Rothmans leave to file its leave application to the Supreme Court of Canada with respect to the Quebec judgment.[89]

2. Some Comeback Motions

i. Leave regarding SCC

On 23 April 2019, Justice McEwen released his reasons on the motion to allow the tobacco companies to pursue an application for leave to appeal the Quebec judgment to the Supreme Court of Canada ("SCC Leave motion").[90] He denied the motion. He ordered a general stay of proceedings applicable to any and all current proceedings against the debtors, and restraining the initiation of any further proceedings by or

87 Initial Reasons in Rothmans, *ibid* at 1.
88 *Ibid at* 2.
89 *Ibid*, citing Initial Reasons in JTI, *supra* note 52 and Initial Reasons in Imperial Tobacco, *supra* note 47.
90 SCC Leave motion, *supra* note 46.

against them, subject to leave of the court.[91] Justice McEwen further ordered that any limitation period relating to any proceeding against the debtors shall be deemed to be extended by a period equal to the period of the stay.[92]

The four main parties to the motion – JTI, Rothmans, Imperial, and the Quebec Plaintiffs – essentially fell into three camps for the purpose of argument.

JTI and Rothmans asked the court to allow them to pursue leave to appeal applications in the Supreme Court of Canada.[93]

The Quebec plaintiffs submitted that the court lacked both the jurisdiction to determine the steps to be taken in the SCC leave application and the jurisdiction to stay an appellate decision such as that of the QCCA.[94] Furthermore, the Quebec plaintiffs argued that an application for leave to appeal to the Supreme Court of Canada should immediately and automatically terminate *CCAA* proceedings.[95] In the alternative, the Quebec plaintiffs asked that the stay be lifted so as to enable them to participate in the leave applications.[96]

Imperial submitted that it did not intend to file an SCC leave application, unless it had to in order to preserve its rights in case the *CCAA* proceedings failed.[97] Accordingly, Imperial sought a general stay of proceedings along with a stay of the relevant limitation periods.[98]

Justice McEwen's decision adopted the approach advanced by Imperial.[99] In the view of the Court, it had jurisdiction to adopt this approach, which was "fair, reasonable and sensible"

91 *Ibid* at para 37.
92 *Ibid.*
93 *Ibid* at para 6.
94 *Ibid* at para 10.
95 *Ibid* at para 11.
96 *Ibid.*
97 *Ibid* at para 7.
98 *Ibid.*
99 *Ibid* at paras 29 and 36.

and afforded the best chance of achieving a global resolution to all litigation claims.[100]

The court was critical of JTI and Rothmans' position that they be allowed to pursue an SCC leave application while all further proceedings were restrained. Despite JTI and Rothmans' submissions that this relief would preserve the status quo and help give effect to a global resolution, the court found that this proposal would actually alter the status quo in their favour.[101] Permitting JTI and Rothmans to file a leave to appeal application with the SCC would allow the companies to make all of their arguments for why the QCCA decision was wrong, while restraining all other proceedings would prevent the Quebec plaintiffs from offering any reply.[102] This would prejudice the Quebec plaintiffs. The relief sought by JTI and Rothmans would also be an impediment to resolving the claims against the debtors. As expressed by Justice McEwen, "[i]t would distract the [tobacco companies] from the resolution process they claim is so important by focusing their attention on the merits of their appeal from a five-person decision of the QCCA."[103]

The court found that the argument in the alternative for the Quebec plaintiffs – *ie* that the Quebec plaintiffs be allowed to participate in a leave application to the SCC – would similarly prejudice the rights of other plaintiffs that are presently pursuing claims against the tobacco companies.[104] This would essentially allow the Quebec plaintiffs to move ahead with their claims while the claims of other plaintiffs were stayed.

Justice McEwen observed that a number of other proceedings against the tobacco companies were approaching trials, including healthcare recovery cost actions by Ontario and New Brunswick, and it did "not seem fair" for the Quebec

100 *Ibid* at paras 14 and 23.
101 *Ibid* at para 30.
102 *Ibid.*
103 *Ibid.*
104 *Ibid* at para 31.

plaintiffs to obtain a benefit not available to other plaintiffs.[105] Furthermore, the Court noted that roughly $1 billion had been deposited in Quebec in order for the tobacco companies to pursue their appeal to the Quebec Court of Appeal, and further orders like this would hinder the ability of other stakeholders seeking a fair process through *CCAA* proceedings.[106]

Justice McEwen held that allowing the SCC leave application to proceed would undermine the *CCAA* proceedings.[107] It would represent a significant parallel proceeding which would have the effect of making the playing field less even for all stakeholders.[108] It would also distract the tobacco companies from the *CCAA* proceedings by diverting enormous resources toward litigation, thereby delaying and reducing the chances of a global resolution.[109]

The Quebec plaintiffs' primary argument posited that the Court overseeing *CCAA* proceedings lacked jurisdiction to stay the effect of the QCCA decision and to determine what steps should be taken in the SCC leave application.[110] Ontario supported the Quebec plaintiff's position, because it had a claim to recover healthcare costs.[111]

The Quebec plaintiffs argued that the wording of s 11 of the *CCAA* provides that the Act supersedes the *Bankruptcy and Insolvency Act* and the *Winding-up and Restructuring Act*.[112] The Quebec plaintiffs submitted that if the tobacco companies wanted to pursue leave to the SCC, then they must abide by the conditions of the QCCA and SCC and the *CCAA* proceeding should be immediately and automatically terminated.[113]

Justice McEwen found that there were no cases directly on

105 *Ibid* at para 32.
106 *Ibid.*
107 *Ibid* at para 22.
108 *Ibid* at paras 33 and 34.
109 *Ibid.*
110 *Ibid* at paras 10-13.
111 *Ibid* at para 13.
112 *Ibid* at para 10.
113 *Ibid* at para 11.

point concerning the ability of the Court to rely on s 11 of the *CCAA* to stay the effect of the QCCA decision and an SCC leave application.[114] The Quebec plaintiffs referred to a number of cases to suggest that the Court overseeing *CCAA* proceedings lacked jurisdiction.[115] Justice McEwen, however, found that these cases were distinguishable on the basis of the broad authority conferred by the *CCAA* and the significant nature of the undertaking at hand, which is to effect a global resolution of multiple, significant claims against the debtor companies.[116]

Looking closely at the wording of s 11, the court found that the *CCAA* confers on the court a general power to "make any order that it considers appropriate in the circumstances".[117] Section 11.02(1)(b) provides that the court may "restrain ... further proceedings in any action, suit or proceeding against the company", while section 11.02(1)(c) provides that the court may prohibit "the commencement of any action, suit or proceeding against the company".[118] Thus, Justice McEwen concluded that the broad jurisdiction of the court includes the ability to restrain further proceedings against the tobacco companies.[119]

Justice McEwen noted that such broad discretion is consistent with the purpose of the *CCAA*, which is aimed at avoiding the "devastating social and economic effects of commercial bankruptcies".[120] The *CCAA* is remedial in nature, and, consistent with its purpose, it enables the court

114 *Ibid* at para 15.

115 *Ibid* at para 26, citing *Mujagic v Kamps*, 2015 ONCA 360 (Ont CA) ; *Re OpenHydro Technology Canada Ltd*, 2018 NSSC 283 (NSSC).

116 *Ibid* at para 26.

117 *Ibid* at para 16, citing *CCAA*, *supra* note 1, s 11.

118 SCC Leave motion, *ibid* at para 16, citing *CCAA*, *ibid*, s 11.02(1)(a) and (c).

119 SCC Leave motion, *ibid* at para 17.

120 *Ibid* at para 18, citing *Re US Steel Canada Inc*, 2016 ONCA 662 (Ont CA) at paras 47, 49. See also *ibid* at para 20, citing *Re Air Canada* (2003), 28 CBR (5th) 52, 2003 CarswellOnt 9109 (Ont SCJ [Commercial List]).

to deal with proceedings beyond the Superior Court level:[121]

> In order to allow for the proper restructuring of debtor companies, or in this case settlement of multiple significant lawsuits, it would be undesirable to restrict the discretion of this court to matters at the Superior Court level. It would lead to a chaotic situation where only proceedings before the Superior Court and/or other provincial trial courts were stayed but proceedings that had reached the appeal courts were allowed to proceed. This would significantly hamper the stated purpose of the *CCAA*, which is to attempt to negotiate a compromised plan of arrangement.

Justice McEwen therefore concluded that the Court has jurisdiction to stay proceedings in appellate courts "to allow for a successful global resolution without benefiting one stakeholder over the other."[122]

The Court thus adopted Imperial's position, which was supported by the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland.[123] The Court was convinced that adopting and implementing Imperial's position into all three orders would "best preserve the status quo", "and provide for the level playing field needed to attempt a resolution of all claims".[124]

Justice McEwen accepted Imperial's submission that the Court has jurisdiction to extend time periods and limitation periods relating to any proceeding for or against debtors or related entities that might otherwise expire.[125] His Honour noted that such relief is common in *CCAA* proceedings, and had been granted in initial orders in other cases, and that the stay protects the interests of all stakeholders.[126] Furthermore, s 58(1) of the *Supreme Court Act* appears to contemplate this

121 SCC Leave motion, *ibid* at para 19.
122 *Ibid* at paras 14 and 22.
123 *Ibid* at paras 8, 14, 23.
124 *Ibid* at para 29.
125 *Ibid* at para 27.
126 *Ibid* at para 27, citing *Re Muscletech Research and Development Inc*, 2006 CanLII 20084 (Ont SCJ); *Re ScoZinc Ltd*, 2009 NSSC 162 (NSSC); *Re Scaffold Connection Corp*, 2000 ABQB 35 (Alta QB).

outcome as it includes the language "subject to any other Act of Parliament", in setting out the time period for appeals.[127]

ii. Lift of Stay motion by Ontario

On 1 May 2019, Justice McEwen released his decision regarding Ontario's motion to lift the stay with respect to the province's heathcare cost recovery action against the three tobacco companies ("Ontario Lift of Stay Motion").[128] Ontario's position was supported by the Quebec plaintiffs, the Canadian Cancer Society and the provinces of Alberta, Newfoundland and Labrador.[129] The tobacco companies opposed the motion, and were supported by the provinces of British Columbia, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, and Prince Edward Island.[130] Justice McEwen denied Ontario's motion, reiterating the importance of preserving the status quo in order to help facilitate a global resolution to the tobacco claims and characterized the litigation as a costly distraction and impediment to an effective resolution.[131]

The Ontario healthcare cost recovery action has been ongoing for roughly ten years, and the province is seeking damages in the amount of $330 billion.[132] As noted by Justice McEwen, the Ontario action is an "extremely significant lawsuit" and raises the issue of whether a province can recover damages for healthcare costs incurred in relation to treating smoking-related diseases.[133] Ontario's action, as well as the pending litigation by other provinces seeking the same relief, are all suspended by the *CCAA* stay.

Ontario argued that the stay should be lifted from its action

127 SCC Leave motion, *ibid* at para 24, citing *Supreme Court Act*, RSC 1985, c S-26, s 58(1).
128 Ontario Lift of Stay Motion, *supra* note 50 at para 22.
129 *Ibid* at para 4.
130 *Ibid* at para 5.
131 *Ibid* at paras 11, 13-15.
132 *Ibid* at para 7.
133 *Ibid* at para 8.

based on four grounds: the balance of convenience favours Ontario; the balancing of relative prejudice as against the tobacco companies tips the scale in favour of Ontario; the meritorious nature of Ontario's claim; and settlement of the Ontario action is unlikely.[134]

Justice McEwen disagreed with Ontario's submissions, averring again to the importance of preserving the *status quo* and providing a level playing field to facilitate the resolution of claims against the tobacco companies.[135] His honour found that Ontario's proposal would alter the *status quo* in the province's favour by allowing it to proceed with its action while the actions of other provinces were stayed.[136] The Ontario action would "add an enormous impediment" to resolving the claims against the tobacco companies, as it would "significantly distract" both Ontario and the debtor companies from the *CCAA* proceedings.[137]

The Court found that the balance of convenience between all stakeholders weighed in favour of maintaining the *status quo* through the stay of proceedings.[138] The balancing of relative prejudice also weighed against Ontario. Justice McEwen observed that "[t]he relative prejudice that may be suffered by all stakeholders far exceeds the relative prejudice to Ontario."[139] While Ontario may prove to have a meritorious claim, it is premature to review the merits of its claim, or any other pending claim. There was no reason to consider Ontario's claim more or less meritorious than any other outstanding action against the tobacco companies.[140] Justice McEwen also refused to accept Ontario's submission that settlement of its action was unlikely.[141]

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134 *Ibid* at para 9.
135 *Ibid* at paras 10-11.
136 *Ibid* at para 12.
137 *Ibid* at paras 13-14.
138 *Ibid* at para 16.
139 *Ibid* at para 17.
140 *Ibid* at para 18.
141 *Ibid* at para 20.

The Court held that the *CCAA* proceedings were in the early stages and needed to be given a chance to progress without "multiple, significant, expensive distractions."[142] Although the tobacco companies have not yet proposed a meaningful restructuring plan, their stated goal is to attempt to resolve the claims against them.

The Court stated that the tobacco companies are supported in this goal by six provinces which would like to try to resolve their claims through *CCAA* proceedings.[143] The Court acknowledged that the *bona fides* of this intention remained to be seen, however, it would be premature to dismiss it at this stage.[144]

Justice McEwen concluded by reiterating that "*CCAA* case law clearly establishes a significant need to preserve the *status quo* between all stakeholders and preserve a level playing field to maximize the chances of obtaining a resolution."[145]

iii. Mediation Process

At the time of writing this article in the fall of 2019, the Tobacco *CCAA* proceeding was in its 6th month. During that period, among other things, the stay of proceedings was extended a few times (the most recent extension to 12 March 2020),[146] and a common service list protocol was adopted in an effort to co-ordinate each individual *CCAA* proceeding.[147] Most importantly, from the perspective of achieving a global settlement of the claims, the Honourable Warren K Winkler, QC was appointed Court-Appointed Mediator (the "Mediator") to mediate a multi-party mediation process,[148]

142 *Ibid* at para 15.
143 *Ibid* at para 19.
144 *Ibid* at para 16.
145 *Ibid* at para 21.
146 Endorsements of Justice McEwen (26 June 2019 and 3 October 2019) in the Tobacco *CCAA* proceedings, *supra* note 5.
147 *Ibid.*
148 Second Amended and Restated Initial Order dated 12 March 2019 (paras 39-44) in the Imperial Tobacco *CCAA* Proceedings; Second

with the assistance of a financial advisor.[149] These are still early days in the proceedings. At the time of writing, therefore, it is uncertain whether or not a global settlement or plan of arrangement will be reached in the Tobacco *CCAA* proceedings.

iv. Leave Motion by the Canadian Cancer Society

During the 26 June 2019 motion, the Court also made it clear that, on a going forward basis, if the Canadian Cancer Society or other social stakeholders or non-creditors wanted to participate in the Tobacco *CCAA* proceedings, they would have to bring a motion for leave. The Court wanted to ensure that there was authority for the Canadian Cancer Society to participate in the proceedings. On 2 October 2019, the Canadian Cancer Society brought its leave motion seeking the Court's permission to continue participating in the Tobacco *CCAA* proceedings, and to participate in the mediation process facilitated by the Mediator. On 3 October 2019, the Court released its decision with reasons to soon follow.[150] The Court held that the Canadian Cancer Society is permitted to participate in these *CCAA* proceedings subject to the conditions to be set out in the reasons, but is not permitted to participate in the mediation process at this time. As of the publication deadline of this article, the reasons had still not been released by the Court and therefore we have provided our review of the Court's reasoning and revisited our conclusions in the attached Addendum.

Amended and Restated Initial Order dated 8 March 2019 (paras 40-45) in the JTI *CCAA* proceedings; Order dated 25 April 2019 (paras 40-44) in the Rothmans *CCAA* proceedings; and Endorsement (Court-Appointed Mediator Communication and Confidentiality Protocol) of Justice McEwen dated 24 May 2019 in the Tobacco *CCAA* proceedings, *ibid.*

149 Order (Appointing a Financial Advisor to the Court-Appointed Mediator) dated 27 June 2019 in the Tobacco *CCAA* proceedings, *ibid.*

150 Endorsement of Justice McEwen (3 October 2019) in the Tobacco *CCAA* proceedings, *ibid.*

VII. CONCLUSIONS

Social stakeholders or non-creditors have a role to play in *CCAA* proceedings. The parameters of that participation were explored in this article. We set out some guiding principles, which should assist the court in deciding the participatory rights of social stakeholders in *CCAA* proceedings. How these principles were applied or should be applied in the Tobacco *CCAA* proceedings are saved for these concluding remarks.

1. Entitlement to Participate

The courts have taken a broad approach to the entitlement of social stakeholders to participate in *CCAA* proceedings. That participation may be direct or indirect. In *Re TLC* and *Red Cross*, the Court recognized and encouraged the direct participation of social stakeholders in the *CCAA* process. In other cases, such as *Anvil Range* and *Canadian Airlines*, that participation was more indirect, in that their interests were recognized in the balancing of public interests. The *CCAA* "widens the lens" to include a broad range of participatory rights beyond creditors and the debtor. The "social fabric" of a community may be impacted by a *CCAA* filing. In the US tobacco litigation and settlements, some of the public interest issues revolved around public education regarding tobacco use; compensation for public health care recovery costs; and cessation of activities detrimental to public health. Similar public interest issues arise in the Canadian Tobacco *CCAA* proceedings. Any individual, group or entity that raises these public interest issues in the Tobacco *CCAA* proceedings will likely be entitled to participate as a social stakeholder in the proceedings.

2. Membership

The identity of those social stakeholders entitled to participate in *CCAA* proceedings has also been broadly defined without clear parameters. Some social stakeholders

recognized by the courts in *CCAA* proceedings have included Canadian air travellers, Canadian television viewers and Canadian blood supply users. Given this broad membership recognized by the courts, we expect that any individual, group or entity impacted by or advancing public interest issues raised in the Tobacco *CCAA* proceedings (*ie*, public education regarding tobacco use; public health care recovery costs) will be considered a "social stakeholder" or member. As noted, however, clear parameters of who is or who is not a "social stakeholder" or member has not been provided in many cases and guidance from the court in this regard would certainly be welcomed. This uncertainty may not be surprising given that wide social stakeholder groups, such as air travellers, television viewers, blood supply users or cigarette smokers, don't exactly give rise to clear definitions of membership.

3. Timing

The participation of social stakeholders at any stage of a *CCAA* proceeding has been recognized in several cases. In *Century Services*, the Supreme Court held that the public interest may be weighed against a particular action. In *Re TCL* and *Red Cross*, participation was encouraged at an early stage of the *CCAA* proceeding so the court did not have to speculate on what the public interest might entail. In light of the significance of the tobacco insolvencies for public health, it is not surprising to see the Court entertain public interest considerations and social stakeholders early in the proceedings.

4. Standard of Proof

The standard of proof on social stakeholders to participate in *CCAA* proceedings does not appear to be onerous in several cases, including *Skydome Corp* and *Re TLC*. A low evidentiary burden or threshold should be adopted for several reasons. It will encourage the participation of social stakeholders. It will also assist the court in its mandate of balancing interests since it

will not have to speculate on what those public interests might be in the *CCAA* proceeding. Given the number of significant public interest issues arising from the Tobacco *CCAA* proceedings, including public education regarding tobacco, public health regarding tobacco usage and public health recovery costs, a low threshold would assist the court in hearing these interests from the various social stakeholders. Where those public interests conflict with the rights of creditors, the court will have to decide whether a higher threshold is necessary in the circumstances.

5. Participatory Rights

Social stakeholders are entitled to "meaningful" participation in *CCAA* proceedings. What is meaningful will depend on the circumstances. They or their interests are certainly entitled to be heard or considered at any stage of the *CCAA* proceeding, including the sanction hearing. We expect that the more their interests are aligned with those of creditors or do not conflict with or prejudice the rights of creditors, the more sympathetic a court will be to their participatory rights. On the other hand, the court may be less sympathetic to social stakeholders that assert participatory rights that conflict with or prejudice the rights of creditors. There are limits to the participatory rights of social stakeholders. In *Anvil Range*, the Court held that public interests cannot override the lawful interests of secured creditors, but they can and must be weighed in the balance as the process works its way through under the *CCAA*. Should this be an absolute rule? Are there exceptions when the public interest should trump the rights or interests of creditors under the *CCAA*? What is the nature of that public interest? Is it of such a critical or urgent nature that it tips the scales in favour of the public interest? For example, climate change and the opioid crisis are certainly urgently pressing societal matters. Is there a middle ground whereby the court may "water down" the rule? For example, the rule that creditors ultimately decide on whether or not to accept a *CCAA* plan may

be "watered down" by a court holding that this does not preclude social stakeholders from having an important influence on non-financial or public issues addressed in the *CCAA* plan.

The *CCAA* filings of JTI-Macdonald, Imperial Tobacco, and Rothmans cut to the very core of the idea of a Canadian public interest: the health and welfare of Canadians. These three insolvencies will accordingly examine the implementation of the public interest in *CCAA* proceedings.

ADDENDUM

Reasons regarding the Leave Motion by the Canadian Cancer Society

On 18 October 2019, the Court released reasons regarding its decision of 3 October 2019, which permitted the Canadian Cancer Society (the "CCS") to participate in these *CCAA* proceedings before the Court on conditions to be set out in the reasons, but not to participate in the court-ordered mediation process at this time.[151] In his reasons, Justice McEwen started by reminding the parties that in his 3 October 2019 endorsement he was prepared to allow the CCS limited participation in the Court proceedings, but not in the mediation at this time.

He then set out three general reasons in support of his decision: firstly, with respect to the Court proceedings, no one objected to the participation of the CCS. The CCS was on the service list and received filings. To date, Justice McEwen had not restricted the ability of the CCS to make submissions and in this regard, he accepted that CCS is a social stakeholder. However, he was not convinced that CCS had a direct financial interest in these *CCAA* proceedings. It was neither a creditor

151 Endorsement of Justice McEwen (18 October 2019) in the Tobacco CCAA proceedings [Re CCS]. Reasons were also provided regarding two other motions concerning Imperial Tobacco payments and the extension of the stay of proceedings to 12 March 2020. They are not reviewed in this Addendum.

nor a debtor and, like many other persons, CCS may be indirectly impacted by a settlement. Given CCS's goals and experience, Justice McEwen believed that it was reasonable to allow it to participate in the Court proceedings subject to the Court's discretion. Going forward, CCS would be free to file materials in response to filings made by other stakeholders and Justice McEwen would then determine the extent to which CCS could make submissions. However, leave of the Court would be required by CCS, on notice, if it wished to initiate its own motion in these proceedings.

Secondly, with respect to mediation, the Court was not prepared to allow CCS to participate at this time. Again, Justice McEwen emphasized that CCS was not a creditor or debtor. He accepted that CCS has extensive experience as a health charity and that it is open to CCS to liaise with the government and other stakeholders outside the mediation process if it deems it desirable to do so.

Thirdly, the Court acknowledged that it granted broad discretion to the Honourable Mr Winkler to conduct the mediation process, including broad discretion to consult with a wide variety of persons that he considers appropriate. Justice McEwen saw no reason, at this time, to vary that order. The Court concluded that it was important to allow the Honourable Mr Winkler, who has vast experience in this area, the ability to carry on with the flexibility outlined in earlier court orders in these very complicated and significant proceedings.

Revisiting Conclusions in light of *Re CCS*

We would like to revisit some of our conclusions in this article in light of the reasons set out in *Re CCS*. The decision confirms that social stakeholders or non-creditors, like CCS, have a role to play in *CCAA* proceedings. The parameters of that participation were also explored in *Re CCS*. Earlier on in this article, we set out some guiding principles in which we thought could assist the court in deciding the participatory rights of

social stakeholders in *CCAA* proceedings. How these principles applied in *Re CCS* is now considered in these revisited concluding remarks.

(a) Entitlement to Participate:

In *Re CCS*, the Court accepted that CCS is a "social stakeholder". Given the goals and experience of the CCS, the Court believed that it was reasonable to allow CCS to participate in the Court proceedings subject to the Court's discretion. The goals of the CCS include eliminating tobacco use and cancer, and its experience includes patient support services, education, advocacy and research geared towards achieving those goals. These activities are all, broadly speaking, in the public interest. Justice McEwen linked the "goals and experience" of the CCS, which are in the public interest, with the right to participate as a social stakeholder in the Tobacco *CCAA* proceedings. This suggests that a non-creditor that has a public interest mandate related to the *CCAA* proceeding may be entitled to participate in the proceeding as a social stakeholder.

(b) Membership:

The identity of those social stakeholders entitled to participate in *CCAA* proceedings has been broadly defined without clear parameters in the earlier cases. Some social stakeholders recognized by the courts in *CCAA* proceedings have included Canadian air travellers, Canadian television viewers, and Canadian blood supply users. In *Re CCS*, the Court accepted that CCS is a social stakeholder; a "health charity" in the words of the Court. Unlike having to deal with more amorphous stakeholders as air travellers or television viewers, the Court in *Re CCS* had a more identifiable social stakeholder, the CCS.

(c) Timing:

The participation of social stakeholders at any stage of a

CCAA proceeding has been recognized in several cases. That participation may begin at the outset of *CCAA* proceedings. In *Re CCS*, the Court acknowledged that no one objected to CCS participating in the court proceedings; CCS was on the service list and received filings; and CCS was not restricted thus far by the Court in its ability to make submissions. In this regard, Justice McEwen accepted that CCS is a social stakeholder. Put another way, the Court recognized that CCS had been participating in the proceedings from the outset of the Tobacco *CCAA* proceedings.

(d) Standard of Proof:

The standard of proof on social stakeholders to participate in *CCAA* proceedings does not appear to be onerous in several cases. In *Re CCS*, the Court held that going forward CCS would be free to file materials in response to filings made by other stakeholders in the Tobacco *CCAA* proceedings and Justice McEwen would then determine the extent to which CCS could make submissions. However, leave of the Court would be required by CCS, on notice, if it wished to initiate its own motion in these proceedings.

(e) Participatory Rights:

In *Re CCS*, the Court was prepared to allow CCS only "limited participation". The Court repeated twice that CCS was neither a creditor nor debtor. It also did not have a direct financial interest in the Tobacco *CCAA* proceedings according to the Court. Instead, the Court held that, like many other persons, CCS may be indirectly impacted by a settlement. This limited the participatory rights of CCS in several ways. The Court held that going forward CCS is not absolutely free to make submissions in the Tobacco *CCAA* proceedings; CCS is not absolutely free to initiate its own motion in the Tobacco *CCAA* proceedings; and CCS is not entitled to participate in the mediation. However, at the same time, the Court did not "freeze" these participatory rights and left the door open for

broader participation by the CCS in the following ways: CCS is free to file materials in response to filings made by other stakeholders in the Tobacco *CCAA* proceedings and the Court would then determine the extent to which CCS can make submissions; CCS is entitled to initiate its own motion in the Tobacco *CCAA* proceedings with leave of the Court on notice; and the prohibition of CCS from participating in the mediation applies "at this time", which suggests that this may change in the future. Finally, the Court accepted the extensive experience of CCS as a health charity and left it open for the CCS to liaise with the government and other stakeholders outside the mediation process if it deems it desirable to do so 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 COMPROMISEOR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Applicants

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

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