Court File No. CV-19-615862-00CL
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ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JTI-MACDONALD CORP.

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

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

Applicants

FACTUM OF THE PROVINCES OF BRITISH COLUMBIA, SASKATCHEWEN, MANITOBA, NEW BRUNSWICK, NOVA SCOTIA AND PRINCE EDWARD ISLAND, AND THE TERRITORIES OF YUKON, NORTHWEST TERRITORIES AND NUNAVUT

(Motions for Sanction Orders)

January 27, 2025

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TO: THE COMMON SERVICE LIST

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PART I - OVERVIEW

1. This factum, submitted on behalf of the Provinces of British Columbia, Saskatchewan, Manitoba, New Brunswick, Nova Scotia and Prince Edward Island, and the Territories of Yukon, Northwest Territories and Nunavut (the "**Consortium**"), is in support of the Monitors' motions for approval and sanction of the CCAA Plans of the Tobacco Companies (referred to herein as "**RBH**", "**Imperial**" and "**JTI**" and collectively the "**Tobacco Companies**").[1]

2. Members of the Consortium have been engaged in litigation against the Tobacco Companies since the late 1990s. Decades of litigation have ensued over the Tobacco Companies' wrongful conduct dating back to the 1950s, with the Consortium's total claims against the Tobacco Companies valued at approximately **$280 billion.**

3. After a quarter century of litigation, in 2019, the Tobacco Companies sought protection under the CCAA with the express goal of coming to a global resolution of all Tobacco Claims.[2] Years of CCAA proceedings, and a Court-ordered mediation, has led to the sanction hearing now before the Court.

4. The Global Settlement Amount of $32.5 billion – while objectively a substantial amount – represents a mere fraction of the Tobacco Claims asserted against the Tobacco Companies. However, recognizing the purposes of the CCAA, and that every plan of arrangement thereunder will necessitate compromises, the Consortium supports the proposed CCAA Plans and requests

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[1] Capitalized terms used but not defined herein have the meaning ascribed to them in the CCAA Plans, and if such terms are not defined in the CCAA Plans they have the meaning ascribed to them in the Monitors' Reports.

[2] "Tobacco Claim" is defined in Article 1.1 of the CCAA Plans, see First Amended and Restated Court-Appointed Mediator's and Monitor's CCAA Plan of Compromise and Arrangement in respect of JTI-Macdonald Corp. dated December 5, 2024 at article 1.1; First Amended and Restated Court-Appointed Mediator's and Monitor's CCAA Plan of Compromise and Arrangement in respect of Imperial Tobacco Company Limited dated December 5, 2024 at article 1.1; First Amended and Restated Court-Appointed Mediator's and Monitor's CCAA Plan of Compromise and Arrangement in respect of Rothmans, Benson & Hedges Inc. dated December 5, 2024 at article 1.1 [collectively the "**CCAA Plans**"] .

their approval and sanction by this Court. The individuals and provincial health care systems that have suffered at the hands of the Tobacco Companies have waited far too long for a resolution and compensation. They should not be required to wait any longer. The CCAA Plans now before the Court provide a fair, reasonable, necessary – and perhaps the only – opportunity to arrive at a final global resolution.

5. The CCAA itself provides the necessary framework for this resolution to occur. The significant multi-party global resolutions that have occurred within the framework of the CCAA – including the *Canadian Red Cross* proceedings, the asset backed commercial paper restructuring, and the cross-border CCAA and Chapter 11 proceeding in *Nortel*,[3] to name a few – demonstrate its breadth and flexibility. These were all complex and novel situations requiring unique approaches that were implemented under the CCAA. The resolution of the Tobacco Claims likewise requires the unique solution before this Court capable of implementation under the CCAA.

6. The sole issue for the Court on this motion is whether the CCAA Plans meet the test for approval and sanction under the CCAA. The Consortium submits that the statutory criteria under the CCAA have been met; nothing has been done that is not authorized by the CCAA; and the CCAA Plans are fair and reasonable and should be sanctioned.

7. The determination of fair and reasonable must be made in the context of these unique circumstances and facts. No plan will be perfect, but the CCAA Plans before the Court represent a workable and viable compromise to bring these longstanding CCAA proceedings (and underlying litigation) to a conclusion, provide much needed compensation and relief in the public

[3] "A global solution in this unprecedented situation is required and perforce, as this situation has not been faced before, it will by its nature involve innovation. Our courts have such jurisdiction." *Nortel Networks Corporation*, 2015 ONSC 2987 at para 208.

interest, and effect successful restructurings as intended by the CCAA. They were approved *unanimously* by the creditors voting and are fair and reasonable in the unique circumstances of this case.

8. As set out herein, none of the arguments raised by the objecting parties change this conclusion. The Consortium requests that this Court sanction the CCAA Plans in their proposed form.

PART II – FACTS AND BACKGROUND

A. *The Consortium's Claims Against the Tobacco Companies*

9. The Province of British Columbia was the first jurisdiction in Canada to enact legislation to recover health care costs against the tobacco industry. After the *Tobacco Damages and Health Care Costs Recovery Act*[4] was upheld by the Supreme Court of Canada,[5] the rest of the Consortium enacted congruent legislation. The purpose of this legislation is to hold the tobacco industry accountable for its wrongful conduct and the resulting health care costs that have been borne by the Provinces and Territories (and their taxpayers).

10. The legislation confers a direct and distinct claim (on a joint and several liability basis) for health care costs recovery (the "**HCCR Claims**") against Canadian tobacco manufacturers, their affiliates, and their multinational parent companies to recover the present value of the total expenditure by the government for health care benefits provided, and that could reasonably be

[4] *Tobacco Damages and Health Care Costs Recovery Act*, SBC 2000, c 30.
[5] *British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49.

expected will be provided, for insured persons resulting from tobacco-related disease or the risk of tobacco-related disease.[6]

11. The proceedings under this legislation were all heavily litigated, with the Tobacco Companies bringing multiple jurisdictional and production challenges, many of which required adjudication by the Supreme Court of Canada. Multinational parent companies and affiliates also unsuccessfully attempted to challenge the jurisdiction of the Courts.[7] The time and resources that have been spent on the HCCR Claims is immense.

12. The HCCR Claims allege that the Tobacco Companies engaged jointly in Canada in campaigns to create doubt and controversy and to reassure smokers that cigarette smoking was not as harmful as public health authorities were reporting starting in the early 1950s. The HCCR Claims further allege that the Tobacco Companies (and their affiliates and parents) knowingly misled the public through these campaigns, that they deceived the public with respect to filtered cigarettes, that they promoted youth smoking, and that they committed tobacco-related wrongs by breaching the duties owed as cigarette manufacturers to persons in the Provinces and Territories over five decades.[8]

13. Section 3 of the *Tobacco Damages and Health Care Costs Recovery Act* provides a presumption of causation for the HCCR Claims: "(1)…[I]f the government proves, on a balance of probabilities, …(a) [the breach of duty], (b) exposure to the type of tobacco product can cause or contribute to disease, and (c) during all or part of the period of the breach… the type of tobacco

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[6] *Tobacco Damages and Health Care Costs Recovery Act*, *supra* note 4, sections 2, 3, 4, and 5.

[7] *British Columbia v Imperial Tobacco Canada Ltd.*, 2006 BCCA 398 leave to appeal to the Supreme Court of Canada refused, [2006] S.C.C. No. 446-448.

[8] *R. v Imperial Tobacco Canada Ltd.*, 2003 BCSC 877 at para 24 summarizing the allegations in BC's statement of claim, reversed in 2004 BCCA 269, Court of Appeal affirmed in 2005 SCC 49, neither the BC Court of Appeal, nor Supreme Court of Canada took issue with the BC Supreme Court's characterization of the statement of claim. The Court of Appeal summarized the allegations at paras 31-32.

product, manufactured or promoted by the defendant was offered for sale in the Province …. (2) …the court must presume that (a) the population of insured persons who were exposed to the type of tobacco product, manufactured or promoted by the defendant, would not have been exposed to the product but for the breach..., and (b) the exposure… caused or contributed to disease or the risk of disease in a portion of the population described in paragraph (a).”[9]

14. The Provinces and Territories quantified their HCCR Claims through expert evidence, including the evidence of Dr. Glenn Harrison.[10] Dr. Harrison employed an econometric analysis of Statistics Canada Canadian Community Health Surveys’ public health data, calculated smoking attributable fractions (“**SAFs**”) for hospital, physician, prescription drugs, and additional health care services utilization. Having determined these statistically significant SAFs, Dr. Harrison applied them to the publicly available data for Provincial and Territorial expenditures for hospital services, physician services, prescription drugs, and additional health care services for the period from 1954/1955 to 2019/2020.[11]

15. Dr. Harrison calculated the present value of the past and future expenditures for all of the Provinces and Territories to be approximately $944.519 billion.[12] The HCCR Claims of the Consortium total approximately $279.812 billion, being 29.625% of the total sum of all Provincial and Territorial HCCR Claims.[13]

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[9] *Tobacco Damages and Health Care Costs Recovery Act*, *supra* note 4, section 3.
[10] CCAA Plans, *supra* note 2 at Schedule “J”, Report of Dr. Glenn Harrison. Note the Report of Dr. Glenn Harrison is at Schedule “J” of the RBH and JTI Plans, it is at Schedule “G” of the Imperial Plan.
[11] *Ibid* at Schedule “J”, Report of Dr. Glenn Harrison at para 2.
[12] *Ibid* at Schedule “J”, Report of Dr. Glenn Harrison page 23, Table 1.
[13] *Ibid* at Schedule “J”, Report of Dr. Glenn Harrison page 23, Table 1.

B. *The Intervening CCAA Proceedings*

16. Faced with insurmountable litigation claims, a finding of solidary (joint) liability, and a judgment for approximately $13.7 billion in damages inclusive of interest confirmed by the Quebec Court of Appeal, the Tobacco Companies filed for CCAA protection in March 2019. This was the start of six years of CCAA proceedings and a mediation by the Court-Appointed Mediator and Monitors. The Consortium participated fully, and in good faith, in the proceedings and the mediation in order to reach a fair, reasonable and workable global resolution.

17. The purpose of the CCAA proceedings was to effect a global resolution of all Tobacco Claims.[14] During these lengthy CCAA proceedings, the Tobacco Companies (including their affiliates and parent companies) have continued to operate without interruption and without material impairment to their business, further demonstrating the reasonableness of the CCAA Plans now before this Court.

18. After years of engagement but limited progress towards resolution, in October 2023, the Court rightly directed the Monitors to develop the CCAA Plans[15] that are now before the Court for approval.

C. *The Proposed CCAA Plans*

19. The Consortium recognizes that in any CCAA proceeding, there will be necessary compromises. Despite holding claims of almost $280 billion, the Consortium supports the Global Settlement Amount of $32.5 billion – of which approximately $25 billion will accrue to all of the

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[14] *Imperial Tobacco Canada Limited, et al, Re*, 2019 ONSC 1684 at para 2.
[15] *Imperial Tobacco Canada Limited*, 2023 ONSC 5449 at para 22.

Provinces and Territories, including the Consortium – in the CCAA Plans as fair and reasonable in these circumstances.

20. The Global Settlement Amount, and its distribution amongst the Claimants, exemplifies the fundamental compromise enshrined in the CCAA Plans. The Global Settlement Amount is comprised of the Upfront Contributions, which total approximately $12.5 billion, and the Annual Contributions which are based on, and comprised solely of, the prescribed percentages of the Net After-Tax Income of each of the three Tobacco Companies calculated in accordance with the Metric, until the aggregate of the Contributions totals the Global Settlement Amount.[16] The structural foundation of the payment of the Global Settlement Amount is the Tobacco Companies' capacity to pay.

21. The Tobacco Companies are obligated to pay their Annual Contributions each year until the aggregate amount of the Contributions paid into the Global Settlement Trust Account equals the Global Settlement Amount. Upon payment of the Global Settlement Amount in full, the Tobacco Companies' obligations in respect of the CCAA Plan shall terminate.[17]

22. The Upfront Contributions and the first Annual Contribution will be distributed approximately equally between the compensation administration plans (the QCAP Administration Plan, the PCC Compensation Plan, and the Cy-Près Foundation, which will indirectly benefit users of tobacco products who are not directly compensated through the QCAP or PCC Plans) and the Provinces and Territories. In the years which follow, the Annual Contributions will be distributed among the Provinces and Territories in satisfaction of (a fraction of) the HCCR Claims.[18]

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[16] CCAA Plans, *supra* note 2 at article 5.1, article 5.4 and article 5.6.
[17] *Ibid* at article 5.8.
[18] *Ibid* at article 5, article 6, article 7, article 8, article 9 and see article 16.

23. After depositing the Annual Contributions into the Global Settlement Trust Account each year, each Tobacco Company is free to deal in its sole discretion with its respective share of the Net After-Tax Income.[19] The CCAA Plans also contain provisions permitting the ordinary course operational activities of the Tobacco Companies.[20] In addition, the respective intercompany arrangements which have been in place throughout the CCAA Proceedings will continue during the Contribution Period.[21]

24. Despite potential liability for the HCCR Claims also residing with affiliates and parent companies, the payments contemplated under the CCAA Plans are only being made by the Tobacco Companies.[22] However, affiliates and parent companies are receiving broad releases under the CCAA Plans as consideration for their requirements under the CCAA Plans in satisfaction of the obligations thereunder.

PART III – ISSUE

25. The issue on this motion is whether the CCAA Plans for the Tobacco Companies meet the test for plan sanction under the CCAA.

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[19] *Ibid* at article 5.11.

[20] *Ibid* at article 11, article 11.1: "During the Contribution Period, [the Tobacco Company] and, as applicable, members of its Tobacco Company Group shall be subject to the following covenants, subject to [the Tobacco Company's] right to engage in its Ordinary Course Operational Activities…" and article 11.2 "Decisions made by [the Tobacco Company's] directors, officers and management, as applicable, pertaining to operational matters, including the matters enumerated in subparagraphs (a) through (n) herein ("Ordinary Course Operational Activities"), shall be considered to be within the reasonable exercise of [the Tobacco Company's] directors' and officers' business judgment, provided that such decisions are made in the Ordinary Course of Business, are consistent with [the Tobacco Company's] covenants and the terms of the CCAA Plan, and are in compliance with all Applicable Laws"

[21] *Ibid* at article 5.15 of the JTI Plan; article 5.14 of the RBH and Imperial Plans.

[22] *Ibid* at article 5.

PART IV – LAW AND ARGUMENT

A. *The CCAA Plans are Within the Jurisdiction of the Court to Sanction*

26. RBH and JTI submit that unless they agree and consent to their CCAA Plan, it is not a Plan capable of sanction under the CCAA. This position is neither consistent with, nor supported by, the Orders issued in these proceedings or the provisions of the CCAA.

27. On October 5, 2023, this Court directed "the three Monitors, to work in conjunction with the Honourable Warren K. Winkler, Court-Appointed Mediator, to develop Plans of Compromise or Arrangement."[23] The Court found that the Monitors were in the best position to develop CCAA Plans in this unique CCAA proceeding.[24] This Court's endorsement also expressly directed the Monitors to assist the Mediator to accomplish the objective of producing plans that would be "acceptable to the required majority and also be seen to be fair and reasonable,"[25] without any reference that such plans would be consented to by the Tobacco Companies.[26]

28. The premise of this Order could only have been that this Court had the jurisdiction to direct the Court-Appointed Monitors to develop CCAA Plans; the Order was never appealed and the mediation continued on that basis.

29. At no point did any interested party move to challenge the jurisdiction of the Court – or the authority of the Mediator or Monitors – to do so (putting aside the issue of whether a party even could have when the Order was never appealed). Therefore, this issue cannot be subject to debate

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[23] *Imperial Tobacco Canada Limited*, *supra* note 15 at para 22.
[24] *Ibid* at para 20.
[25] *Ibid* at para 20.
[26] While JTI highlights that the Endorsement contemplates "due consideration" by the Applicants (Responding Factum of JTI-Macdonald Corp., dated January 24, 2025 ["**Responding Factum of JTI-Macdonald Corp**"] at para 66, Caselines Master: A1334: Current A354), that is not the same as ordering that their consent is required, nor is the statement that they Monitor Developed Plans "will have the best opportunity to be considered fair and reasonable to all three Applicants" anything other than a statement of what the Court would consider.

now, particularly where all parties engaged in the development of the CCAA Plans for over 15 months on the basis of this Order. Put differently, it is not open to RBH and JTI to now impugn the process that everyone freely participated in for over 15 months.

30. There is also no legal foundation for this submission. There is no requirement in the CCAA that the *debtor* must file, consent to, support, or otherwise agree with a CCAA Plan for it to be sanctioned. If Parliament intended for such a requirement, it could have expressly stated so quite easily; however, no such provision exists, and the Court's jurisdiction in this regard is therefore not fettered by the statute.

31. This is supported by the use of the CCAA for creditor-driven plans of arrangement and compromise. Such plans have been approved by Courts under the CCAA, with no concern that the debtor company is not the one bringing the Plan forward or supporting the Plan's adoption.[27]

32. The only authority cited for the proposition that debtor consent is required (by RBH) is a 1990 lower court Saskatchewan decision,[28] which was reversed by the Saskatchewan Court of Appeal,[29] in which the Court considered whether to order a meeting under the CCAA. Even if (i) that statement was correct, (ii) the context of ordering a meeting was relevant here, and (iii) the statement could apply in the face of a Court order directing the Monitors to develop the CCAA Plans, the case has never been followed on that statement (and would be contrary to the above principles and case law). Moreover, CCAA case law has clearly evolved to allow for a broad range of restructurings.

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[27] See e.g. of creditor-driven CCAAs: *1078385 Ontario Ltd., 1078385 Ontario Ltd.*, *Re*, 2004 CanLII 55041 (ON CA); *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 CanLII 21724 (ON SC); *HSBC Bank Canada v Bear Mountain Master Partnership*, 2010 BCSC 1563; *MJardin Group Inc.*, 2022 ONSC 3338.
[28] *Ursel Investments Ltd., Re*, 1990 CanLII 7504 (SK KB).
[29] *Ursel Investments Ltd., Re*, 1992 CanLII 8251 (SK CA).

33. The remainder of the arguments submitted by RBH in respect of the CCAA Plans somehow requiring debtor approval or consent – selectively presenting various judicial statements out of context[30] – entirely ignore the broader case law supporting the broad jurisdiction and extensive discretion granted to Courts under the CCAA. The same can be said of the arguments presented by JTI that a CCAA Court is solely to act as a "referee".[31] That is obviously not correct.

B. *The Broad Jurisdiction of CCAA Courts*

34. There is no question that these CCAA proceedings present unique facts and novel circumstances, requiring a unique and novel approach. But that is precisely what the CCAA was intended for: "A restructuring under the CCAA may take any number of forms, limited only by the creativity of those proposing the restructuring."[32] As prior cases have demonstrated, courts under the CCAA have the jurisdiction to approve innovative global solutions in unprecedented situations, in furtherance of the objectives and purposes of the CCAA.[33]

35. The CCAA Plans put forth in this proceeding are the form of restructuring best suited for these unique facts and circumstances, as determined by the Court-Appointed Mediator and Monitors, who were directed to develop the CCAA Plans having regard to the positions of all parties and the totality of circumstances, and the unanimous support by creditors.

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[30] As just one example, citing a statement that the company *initially* accepts or rejects claims, while ignoring that Courts also have the authority to determine claims, and while ignoring that claims determination is not the issue before the Court: Factum of Rothmans, Benson & Hedges dated January 24, 2025 at para 54, Caselines: Master A2235: Current: A1084.

[31] Responding Factum of JTI-Macdonald Corp., *supra* note 26 at para 63, Caselines Master: A1333: Current: A353.

[32] *ATB v Mansfield*, 2008 CanLII 21724 (ON SC).

[33] *Nortel Networks Corporation*, 2015 ONSC 2987 at para 208; *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re*, 1998 CanLII 14907 (ON SC) at para 45.

36. It is trite that section 11 empowers this Court to make any order that it considers appropriate in the circumstances of each case to further the remedial objectives of the CCAA.[34] The arguments presented by the objecting parties ignore this overarching judicial authority.

37. Similarly, JTI's submissions to the effect that approval of the CCAA Plans would cause a "chilling effect" on restructurings[35] ignores the reality of these unique and complex CCAA proceedings. The CCAA Plans represent the culmination of a multi-step process that has been carried out by the Mediator and Monitors – in a jointly-administered CCAA process – at the Court's direction and supervision over the course of six years. In these circumstances, it is hard to see what practical risk exists that the landscape of Canadian restructurings will change; any CCAA proceeding is necessarily fact-driven, always court-supervised, and shaped by the unique circumstances of each case. Therefore, the appropriateness of the outcome of this unique and complex proceeding can only be viewed in the context of its unique and complex facts.

C. *The Test for Approval of the CCAA Plans is Met*

38. The test for approval of a CCAA Plan is well-known:

(a) there must be compliance with all statutory requirements;

(b) nothing has been done or purported to be done that is not authorized by the CCAA and prior orders of the Court in the CCAA proceedings; and

(c) the plan must be fair and reasonable.[36]

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[34] *9354-9186 Quebec inc. v Callidus Capital Corp.*, 2020 SCC 10 at paras 48-49.
[35] Responding Factum of JTI-Macdonald Corp., *supra* note 26 at para 63, Caselines: Master: A1333: Current: A353.
[36] *Nordstrom Canada Retail, Inc.,* 2024 ONSC 1622 at para 18, citing *Laurentian University of Sudbury*, 2022 ONSC 5645 at para 23, and *Lydian International Limited (Re)*, 2020 ONSC 4006 at para 22.

39. Once the Court is satisfied that these factors have been met, the Plan should be sanctioned. The Consortium submits that in this case, all requirements for approval are satisfied, and the objections raised do not negate the satisfaction of these factors.

A. *Compliance with Statutory Requirements*

40. The Consortium adopts and supports the submissions of the Monitors with respect to the satisfaction of the statutory requirements. Further, certain of the specific objections on this category by the objecting parties are addressed in section D below.

B. *Steps Unauthorized by the CCAA*

41. The Consortium adopts and supports the submissions of the Monitors for the proposition that no steps were taken during the CCAA proceedings that were unauthorized by the CCAA.

C. *Fair and Reasonable*

42. The Consortium adopts and supports the submissions of the Monitors that the CCAA Plans are fair and reasonable. The Consortium offers these additional submissions in support from its perspective as a material creditor of the Tobacco Companies.

43. *First*, when assessing fairness and reasonableness, perfection is not the standard;[37] rights and remedies must be sacrificed in order to result in a reasonable and viable compromise for all concerned.[38] "[T]here can never be a perfect plan, but rather only one that is supportable."[39] Contrary to some of the submissions being made, equal treatment is not the standard; under the

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[37] *AbitibiBowater Inc., Re*, 2010 QCCS 4450 at para 33; *Laurentian University of Sudbury*, *supra* note 36 at para 31.
[38] *Canadian Airlines Corp., Re*, 2000 ABQB 442 at para 178.
[39] *Ibid* at para 179.

CCAA, "[e]quitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment."[40]

44. Against this backdrop, there is intrinsic fairness and equitable treatment embodied throughout the CCAA Plans, both between the Claimants and the Tobacco Companies, and among the Tobacco Companies and their affiliates and parents.[41] The CCAA Plans balance the financial interests of all Parties and provide for an equitable and just determination of any disputes that may arise thereunder.[42]

45. *Second,* as material creditors of the Tobacco Companies, the Consortium emphasizes that there is "a heavy onus on parties seeking to upset a plan where the required majorities have overwhelmingly supported it."[43] The level of approval by creditors is a very significant factor in determining whether a CCAA plan is fair and reasonable.[44] In this case, the double majorities for the CCAA Plans were overwhelmingly achieved – the vote was unanimous.[45]

46. *Third,* fairness and reasonableness must be measured against the available commercial alternatives.[46] In this case, no other plan was put before or offered to the creditors. Without sanction, the considerable advantages created by the CCAA Plans will likely be lost to the great detriment of all stakeholders,[47] all the more glaring in this case where the CCAA proceedings have

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[40] *Ibid* at para 179 citing *Re Sammi Atlas Inc.*, 1998 CanLII 14900 (ON SC) at para 4; *PSINet Ltd., Re*, 2002 CanLII 49587 (ON SC) at para 8.
[41] See e.g. CCAA Plans, *supra* note 2 at article 5 and article 11.
[42] *Ibid* at article 10 and article 13, under which, among other things, the CCAA Court retains jurisdiction.
[43] *AbitibiBowater Inc.*, *supra* note 37 at para 34.
[44] *Ibid* at para 35.
[45] Factum of the Imperial and RBH Monitors dated January 22, 2025 ["**Factum of the Imperial and RBH Monitors**"] at para 20, Caselines: Master: E2440: Current:E159; FTI 24th Report at Appendix A Scrutineer's Report, Caselines: Master: E3645: Current: E66; EYI 22nd Report at Appendix A: Scrutineer's Report, Caselines: Master: E2231: Current: E65; Deloitte 21st Report at Appendix A: Scrutineer's Report, Caselines: Master: E2231: Current: E67.
[46] *Canadian Airlines Corp.*, *supra* note 38 at para 179.
[47] *AbitibiBowater Inc.*, *supra* note 37 at para 41.

been ongoing since 2019, combined with the fact that the Plans are the product of the Mediator and Monitor-driven process directed by the Court over 15 months ago.

47. Without Court sanction of the CCAA Plans, the approximately $1 trillion of claims will presumably bankrupt and require the liquidation of the Tobacco Companies;[48] the Consortium would resume prosecution of its large and complex litigation against the Tobacco Companies, their parents and affiliates; and the Consortium and its taxpayers – and surviving individuals who suffered tobacco-related harms – would be forced to wait even longer for some form of compensation or relief. After six years of CCAA proceedings and an exhaustive mediation, the Consortium would not support continuation of the CCAA proceedings if the CCAA Plans are not sanctioned.

48. *Fourth,* the public interest is a relevant factor in assessing whether a plan is fair and reasonable.[49] In this case, the amounts that will be distributed to the Consortium will immediately benefit the public interest through their investment into a healthcare system that has borne the significant burden of the wrongs committed by the Tobacco Companies,[50] along with direct compensation for individuals who have suffered certain specified tobacco-related harms.

49. In addition, the mission of the Cy-Pres Foundation, which is established through the CCAA Plans, is to fund research, programs and initiatives regarding tobacco-related cancers, Emphysema/COPD and other illnesses and conditions which are reasonably and rationally connected to tobacco-related harms.[51] This furthers the public interest in these CCAA proceedings and supports the CCAA Plans as fair and reasonable. The Consortium adopts the submissions of

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[48] Factum of the Imperial and RBH Monitor, *supra* note 45 at para 47, Caselines: Master: E2449: Current: E168.
[49] *Laurentian University of Sudbury*, *supra* note 36 at para 32.
[50] This is consistent with the legislative policy objectives relating to tobacco: see *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 69, para 95, para 136 and para 139.
[51] CCAA Plans, *supra* note 2 at article 9.1.

PCC Representative Counsel with respect to the appropriateness of the Cy-Pres Fund and the Cy-Pres Foundation.[52]

50. *Fifth,* as set out in the next section below, from the perspective of the Consortium, the objections raised by RBH, JTI and the privately appointed receiver of JTI-MacDonald TM Corp. ("**JTI-TM**") do not alter the conclusion that the CCAA Plans meet the test for sanction and are fair and reasonable. "The fairness and reasonableness of a plan are shaped by the unique circumstances of each case, within the context of the CCAA."[53]

D. *The Objections Raised Do Not Change the Fair and Reasonable Conclusion*

1. Payments are Contained within the Proposed CCAA Plans

51. The issue of allocation, and the respective payments to be made by each Tobacco Company, are contained within the existing payment protocols of the CCAA Plans. As such, Article 5.2 can be deleted (a non-material amendment given that it has no effect on the working of, or fundamental economics reflected in, the CCAA Plans) and the CCAA Plans can function holistically on a standalone basis.

52. The creditors voting at the meetings, including the Consortium, *unanimously* voted in approval of the CCAA Plans which contained these payment mechanisms. The business judgment

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[52] In class actions, cy-près distributions have been used to indirectly benefit a class of persons for whom direct compensation is not practical, but it is considered necessary and appropriate to indirectly benefit those persons for whom there is a sufficient nexus to the cause of action. (Mulheron, R. P., The Modern Cy-Près Doctrine: Applications and Implications (Oxon: UCL Press 2006) at p.215; *Ali Holdco Inc. v Archer Daniels Midland Co*., 2019 ONSC 131 at paras 46-47. Therefore, there is a nexus between the cause of action, which is the historical breach of duty by the Tobacco Company, and the benefit, which is, through medical research, to improve outcomes in the treatment of tobacco-related disease. As such, the mission of the Cy-Près is entirely appropriate considered in the context of the cause of action against the Tobacco Companies and the legal requirements for a cy-près distribution to be considered fair and reasonable.

[53] *PSINet Ltd., Re*, *supra* note 40 at para 8.

of the creditors unanimously approving the CCAA Plans – which included these mechanisms – should not be second guessed.[54]

53. While this payment protocol may not be perfect from the perspective of RBH and JTI, the question for this Court is whether it is fair and reasonable in these circumstances; this does not require equal treatment, but only equitable treatment as assessed with a view to the unique circumstances of the case.[55] RBH's presentation of various market share scenarios are simply not reflective of the economic reality that the CCAA Plans are based on the capacity of the Tobacco Companies' to pay. Moreover, in the view of the JTI Monitor, this allocation mechanism "is affordable for each of the Tobacco Companies."[56]

54. Any re-working of the payment mechanisms that departs from the affordable and practical payment requirements of the CCAA Plans would deprive the creditors of the fundamental economic bargain enshrined in the CCAA Plans on which they unanimously voted in favour, and would have substantial financial consequences to the proposed economic functioning of the CCAA Plans. While the CCAA Plans contemplate potential amendments after the Meeting Order in select situations,[57] courts have emphasized that after a vote has been taken, amendments to a CCAA Plan should only be considered in "exceptional circumstances".[58]

55. It is apparent that the Tobacco Companies' concerns with respect to the issue of allocation are intractable. Therefore, any re-working would also require more negotiation amongst all key stakeholders and potentially another vote by all creditors; there is also no certainty that even if that

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[54] *Sammi Atlas Inc.*, *Re*, *supra* note 40 at para 5 citing *Olympia & York Developments Ltd. v Royal Trust Co. (1993)*, 1993 CanLII 8492 (ON SC).
[55] *Canadian Airlines Corp.*, *Re*, *supra* note 38 at para 178; *Sammi Atlas Inc., Re*, *supra* note 40 at para 4; *PSINet Ltd., Re*, *supra* note 40 at para 8.
[56] JTI-Macdonald Corp. Factum of the Monitor dated January 22, 2025 at para 24(i), Caselines: Master: E2466: Current: E206.
[57] CCAA Plans, *supra* note 2 at article 20.4.
[58] *Sammi Atlas Inc., Re*, *supra* note 40 at para 6; *Algoma Steel Corp. v Royal Bank* (1992), 1992 CanLII 7413 (ON CA) at see here; *BlueStar Battery Systems International Corp.,* 2000 CanLII 22678 (ON SC) at para 7.

occurred, further negotiations would result in a plan that all three Tobacco Companies support. The creditors unanimously approved the existing metrics in *these* CCAA Plans; that vote must be given deference.

2. The treatment of JTI-TM under the CCAA Plan is fair and reasonable

56. The private receiver appointed in respect of JTI-TM opposes JTI-TM's treatment under the JTI CCAA Plan and, in particular, the fact it is designated as an "Unaffected Creditor".

57. The JTI CCAA Plan contemplates that JTI-TM will subordinate its security interest until the Global Settlement Amount – which is a significantly discounted amount from the actual claims advanced – is settled. In exchange, JTI-TM obtains a broad and comprehensive release. JTI-TM's objections should be rejected.

58. *First,* JTI-TM's claim is not being compromised or released and therefore the Consortium considers that its designation as an Unaffected Creditor was correct. Where a claim is solely being subordinated and deferred without reduction, it is not automatically a confiscation of rights requiring voting status. Courts have held that a compromise, necessitating a creditor vote, is one where rights are taken away or there is a proposal to accept less than 100 cents on the dollar.[59] JTI-TM's claim will still exist after the CCAA Plans are approved; there is no confiscation, deletion or reduction of its claim.

59. This is supported by the finding in CCAA cases that limiting recovery of a claim to insurance proceeds is not a compromise of a claim.[60] Similarly, changing the financial landscape

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[59] See *9354-9186 Quebec inc. v Callidus Capital Corp.*, *supra* note 34 at paras 100-101; *Crystallex International Corp., Re,* 2012 ONSC 2125 at para 50.

[60] *Trican Well Service Ltd. v Delphi Energy Corp*, 2020 ABCA 363 at paras 22-23; *Sino-Forest Corporation (Re)*, 2012 ONSC 7041 at para 44.

of a CCAA debtor does not equate to a confiscation of rights necessitating a vote.[61] JTI-TM's ability to collect is simply being deferred until the obligations under the CCAA Plan are fulfilled.[62]

60. *Second,* granting JTI-TM a vote in this situation would have been inappropriate. JTI and JTI-TM submit that JTI-TM should have been given a vote in its own class as a secured creditor. However, if this had been done (which the Consortium submits was not warranted in the circumstances as there is only a deferral of rights), JTI-TM would have had an effective veto over the CCAA Plan. And as JTI-TM could likely only vote against and not for the CCAA Plan,[63] the outcome would have been predetermined. Courts have held that unless clearly mandated by the statute, granting any one creditor a veto power is to be avoided;[64] "the court must act for the greater good consistent with the purpose and spirit and within the confines of the legislation."[65]

61. There is also an overriding discretion held by a judge under section 11 to prevent a creditor from voting when it is acting for an improper purpose.[66] There is no specific threshold for such an order; rather, "it is necessarily a discretionary, circumstance-specific inquiry" depending on whether a creditor is voting "in a manner that frustrates, undermines or runs counter" to the "remedial objectives of the CCAA."[67] Therefore, an improper purpose does not mean that a party is acting in bad faith or with ill intentions, but rather solely that their vote would frustrate the objectives and purpose of the CCAA in the circumstances of the case before the Court.

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[61] See *Calpine Canada Energy Ltd.*, *Re*, 2007 ABQB 504 at paras 62-63 (in the context of Court approval of settlements under the CCAA); leave to appeal refused 2007 ABCA 266 .

[62] The same arguments in this section could also be applied to JTI's submissions with respect to section 11.01 of the CCAA; this provision does not apply to prevent sanction of the CCAA Plans for many reasons, including that its ability to pay these amounts has not been taken away, but merely deferred.

[63] Section 22(3):"A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company." Despite the private receiver's assertion that JTI "exercises no control" over JTI-TM (JTI-TM Factum at para 15), the entities may still be "related" under ss. 22(3). In any event, even if this provision did not apply, it would still hold a veto.

[64] *Calpine Canada Energy Ltd.*, *supra* note 61 at para 38.

[65] *Ibid* at para 38.

[66] *9354-9186 Quebec inc. v Callidus Capital Corp.*, *supra* note 34 at para 56 and para 66.

[67] *Ibid* at paras 69-70.

62. In this long-standing and complex CCAA proceeding, granting a related party an effective veto over all three CCAA Plans (given their interconnectedness), would frustrate the entire purpose of these CCAA proceedings, including providing for timely and efficient resolution of the insolvency proceedings, achieving a global resolution of all Tobacco Claims and protecting the public interest[68] which, as noted above, is a key feature of these CCAA Plans. As such, even if JTI-TM had been given a vote, such a vote would have thwarted the objectives of the CCAA in this case and therefore could have been disallowed in accordance with these principles.

63. *Third,* JTI-TM is being granted a release, including from claims by the Consortium. For a party to obtain a release, there must be some contribution to the CCAA Plan. The factors a court will consider in determining whether to grant a release include:

(a) whether the released claims are rationally connected to the purpose of the plan;

(b) whether the plan can succeed without the releases;

(c) whether the parties being released contributed to the plan;

(d) whether the releases benefit the debtors as well as the creditors generally;

(e) whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

(f) whether the releases are fair, reasonable and not overly-broad or offensive to public policy.[69]

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[68] *Ibid* at para 40.
[69] *Laurentian University of Sudbury*, *supra* note 36 at para 40; *Nordstrom Canada Retail, Inc.*, *supra* note 36 at para 29.

64. For JTI-TM to obtain its contemplated release, it must make a contribution to the JTI Plan. The contribution contemplated that warrants a release of the breadth and magnitude contemplated under the CCAA Plan is the temporary subordination of its security interest. Moreover, without the JTI-TM release, the JTI CCAA Plan will not operate as intended, as claims against the related entity would continue to be advanced, thwarting the goal and purpose of a global settlement of all Tobacco Claims. Therefore, the release is also essential to the overall operation of the CCAA Plans.

65. *Fourth,* to the extent that subordination is required for implementation of the CCAA Plans, this Court has the authority to make such an order. Under section 11, the breadth of which is discussed above, courts have made orders effectively re-ordering priorities without an express provision permitting such an order.[70] This includes, for example, granting a charge for key employee retention plans,[71] or priming charges for break fees in stalking horse bids.[72] These cases demonstrate that section 11 can be used to effectively subordinate even secured creditors when the interests of the restructuring require it; the same could occur here.

66. *Fifth,* the arguments of JTI-TM must be considered in context. A privately appointed receiver is generally regarded as the agent of the principal who appointed it – in this case JT Canada LLC Inc. (the parent company of JTI).[73] The primary objective of this private receiver is to enhance the profitability of the JTI Tobacco Company Group, specifically by attempting to optimize the intercompany structure to achieve what the JTI Monitor has described as "tax efficiencies".[74] JTI-TM describes itself as "not a party to the CCAA proceedings"[75] while simultaneously asserting

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[70] See discussion in *Canada v Canada North Group Inc.*, 2021 SCC 30 at para 70.
[71] E.g. *Bron Media Corp., Re*, 2023 BCSC 1563 at paras 24-26.
[72] E.g. *Quest University Canada (Re)*, 2020 BCSC 1845 at paras 53-54.
[73] Responding Factum of the TM-Receiver dated October 29, 2024 at para 16, Caselines: Master: F790: Current: F176 .
[74] JTI – Second Report of the Monitor dated April 1, 2019, at para 30.
[75] Responding Factum of the TM-Receiver dated October 29, 2024 at para 8, Caselines: Master: F789: Current: F175 .

that it should be afforded a veto right in respect of any plan proposed in respect of JTI. Therefore, these submissions are being made in the context of advancing the intercompany interests of the JTI Tobacco Company Group.

3. The Needed Support of JTI's Tobacco Company Group is Overstated

67. JTI submits that its CCAA Plan is unworkable due to the necessary supply of intercompany services and intercompany payments. However, JTI and its affiliates have been operating without material detriment during the pendency of these CCAA proceedings. There is no basis to conclude that such operations would somehow fall apart if the CCAA Plan was approved. JTI's objection appears opportunistic and contrived.

68. Indeed, in the JTI Monitor's 23rd report, intercompany payments in excess of $100 million are anticipated to be made by JTI to its Tobacco Company Group members during the forecast extension to the stay period.[76] In excess of $540 million of net intercompany profits have been paid by JTI to other members of its corporate group during the pendency of these CCAA proceedings.[77] There is no basis to conclude that financial harm would result during the proposed contribution periods.

69. To the extent that affiliates are required to provide ongoing support to the Tobacco Companies under the CCAA Plans, those parties are compensated for their support through the broad releases granted. This is a fair and reasonable balancing of interests that cannot be disturbed without compromising the integrity of the CCAA Plans as a whole.

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[76] JTI – Twenty-Third Report of the Monitor dated January 22, 2025 at para 29 (see chart "13-Week Revised Cash Flow Statement"), Caselines: Master: E2441: Current: E181.

[77] This figure represents the net total of all Intercompany Disbursements minus all Intercompany Receipts as disclosed in the reports of the JTI Monitor filed throughout these CCAA proceedings. Note substantially all of this amount was paid after the suspension of intercompany royalty and interest payments.

PART V – ORDER REQUESTED

70. The test for sanction of the CCAA Plans is met and in the unique circumstances of this lengthy and complex CCAA proceeding, it could only be described as unfair and unreasonable to not sanction the CCAA Plans that hold unanimous support from the creditors accepting significant compromises on their claims, in the face of evidence of wrongdoing by the Tobacco Companies.

71. The Consortium respectfully requests that the Court approve and sanction the proposed CCAA Plans.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of January, 2025.

BENNETT JONES LLP

SCHEDULE "A"

LIST OF AUTHORITIES

1. *1078385 Ontario Ltd., Re*, 2004 CanLii 55041 (ON CA).
2. *9354-9186 Quebec inc. v Callidus Capital Corp.*, 2020 SCC 10.
3. *AbitibiBowater Inc., Re*, 2010 QCCS 4450.
4. *Algoma Steel Corp. v Royal Bank* (1992), 1992 CanLII 7413 (ON CA).
5. *Ali Holdco Inc. v Archer Daniels Midland Co.*, 2019 ONSC 131.
6. *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 CanLII 21724 (ON SC).
7. *BlueStar Battery Systems International Corp.*, 2000 CanLII 22678 (ON SC).
8. *British Columbia v Imperial Tobacco Canada Ltd.*, 2006 BCCA 398.
9. *British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49.
10. *Bron Media Corp., Re*, 2023 BCSC 1563.
11. *Calpine Canada Energy Ltd., Re*, 2007 ABQB 504.
12. *Canadian Airlines Corp., Re*, 2000 ABQB 442.
13. *Canada v Canada North Group Inc.*, 2021 SCC 30.
14. *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re*, 1998 CanLII 14907 (ON SC).
15. *Crystallex International Corp., Re*, 2012 ONSC 2125.
16. *HSBC Bank Canada v Bear Mountain Master Partnership*, 2010 BCSC 1563.
17. *Imperial Tobacco Canada Limited, et al, Re*, 2019 ONSC 1684.
18. *Imperial Tobacco Canada Limited*, 2023 ONSC 5449.
19. *Laurentian University of Sudbury*, 2022 ONSC 5645.
20. *Lydian International Limited (Re)*, 2020 ONSC 4006.
21. *MJardin Group Inc.*, 2022 ONSC 3338.
22. *Nordstrom Canada Retail, Inc.*, 2024 ONSC 1622.
23. *Nortel Networks Corporation*, 2015 ONSC 2987.
24. *Olympia & York Developments Ltd. v Royal Trust Co. (1993)*, 1993 CanLII 8492 (ON SC).
25. *PSINet Ltd., Re*, 2002 CanLII 49587 (ON SC).
26. *Quest University Canada (Re)*, 2020 BCSC 1845.
27. *Re Sammi Atlas Inc.*, 1998 CanLII 14900 (ON SC).
28. *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199.
29. *R. v Imperial Tobacco Canada Ltd.*, 2003 BCSC 877.
30. *R. v Imperial Tobacco Canada Ltd.*, 2004 BCCA 269.
31. *Sino-Forest Corporation (Re)*, 2012 ONSC 7041.
32. *Trican Well Service Ltd. v Delphi Energy Corp*, 2020 ABCA 363.
33. *Ursel Investments Ltd., Re*, 1990 CanLII 7504 (SK KB).
34. *Ursel Investments Ltd., Re*, 1992 CanLII 8251 (SK CA).

I certify that I am satisfied as to the authenticity of every authority.
Dated: January 27, 2025

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

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

Section 6

Compromises to be sanctioned by court

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

> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

> (a) subsection 224(1.2) of the Income Tax Act;
>
> (b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or

employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a provincial pension plan as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(A.1) an amount equal to the sum of all special payments, determined in accordance with section 9 of the Pension Benefits Standards Regulations, 1985, that were required to be paid by the employer to the fund referred to in sections 81.5 and 81.6 of the Bankruptcy and Insolvency Act to liquidate an unfunded liability or a solvency deficiency,

(A.2) any amount required to liquidate any other unfunded liability or solvency deficiency of the fund as determined on the day on which proceedings commence under this Act,

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(A.1) an amount equal to the sum of all special payments, determined in accordance with section 9 of the Pension Benefits Standards Regulations, 1985, that would have been required to be paid by the employer to the fund referred to in sections 81.5 and 81.6 of the Bankruptcy and Insolvency Act to liquidate an unfunded liability or a solvency deficiency if the prescribed plan were regulated by an Act of Parliament,

(A.2) any amount required to liquidate any other unfunded liability or solvency deficiency of the fund as determined on the day on which proceedings commence under this Act,

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

General power of court

Section 11

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Section 11.001

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an

initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Section 11.01

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

Section 22(3)

Related Creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

***Tobacco Damages and Health Care Costs Recovery Act*, SBC 2000, c 30**

Section 2

Direct action by government

2 (1)The government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco-related wrong.

(2)An action under subsection (1) is brought by the government in its own right and not on the basis of a subrogated claim.

(3)In an action under subsection (1), the government may recover the cost of health care benefits whether or not there has been any recovery by other persons who have suffered damage caused or contributed to by the tobacco-related wrong committed by the defendant.

(4)In an action under subsection (1), the government may recover the cost of health care benefits

(a)for particular individual insured persons, or

(b)on an aggregate basis, for a population of insured persons as a result of exposure to a type of tobacco product.

(5)If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,

(a)it is not necessary

(i)to identify particular individual insured persons,

(ii)to prove the cause of tobacco-related disease in any particular individual insured person, or

(iii)to prove the cost of health care benefits for any particular individual insured person,

(b)the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits for particular individual insured persons are not compellable except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness,

(c)a person is not compellable to answer questions with respect to the health of, or the provision of health care benefits for, particular individual insured persons,

(d)despite paragraphs (b) and (c), on application by a defendant, the court may order discovery of a statistically meaningful sample of the documents referred to in paragraph (b) and the order must include directions concerning the nature, level of detail and type of information to be disclosed, and

(e)if an order is made under paragraph (d), the identity of particular individual insured persons must not be disclosed and all identifiers that disclose or may be used to trace the names or identities of any particular individual insured persons must be deleted from any documents before the documents are disclosed.

Section 3

Recovery of cost of health care benefits on aggregate basis

3 (1)In an action under section 2 (1) for the recovery of the cost of health care benefits on an aggregate basis, subsection (2) applies if the government proves, on a balance of probabilities, that, in respect of a type of tobacco product,

(a)the defendant breached a common law, equitable or statutory duty or obligation owed to persons in British Columbia who have been exposed or might become exposed to the type of tobacco product,

(b)exposure to the type of tobacco product can cause or contribute to disease, and

(c)during all or part of the period of the breach referred to in paragraph (a), the type of tobacco product, manufactured or promoted by the defendant, was offered for sale in British Columbia.

(2)Subject to subsections (1) and (4), the court must presume that

(a)the population of insured persons who were exposed to the type of tobacco product, manufactured or promoted by the defendant, would not have been exposed to the product but for the breach referred to in subsection (1) (a), and

(b)the exposure described in paragraph (a) caused or contributed to disease or the risk of disease in a portion of the population described in paragraph (a).

(3)If the presumptions under subsection (2) (a) and (b) apply,

(a)the court must determine on an aggregate basis the cost of health care benefits provided after the date of the breach referred to in subsection (1) (a) resulting from exposure to the type of tobacco product, and

(b)each defendant to which the presumptions apply is liable for the proportion of the aggregate cost referred to in paragraph (a) equal to its market share in the type of tobacco product.

(4)The amount of a defendant's liability assessed under subsection (3) (b) may be reduced, or the proportions of liability assessed under subsection (3) (b) readjusted amongst the defendants, to the extent that a defendant proves, on a balance of probabilities, that the breach referred to in subsection (1) (a) did not cause or contribute to the exposure referred to in subsection (2) (a) or to the disease or risk of disease referred to in subsection (2) (b).

Section 4

Joint and several liability in an action under section 2 (1)

4 (1)Two or more defendants in an action under section 2 (1) are jointly and severally liable for the cost of health care benefits if

(a)those defendants jointly breached a duty or obligation described in the definition of "tobacco-related wrong" in section 1 (1), and

(b)as a consequence of the breach described in paragraph (a), at least one of those defendants is held liable in the action under section 2 (1) for the cost of those health care benefits.

(2)For purposes of an action under section 2 (1), 2 or more manufacturers, whether or not they are defendants in the action, are deemed to have jointly breached a duty or obligation described in the definition of "tobacco-related wrong" in section 1 (1) if

(a)one or more of those manufacturers are held to have breached the duty or obligation, and

(b)at common law, in equity or under an enactment those manufacturers would be held

(i)to have conspired or acted in concert with respect to the breach,

(ii)to have acted in a principal and agent relationship with each other with respect to the breach, or

(iii)to be jointly or vicariously liable for the breach if damages would have been awarded to a person who suffered as a consequence of the breach.

Section 5

Population based evidence to establish causation and quantify damages or cost

5 Statistical information and information derived from epidemiological, sociological and other relevant studies, including information derived from sampling, is admissible as evidence for the purposes of establishing causation and quantifying damages or the cost of health care benefits respecting a tobacco-related wrong in an action brought

(a)by or on behalf of a person in the person's own name or as a member of a class of persons under the Class Proceedings Act, or

(b)by the government under section 2 (1).

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **JTI-MACDONALD CORP.**
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED**
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF RELIANCE INSURANCE COMPANY
AND IN THE MATTER OF THE INSURANCE COMPANIES ACT, SC 1991, C.47, AS AMENDED
AND IN THE MATTER OF THE WINDING-UP AND RESTRUCTURING ACT, RSC 1985, C.W-11, AS AMENDED

FACTUM OF THE PROVINCES OF BRITISH COLUMBIA, SASKATCHEWEN, MANITOBA, NEW BRUNSWICK, NOVA SCOTIA AND PRINCE EDWARD ISLAND, AND THE TERRITORIES OF YUKON, NORTHWEST TERRITORIES AND NUNAVUT

(Motions for Sanction Orders)

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