

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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(Sanction Orders)  
Returnable on January 29, 2025

January 24, 2025

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**TO: COMMON SERVICE LIST**

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AND IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
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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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## PART I - INTRODUCTION

### Summary Overview

1. The recognition of broader societal interests under the *Companies' Creditors Arrangement Act* ("CCAA") is not new. The interests of so-called "social stakeholders" takes on particular importance for the court at CCAA sanction hearings. Justice Paperny characterized the sanction exercise as one that "widens the lens" for the court to balance a broader range of interests that includes creditors, stakeholders and the public in advancing the remedial objectives of the CCAA.<sup>1</sup> The Canadian Cancer Society ("CCS") has been recognized as a social stakeholder in these proceedings. However, it was not permitted to participate in the mediation during that long process. Nor did it vote on the CCAA Plans. This sanction hearing provides the CCS with an opportunity to voice its concerns about the CCAA Plans to this Court.

2. From the outset, CCS is not opposed to the allocation of funds under the CCAA Plans. However, CCS submits that the CCAA Plans should be modified prior to Court approval and sanction, and that the CCAA Plans should not be sanctioned in their current form. In particular, CCS has proposed changes to the CCAA Plans, with recommended text, to: (1) ensure there is not a release to protect Tobacco Companies from liability for future wrongful conduct; (2) restrict promotion; (3) require public disclosure of internal tobacco company documents provided in provincial lawsuits; (4) expand the mandate of the charitable Cy-près Foundation ("**Foundation**") to include programs and initiatives to reduce tobacco use, and (5) make a series of administrative changes related to the Foundation to improve the Foundation's operations and impact. All of the CCS proposed changes would be feasible and would be in the public interest. If one or more of the

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<sup>1</sup> *Re Canadian Airlines Corp.*, [2000 ABQB 442](#), at para. 144.



CCS proposed changes would not be acceptable to the Court, then the remaining CCS proposed changes could stand on their own. The changes proposed by CCS could be made in a matter of days.

3. The measures proposed by CCS are not new. They are at the origin of provincial tobacco lawsuits. On June 16, 1997, the BC government announced that Health Minister Joy MacPhail had written to tobacco companies demanding that they stop marketing that affects teenagers, fund programs to discourage teens from smoking, disclose documents including market research and regarding health dangers, and pay for health costs, otherwise BC would file a lawsuit,<sup>2</sup> which BC would do, becoming the first province to do so.

4. The CCS proposed changes to Articles 9 and 11 of the CCAA Plans were briefly mentioned by CCS orally to the Court at the October 31, 2024, hearing.<sup>3</sup> The proposed changes were outlined in detail in subsequent correspondence, including track changes to the CCAA Plans, with accompanying rationale<sup>4</sup> that was circulated to all parties in the mediation and to the Monitors and Court-Appointed Mediator (“**Mediator**”) by January 3, 2025.<sup>5</sup>

5. Again, CCS does not object to the allocation of payments among the Claimants in the CCAA Plans. In particular, CCS supports the compensation for individuals for the Quebec Class Action Plaintiffs (“QCAPs”) and the Pan-Canadian Claimants (“PCCs”).

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<sup>2</sup> Letter from BC Health Minister to Tobacco Company CEO's, June 16, 1997, Exhibit "A" to Affidavit of Kelly Cull sworn January 20, 2025 ("**Cull Affidavit**").

<sup>3</sup> On Oct. 30, 2024, CCS wrote to the Monitors to outline proposed changes to the CCAA Plans: Exhibit "C" to Cull Affidavit.

<sup>4</sup> CCS proposed changes in track changes to Articles 9 and 11 of CCAA plans, Dec. 27, 2024, with letter to Monitors' counsel copied to many parties, Exhibit "D" to Cull Affidavit; CCS proposed changes to Schedule "S" of Imperial CCAA Plan (Schedule "V" of JTI and RBH CCAA Plans), Dec. 30, 2024, with letter to Monitors' counsel, Exhibit "E" to Cull Affidavit.

<sup>5</sup> CCS letter to counsel to all parties in mediation, companies related to tobacco companies, Mediator, and Monitors, Jan. 3, 2025, Exhibit "F" to Cull Affidavit. The CCS documents of Exhibits "D" and "E" to Cull Affidavit were enclosed with the correspondence.

## PART II – BACKGROUND AND FACTS

### The Health Effects of Tobacco are Devastating and Massive

6. Tobacco remains the leading preventable cause of disease and death in Canada, killing more than 46,000 Canadians each year. At least 1 of 2 long-term regular cigarette smokers who do not quit will die because of smoking. Smoking causes cancer, heart disease, stroke, emphysema and many other health effects, as indicated by the picture health warnings required on cigarette packages. Nicotine is highly addictive. Second-hand smoke is harmful. There are still 3.6 million Canadians who smoke, representing 11.4% of the population 18+ (2023).<sup>6</sup>

7. The tobacco industry has a horrific history of wrongful behaviour, resulting in the massive toll of addiction, disease and death that has occurred, and that will occur.<sup>7</sup> The deliberate, wrongful conduct of the Tobacco Companies is outlined in the statements of claim of the Provinces.<sup>8</sup> In the Quebec class actions, the Quebec Courts were highly critical of tobacco companies.<sup>9</sup>

8. CCS has been a leader in tobacco control in Canada, and for decades has supported tobacco class actions and provincial government health care cost recovery lawsuits, as well as other tobacco product liability claims. CCS has supported provincial legislation that has supported such lawsuits, and urged provinces to file lawsuits. CCS has attended court hearings in many of these cases in multiple provinces as an observer regarding various pre-trial issues. In 1997, CCS spoke publicly at the announcement by the BC Premier and Minister of Health that BC was preparing to be the

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<sup>6</sup> Affidavit of Robert Schwartz sworn January 17, 2025 ("**Schwartz Affidavit**") at paras. 3-4, and Exhibit "A" to Schwartz Affidavit, Health warnings and messages required for cigarette packages in Canada.

<sup>7</sup> Schwartz Affidavit at para.4; *Létourneau c. JTI-MacDonald Corp.*, [2015 QCCS 2382](#); *Imperial Tobacco Canada ltée v. Conseil québécois sur le tabac et la santé*, [2019 QCCA 358](#). [“**Quebec class action trial and appellate judgments**”].

<sup>8</sup> RBH Responding Record for Sanction Hearing, Jan. 20, 2025 (“RBH Record”), Tab 2, A-J, pp.22-960.

<sup>9</sup> Quebec class action [trial](#) and [appellate](#) judgments, note 7, *infra*.

first province to file a tobacco health care claim. In 1999, CCS organized a national meeting in Montreal for lawyers to encourage litigation against the tobacco industry.<sup>10</sup>

9. In the tobacco CCAA proceedings, CCS has been at all court hearings in the proceedings since and including the comeback hearing in March 2019.<sup>11</sup> On October 3, 2019, Justice McEwen authorized CCS to continue to participate as a social stakeholder in the proceedings, but did not authorize CCS to participate in the mediation “at this time”.<sup>12</sup>

10. During these CCAA proceedings, CCS, together with other health organizations, wrote on multiple occasions to provincial governments urging that public health measures to reduce tobacco use be the priority in any CCAA outcome, outlining specific measures to be included. These measures included an independent foundation to reduce tobacco use, promotion restrictions, and public disclosure of tobacco industry documents. As an example, letters were written to the Saskatchewan government on March 2, 2020, August 24, 2021, and January 6, 2023, with similar letters written to all provinces.<sup>13</sup> On May 29, 2023, CCS and other health organizations wrote to Premiers, again regarding priority health measures for any CCAA outcome.<sup>14</sup>

### **The Tobacco CCAA Cases are Unique**

11. The tobacco CCAA cases are highly unusual and unique for several reasons. First, the Tobacco Companies remain highly profitable. Normally, under the CCAA, there is a public interest in maintaining a company’s sales and business practices. But for tobacco the overwhelming public interest is in reducing tobacco sales by as much as possible and as soon as

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<sup>10</sup> Cull Affidavit at para. 9.

<sup>11</sup> Cull Affidavit at para. 13.

<sup>12</sup> Endorsement of McEwen J, [Oct. 3, 2019](#). See also Endorsement of McEwen J, [Oct. 18, 2019](#).

<sup>13</sup> Exhibit "G" to Cull Affidavit. The first two of these letters for all provinces are available on [www.StopBigTobacco.ca](http://www.StopBigTobacco.ca).

<sup>14</sup> Letter from CCS and other health organizations to Premiers, May 29, 2023, Exhibit "H" to Cull Affidavit.

possible, which has been the objective of federal, provincial and territorial governments for several decades. Cigarettes – the product sold by the companies – are highly addictive, and lethal when used as the manufacturer intends. The tobacco industry kills its best customers.

12. Also, in these cases, the three debtors are unrelated companies – competitors, and in fact essentially “the entire Canadian tobacco industry”<sup>15</sup> – in the CCAA process at the same time. The CCAA outcome thus provides a unique opportunity to enact measures to reduce tobacco use.

13. Finally, the public interest includes future tobacco users. Future tobacco users include not just those who are current users, but also youth and others who will begin, and future immigrants to Canada. All CCS proposed changes affect both current and future tobacco users, including the changes related to the releases, promotion restrictions, document disclosure, and the Foundation.

### **The U.S. Tobacco Health Care Lawsuit Settlement Experience**

14. Health care cost recovery lawsuits in Canada are inspired by the US experience, which included a 1997 Proposed Resolution that was not in the end implemented; individual state tobacco health care settlements in Mississippi (1997), Florida (1997), Texas (1998), and Minnesota (1998); and a Master Settlement Agreement for 46 states, D.C. and US territories (November 1998).<sup>16</sup>

15. U.S. settlements included public health tobacco control measures, thus illustrating how tobacco control measures could be included in a Canadian settlement. Tobacco control measures in the various U.S. settlements include:<sup>17</sup>

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<sup>15</sup> Affidavit of William E. Aziz, sworn January 20, 2025, at para. 41, JTIM Responding Motion Record (Sanction Motion), at p.18.

<sup>16</sup> CCS, Tobacco Control Measures Found in US Tobacco Settlements, Jul 2019, Cull Affidavit Exhibit “B”.

<sup>17</sup> CCS, Tobacco Control Measures Found in US Tobacco Settlements, Jul 2019, Cull Affidavit Exhibit “B”.

- Establishing and funding a new independent foundation to reduce tobacco use; a foundation that continues to this day (previously called the American Legacy Foundation; it is now called the Truth Initiative).
- Promotion restrictions (e.g. restrictions on billboards, sponsorship, branded merchandise, cartoon characters, product placement in entertainment media).
- Public disclosure of access to more than 40 million pages of previously secret tobacco industry documents.
- Restrictions on lobbying, including the dissolution of the lobbying group the Tobacco Institute, and of the “research” organizations, the Council for Tobacco Research and the Council for Indoor Air Research.
- Ban on initiating most new legal challenges to existing laws of states (or of municipalities or other state political subdivisions).
- A “look back” provision requiring industry to pay monetary penalties if youth reduction targets are not reached (in the “Proposed Resolution” only).

### **PART III – ISSUES, LAW & ARGUMENT**

16. The issue for CCS is: should this Court grant the Sanction Order(s) regarding the CCAA Plans? The CCS position is: No, the CCAA Plans should be modified prior to being sanctioned.

#### **The Importance of the Public Interest**

17. Canadian courts have considered “social stakeholders” in insolvency matters. As recently as 2023, Justice Fitzpatrick noted that the consideration of the “interests of other persons, who have been described as 'social stakeholders', in insolvency matters is a not new concept.”<sup>18</sup> Some commentators have noted the growing role of non-economic interests in CCAA proceedings:<sup>19</sup>

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<sup>18</sup> *Vancouver Coastal Health Authority v. Seymour Health Centre Inc.*, [2023 BCSC 1158](#) (CanLII), at paras. [67–75](#).

<sup>19</sup> Mary I A Buttery, H Lance Williams and Tijana Garvic, "TLC The Land Conservancy of Canada: The Evolution of the Role of 'Other' Interests in Companies' Creditors Arrangement Act Proceedings", in Janis P Sarra and Justice Barbara Romaine, eds, *Annual Review of Insolvency Law 2015* (Toronto: Carswell, 2016) 513 at 521, Book of Authorities of Canadian Cancer Society dated January 24, 2025 ("CCS BOA"), Tab 17. See also Virginia Torrie and Vern W. DaRe, "The Participation of Social Stakeholders in CCAA Proceedings", *Annual Review of Insolvency Law 2019* (Toronto: Thomson Reuters, 2020) 369, CCS BOA, Tab 18.

...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.

18. The sanctioning of a CCAA plan is governed by s. 6 of the CCAA. The jurisdiction of the court is discretionary and before sanctioning a CCAA plan, the court will consider, among other things, whether the CCAA plan is fair and reasonable.<sup>20</sup> In *Canwest*, the Court listed the following factors, including public interest, in deciding whether the CCAA plan was fair and reasonable:<sup>21</sup>

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

19. The petitioners ("CMI Entities") in *Canwest* provided national television broadcasting services. The public interest was an important consideration for the Court:<sup>22</sup>

[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.

20. In *Century Services*, the Supreme Court of Canada recognized the importance of the broader public interest in the reorganization process:<sup>23</sup>

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<sup>20</sup> *CannTrust Holdings Inc., et al. (Re)*, [2021 ONSC 4408](#) (CanLII), at para 13.

<sup>21</sup> *Re: Canwest Global Communications Corp*, [2010 ONSC 4209](#) (CanLII) ["*Canwest*"] at para. [21](#).

<sup>22</sup> *Ibid* at para. [26](#).

<sup>23</sup> *Century Services Inc. v. Canada (A.G.)*, [2010 SCC 60](#) ["*Century Services*"] at para. [60](#) (citations omitted).

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

21. The Supreme Court, in its reasons, cited *Canadian Airlines* and *Red Cross*, among other cases, as examples of restructurings that had implications for the broader community. The Supreme Court also recognized that "judicial decision making under the CCAA takes many forms".<sup>24</sup>

22. In *Canadian Airlines*, the petitioners were major Canadian airlines and broader societal interests were considered by the Court in finding the CCAA plan fair and reasonable:<sup>25</sup>

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.

23. In *Red Cross*, the Canadian Red Cross Society faced mass tort claims in the billions of dollars from individuals who had contracted diseases from contaminated blood products. The broader public interest in *Red Cross* of having a Canadian blood supply with integrity was a paramount consideration in the Court's decision to approve a sale and transfer of its blood supply assets and operations to two new agencies before any restructuring plan was put to creditors:<sup>26</sup>

I conclude that the Red Cross is entitled to the relief it seeks at this stage, and orders will go accordingly. In the end, I come to these conclusions having regard in particular to the public interest imperative which requires a Canadian Blood Supply

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<sup>24</sup> *Ibid* at para. [60](#).

<sup>25</sup> *Re Canadian Airlines Corp*, [2000 ABQB 442](#) (CanLII), at para. [174](#).

<sup>26</sup> *Canadian Red Cross Society/Société Canadienne de la Croix-Rouge*, *Re* [1998 CanLII 14907 \(ON SC\)](#) [*Red Cross*] at para. [50](#).

with integrity and a seamless, effective and relatively early transfer of blood supply operations to the new agencies; having regard to the interests in the Red Cross in being able to put forward a Plan that may enable it to avoid bankruptcy and be able to continue on with its non-blood supply humanitarian efforts; and having regard to the interests of the Transfusion Claimants in seeing the value of the blood supply assets maximized.

24. The *TLC The Land Conservancy of British Columbia* decision provides another example of a CCAA proceeding in which the broader public interest was engaged and heavily influenced the court's decision-making. TLC was a non-profit and charitable land trust. TLC's mission was to protect and educate the public about properties that have significant historical, cultural, scientific or scenic value.<sup>27</sup> The Court emphasized the importance of considering the broader stakeholders.<sup>28</sup> The support of several social stakeholders, including local governments, various preservation charities and community groups, were important considerations for the Court:<sup>29</sup>

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

This is not one of those cases where the Court has to speculate about what those broader interests might entail. It is beyond dispute that in TLC's case, such broader interests were engaged and the Court has heard directly from many of those interests on the important issues raised during the course of these proceedings. The involvement of the Ecoforestry Institute Society and the Habitat Conservation Trust Foundation are but an example of community involvement in TLC's restructuring efforts. The Plan clearly discloses that many other community groups and societies were and remain involved in assisting in TLC's efforts while ensuring that TLC respects any trust requirements or other restrictions in relation to the properties.

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<sup>27</sup> *TLC The Land Conservancy of British Columbia (Re)*, [2015 BCSC 656](#) (CanLII) at para. [8](#).

<sup>28</sup> *Ibid* at para. [63](#).

<sup>29</sup> *Ibid* at paras. [64-65](#); see also paras. [66-68](#).



25. Other cases recognizing the public interest include *Laurentian University* (bilingual, tri-cultural university; thousands of students to attend and complete degrees; employment);<sup>30</sup> and *Meridian Credit Union* (seniors' home residents).<sup>31</sup>

26. The current tobacco CCAA proceedings have enormous societal and public policy considerations. If ever there was a CCAA case for the importance of the public interest, this is the case.

27. In most CCAA cases, the underlying product or service is desirable, such as blood supply, broadcasting or airlines. But here tobacco products kill when used exactly as the manufacturer intends. The societal goal in Canada is not to maintain tobacco sales, but to reduce sales as quickly as possible and thus prevent disease and save lives. There should not be “business as usual” with 46,000 Canadians continuing to die each year.<sup>32</sup>

28. Imagine in the *Red Cross* case if, following a settlement, companies were still able to sell tainted blood, promote the use of tainted blood, and use a series of lobbying and other approaches to block, weaken or undermine government measures to curtail tainted blood. While such a scenario seems unthinkable, for tobacco the potential for a settlement under CCAA that has weak public health measures is of fundamental concern to CCS.<sup>33</sup>

29. Tobacco companies want to increase tobacco sales or at least forestall the decline of tobacco sales. CCS wants to minimize tobacco sales. The ultimate objective is to have a tobacco-free society. Health Canada's objective is to reduce tobacco use to less than 5% by 2035. Tobacco

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<sup>30</sup> *Laurentian University of Sudbury*, [2022 ONSC 5645](#) (CanLII), para 38.

<sup>31</sup> *Meridian Credit Union Limited v. Garden Villa Retirement Residence Inc.*, Oct. 26, 2023, OSC, Hackland J (Endorsement), CCS BOA, Tab 11.

<sup>32</sup> Cull Affidavit at para. 14.

<sup>33</sup> Cull Affidavit at para. 15.

is only legal by historical accident. If tobacco were proposed to be a new product today given what is known about the health consequences, tobacco would never be allowed on the market.<sup>34</sup>

30. Some CCAA cases identify jobs for employees as part of the public interest. But when a person dies from smoking, including people in their 40s and 50s, the person loses not only their job but also their life. A family may be left without a breadwinner because a parent is dead, and there is no possibility of the parent ever finding a new job.

31. Measures in a settlement to reduce tobacco use will benefit the health of PCCs and QCAPs, and will benefit public health in all Provinces and Territories. All provincial and territorial governments have an objective to reduce tobacco use in order to not only reduce disease and death, but also to reduce health care costs, which is the underlying reason behind the provincial lawsuits.

### **Article 11 Should Not Release Tobacco Companies from Liability for Future Wrongful Conduct**

32. In the analysis concerning the fairness and reasonableness of a CCAA plan, one of the factors to be considered by a court is whether any releases, particularly third-party releases, are fair and reasonable and not overly broad or offensive to public policy.<sup>35</sup> In the CCAA Plans, Article 18 provides Releases to Tobacco Companies and their Tobacco Company Groups for *past* conduct. However, CCS is concerned that the effect of Article 11 of the CCAA Plans, “Covenants and Other Payment Assurance”, is to provide a release from liability for Tobacco Companies for some *future* wrongful conduct after the Effective Time, in perpetuity. This would be inappropriate and unacceptable, would not be in the public interest, and would be contrary to public policy. CCS

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<sup>34</sup> Cull Affidavit at para. 16.

<sup>35</sup> *Lydian International Limited (Re)*, [2020 ONSC 4006](#) (CanLII), at paras. [53-54](#); *Laurentian University of Sudbury*, [2022 ONSC 5645](#) (CanLII) at para. [40](#).

thus proposes to add a new section into Article 11 to clarify that Article 11 does not provide a release from liability for *future* Tobacco Company conduct:

**11.6 Release Not Extended**

For greater certainty, nothing in this Article extends, in whole or in part, the Release for the Released Parties contained in Article 18, including beyond the Effective Time.

33. For this issue of the effect of Article 11 providing a release for future conduct, the following are relevant provisions in the CCAA Plans:

In Article 1, Section 1.1, “Ordinary Course of Business” is defined to mean “[...] the ordinary course of day-to-day business activities and operations of that company consistent with *past practices* [...]” (emphasis added)

In Article 1, Section 1.1, “Ordinary Course Operational Activities” “has the meaning given in Article 11, Section 11.2”.

Under Article 11, the first sentence refers to “[the company’s] *right* to engage in its Ordinary Course Operational Activities” (emphasis added)

Under Article 11, “Covenants and Other Payment Assurance”, s.11.1(a) states that “[the company] shall use commercially reasonable efforts to operate and carry on business in a manner consistent with its Business Plan [...] and as may be necessary or required in the Ordinary Course of Business of [the company].”

Article 11, Section 11.1(g) provides that “[the company] [...] shall not conduct their businesses and operations [...], and/or alter their [...] operational practices, in any manner that circumvents or is adverse to the ability of [the company] to satisfy its obligations under the CCAA Plan including [...] Annual Contributions.”

Article 11, Section 11.2, “Ordinary Course Operational Activities” specifically includes “(a) Product mix, pricing, volume and distribution of Tobacco Products” and (d) Tobacco Products sales and promotional activities”

34. The effect of the current wording of the CCAA Plans seems to give tobacco companies the right or the obligation to continue past practices, which have been extremely detrimental. To paraphrase, Article 11 provides that the companies shall operate their business in a reasonable manner that is not adverse to making their annual contributions, and consistent with *past practices*, and they have the *right* to do so. Are the companies to continue the past practices of misinformation

and concealment of information to the public and to governments, marketing to non-smokers, promotion undermining health warnings, lobbying against legislation, and engaging in many other types of tortious, wrongful and detrimental activity?<sup>36</sup> The wrongful past practices of the Tobacco Companies, as outlined in part in the Provinces' Statements of Claim,<sup>37</sup> are extensive.

35. One example of a practice is that Tobacco Companies have sold cigarettes, both in the past and currently, with filters and with ventilation holes in the filter. Professor Schwartz states:

[t]here has been increasing discussion of banning filter ventilation or banning filters altogether on the basis in part that consumers are deceived into thinking that these product characteristics reduce harm, when in fact harm is not reduced. Filter ventilation (very small holes in the filter) is often found in cigarettes that previously had deceptive descriptors such as "light", "mild", "extra light" or "ultra light".<sup>38</sup>

36. In the future, a civil claim might be filed regarding these filter product characteristics for failure to warn, deception, or other claims. Should a Tobacco Company be protected from civil liability in the future because such business conduct is consistent with past practices? No.

37. In another example, with the advent of artificial intelligence, Tobacco Companies and/or their foreign parents may well have another tool being used today to support cigarette sales to youth or to non-smokers, to impede quitting by smokers, or to encourage relapse by ex-smokers.<sup>39</sup> Such use of artificial intelligence prior to the Effective Time would thus become a past practice.

38. A clarification to Article 11 is necessary for public protection. The proposed new Section 11.6 would ensure that Article 11 would not protect Tobacco Companies from civil liability for

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<sup>36</sup> Quebec class action [trial](#) and [appellate](#) judgments, note 7, *infra*. Statements of Claim of Provinces, RBH Record, Tab 2, A-J, pp.22-960.

<sup>37</sup> Statements of Claim of Provinces, RBH Record, Tab 2, A-J, pp.22-960.

<sup>38</sup> Schwartz Affidavit at para. 15.

<sup>39</sup> JTIM staff have indicated that they expect artificial intelligence to have an important role going forward: Schwartz Affidavit, paras. 19-20 and Exhibit "D". In response to the question, "What excites you most about the future of this channel [tobacco]?" one JTIM manager stated "It keeps evolving even though we have so many restrictions. JTI turns those into opportunities. I can't wait to see how they will use artificial intelligence to their advantage." (Schwartz Affidavit, Exhibit "D").

*future* wrongful conduct. Future tobacco users are also in need of protection for several reasons. Firstly, the PCC Representative Counsel has only represented individuals who had claims against the Tobacco Companies or other Released Parties for *past* conduct prior to the Effective Time (even if the harm would be in the future).<sup>40</sup> Thus there has been no representation for future tobacco users who will suffer future harm due to *future* wrongful conduct after the Effective Time; in other words, they have not participated in these CCAA proceedings. Secondly, many future tobacco users are particularly vulnerable. Some future tobacco users may not even be born yet and will only start tobacco use as future teenagers. Some future tobacco users may only begin tobacco use in Canada as future immigrants.

39. In a final note, it is not suggested that Article 11 would provide protection from prosecution for an infringement of a statute or other enactment in a penal context. Section 11.2 refers to what is within reasonable business judgment “provided that such decisions [...] are in compliance with all Applicable Laws”. The definition of “Applicable Laws” does not include common law or civil law.<sup>41</sup>

### **Promotional Expenditures Should be Restricted**

40. US tobacco settlements include promotion restrictions,<sup>42</sup> but at present the CCAA Plans do not. Tobacco promotion expenditures in Canada remain extensive, with the biggest area being tobacco company promotional incentives and other promotions directed to retailers.<sup>43</sup> Promotions

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<sup>40</sup>Appointment of Representative Counsel Order, [December 8, 2019](#). Amending and Restating the Appointment of Representative Counsel Order, [November 22, 2024](#). The definition of “PCC Claim” in Article 1, Section 1.1 of the CCAA Plans only applies to Tobacco Company conduct prior to the Effective Time, even if the harm occurs after the Effective Time.

<sup>41</sup> CCAA Plans, Article 1, Section 1.1.

<sup>42</sup> CCS, “Tobacco Control Measures Found in US Tobacco Settlements” July 2019, Exhibit “B” to Cull Affidavit.

<sup>43</sup> Schwartz Affidavit at para. 8.

include bonuses to retailers for achieving sales targets; reduced product prices based on the quantity purchased by a retailer; lower prices to some retailers but not others; chances for retail employees to win vacations or entertainment tickets; and others.<sup>44</sup> Such promotions increase overall tobacco consumption in part because lower prices increase consumption.<sup>45</sup>

41. Based on JTIM Monitor Reports from the First Report (Mar. 28, 2019) to the Supplement to the Seventeenth Report (Oct. 25, 2024), JTI-Macdonald's annualized forecasted spending on "promotions and marketing" for 52-week periods ranged from \$116.5 million to \$164.3 million.<sup>46</sup> This shows how promotional expenditures remain extensive. JTIM is the smallest of the three companies with 21.7% market share, compared with 41.5% for Imperial and 36.8% for RBH.<sup>47</sup> The total promotional expenditures combined for all three companies would be much greater than for just JTIM's, especially over 5-, 10- and 20-year periods.

42. The Tobacco Companies make these promotional expenditures in part to compete with each other for market share. RBH states that it is "a reasonable assumption" that the market share of companies will not change over the 20-year Contribution Period.<sup>48</sup> Thus a large portion of these expenditures simply cancel out expenditures of other companies and thus are a net waste of money for the industry, contrary to Claimants' interests.

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<sup>44</sup> Schwartz Affidavit at para. 8.

<sup>45</sup> Schwartz Affidavit at paras. 7-8.

<sup>46</sup> Compilation of JTI-Macdonald Forecasted Promotions and Marketing Expenditures from Reports of the Monitor to JTI-Macdonald, 2019-2024, January 17, 2025, Exhibit "C" to Schwartz Affidavit. Though Monitor Reports for the other two companies do not provide such promotional expenditure information, the Monitors have full access to such information and could provide the information.

<sup>47</sup> Affidavit of Milena Trentadue, sworn January 20, 2025, para. 18, RBH Record ["**Trentadue Affidavit**"], para. 19(c).

<sup>48</sup> Trentadue Affidavit, para. 19(c).

43. As outlined December 27, 2024, CCS proposes that the following promotional restrictions, which are partly based on legislation, be included in a new section in the CCAA Plans:<sup>49</sup>

### **11.7 Promotion Restrictions**

A Released Company shall not, in Canada, sell or supply a Tobacco Product

- (a) at a reduced price based on the quantity sold or periodic or temporary discounts;
- (b) to a retailer at a price that is different than the price at which the same product is sold, directly or indirectly, to another retailer in the same municipality;
- (c) to a consumer at a price that is different than the price at which the same product is sold, directly or indirectly, to another consumer in the same retail establishment or, in the case of a sale under paragraph 13(2)(b), in the same municipality;
- (d) at a price that is less than the total of all taxes on the product under the laws of the applicable Province or Territory and Canada, including taxes on taxes.

A Released Company, or their employee or agent, shall not

- (a) provide a retailer or other seller of Tobacco Products, or their employee or agent, any rebate, gratuity, benefit, payment, incentive or consideration related to a Tobacco Product other than a Tobacco Product at the regular price that is available to all other retailers in the municipality, or, for a place outside a municipality, in the closest municipality; or
- (b) provide a consumer any rebate, gratuity, benefit, payment, incentive or consideration other than a Tobacco Product at the regular price that is available to all other consumers in that Province or Territory.

44. These promotion restrictions would be a Win-Win. Public health would benefit through reduced tobacco consumption,<sup>50</sup> with Provinces and Territories benefitting through improved population health and reduced health care costs. Moreover, reduced company expenditures mean increased profits and thus greater payments to Provinces and Territories. These proposed promotion restrictions would free up a lot of money, especially when added up over time. The substantial amounts of money at issue could make a significant contribution to alleviating tobacco company disagreements on financial issues that remain outstanding under the CCAA Plans.

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<sup>49</sup> CCS proposed changes to Articles 9 and 11, December 27, 2024, Exhibit "D" to Cull Affidavit. These restrictions are based on Nunavut *Tobacco and Smoking Act*, s.17, reproduced in Schedule B.

<sup>50</sup> Schwartz Affidavit at para. 7.

### **Tobacco Industry Documents Should be Publicly Disclosed**

45. CCS proposes that the documents received by Ontario and New Brunswick (or just Ontario) as part of pre-trial discovery in their provincial lawsuits be made public by requiring the provision of these documents<sup>51</sup> to the Industry Documents Library at the University of California at San Francisco.<sup>52</sup> After a settlement, normally a party will destroy documents obtained on discovery, or will return the documents to the other party. Here, if these tobacco documents are not made public, they may be lost to the detriment of the public if they are destroyed or misplaced. At present, the CCAA Plans are silent on the issue of public disclosure of these documents. In the CCAA context, valuable assets should not be destroyed or misplaced. The documents are extremely valuable assets and are a source of essential information for the public interest.

46. In the US, recent plans under Chapter 11 involving opioid companies have included public disclosure of documents,<sup>53</sup> as have settlements involving opioid companies.<sup>54</sup> US tobacco settlements with state governments have included public disclosure of documents,<sup>55</sup> as have recent state government settlements involving e-cigarette company Juul.<sup>56</sup> If this can happen in the U.S., why not in Canada?

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<sup>51</sup> Ontario and New Brunswick were the provinces where the litigation was closest to trial.

<sup>52</sup> Letter from UCSF Industry Documents Library, January 14, 2025, indicating that they would be prepared to receive the documents arising from provincial tobacco lawsuits in Canada: Exhibit "L" to Affidavit of Monique E. Muggli, sworn January 20, 2025 ("**Muggli Affidavit**").

<sup>53</sup> Muggli Affidavit, at para. 33, citing (with links) opioid plans under Chapter 11 for Mallinckrodt plc; Insys Therapeutics; and Purdue Pharma L.P. See also Compilation of extracts regarding public disclosure of documents from U.S. tobacco, opioid and e-cigarette settlements, January 19, 2025, Exhibit "J" to Muggli Affidavit.

<sup>54</sup> Muggli Affidavit, at para. 33, citing with links settlements with opioid companies Allergan and Teva, and with consulting firm McKinsey & Company.

<sup>55</sup> This includes the Minnesota settlement (1998) and the 46-state Master Settlement Agreement (1998). See: Compilation of extracts regarding public disclosure of documents from U.S. tobacco, opioid and e-cigarette settlements, January 19, 2025, Exhibit "J" to Muggli Affidavit.

<sup>56</sup> Muggli Affidavit, at para. 34, citing (with links) settlements involving California and North Carolina.



47. In 1998, US President Clinton signed an Executive Memorandum with initiatives to increase public access to tobacco industry documents. A White House statement summarized benefits of such public access:<sup>57</sup>

**Access To Documents Will Lead To Additional Research.** By making these documents widely available, the public and private sector will benefit:

- Public health experts can design more effective anti-smoking strategies by studying marketing plans in these documents;
- Scientists can look to the documents for findings that can aid their research into nicotine addiction and tobacco-related illnesses;
- All Americans can understand the role the tobacco industry has played in addicting our children to this deadly habit.

48. This rationale applies in Canada today. More specifically, there are several reasons why the documents are so highly valuable. Firstly, the tobacco industry has carried out the best and most extensive tobacco-related research and analysis in Canada, given their vast financial resources and capacity over decades.<sup>58</sup> This research is valuable to researchers.<sup>59</sup> In the US, tobacco documents have given rise to more than 1,000 published items, including more than 800 journal articles.<sup>60</sup> The research is valuable to develop better programs and policies. For example, documents on nicotine and nicotine addiction can help with better treatments.<sup>61</sup> Documents relating to packaging and package warnings can help develop better federal labelling regulations.

49. Secondly, the CCAA Plans would establish a Foundation to do research. It would be incoherent at the same time to allow the best, most extensive tobacco research to be destroyed, or not made public.

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<sup>57</sup> White House statement on President Clinton Executive Memorandum on tobacco documents, July 17, 1998, Exhibit "M" to Muggli Affidavit.

<sup>58</sup> Schwartz Affidavit at para. 12.

<sup>59</sup> Schwartz Affidavit at para. 12.

<sup>60</sup> Muggli Affidavit at para 39 and Exhibit "N".

<sup>61</sup> Schwartz Affidavit at para. 12.

50. Thirdly, document disclosure will benefit provincial/territorial/federal governments, including by helping to defend future constitutional challenges to tobacco legislation. As the Supreme Court of Canada recognized in *RJR-MacDonald* (1995), “perhaps the most compelling evidence” regarding the impact of tobacco advertising on consumption came from tobacco company documents.<sup>62</sup> In *JTI-MacDonald* (2007), the Quebec Superior Court cited documents in upholding new federal laws on tobacco advertising/sponsorship.<sup>63</sup> There have been many past constitutional challenges to provincial and federal tobacco laws, and more can be expected in the future. In the Quebec class actions, documents were cited extensively at trial and on appeal.<sup>64</sup>

51. Fourthly, document disclosure would deter potential future wrongful behaviour by tobacco companies. Transparency should be encouraged. “Sunlight is the best disinfectant”.<sup>65</sup> Once the true nature of a detrimental activity is publicly exposed, it becomes harder for a company to repeat that activity.<sup>66</sup> In the US, in finding that the tobacco industry had infringed the *Racketeer-Influenced and Corrupt Organizations Act*, the US federal court ordered document disclosure, stating:

Disclosing such information will allow the public to monitor what Defendants are doing internally and to assess the accuracy of future information they may make available about their activities and their products. Imposing such disclosure requirements will act as a powerful restraint on Defendants’ future fraudulent conduct.<sup>67</sup>

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<sup>62</sup> *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995 CanLII 64 \(SCC\)](#), at para. 88, per La Forest J., speaking for six Justices on this point.

<sup>63</sup> *JTI MacDonald Corporation v Canada (Attorney General)*, [2002 CanLII 46639 \(QC CS\)](#). The laws were ultimately unanimously upheld by the Supreme Court: *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007 SCC 30 \(CanLII\)](#). CCS was an intervener through all levels of Court.

<sup>64</sup> Quebec class action [trial](#) and [appellate](#) judgments, note 7, *infra*.

<sup>65</sup> Louis Brandeis, former US Supreme Court Justice.

<sup>66</sup> Schwartz Affidavit at para. 17.

<sup>67</sup> *U.S. vs. Philip Morris USA Inc., et al.*, U.S. District Court, [Final Opinion](#), 2006, pages 1637-38, para. X(B)(3)(a). See also Muggli Affidavit at para. 19, Schwartz Affidavit at para. 17.

52. Fifthly, the tobacco industry has engaged in a decades long cover-up. The Court should not sanction a continuation of that cover-up. Document disclosure goes back to the origins of provincial tobacco lawsuits. As previously noted, document disclosure was one of BC's demands in 1997 to avoid the filing of a government lawsuit. In subsequent years, CCS and other health organizations repeatedly called for document disclosure as part of tobacco lawsuit outcomes.<sup>68</sup> Pursuing truth through document disclosure is one of the objectives of tobacco lawsuits.<sup>69</sup>

53. Sixthly, document disclosure is a matter of justice to hold the tobacco industry accountable in the circumstances. The tobacco industry has perpetrated the most devastating wrongdoing in Canadian history.<sup>70</sup> There have been public enquiries, including with compelled document disclosure, where the number of deaths or the public harm, though very serious, has been of much smaller scale. Examples include tainted blood (Krever JA), Walkerton contaminated water (O'Connor ACJO), Westray mine disaster (Richard J), and drugs in sport (Dubin ACJO, as he then was).<sup>71</sup> For tobacco, given that extensive information already exists in these documents, why not publicly disclose them?

54. In the US, the Foundation created by the Master Settlement Agreement, now called the Truth Initiative, has provided about US\$15 million to the UCSF Industry Documents Library, an indication of the value of tobacco documents.<sup>72</sup> The Truth Tobacco Industry Documents Library, a sub-collection of the UCSF Industry Documents Library, is named after the Truth Initiative.<sup>73</sup>

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<sup>68</sup> Cull Affidavit, Exhibits "G" and "H".

<sup>69</sup> CCS sample news releases, Exhibit "J" to Cull Affidavit.

<sup>70</sup> Statements of Claim of Provinces, RBH Record, Tab 2, A-J, pp.22-960; Quebec class action [trial](#) and [appellate](#) judgments, note 7, *infra*.

<sup>71</sup> Schwartz Affidavit at para. 18.

<sup>72</sup> UCSF Industry Documents Library, Technical Recommendations for Preserving Industry Documents Disclosed in Litigation, July 26, 2021, p.2, Exhibit "L" to Muggli Affidavit.

<sup>73</sup> Muggli Affidavit, para. 22. Documents from the Quebec class actions are available on this website: Muggli Affidavit, Exhibit "L".

55. The documents provided to Ontario and New Brunswick would be subject to confidentiality, as is typical in the discovery process. But that would also have been true in the U.S. Under the CCAA, could the Court order public disclosure of the documents? Respectfully, yes.<sup>74</sup> The Court's authority is very broad. Under s.11 of the CCAA, the Court may "make any order that it considers appropriate in the circumstances".

56. CCS has proposed text to change the CCAA plans regarding document disclosure.<sup>75</sup> But another approach would be to give parties 6 months to work on it and come back to Court with a proposal. This would ensure the documents are not destroyed or misplaced, and would identify that a requirement for public disclosure is to be brought back for approval. The CCAA Plans could thus be amended by adding:

#### **11.5 Public Disclosure of Documents**

Parties that participated in the mediation shall have 6 months from a judgment by the Court on the Motion for Plan Sanction Orders to prepare, with the continued role of the Court-Appointed Mediator and Monitors, proposed text for the CCAA Plans regarding public disclosure of documents obtained by Ontario and New Brunswick in the discovery process in their respective Provincial HCCR Claims litigation. Such proposed text shall indicate which document content is not subject to public disclosure. Such proposed text shall be subject to approval by the CCAA Court for inclusion in the CCAA Plans. Should there not be agreement after 6 months, the Court-Appointed Mediator and the Monitors/Plan Administrators shall prepare proposed text subject to approval by the CCAA Court for the purpose of inclusion in the CCAA Plans.

57. This approach would be consistent with provisions in the existing CCAA Plans requiring that many aspects of the Foundation be brought back to the Court for approval after being developed (i.e., structure, bylaws, governance).<sup>76</sup>

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<sup>74</sup> Privileged documents would not be provided.

<sup>75</sup> CCS proposed changes to Articles 9 and 11, December 27, 2024, Exhibit "D" to Cull Affidavit.

<sup>76</sup> CCAA Plans, Article 9, Section 9.4.

### **The Charitable Foundation under Article 9 Should Have an Expanded Mandate**

58. In the US, the 1998 Master Settlement Agreement established a Foundation to reduce tobacco use; a Foundation that continues to this day.<sup>77</sup> In Canada, though the Foundation to be established by the CCAA Plans includes tobacco-related research as part of the mandate,<sup>78</sup> programs and initiatives to reduce tobacco use are specifically excluded from the mandate.<sup>79</sup> CCS proposes that this exclusion be removed from Article 9 by striking out text as follows:

#### **9.3 Cy-près Foundation**

[...]

**What Will Be Eligible for Consideration for Support by the Cy-près Foundation:** Proposals regarding research, programs and initiatives falling within the scope of the Cy-près will be received by the board of directors of the Cy-près Foundation (“**Foundation Board**”) for consideration for financial or other support from the Cy-près Foundation. ~~Programs and initiatives aimed at reducing or preventing tobacco use in Canada are outside of the scope of the Cy-près because they fall within the purview of the Provinces and Territories, involving policy issues and advocacy. Accordingly, such programs and initiatives will not be considered for funding or other support from the Cy-près Foundation.~~

59. Expanding the Foundation’s mandate to include programs and initiatives to reduce tobacco use would increase the benefit and impact of the Foundation. Doing so would provide increased benefits for PCCs by improving their health, which is a core intent of the Foundation in the first place.<sup>80</sup> PCCs who use tobacco, or who have quit and may relapse, as well their heirs and other family members, would benefit by not using tobacco. This would also apply to QCAPs as well as to other Canadians now or in the future who use tobacco, who are at risk of relapsing back to tobacco use, or who are at risk of starting tobacco use. It is well-established that properly funded,

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<sup>77</sup> Master Settlement Agreement, [Nov. 1998](#), para VI; Muggli Affidavit, paras. 8, 15-17. The Foundation was previously the American Legacy Foundation, now called the Truth Initiative.

<sup>78</sup> CCS acknowledges the improvement of the Foundation’s mandate regarding tobacco-related research in the Dec. 5, 2024, version of the CCAA Plans compared with the Oct. 17, 2024, version.

<sup>79</sup> CCAA Plans, Article 9, Section 9.3.

<sup>80</sup> Article 9, Section 9.3.

sustained, comprehensive tobacco control strategies are effective at reducing tobacco use.<sup>81</sup> The Foundation could fund a wide variety of programs and initiatives.

60. Preventing disease in the first place is a much better health strategy instead of just trying to help people after they get disease. Moreover, not smoking improves outcomes for Tobacco-related Diseases. As Professor Schwartz has stated:

[...] not smoking improves health outcomes for individuals who contract disease due to tobacco use. Importantly, smoking not only causes cancer, but smoking can also substantially reduce survivability for a person diagnosed with cancer. Further, for a person who survives smoking-related cancer, not smoking greatly reduces the risk of subsequent disease, such as a second cancer, heart disease, stroke or emphysema.<sup>82</sup>

61. Reducing tobacco use will benefit Provinces and Territories not only by improving the health of the population, but also by reducing health care costs. Each year, tobacco use costs Provinces and Territories \$5.4 billion in health care costs, and \$11.2 billion in economic costs.<sup>83</sup> The \$5.4 billion alone is far more than the payments to be received by the Provinces and Territories under the CCAA Plans of \$1.07 billion to \$1.1 billion per year in years 1-3 of the CCAA Plans, and \$1.04 billion per year in year 4 and subsequent years.<sup>84</sup> The devastating health effects and health care costs from tobacco are at the origin of provincial HCCR Claims. While Provinces and Territories are to receive \$24.725 billion in payments from the CCAA Plans, nothing obligates the Provinces and Territories to allocate even a small portion of these funds to tobacco control. This provides a further reason to expand the mandate of the Foundation.

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<sup>81</sup> Schwartz Affidavit at para. 23, citing in part US Centers for Disease Control and Prevention, Best Practices for Comprehensive Tobacco Control Programs, 2014.

<sup>82</sup> Schwartz Affidavit at para. 22.

<sup>83</sup> Schwartz Affidavit at para. 5, citing Canadian Substance Use Costs and Harms Scientific Working Group, 2023.

<sup>84</sup> Article 16, Sections 16.1-16.3.

62. Under the current CCAA Plans, going forward, future tobacco users through purchases would end up paying compensation for past claimants. Yet the Foundation would not be able to fund programs and initiatives to reduce tobacco use. This is of additional concern given that, as previously noted, future tobacco users who suffer harm because of future wrongful conduct of the tobacco industry were not represented during the mediation nor at the meetings of creditors.

### **Administrative Changes Regarding the Foundation**

63. CCS has proposed some administrative changes to the CCAA Plans to enhance the Foundation's operations and impact, and to address some drafting oversights.<sup>85</sup> CCS proposes to work with the Parties involved in drafting Article 9<sup>86</sup> to work through the proposed administrative changes regarding Article 9 and the applicable Schedule. CCS is confident consensus can be achieved on many aspects, given the common objective of having an effective Foundation. The outcome of these discussions could be presented to the Court to facilitate the Court's work.

### **The Allocation of the Global Settlement Amount Among the Tobacco Companies and the Required Payments by the Tobacco Companies are Acceptable**

64. RBH objects to its share of the Global Settlement Amount in the CCAA Plans, arguing that its share is too much in proportion to the other two companies. This argument should be rejected. Each of the three companies, including RBH, will obtain an incredible deal under the CCAA Plans as currently worded, paying governments and victims literally only pennies on the dollar, even if

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<sup>85</sup> CCS proposed changes to Articles 9 and 11 of CCAA Plans, December 27, 2024, Cull Affidavit, Exhibit "D"; CCS proposed changes to Schedule "S" to the Imperial CCAA Plan (Schedule "V" to the JTIM and RBH Plans), December 30, 2024, Cull Affidavit, Exhibit "E".

<sup>86</sup> Schedule "S" to the Imperial CCAA Plan (Schedule "V" to the JTIM and RBH Plans), p.4 indicates that these parties are PCCs, QCAPs, Provinces and Territories, together with the Mediator and Monitors. The administrative changes proposed by CCS to Article 9 and the related Schedule are different than what is contemplated by Section 9.4, (e.g. Foundation structure, bylaws, governance) that are subject to future Court approval.

it may be that one or two companies will pay even fewer pennies on the dollar. Meanwhile, a vast number of people who have suffered debilitating diseases and may have died as a result will receive no compensation.

**Other Issues**

65. **Lack of support by debtor tobacco companies** - CCS submits that the CCAA Plans can be sanctioned even if one or more of the debtor tobacco companies is opposed. Nothing in the CCAA provides that this cannot be done.

66. **JTI-Macdonald TM Corp. (JTIM TM)** - Regarding the JTIM and JTIM TM argument that funds associated with JTIM TM should not be included in the Global Settlement Amount, CCS submits that this argument should be rejected. Moreover, as noted, JTIM and its Tobacco Company Group will obtain an incredible deal under the CCAA Plans.

**PART IV – RELIEF REQUESTED**

67. CCS requests that this Court exercise its discretion and not grant the proposed Sanction Order until the CCAA Plans have been modified to include the CCS proposed changes.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 24th day of January 2025.



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Vern DaRe



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**SCHEDULE “A”  
LIST OF AUTHORITIES**

**Cases**

1. *Re Canadian Airlines Corp.*, [2000 ABQB 442](#) (CanLII)
2. *Létourneau c. JTI-MacDonald Corp.*, [2015 QCCS 2382](#) (CanLII)
3. *Imperial Tobacco Canada ltée v. Conseil québécois sur le tabac et la santé*, [2019 QCCA 358](#) (CanLII)
4. *Vancouver Coastal Health Authority v. Seymour Health Centre Inc.*, [2023 BCSC 1158](#) (CanLII)
5. *CannTrust Holdings Inc., et al. (Re)*, [2021 ONSC 4408](#) (CanLII)
6. *Re: Canwest Global Communications Corp*, [2010 ONSC 4209](#) (CanLII)
7. *Century Services Inc. v. Canada (A.G.)*, [2010 SCC 60](#) (CanLII)
8. *TLC The Land Conservancy of British Columbia (Re)*, [2015 BCSC 656](#) (CanLII)
9. *Canadian Red Cross Society/Société Canadienne de la Croix-Rouge, Re* [1998 CanLII 14907 \(ON SC\)](#)
10. *Laurentian University of Sudbury*, [2022 ONSC 5645](#) (CanLII)
11. *Meridian Credit Union Limited v. Garden Villa Retirement Residence Inc.*, Oct. 26, 2023, OSC, Hackland J (Endorsement)
12. *Lydian International Limited (Re)*, [2020 ONSC 4006](#) (CanLII)
13. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995 CanLII 64 \(SCC\)](#)
14. *JTI MacDonald Corporation v Canada (Attorney General)*, [2002 CanLII 46639 \(QC CS\)](#)
15. *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007 SCC 30 \(CanLII\)](#)
16. *U.S. vs. Philip Morris USA Inc., et al.*, U.S. District Court, [Final Opinion](#), 2006

**Other/Secondary Sources**

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)

**SCHEDULE “B”  
RELEVANT STATUTES**

***Companies’ Creditors Arrangements Act, RSC 1985, c C-36, ss. 6, 11***

**Compromises to be sanctioned by court**

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

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the [Bankruptcy and Insolvency Act](#) or is in the course of being wound up under the [Winding-up and Restructuring Act](#), on the trustee in bankruptcy or liquidator and contributories of the company.

**General power of court**

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

***Nunavut Tobacco and Smoking Act, C.S.Nu., c.T-40, s.17***

**Pricing**

17. (1) A person shall not sell tobacco or a smoking product

(a) at a reduced price based on the quantity sold or periodic or temporary discounts;

(b) to a retailer at a price that is different than the price at which the same product is sold, directly or indirectly, to another retailer in the same municipality;

(c) to a consumer at a price that is different than the price at which the same product is sold, directly or indirectly, to another consumer in the same retail establishment or, in the case of an online or remote sale, in the same municipality;

(d) at a price that is less than the total of all taxes on the product under the laws of Nunavut and Canada, including taxes on taxes; or

(e) at a price that does not otherwise meet the conditions prescribed by regulation.

**Incentives – wholesale**

(2) A cultivator, producer, manufacturer, seller or other provider of tobacco or smoking products, or their employee or agent, shall not provide a retailer or other seller of tobacco or smoking products, or their employee or agent, any rebate, gratuity, benefit, payment, incentive or consideration other than

- (a) tobacco or a smoking product at the regular price that is available to all other retailers in the municipality, or, for a place outside a municipality, in the closest municipality; or
- (b) a rebate, gratuity, benefit, payment, incentive or consideration that is prescribed by regulation.

**Incentives – retail**

(3) A cultivator, producer, manufacturer, seller or other provider of tobacco or smoking products, or their employee or agent, shall not provide a consumer any rebate, gratuity, benefit, payment, incentive or consideration other than

- (a) tobacco or a smoking product at the regular price that is available to all other consumers; or
- (b) a rebate, gratuity, benefit, payment, incentive or consideration that is prescribed by regulation.

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

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**

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