

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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(Returnable October 2, 2019)

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

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

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

Applicants

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

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FACTUM

PART I - INTRODUCTION AND SUMMARY

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

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

PART II - SUMMARY OF FACTS PERTINENT TO THIS MOTION¹

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

About CCS

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

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

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

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

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

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

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

than \$500 billion sought by claimants³ and what the tobacco companies actually will pay, and to ensure that such measures are effective.

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

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

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

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

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

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

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

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

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

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

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

1997-2007 – Intervention⁹ by CCS before the Quebec Superior Court,¹⁰ Quebec Court of Appeal¹¹ and Supreme Court of Canada¹² to defend the constitutional validity of federal tobacco advertising and promotion restrictions, and larger, picture-based package health warnings. The Supreme Court unanimously (9:0) upheld the legislation in its entirety. As part of Superior Court proceedings, CCS participated in the pre-trial discovery process, and also intervened opposing an application by tobacco companies to stay implementation of new package health warnings.¹³

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

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

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

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

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

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

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

¹⁴ Exhibit "A" to Chirrey Affidavit.

CCS role in tobacco medicare cost recovery lawsuits and class actions

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

The U.S. tobacco medicare lawsuit settlement experience

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

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

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

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

CCS role in the CCAA proceedings to date

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

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

¹⁵ Exhibit "B" to Chirrey Affidavit.

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

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

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

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

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

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

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

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

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

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

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

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

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

¹⁸ *Ibid* at 26.

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

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

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

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

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

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

²⁰ *Ibid* at 70.

²¹ *Ibid* at 60.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁶ *Ibid.* at 163. (our emphasis)

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

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

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

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

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

²⁸ *Ibid* at 63.

²⁹ *Ibid* at 64-68, 71.

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

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

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

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

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

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

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

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

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

³¹ Initial Order Factum of ITCAN and ITCO, March 12, 2019, para. 7.

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

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

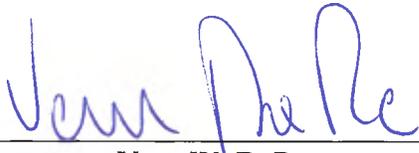
to public health/public policy measures in a tobacco settlement distinguishes these CCAA tobacco proceedings from almost all other CCAA cases.

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

PART IV - ORDER REQUESTED

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

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



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SCHEDULE "A"

LIST OF AUTHORITIES

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

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

SCHEDULE “B”

TEXT OF STATUTES

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

General power of court

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

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

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

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

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

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

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

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

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
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