

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)**

B E T W E E N:

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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**RESPONDING FACTUM OF THE HEART AND STROKE FOUNDATION OF CANADA  
(OBJECTION TO SANCTION ORDERS)**

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January 24, 2025

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**TO: The Common Service List  
See Schedule "C"**

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## PART I - OVERVIEW

1. This factum is filed by the Heart and Stroke Foundation of Canada (“**Heart & Stroke**”) objecting to the plans of compromise and arrangement (the “**CCAA Plans**” or the “**Plans**”) in their current form of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited, Rothmans Benson & Hedges Inc., and JTI-MacDonald Corp. (collectively, the “**Tobacco Companies**”).
2. The CCAA Plans that have been negotiated for the past half decade are less protective of the Canadian public than comparable agreements from the United States that were entered into over 26 years ago. These Plans miss the “big picture”<sup>1</sup> and suffer from a fundamental flaw that render them unfair and unreasonable.
3. An essential flaw in the CCAA Plans rests in the mandate of the \$1 billion public charitable foundation (the “**Cy-près Foundation**” or “**Foundation**”) created under the Plans. The Foundation is designed to provide indirect benefits to a broad group including the Pan Canadian Claimants and the general public. Its creation is integral to the consideration for the global releases in the CCAA Plans.
4. Fatally, in its current form, the Cy-près Foundation has a narrow mandate to only fund research, programs and initiatives focused on improving outcomes in tobacco-related diseases. The CCAA Plans and the Cy-près Foundation do not address appropriately, or at all, the legitimate interests of the millions of individuals who will suffer harm from the future use of tobacco products (the “**FTH Stakeholders**”).

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<sup>1</sup> *Canadian Airlines Corp.*, [Re, 2000 ABQB 442](#) at [para 178](#) (leave to appeal denied [2000 ABCA 238](#) (Alta. C.A. [In Chambers]), aff'd [2001 ABCA 9](#) (Alta. C.A.), leave to appeal to S.C.C. refused July 12, 2001 [2001 CarswellAlta 888 (S.C.C.)] [*Canadian Airlines*], Abbreviated Book of Authorities of the Heart and Stroke Foundation of Canada, dated January 24, 2025 (“**HSFC ABOA**”), Tab 1.

5. The FTH Stakeholders' interests, and those of the Canadian public more broadly, require the inclusion of tobacco use prevention and reduction measures, including smoking cessation and public awareness. The CCAA Plans not only ignore these interests, but they explicitly exclude them. The Foundation is currently precluded from funding initiatives and programs related to tobacco use prevention and reduction. This restraint is not only unnecessary, unreasonable and inexplicable, it is at odds with the intention for the Foundation to provide indirect benefits to users of tobacco products (which include the FTH Stakeholders) who are not directly compensated by the proposed settlement.

6. The exclusion of prevention and reduction measures in the CCAA Plans is flatly inconsistent with how global settlements have been structured in cases where the irresponsible sale of dangerous products resulted in sweeping public harm. For example, recent insolvency experience in the United States involving opioid manufacturers has resulted in settlements that prioritize harm reduction measures, including funding addiction treatment and public education. More emphatically, the Master Settlement Agreement between the largest U.S. tobacco companies and a vast majority of the States, executed in 1998, also established an ongoing charitable fund dedicated to prevention and reduction measures for the use of tobacco-products.

7. The CCAA Plans are intended to provide critical compensation to individuals who have been victimized by tobacco addiction for decades, and they are an important step forward toward redressing the harms of the past. Heart & Stroke appreciates the immense efforts of the Monitors to reach an acceptable compromise and fully supports completing a resolution and providing compensation to victims. There is, however, a clear, viable and

better alternative to the CCAA Plans: Plans that include a Cy-près Foundation with a mandate that expressly includes prevention and reduction measures.

8. Heart & Stroke submits that the CCAA plans should not be sanctioned by this Court unless and until the Plans are amended to include prevention and reduction measures within the mandate of the Cy-près Foundation. Heart & Stroke has provided what it considers necessary revisions to the Monitors that would, if implemented, address the issues raised above and addressed in greater detail below.

## PART II - FACTS

### A. Heart & Stroke and the FTH Stakeholders

9. Tobacco use is highly addictive<sup>2</sup> and there is no longer debate that tobacco use dramatically increases the risk of developing heart disease, stroke, and other life-threatening diseases.<sup>3</sup>

10. Heart & Stroke is one of Canada's preeminent charities and a leader in disease prevention. Its activities include, but are not limited to, funding research and initiatives aimed at preventing and reducing tobacco use and harm caused by tobacco use. Although Heart & Stroke is not a creditor of the Tobacco Companies, it has been recognized as a social stakeholder in these CCAA proceedings.<sup>4</sup>

11. As a social stakeholder in these proceedings, Heart & Stroke has made several attempts to meaningfully participate in the proceedings and advocate for the legitimate interests of the FTH Stakeholders. Most notably, Heart & Stroke brought a motion for

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<sup>2</sup> Expert Report of Dr. Andrew Pipe, CM, BA, MD, LLD, DSc, dated January 20, 2025 ("**Pike Expert Report**") at para. 13, Responding Motion Record of the Heart and Stroke Foundation of Canada ("**HSFC RMR**"), Affidavit of Dr. Andrew Pike, sworn January 20, 2025 ("**Pike Affidavit**"), Tab 2A, p. 60.

<sup>3</sup> Pike Expert Report at paras 14-15, Pike Affidavit, HSFC RMR, Tab 2A, pp. 60-61.

<sup>4</sup> *In the Matter of a Plan of Compromise and Arrangement of JTI-Macdonald, Imperial Tobacco and Rothmans*, 2023 ONSC 2347 at para 89 [[Heart & Stroke Leave Decision](#)], HSFC ABOA, Tab 2.

leave to bring a motion for leave to appoint representative counsel for the FTH Stakeholders in the then ongoing mediation of a global settlement (the “**Mediation**”).

12. The FTH Stakeholders are the millions of individuals who will purchase or consume tobacco products, or be exposed to their use, following the commencement of these proceedings but who have not suffered any harm prior to the claims bar date.<sup>5</sup> These individuals are a central source by which the CCAA Plans are funded as post-petition cash-flows will be generated from tobacco sales to the FTH Stakeholders.<sup>6</sup> Importantly, the FTH Stakeholders include individuals whose claims are released under the CCAA Plans.

13. The FTH Stakeholders do not have existing claims under these proceedings because, by their nature, they did not use tobacco products and/or suffer harm before the CCAA Proceedings began. That said, the potential future claims for the harm many of these individuals will suffer as a result of the historic conduct of the Tobacco Companies are released under the CCAA Plans. As discussed below, in many cases, their interests will fall within the forward-looking scope of potential Pan-Canadian Claimants (“**PCC**”) being released under the CCAA Plans but which are not eligible for and will not receive direct compensation under the PCC Compensation Plan.<sup>7</sup>

14. The FTH Stakeholders will therefore be deeply impacted by the CCAA Plans and are uniquely positioned within these CCAA Proceedings. Indeed, as noted it is the purchase of tobacco products by the millions of individuals who comprise the FTH Stakeholders that will generate the Downstream Contributions to the Universal Settlement

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<sup>5</sup> [CCAA Plans](#), Article 1.1.

<sup>6</sup> [CCAA Plans](#), Article 5.6.

<sup>7</sup> [CCAA Plans](#), Article 1.1.

Amount. It is obvious that the FTH Stakeholders are an integral source of revenue from which creditors in these CCAA Proceedings will receive compensation.

15. In reasons dated June 23, 2023, Justice McEwen denied Heart & Stroke's request for leave. However, his Honour emphasized that Heart & Stroke retained its ability to participate in the CCAA Proceedings as a social stakeholder and return to court "if difficulties arise with respect to what Heart & Stroke has identified as the FTH Stakeholders."<sup>8</sup>

16. On February 6, 2024, following Justice McEwen's decision, Heart & Stroke wrote to the Monitors offering to discuss the specific interests of the FTH Stakeholders so that the participants in the ongoing Mediation would have the benefit of the Heart & Stroke's expertise and consider fully the perspective on the interests of the FTH Stakeholders.<sup>9</sup> The Monitors declined this invitation.<sup>10</sup>

17. On November 1, 2024, Heart & Stroke again wrote to the Monitors raising the specific interests of the FTH Stakeholders and concerns that they were not adequately represented in the Mediation in light of the motion to retroactively expand the scope of representative counsel for PCCs.<sup>11</sup> By reply letter dated November 11, 2024, the Monitors

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<sup>8</sup> [Heart & Stroke Leave Decision](#) at para 89, HSFC ABOA, Tab 2.

<sup>9</sup> Letter from Jim Bunting to the Monitors dated February 6, 2024; Letter from Jim Bunting to Counsel for the Monitors dated February 6, 2024, Affidavit of Sandy Ballott, Sworn January 20, 2025 ("**Ballott Affidavit**"), HSFC RMR, Tab 1, Exhibit A, pp. 38-39.

<sup>10</sup> Letter from Natasha MacParland to Jim Bunting dated February 16, 2024, Ballott Affidavit, HSFC RMR, Tab 1, Exhibit B, p. 41.

<sup>11</sup> Letter from Jim Bunting to the Monitors dated November 1, 2024, Ballott Affidavit, HSFC RMR, Tab 1, Exhibit C, pp. 43-45.



declined the invitation to discuss the specific interests of the FTH Stakeholders and dismissed Heart & Stroke's concerns.<sup>12</sup>

## **B. The Broad Releases under the CCAA Plans**

18. The CCAA Plans provide for broad and comprehensive releases for the Tobacco Companies and related entities. At a high level, the claim of any person, organization or party that may have an Affected Claim or Released Claim, as defined in the CCAA Plans, is being released.<sup>13</sup> In particular, the scope of "Released Claims" captures two categories:

(a) Tobacco Claims which are:

any Claim of any Person against or in respect of a Tobacco Company [...] that could have been advanced **or that could be advanced** [...] in respect of the development, design, manufacture, production, marketing, advertising, distribution, purchase, sale or disposition of Tobacco Products, the use of or exposure (**whether directly or indirectly**) to Tobacco Products or their emissions, the development of any disease related to the use of Tobacco Products, or any representation or omission in respect of Tobacco Products, including any misrepresentations, breach of duty or fraud [...] in each case based on, arising from or in respect of any conduct, act, omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing, fact, matter or occurrence **existing or taking place at or prior to the Effective Time (whether or not continuing thereafter)** [...].<sup>14</sup>

(b) Any Claims:

in respect of the assets, obligations, business or affairs of the Released Parties in Canada or, in the case of Imperial, anywhere else in the world, relating to Tobacco Products, which are based on, arising from or in respect of any conduct, act, omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing, fact,

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<sup>12</sup> Letter from Shayne Kukulowicz dated November 11, 2024, Ballott Affidavit, HSFC RMR, Tab 1, Exhibit D, p. 47. Although the Monitors' they agreed to share Heart & Stroke's comments with the Court-Appointed Mediator, they did not accept.

<sup>13</sup> [Twentieth Report of the Monitor](#), Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited at para 41 [20<sup>th</sup> Report of the Monitor].

<sup>14</sup> [CCAA Plans](#), Article 1.1.

matter or occurrence **existing or taking place at or prior to the Effective Time (whether or not continuing thereafter)** [...];<sup>15</sup>

19. Part of the breadth of these releases, as underlined in the definitions above, is the fact that they are explicitly forward-looking. While in all cases the releases are anchored to wrongs committed by the Tobacco Companies that occurred before the Effective Time, they capture future claims “that could be advanced”, whether “directly or indirectly”, on a “continuing” basis.

### **C. The Retroactive Expansion of the Definition of Pan-Canadian Claimants**

20. The PCC are one of the recognized classes of claimants being released under the CCAA Plans.<sup>16</sup> They are defined as the individuals (excluding Quebec Class Action Plaintiffs) who “have asserted or **may be entitled to assert**” a PCC Claim, which are claims to:

“recover damages or any other remedy in respect of the development, design, manufacture, production, marketing, advertising, distribution, purchase or sale of Tobacco Products, including any representations or omissions in respect thereof, the **historical or ongoing use of or exposure (whether directly or indirectly)** to Tobacco Products or their emissions and the development of any disease or condition as a result thereof, **whether existing or hereafter arising**, in each case based on, arising from or in respect of any conduct, act, omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing, fact, matter or occurrence existing or taking place at or prior to the Effective Time **(whether or not continuing thereafter)** including, all Claims that have been advanced, **could have been advanced or could be advanced** in the following actions commenced by Individuals under provincial class proceedings legislation and actions commenced by Individuals, or in any other similar proceedings:<sup>17</sup>

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<sup>15</sup> [CCAA Plans](#), Article 1.1.

<sup>16</sup> [CCAA Plans](#), Article 1.1.

<sup>17</sup> [CCAA Plans](#), Article 1.1.

21. The scope of the definition for PCCs under the current CCAA Plans is similar to the forward-looking nature of Released Claims, but this language is a recent development. This definition was only adopted on November 22, 2024, through an amendment to the Representative Counsel Order dated December 9, 2019, almost a month after this Court, on October 31, 2024, approved the filing of the CCAA Plans, the meeting of affected creditors, and a claims process for claimants to attend the meeting and vote on the CCAA Plans.<sup>18</sup> When the CCAA Plans were before the Court on October 31, 2024, PCCs were defined by the existing definition of “TRW Claimants” that did not include the following language:

(a) “or may in the future be asserted”

(b) “could be advanced”

(c) “or hereafter arising”

(d) “Effective Time (whether or not continuing thereafter)”.<sup>19</sup>

22. Therefore, throughout the Mediation, including the negotiation of the releases of the CCAA Plans and the approval of filing for the CCAA Plans, the defined scope of Representative Counsel for the PCC/TRW Claimants did not include the forward-looking interests of PCCs that are being released under the proposed CCAA Plans.

#### **D. Consideration Under the CCAA Plans**

23. Under the CCAA Plans, the primary consideration for the global releases of the Tobacco Companies is a Global Settlement Amount of over \$32.5 billion, which is comprised of funds contributed in an upfront payment and funds to be paid in future years

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<sup>18</sup> Amended and Restated Appointment Order (Appointment of PCC Representative Counsel) dated November 22, 2024; [Meeting Order](#) dated October 31, 2024.

<sup>19</sup> [Representative Counsel Order](#) dated December 9, 2019.

by the Tobacco Companies.<sup>20</sup> The funds to be paid in future years (the “**Downstream Contributions**”) are primarily made by payments to be calculated as a percentage of after-tax net income from the Tobacco Companies.<sup>21</sup>

24. A key component of the CCAA Plans is the establishment of a public charitable foundation intended to provide indirect benefits to those individuals who are not entitled to direct compensation under the CCAA Plans (the “**Cy-près Foundation**”).<sup>22</sup> This broad group of claimants includes persons who smoke or have smoked Tobacco Products who have not yet or may never develop a tobacco-related harm.<sup>23</sup>

25. As stated in the CCAA Plans, the creation of the Cy-près Foundation is integral to provide consideration for the release of the otherwise uncompensated potential claims of PCCs who are not eligible for direct compensation from the PCC Compensation Plan:

The Cy-près Fund will provide consideration for the full and final settlement and release of all claims **and potential claims** of PCCs who are not receiving direct compensation payments from the PCC Compensation Plan [...] but will be indirectly benefited by falling within the scope of the Cy-près Foundation.<sup>24</sup>

26. Under the CCAA Plans, the Cy-près Foundation will be funded in the amount of \$1.0 billion allocated from the Global Settlement Amount. Article 9.1 of the CCAA Plans defines the purpose of the Cy-près Fund as

[T]o fund research, programs and initiatives focused on improving outcomes in tobacco-related diseases that will provide indirect benefits to such Persons.<sup>25</sup>

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<sup>20</sup> [Twentieth Report of the Monitor](#), Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited at para 32 [20<sup>th</sup> Report of the Monitor].

<sup>21</sup> [20<sup>th</sup> Report of the Monitor](#) at para 32.

<sup>22</sup> [20<sup>th</sup> Report of the Monitor](#) at para 50.

<sup>23</sup> [CCAA Plans](#), Article 9.1.

<sup>24</sup> [CCAA Plans](#), Article 9.1.

<sup>25</sup> [CCAA Plans](#), Article 9.1.

27. Importantly, the Cy-près Foundation is expressly precluded from funding programs and initiatives aimed at reducing or preventing tobacco use in Canada and is confined to providing indirect benefits related to certain tobacco-related diseases.<sup>26</sup> The CCAA Plans do not permit the Court to add prevention and reduction measures to the scope of the Cy-près Foundation after the CCAA Plans have been sanctioned and the mandate of the Foundation is a central issue to the fairness and reasonableness of the Plans.

### **PART III - ISSUE**

28. The sole issue raised by Heart & Stroke's objection to the CCAA Plans is whether the CCAA Plans are fair and reasonable such that the Sanction Orders should be granted. For the reasons set out below, Heart & Stroke submits that the CCAA Plans are not fair and reasonable in their current form.

### **PART IV - LAW AND ARGUMENT**

#### **A. The General Requirements for Sanctioning the CCAA Plans**

29. The applicable law for determining whether to approve a plan under the CCAA is set-out in the facts of the Monitors. Heart & Stroke agrees with the Monitors that the first two general requirements are satisfied. The CCAA Plans are not, however, fair and reasonable.

30. This Court should not sanction the CCAA Plans in their current form.

#### **B. The CCAA Plans are not Fair and Reasonable**

31. When reviewing the fairness and reasonableness of a plan of compromise, fairness is "the quintessential expression of the court's equitable jurisdiction", while

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<sup>26</sup> [CCAA Plans](#), Article 9.3.

reasonableness is “what lends objectivity to the process.”<sup>27</sup> Importantly, the Court’s decision should be informed by the objectives of the CCAA which are to facilitate the reorganization of a debtor company “for the benefit of the company, its creditors, employees and **in many instances, a much broader constituency of affected persons.**”<sup>28</sup> This Court instructs:

The articulated purpose of the Act and the jurisprudence interpreting it, “**widens the lens**” to balance a broader range of interests that includes creditors and shareholders and beyond to the company, the employees and the public, and tests the fairness of the plan with reference to its impact on all of the constituents.<sup>29</sup>

32. The CCAA Plans are not fair and reasonable in their current form. This is so for three interrelated reasons: i) the CCAA Plans do not address or protect the legitimate interests of the FTH Stakeholders; ii) the CCAA Plans are not in the public interest; and iii) there are other alternatives that would remedy these deficiencies.

***i. The CCAA Plans do not address the legitimate interests of FTH Stakeholders***

33. The CCAA Plans are not a fair and reasonable balancing of the interests of stakeholders because they do not include measures focused on prevention, reduction, cessation, or awareness of the risks associated with tobacco use which are critical for the FTH Stakeholders, a group that includes individuals whose claims are being released.

34. The FTH Stakeholders are in a unique position in the context of these CCAA proceedings. On the one hand, there can be no sufficient recovery for those who have been previously harmed by tobacco products without the continued sale of tobacco to

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<sup>27</sup> *Canadian Airlines* at [para 94](#), citing *Olympia & York Developments Ltd. v. Royal Trust Co.*, [1993 CanLII 8492](#) (ON SC).

<sup>28</sup> *Canwest Global Communications Corp. Re*, [2010 ONSC 4209](#) at [para 20](#) [*Canwest*] [emphasis added].

<sup>29</sup> *Stelco Inc., Re*, [2006 CanLII 1773](#) (ON SC) at [para 15](#), citing *Canadian Airlines* at paras [144-145](#).

those who have yet to suffer harm. The contribution of the FTH Stakeholders to the Global Settlement Amount is therefore essential to the CCAA Plans but that economic contribution will also inevitably result in harm to FTH Stakeholders. All the while, the FTH Stakeholders are ineligible to receive compensation for this same harm from the Global Settlement Amount.

35. It is in this context that the FTH Stakeholders have divergent interests from other stakeholders in these CCAA Proceedings, and specifically those claimants who are eligible for direct compensation under the CCAA Plans. Having not used tobacco for weeks or months or years – or in some cases never having even picked up a cigarette – the FTH Stakeholders most pressing needs are not cancer and other disease treatments.<sup>30</sup> The FTH Stakeholders require initiatives and programs focusing on tobacco use prevention, reduction, cessation, and awareness of the associated risks *before* they become sick.<sup>31</sup> These measures may understandably be less pressing to those claimants who have already suffered irreparable harm and require acute care or treatment. However, they are essential for the FTH Stakeholders.

36. The failure to account for the legitimate interests of the FTH Stakeholders is most apparent in the structure and substance of the Cy-près Foundation. The Cy-près Foundation is intended to provide indirect benefits as consideration for the potential claims of PCCs being released, including claims of FTH Stakeholders. It is, therefore, essential that the Cy-près Foundation provide satisfactory consideration to the FTH Stakeholders.<sup>32</sup> Unfortunately, the Cy-près Foundation unequivocally prohibits funding to

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<sup>30</sup> Pipe Expert Report at para 20, Pipe Affidavit, HSFC RMR, Tab 2A, p. 62

<sup>31</sup> Pipe Expert Report at paras 20 and 30, Pipe Affidavit, HSFC RMR, Tab 2A, p. 62 and p. 65.

<sup>32</sup> [CCAA Plans](#), Article 9.1.

any programs and initiatives aimed at reducing or preventing tobacco use in Canada such that the consideration of the Cy-près Foundation is lacking in compensation and reasonableness against the broad release because it excludes prevention and reduction measures.

37. This is clear on the face of the Plans but also from the expert opinion evidence of Dr. Andrew Pipe, a leading expert on issues related to tobacco use and smoking cessation, who has opined:

In summary, in my opinion, for the reasons expressed above it is critically important that the Cy-Pres Foundation include within the scope of its mandate tobacco use reduction and prevention measures, in order to more effectively benefit people in Canada. **If these measures are not included, the Cy-Pres Foundation will not be able to meaningfully benefit future tobacco users or those individuals who smoke or have smoked tobacco products and have not yet developed tobacco-related disease. Indeed, this group of individuals who as of yet have not suffered any tobacco related disease will only truly benefit from prevention and mitigation measures.**<sup>33</sup>

38. The CCAA Plans attempt to justify this exclusion by asserting that prevention and reduction are outside the scope of the Cy-près “because they fall within the purview of the Provinces and Territories”.<sup>34</sup> This cursory justification, which is supported by PCC Representative Counsel, does not withstand scrutiny for four reasons.<sup>35</sup>

39. *First*, the carve-out in the Cy-près Foundation disproportionately benefits the Tobacco Companies at the direct expense of the FTH Stakeholders because it prioritizes the Tobacco Companies’ profits without any regard to supporting the FTH Stakeholders consumption of tobacco products in an informed and responsible manner. Ignoring the

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<sup>33</sup> Pipe Expert Report at para 32, Pipe Affidavit, HSFC RMR, Tab 2A, p. 65 [emphasis added].

<sup>34</sup> [CCAA Plans](#), Article 9.3.

<sup>35</sup> Factum of PCC Representative Counsel dated January 24, 2025 at para 30.



FTH Stakeholders in this way is unequitable and unfair. This unreasonableness defeats the CCAA Plans' intention for the Cy-près Foundation to be "independent and free from any influence or interference" by the Tobacco Companies and other stakeholders.<sup>36</sup>

40. *Second*, reducing or preventing tobacco use engages similar considerations as the treatment of tobacco-related diseases, which are eligible for funding, and they are generally not more difficult or complex to implement.<sup>37</sup> In fact, smoking cessation has been shown to dramatically alleviate harm related to tobacco-related diseases such as cardiovascular disease.<sup>38</sup> The CCAA Plans do not provide a rationale basis for carving out reduction and prevention measures when they are primary drivers to combatting tobacco-related disease.

41. At their core, research, prevention, cessation, awareness and treatment are measures needed to address tobacco addiction, which is a tobacco-related disease in and of itself.<sup>39</sup> No explanation has been provided for why tobacco addiction measures should be treated differently than other medical concerns. It is illogical and unreasonable to exclude key methods of combatting addiction from the scope of the Cy-près Fund when other healthcare initiatives are included.

42. *Third*, this exclusion is internally inconsistent with the Cy-près Foundation's stated values, which include a focus on: (i) The inherent value of the research, program or initiative from the standpoint of its indirect benefit to Persons covered by the Cy-près and Canadians at large; (ii) Awareness of the need to maintain a "rational connection" between the work supported by the Cy-près Foundation and the individuals benefitting

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<sup>36</sup> [CCAA Plans](#), Article 9.1

<sup>37</sup> Pipe Expert Report at para 31, Pipe Affidavit, HSFC RMR, Tab 2A, p. 65.

<sup>38</sup> Pipe Expert Report at para 18, Pipe Affidavit, HSFC RMR, Tab 2A, pp. 61-62.

<sup>39</sup> Pipe Expert Report at paras 13 and 14, Pipe Affidavit, HSFC RMR, Tab 2A, p. 60.

from the Cy-près; and (iii) Devotion to the principles of best evidence and expert peer review.<sup>40</sup>

43. Explicitly excluding prevention and reduction from the Cy-près Foundation's mandate is incompatible with these values because it does not prioritize the value of research, programs and initiatives from the standpoint of FTH Stakeholders and the general public. In fact, including reduction and prevention measures would further the rational connection between the work of the Cy-près Foundation and the actual needs of those benefitting from it. Best evidence and expert peer review overwhelmingly supports the inclusions of prevention and reduction measures to best address the concerns of individuals like the FTH Stakeholders and Canadians more broadly.<sup>41</sup>

44. *Fourth*, the complete prohibition on funding programs or initiatives aimed at reducing or preventing tobacco is unreasonable in the context of how the Cy-près Foundation selects the programs and initiatives it funds. Even if it could be shown that some outlier prevention and reduction programs engage complex policy and advocacy issues, the selection of research, programs and initiatives by the Cy-Près Foundation is entirely discretionary.<sup>42</sup> The Foundation retains the unambiguous discretion to refuse funding if any outlier cases with complex policy and advocacy concerns present themselves. Inexplicably, instead of relying on the Cy-près Foundation's discretion to fund appropriate programs, the Cy-près Foundation is barred from considering every program and initiative directed at prevention and reduction, regardless of its individual merits.

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<sup>40</sup> [CCAA Plans](#), Article 9.3

<sup>41</sup> Pipe Expert Report at para 26, Pipe Affidavit, HSFC, RMR, Tab 2A, p. 64.

<sup>42</sup> [CCAA Plans](#), Article 9.3 [emphasis added].

45. Based on the foregoing, the exclusion of prevention and reduction measures from the Cy-près Foundation's mandate is unfair and unreasonable because it does not account for the legitimate interests of the FTH Stakeholders.

***ii. The CCAA Plans are not in the public interest***

46. In order for a plan to be fair and reasonable it should also be in the public interest.<sup>43</sup> The CCAA Plans are not in the public interest in their current form and should not be sanctioned.

47. In many CCAA proceedings, the only concern for the public interest is the re-establishment of an insolvent company as a going concern to ensure individuals continue to be employed and unnecessary litigation is avoided.<sup>44</sup> However, in cases like this one where the public interest overwhelms other factors, courts have placed a heavy emphasis on the public interest.<sup>45</sup> The current proceedings engage an expansive public interest because the reestablishment of the Tobacco Companies as a going-concern means that harmful tobacco products will continue to be sold in the market in the normal course. Canadians will continue to consume products that, when taken as instructed by the manufacturers, will significantly jeopardize their health, and many of those individuals will have their claims for compensation arising from that harm released under these Plans.

48. In light of these sweeping public interest concerns, significant deference should also not be afforded to a unanimous creditor vote. While the degree to which creditors support a plan of compromise and arrangement may be an important measure of a plan's

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<sup>43</sup> *Target Canada Co., Re*, 2016 ONSC 3651 at para 28, HSFC ABOA, Tab 3.

<sup>44</sup> *Target Canada Co. Re*, 2016 ONSC 3651 at para 31(f), HSFC ABOA, Tab 3.

<sup>45</sup> *Canadian Red Cross Society, Re*, [1998 CanLII 14907](#) (ON SC) (leave to appeal refused) at [para 50](#). In that case, the public interest 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 new agencies before any restructuring plan was put to creditors for a vote.

fairness and reasonableness in many cases, this is not such a case. Justice Blair explained the rationale for deference to the creditor approval of a plan as follows:

One important measure of whether a Plan is fair and reasonable is the parties' approval of the Plan, and the degree to which approval has been given.

As other courts have done, I observe that it is not my function to second guess the business people **with respect to the "business" aspects of the Plan** [...] The parties themselves know best what is in their interests **in those areas**.<sup>46</sup>

49. The public interest considerations at the core of these proceedings are not borne out in the “business” aspects of the CCAA Plans. Therefore, the unanimous approval of the CCAA Plans should not overwhelm valid public interest considerations and the interests of FTH Stakeholders.

50. These CCAA Proceedings are exactly the type of case where the Court must “widen the lens” beyond those creditors voting to approve the CCAA Plans and there are two overarching reasons precluding the CCAA Plans from being in the public interest in their current form.

51. First, the CCAA Plans should provide some mechanism to promote the public’s interest in prevention, reduction, cessation and awareness related to tobacco use. The benefits of tobacco use reduction and prevention measures are significant and supported by best-evidence.<sup>47</sup> These measures also serve to reduce the socio-economic burden of tobacco use on the Canadian public, which burdens Canadian society with \$11.2 billion in direct healthcare, indirect economic criminal justice, as well as other direct costs every

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<sup>46</sup> *Olympia & York* at paras [36 and 37](#).

<sup>47</sup> Pipe Expert Report at para 26, Pipe Affidavit, HSFC RMR, Tab 2A, p. 64.

year.<sup>48</sup> These measures would empower Canadians to consume more responsibly where possible and make informed decisions about their own health. By assisting Canadians to find and take advantage of addiction treatment, this Court can also ensure the highly addictive nature of tobacco is balanced with supports that enhance consumer-autonomy.

52. In the absence of these measures, the CCAA Plans are not in the public interest.

53. Second, it is important not only that justice be done, but that justice is seen to be done. In the context of CCAA proceedings, that means not only that the result is substantively fair but that the process is perceived to be fair.<sup>49</sup> This is especially true in a case of this nature with a substantial public interest where the Plan was negotiated over a half decade behind closed doors.

54. The glaring absence of prevention and reduction measures from the mandate of the Cy-près Foundation coupled with the late-breaking retroactive amendment to the scope of Representative Counsel's mandate raises very serious concerns. Heart & Stroke notes the following sequence of events.

55. Heart & Stroke sought an order appointing representative counsel to protect the interests of the FTH Stakeholders: interests that Heart & Stroke argued were not currently represented or were represented by counsel in an inherent conflict of interest. In this regard, as discussed above, the FTH Stakeholders are not typical consumers because of the addictive nature and harmful quality of tobacco products. The addictive nature of tobacco will ensure the FTH Stakeholders continued use of tobacco products to generate

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<sup>48</sup> Pipe Expert Report at para 16, Pipe Affidavit, HSFC RMR, Tab 2A, p. 61.

<sup>49</sup> *Wiebe v. Weinrich Contracting Ltd.*, [2020 ABCA 396](#) at para 44, citing *Rescue! The Companies' Creditors Arrangement Act*, 2<sup>nd</sup> Ed, Toronto: Carswell, 2013 at 139, HSFC ABOA, Tab 7. In that case, the Alberta Court of Appeal recognized that the flexibility and efficiency of CCAA proceedings should not outweigh well-recognized principles of procedural fairness, including the important consideration that justice must be seen to be done (see also *Calpine Canada Energy Ltd., Re*, [2007 ABQB 49](#) at para 31, where the principle that justice must be seen to be done in the context of a CCAA proceeding was also affirmed).

revenue to pay out existing claims. The addictive nature of tobacco will also inevitably result in negative health impacts on the FTH Stakeholders through their continued use of tobacco products. This tension places the FTH Stakeholders in a vulnerable position: all creditors, including individuals receiving direct compensation under the CCAA Plans, rely on the FTH Stakeholders' use of tobacco products to fund their existing claims at the expense of the health, well-being and longevity of the FTH Stakeholders.

56. Heart & Stroke argued that the FTH Stakeholders were not currently represented and that even if a subset of the group was represented by Representative Counsel there was an inherent conflict between the FTH Stakeholders and those individuals receiving direct compensation under the CCAA Plans. Heart & Stroke further made it clear that the most important and central issue for the FTH Stakeholder was the inclusion of prevention and reduction measures.<sup>50</sup>

57. The Monitors opposed the participation of Heart & Stroke, arguing, in addition to various procedural grounds, that the interests of FTH stakeholders and the public at large were adequately represented in the Mediation.<sup>51</sup> The Monitors also contended it was "premature to even consider any issues of conflict of interest".<sup>52</sup>

58. The Court declined to grant Heart & Stroke leave to bring a motion but directed Heart & Stroke to raise its concerns about the interests of the FTH Stakeholders in the future. Heart & Stroke then twice offered to meet with the Monitors before the CCAA Plans had been fully negotiated and finalized so that the Monitors could consider the perspective of the FTH Stakeholders. The Monitors declined both invitations.

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<sup>50</sup> [Heart & Stroke leave Decision](#) at para 52, HSFC ABOA, Tab 2.

<sup>51</sup> [Heart & Stroke leave Decision](#) at para 68, HSFC ABOA, Tab 2.

<sup>52</sup> [Heart & Stroke leave Decision](#) at para 69, HSFC ABOA, Tab 2.

59. After the CCAA Plans had been negotiated, a motion was brought to expand the definition of PCCs to ensure that the scope of PCCs aligned with the scope of the releases agreed to in the Mediation. This resulted in the retroactive amendment to Representative Counsel's mandate to include members of the FTH Stakeholder group that Heart & Stroke had previously advised were unrepresented.

60. The retroactive amendment is objectively concerning and raises significant procedural concerns that undermine the reasonableness and fairness of the CCAA Plans. The evidence does not establish that the interests of FTH Stakeholders were adequately represented in the negotiation of the releases or the determination to exclude prevention and reduction measures from the Cy-près Foundation. Indeed, there is an inherent conflict within the PCCs and it is unclear how Representative Counsel can adequately represent all interests, especially retroactively. Some PCCs' best interests are served by the FTH Stakeholders continuing to purchase tobacco products to contribute to the Global Settlement Fund; other PCCs, including those with potential claims like the FTH Stakeholders, are best served by prevention and reduction measures. Rather than balancing these interests by expanding the scope of the Cy-près Foundation to allow funding for prevention and reduction, the process and result of the CCAA Plans only recognize the former.

61. Put simply, the conflict between different groups of PCCs is resolved overwhelmingly in favour of those PCCs whose interests align with the Tobacco Companies. Moreover, even if the interests of FTH Stakeholders were subjectively and substantively represented in the mediation, it is against the public interest to sanction plans of compromise and arrangement when conflicts of interest and other procedural

deficiencies regarding the representation of individuals being released achieve a result with such glaring gaps. This Court should also not set a precedent for sanctioning a plan of compromise and arrangement where the group of individuals whose claims are being released is not reflected in the scope of any representative counsel's mandate until after the plans are approved for filing and key releases have been negotiated.

62. None of this passes the test for justice being seen to be done.

***iii. There are other commercial alternatives that would remedy the deficiencies***

63. The fairness and reasonableness of a plan will also be assessed against available commercial alternatives to what is offered in the proposed plan.<sup>53</sup> To assess the availability of commercial alternatives, it is useful to examine other precedents for large scale settlements in the context of tobacco lawsuits and other cases involving the sale of harmful addictive substances. The CCAA Plans are not fair and reasonable when compared to similar arrangements because they do not address prevention and reduction measures.

64. The U.S. experience with tobacco lawsuits originated by various States and the related settlements demonstrates that funding for prevention and reduction programs has formed part of a settlement for tobacco-related harm on a go-forward basis. For example, in June 1997, the four largest United States tobacco companies, Philip Morris Inc, RJ Reynolds, Brown & Williamson and Lorillard, entered a Tobacco Master Settlement Agreement with 46 states and other stakeholders that included settlement money designated for a tobacco prevention foundation and public education. Under this Master

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<sup>53</sup> *Canadian Airlines* at para [3](#).



Settlement Agreement, the parties agreed to establish a National Foundation to support the following:

(1) the study of and programs to reduce Youth Tobacco Product usage and Youth Substance abuse in the States, and (2) the study of and educational programs to prevent diseases associated the use of Tobacco Products in the States.<sup>54</sup>

65. The Master Settlement Agreement required the four tobacco manufacturers to each pay US\$25,000,000 per year for a period of nine years into the National Foundation.<sup>55</sup> In the 26 years since the Master Settlement Agreement was entered, the understanding of the benefits of reduction and prevention measures have only deepened and become more integral to combatting tobacco-related diseases.<sup>56</sup> The CCAA Plans' gap regarding these measures is outdated and glaring.

66. Recent examples of insolvency cases involving opioid sales in the U.S. are also precedents for incorporating prevention and reduction programs and payments into settlements. For example, in the case of Purdue Pharma's U.S. insolvency proceedings, a revised settlement included substantial funding to address opioid reduction and prevention. The revised settlement (increased from US\$4.5 billion to USD\$6 billion) included an additional US\$276,888,888.87 which was "devoted exclusively to opioid-related abatement, including support and services for survivors, victims and their families" through a supplemental opioid abatement fund.<sup>57</sup>

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<sup>54</sup> [Master Settlement Agreement](#) (1998), Article VI(a), HSFC ABOA, Tab 5.

<sup>55</sup> [Master Settlement Agreement](#), (1998) Article VI(b), HSFC ABOA, Tab 5.

<sup>56</sup> Pipe Expert Report at paras 28 and 29, Pipe Affidavit, HSFC RMR, Tab 2A, pp. 64-65.

<sup>57</sup> *In re: Purdue Pharma L.P., et al*, Motion of Debtors Pursuant To 11 U.S.C. § 105(A) And 363(B) For Entry Of An Order Authorizing And Approving Settlement Term Sheet at para. 2, March 3, 2022, Case No. 19-23649, United States Bankruptcy Court for the Southern District of New York, available at: <https://www.marylandattorneygeneral.gov/press/2022/030322.pdf>, HSFC ABOA, Tab 6.

67. Similarly, the global settlement by four opioid manufacturers, Johnson & Johnson, AmerisourceBergen, Cardinal Health and McKesson, included a large share of funds earmarked for health care and drug treatment programs designed to ease the opioid crisis.<sup>58</sup>

68. These experiences form a basis against which this Court should assess the fairness and reasonableness of the CCAA Plans, specifically in the context of assessing whether there are other commercially available alternatives. Although the Tobacco CCAA Proceedings have been described as enormously complex, they are of comparable complexity to the U.S. precedents involving tobacco and opioids.<sup>59</sup> Using these precedents as guides, the CCAA Plans, and specifically the mandate of the Cy-près Foundation therein, are not fair or reasonable.

69. Stated simply, there is a clear and preferable commercial alternative to the CCAA Plans: modified CCAA Plans that include prevention and reduction measures within the mandate of the Cy-près Foundation.

## **PART V - RELIEF REQUESTED**

70. For these reasons, Heart & Stroke respectfully requests that the court refuse to sanction the CCAA Plans in their current form.

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<sup>58</sup> Brian Mann, “4 U.S. companies will pay \$26 billion to settle claims they fueled the opioid crisis,” National Public Radio, February 25, 2022, available at: <https://www.npr.org/2022/02/25/1082901958/opioid-settlement-johnson-26-billion>, HSFC ABOA, Tab 4.

<sup>59</sup> [\*Heart & Stroke Leave Decision\*](#) at para 4, HSFC ABOA, Tab 2.

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



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**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. *Calpine Canada Energy Ltd., Re*, [2007 ABQB 49](#)
2. *Canadian Airlines Corp., Re*, [2000 ABQB 442](#) (leave to appeal denied [2000 ABCA 238](#) (Alta. C.A. [In Chambers])), aff'd [2001 ABCA 9](#) (Alta. C.A.), leave to appeal to S.C.C. refused July 12, 2001 [2001 CarswellAlta 888 (S.C.C.)]
3. *Canadian Red Cross Society, Re*, [1998 CanLII 14907](#) (ON SC) (leave to appeal refused)
4. *Canwest Global Communications Corp. Re*, [2010 ONSC 4209](#)
5. *In the Matter of a Plan of Compromise and Arrangement of JTI-Macdonald, Imperial Tobacco and Rothmans*, 2023 ONSC 2347
6. *Olympia & York Developments Ltd. v. Royal Trust Co.*, [1993 CanLII 8492](#) (ON SC)
7. *Stelco Inc., Re*, [2006 CanLII 1773](#) (ON SC)
8. *Target Canada Co., Re*, 2016 ONSC 3651
9. *Wiebe v. Weinrich Contracting Ltd.*, [2020 ABCA 396](#)

**SCHEDULE "B"**  
**TEXT OF STATUTES, REGULATIONS & BY-LAWS**

[N/A]

**SCHEDULE "C"  
COMMON SERVICE LIST**

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

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

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

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

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

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

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(Commercial List)**

Proceeding commenced at TORONTO

**RESPONDING FACTUM OF THE HEART AND  
STROKE FOUNDATION OF CANADA**

**(OBJECTION TO SANCTION ORDERS)**

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