

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

**RESPONDING FACTUM OF THE HEART AND STROKE FOUNDATION
OF CANADA (MOTION FOR CCAA AMENDMENT ORDERS)**

March 2, 2025

Tyr LLP
488 Wellington Street West
Suite 300-302
Toronto, ON M5V 1E3
Fax: 416-987-2370

James Bunting (LSO# 48244K)
Email: jbunting@tyrllp.com
Tel: 647.519.6607

Sam Cotton (LSO# 84324T)
Email: scotton@tyrllp.com
Tel: 613.862.9264

Lawyers for the Heart and Stroke
Foundation of Canada

TO: THE COMMON SERVICE LIST
See Schedule "C"

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A. Overview

1. Heart & Stroke¹ files these submissions in response to the relief requested by Ernst & Young Inc., Deloitte Restructuring Inc., and FTI Consulting Canada Inc. (the “**Monitors**”) in their respective motions for CCAA Plan Amendment Orders returnable March 3, 2025 (the “**Amendment Motions**”). Heart & Stroke opposes the approval of the respective Third Amended and Restated Plans of Compromise and Arrangement of the Tobacco Companies (the “**Amended Plans**”).

2. The Amended Plans do not cure the fatal deficiencies in the scope of the Cy-près Foundation. The Cy-près Foundation does not include reduction and prevention measures, and the Plans do not provide, appropriately or at all, compensation and consideration to the FTH Stakeholders. The Plans are not, therefore, fair and reasonable and cannot be approved.

3. The Amendment Motions do, however, highlight the flexible nature of CCAA proceedings and the fact that the Plans presented to the Court on January 29, 2025 can be changed, including to address concerns about fairness, and that the Court can exercise its equitable jurisdiction to make changes. Accordingly, Heart & Stroke submits that the Court’s decision on these Amendment Motions, and the Sanction Hearing more broadly, is not a binary choice between plan approval and a return to litigation.

4. Heart & Stroke’s objective is for the Plans approved by this Court to be fair and reasonable and to adequately consider and address the interests of Future Tobacco

¹ Unless otherwise defined herein, capitalized terms have the meaning provided for in the Responding Factum of the Heart & Stroke dated January 24, 2025 (the “**Responding Factum**”).

Harm Stakeholders. Prevention and mitigation measures are clearly appropriate and necessary to the fairness of the Plans. No meaningful or cogent explanation has been provided for the exclusion of these measures and Heart & Stroke opposes Plans that do not include these measures.

5. This Court should reject a forced choice between approving a Plan that does not include prevention and mitigation measures and one that does. Instead, this Court should adopt one of the two following paths:

- (a) Conditionally approve the CCAA Plans, with or without the proposed amendments, on the basis the Cy-près Foundation mandate be revised to include reduction or prevention measures and if it is not for the Court to be provided with evidence explaining who objects to the inclusion of these measures within the mandate of the Foundation and why; or
- (b) Directly amend the CCAA Plans to include prevention and reduction measures with the scope of the Cy-près Foundation pursuant to s. 6(2) of the CCAA or this Court's inherent equitable jurisdiction.

B. Excluding Reduction and Prevention Remains Unjustified

6. Heart & Stroke objects to the approval of the Amended Plans on the same grounds that it objected at the Sanction Hearing, as detailed in its Responding Factum and in oral submissions.

7. The Monitors' Amended Plans and latest reports do not address this absence. It is glaring that no justifiable explanation has been provided by the Monitors, the Tobacco

Companies, or any other party to explain why the scope of the Cy-près Foundation continues to expressly exclude reduction and prevention measures from its mandate. This omission stands in stark contrast to the undisputed fact that reduction and prevention measures are the obvious way to provide consideration to those individuals who are not yet receiving compensation under the CCAA Plans.

8. At the Sanction Hearing, Heart & Stroke discussed whether this Court was caught in the horns of a dilemma between two bad options: 1) sanctioning the CCAA Plans in their current form, despite the lack of consideration for uncompensated future tobacco users; or 2) refuse to sanction the CCAA Plans and return to litigation. Heart & Stroke submits that if the Court is on the horns of a dilemma, it must understand why so it can make a fair choice in the circumstances. In this regard, there are two primary potential objectors to the exclusion of prevention and mitigation measures from the mandate of the Foundation:

- (a) If it is the Tobacco Companies who are objecting to the inclusion of prevention and mitigation measures, the Court should know why and understand the concerning context in which that position unfolds. These proceedings are rooted in the Tobacco Companies being held liable for prioritized profits over protecting the health of Canadians. If the Tobacco Companies are taking this same position again by excluding reduction and prevention measures from the scope of the Cy-près Foundation, this is relevant to whether the Plans can be fair and reasonable and a factor the Court should consider.

(b) If Class Counsel and the Provinces/Territories are objecting to the inclusion of these measures, this highlights the conflicts of interest previously raised and set out by Heart & Stroke. The addictive nature of tobacco will inevitably result in negative health impacts on the FTH Stakeholders through their continued use of tobacco products, but this continued use is necessary to pay out existing claims. Class members and the Provinces/Territories therefore rely on the FTH Stakeholders' future use of tobacco products to fund their existing claims at the expense of the health, well-being and longevity of the FTH Stakeholders. If it is this inherent conflict that has resulted in the exclusion of reduction and prevention measures from the mandate of the Cy-près Foundation, there are very serious procedural and substantive concerns that impact the fairness and reasonableness of the Plans. This would be a very important factor to be considered by the Court.

9. Simply put, if this Court is truly on the horns of a dilemma, it should have the relevant evidence, information and positions to allow it to determine whether the Plans are fair and reasonable despite the exclusion of reduction and prevention measures. The Court would then be in a position to make a fully informed decision on what choice to make.

C. The Court Can Modify the Cy-près Foundation's Mandate

10. Just as the Monitors request this Court to exercise its equitable jurisdiction and statutory powers to accept an 11th hour amendment to the CCAA Plans, Heart & Stroke

emphasises that this Court has the jurisdiction to cure the limited mandate of the Cy-près Foundation.

11. As previously advanced by Heart & Stroke at the Sanction Hearing, this Court may exercise its inherent equitable jurisdiction in this regard. The Court is also specifically empowered to amend the scope of the Cy-près Foundation under s. 6(2) of the CCAA which states:

Court may order amendment

6(2) If a court sanctions a compromise or arrangement, it may order that the debtor’s **constating instrument** be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.² [emphasis added]

12. There is limited jurisprudence interpreting s. 6(2) and the scope of “constating instrument” therein and the CCAA does not define this term. However, “constate” is commonly understood to mean “to establish”³ and “instrument” is defined broadly in *Black’s Law Dictionary, 12th edition*:

Instrument 1. A written legal document that defines rights, duties, entitlements, or liabilities, such as a statute, contract, will, promissory note, or share certificate.⁴

13. An ‘instrument’ is also generally understood to “embrace contracts, deeds, statutes, wills, Orders in Council, orders, warrants, schemes, letters patent, rules, regulations, by-laws...”.⁵

² CCAA, s. 6(2).

³ *The Oxford English Dictionary*, 2025, s.v. “constate”.

⁴ *Black’s Law Dictionary*, 12th ed, s.v. “instrument”.

⁵ Edward Beal, *Cardinal Rules of Legal Interpretation* 55 (A.E. Randall ed., 3d ed. 1924)

14. Here, the Terms of Reference for the Cy-Près Foundation becomes a “constating instrument” of the debtors on a go-forward basis because it is a legal document that defines rights and duties for the Tobacco Companies as they emerge from these proceedings. The Court therefore has the jurisdiction under s. 6(2) of the CCAA to amend s. 9(3) of the CCAA Plans to ensure it is fair and reasonable at the time of sanctioning.

15. This Court may also rely on its equitable jurisdiction to amend the Plans to include reduction and prevention measures in the Cy-près Foundations’ scope. Courts in CCAA proceedings have an inherent and equitable jurisdiction to advance the purposes of the CCAA.⁶ It is also recognized that CCAA courts will in some cases be called upon to assess the broader public interest engaged by aspects of a restructuring.⁷ On that basis, Heart & Stroke submits that this Court should exercise its equitable discretion to amend the CCAA Plans to include prevention and reduction measures in the mandate of the Cy-près Foundation.

D. Relief Requested

16. Based on the foregoing, Heart & Stroke objects to the Monitors’ Amendment Motions and requests either of the following relief:

- (a) Conditionally approve the CCAA Plans, with or without the Proposed Amendments, on the basis that the Cy-près Foundation mandate is revised to include reduction or prevention measures and if it is not for the

⁶ *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at [para 64](#) [*Century Services*].

⁷ *Century Services* at [para 60](#).

Court to be provided with evidence explaining who objects to the inclusion of these measures within the mandate of the Foundation and why; or

- (b) Directly amend the CCAA Plans to include prevention and reduction measures within the scope of the Cy-près Foundation pursuant to s. 6(2) of the CCAA or this Court's inherent equitable jurisdiction.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of March 2025.



Tyr LLP

488 Wellington Street West
Suite 300-302
Toronto, ON M5V 1E3
Fax: 416-987-2370

James Bunting (LSO# 48244K)

Email: jbunting@tyrllp.com

Tel: 647.519.6607

Sam Cotton (LSO# 84324T)

Email: scotton@tyrllp.com

Tel: 613.862.9264

Lawyers for the Heart and Stroke
Foundation of Canada

SCHEDULE “A”
LIST OF AUTHORITIES

- 1 *Century Services Inc. v. Canada (Attorney General)*, [2010 SCC 60](#)

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY-LAWS

Companies’ Creditors Arrangement Act (R.S.C., 1985, c. C-36)

Court may order amendment

6(2) If a court sanctions a compromise or arrangement, it may order that the debtor’s constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

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ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Applicants

**COMMON SERVICE LIST
(as of February 26, 2025)**

TO:	<p>THORNTON GROUT FINNIGAN LLP 100 Wellington Street West, Suite 3200 TD West Tower, Toronto-Dominion Centre Toronto, ON M5K 1K7 Fax: 416-304-1313</p> <p>Robert I. Thornton Tel: 416-304-0560 Email: rthornton@tgf.ca</p> <p>Leanne M. Williams Tel: 416-304-0060 Email: lwilliams@tgf.ca</p> <p>Rachel A. Nicholson Tel: 416-304-1153 Email: rnicholson@tgf.ca</p>
------------	--

* For any additions or questions, please contact Nancy Thompson at nancy.thompson@blakes.com

	<p>Mitchell W. Grossell Tel: 416-304-7978 Email: mgrossell@tgf.ca</p> <p>John L. Finnigan Tel: 416-304-0558 Email: jfinnigan@tgf.ca</p> <p>Rebekah O'Hare Tel: 416-307-2423 Email: rohare@tgf.ca</p> <p>Rudrakshi Chakrabarti Tel: 416-307-2425 Email: rchakrabarti@tgf.ca</p> <p>Lawyers for JTI-Macdonald Corp.</p>
<p>AND TO:</p>	<p>DELOITTE RESTRUCTURING INC. Bay Adelaide East 8 Adelaide Street West Suite 200 Toronto, ON M5H 0A9 Fax: 416-601-6690</p> <p>Paul Casey Tel: 416-775-7172 Email: paucasey@deloitte.ca</p> <p>Warren Leung Tel: 416-874-4461 Email: waleung@deloitte.ca</p> <p>Jean-Francois Nadon Tel: 514-390-0059 Email: jnadon@deloitte.ca</p> <p>Phil Reynolds Tel: 416-956-9200 Email: philreynolds@deloitte.ca</p> <p>The Monitor of JTI-Macdonald Corp.</p>

AND TO:	<p>BLAKE, CASSELS & GRAYDON LLP 199 Bay Street Suite 4000, Commerce Court West Toronto, ON M5L 1A9 Fax: 416-863-2653</p> <p>Pamela Huff Tel: 416-863-2958 Email: pamela.huff@blakes.com</p> <p>Linc Rogers Tel: 416-863-4168 Email: linc.rogers@blakes.com</p> <p>Jake Harris Tel: 416-863-2523 Email: jake.harris@blakes.com</p> <p>Nancy Thompson, Law Clerk Tel: 416-863-2437 Email: nancy.thompson@blakes.com</p> <p>Lawyers for Deloitte Restructuring Inc., in its capacity as Monitor of JTI-Macdonald Corp.</p>
AND TO:	<p>MILLER THOMSON LLP Scotia Plaza 40 King Street West, Suite 5800 Toronto, ON M5H 3S1</p> <p>Craig A. Mills Tel: 416-595-8596 Email: cmills@millerthomson.com</p> <p>Lawyers for North Atlantic Operating Company, Inc.</p>
AND TO:	<p>MILLER THOMSON LLP 1000, rue De La Gauchetière Ouest, bureau 3700 Montreal, QC H3B 4W5</p> <p>Hubert Sibre Tel: 514-879-4088 Email: hsibre@millerthomson.com</p> <p>Lawyers for AIG Insurance Canada</p>

AND TO:	BLUETREE ADVISORS INC. First Canada Place 100 King Street West Suite 5600 Toronto, ON M5X 1C9 William E. Aziz Tel: 416-575-2200 Email: baziz@bluetreadvisors.com Chief Restructuring Officer of JTI-Macdonald Corp.
AND TO:	STIKEMAN ELLIOTT LLP Commerce Court West 199 Bay Street, Suite 5300 Toronto, ON M5L 1B9 Fax: 416-947-0866 David R. Byers Tel: 416-869-5697 Email: dbyers@stikeman.com Maria Konyukhova Tel: 416-869-5230 Email: mkonyukhova@stikeman.com Lesley Mercer Tel: 416-869-6859 Email: lmercerc@stikeman.com Lawyers for British American Tobacco p.l.c., B.A.T. Industries p.l.c. and British American Tobacco (Investments) Limited
AND TO:	OSLER, HOSKIN & HARCOURT LLP 100 King Street West 1 First Canadian Place Suite 6200, P.O. Box 50 Toronto, ON M5X 1B8 Fax: 416-862-6666 Deborah Glendinning Tel: 416-862-4714 Email: dglendinning@osler.com Marc Wasserman Tel: 416-862-4908 Email: mwasserman@osler.com

	<p>John A. MacDonald Tel: 416-862-5672 Email: jmacdonald@osler.com</p> <p>Michael De Lellis Tel: 416-862-5997 Email: mdelellis@osler.com</p> <p>Craig Lockwood Tel: 416-862-5988 Email: clockwood@osler.com</p> <p>Marleigh Dick Tel: 416-862-4725 Email: mdick@osler.com</p> <p>Martino Calvaruso Tel: 416-862-6665 Email: mcalvaruso@osler.com</p> <p>Lawyers for Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited</p>
<p>AND TO:</p>	<p>DAVIES WARD PHILLIPS & VINEBERG LLP 155 Wellington Street West Toronto, ON M5V 3J7</p> <p>Natasha MacParland Tel: 416-863-5567 Email: nmacparland@dwpv.com</p> <p>Chanakya Sethi Tel: 416-863-5516 Email: csethi@dwpv.com</p> <p>Rui Gao Tel: 416-367-7613 Email: rgao@dwpv.com</p> <p>Benjamin Jarvis Tel: 514-807-0621 Email: bjarvis@dwpv.com</p> <p>Robert Nicholls Email: rnicholls@dwpv.com</p>

	<p>Anisha Visvanatha Tel: 416-367-7480 Email: avisvanatha@dwpv.com</p> <p>Ashley Perley, Law Clerk Tel: 416-566-0463 Email: aperley@dwpv.com</p> <p>Lawyers for FTI Consulting Canada Inc., in its capacity as Monitor of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited</p>
AND TO:	<p>MORGAN, LEWIS & BOCKIUS LLP 101 Park Avenue New York, NY 10178-0060</p> <p>Jennifer Feldsher Tel: 212-309-6017 Email: jennifer.feldser@morganlewis.com</p> <p>MORGAN, LEWIS & BOCKIUS LLP One State Street Hartford, CT 06103-3178</p> <p>David K. Shim Tel: 860-240-2580 Email: david.shim@morganlewis.com</p> <p>US Counsel for FTI Consulting Canada Inc., in its capacity as Monitor of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited</p>
AND TO:	<p>FTI CONSULTING CANADA INC. 79 Wellington Street West Suite 2010, P.O. Box 104 Toronto, ON M4K 1G8 Fax: 416-649-8101</p> <p>Greg Watson Tel: 416-649-8077 Email: greg.watson@fticonsulting.com</p> <p>Paul Bishop Tel: 416-649-8053 Email: paul.bishop@fticonsulting.com</p> <p>Jeffrey Rosenberg Tel: 416-649-8073 Email: jeffrey.rosenberg@fticonsulting.com</p>

	<p>Kamran Hamidi Tel: 416-649-8068 Email: kamran.hamidi@fticonsulting.com</p> <p>Carter Wood Tel: 416-844-9169 Email: carter.wood@fticonsulting.com</p> <p>Monitor of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited</p>
AND TO:	<p>MCCARTHY TÉTRAULT LLP 66 Wellington Street West Suite 5300 TD Bank Tower, Box 48 Toronto, ON M5K 1E6 Fax: 416-868-0673</p> <p>James Gage Tel: 416-601-7539 Email: jgage@mccarthy.ca</p> <p>Heather Meredith Tel: 416-601-8342 Email: hmeredith@mccarthy.ca</p> <p>Paul Steep Tel: 416-601-7998 Email: psteep@mccarthy.ca</p> <p>Trevor Courtis Tel: 416-601-7643 Email: tcourtis@mccarthy.ca</p> <p>Deborah Templer Tel: 416-601-8421 Email: dtempler@mccarthy.ca</p> <p>Lawyers for Rothmans, Benson & Hedges, Inc.</p>
AND TO:	<p>LAPOINTE ROSENSTEIN MARCHAND MELANÇON LLP 1 Place Ville Marie, Suite 1300 Montreal, QC H3B 0E6</p>

	<p>Mireille Fontaine Tel: 514-925-6342 Email: mireille.fontaine@lrmm.com</p> <p>Lawyers for the Top Tube Company</p>
AND TO:	<p>TORYS LLP 79 Wellington St. West, Suite 3000 Box 270, TD Centre Toronto, ON M5K 1N2 Fax: 416-865-7380</p> <p>Scott Bomhof Tel: 416-865-7370 Email: sbomhof@torys.com</p> <p>Adam Slavens Tel: 416-865-7333 Email: aslavens@torys.com</p> <p>Alec Angle Tel: 416-865-7534 Email: aangle@torys.com</p> <p>Lawyers for JT Canada LLC Inc. and PricewaterhouseCoopers Inc., in its capacity as receiver of JTI-Macdonald TM Corp.</p>
AND TO:	<p>PRICEWATERHOUSECOOPERS PwC Tower 18 York St., Suite 2600 Toronto, ON M5J 0B2 Fax: 416-814-3210</p> <p>Mica Arlette Tel: 416-814-5834 Email: mica.arlette@pwc.com</p> <p>Tyler Ray Email: tyler.ray@pwc.com</p> <p>Receiver and Manager of JTI-Macdonald TM Corp.</p>
AND TO:	<p>BENNETT JONES 100 King Street West Suite 3400 Toronto, ON M5X 1A4 Fax: 416-863-1716</p>

	<p>Mike Eizenga Tel: 416-777-4879 Email: eizengam@bennettjones.com</p> <p>Sean Zweig Tel: 416-777-6254 Email: zweigs@bennettjones.com</p> <p>Jesse Mighton Tel: 416-777-6255 Email: mightonj@bennettjones.com</p> <p>Preet Gill Tel: 416-777-6513 gillp@bennettjones.com</p> <p>SISKINDS 275 Dundas Street, Unit 1 London, ON N6B 3L1</p> <p>Andre I.G. Michael Tel: 519-660-7860 Email: andre.michael@siskinds.com</p> <p>James Virtue Tel: 519-660-7898 Email: jim.virtue@siskinds.com</p> <p>Jeffrey Leon Email: jsleon1591@gmail.com</p> <p>Michael Peerless Email: mike.peerless@peerlesslaw.com</p> <p>Lawyers for the Province of British Columbia, Province of Manitoba, Province of New Brunswick, Province of Nova Scotia, Province of Prince Edward Island, Province of Saskatchewan, Government of Northwest Territories, Government of Nunavut, and Government of Yukon in their capacities as plaintiffs in the HCCR Legislation claims</p>
AND TO:	MINISTRY OF THE ATTORNEY GENERAL Legal Services Branch 1001 Douglas Street Victoria, BC V8W 2C5 Fax: 250-356-6730

	<p>Peter R. Lawless Tel: 250-356-8432 Email: peter.lawless@gov.bc.ca</p>
AND TO:	<p>KSV ADVISORY INC. 150 King Street West Suite 2308, Box 42 Toronto, ON M5H 1J9 Fax: 416-932-6266</p> <p>Noah Goldstein Tel: 416-932-6207 Email: ngoldstein@ksvadvisory.com</p> <p>Bobby Kofman Email: bkofman@ksvadvisory.com</p> <p>Jordan Wong Tel: 416-932-6025 Email: jwong@ksvadvisory.com</p> <p>Financial Advisory for the Provinces of British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan, in their capacities as plaintiffs in the HCCR Legislation claims</p>
AND TO:	<p>MINISTRY OF THE ATTORNEY GENERAL Crown Law Office - Civil 720 Bay Street, 8th Floor Toronto, ON M7A 2S9 Fax: 416-326-4181</p> <p>Jacqueline Wall Tel: 416-434-4454 Email: jacqueline.wall@ontario.ca</p> <p>Lawyers for His Majesty the King in Right of Ontario</p>
AND TO:	<p>FISHMAN FLANZ MELAND PAQUIN LLP Place du Canada 1010 de la Gauchetière St. West, Suite 1600 Montreal, QC H3B 2N2</p> <p>Avram Fishman Email: afishman@ffmp.ca</p>

Mark E. Meland

Tel: 514-932-4100
Email: mmeland@ffmp.ca

Margo R. Siminovitch

Email: msiminovitch@ffmp.ca

Jason Dolman

Email: jdolman@ffmp.ca

Nicolas Brochu

Email: nbrochu@ffmp.ca

Tina Silverstein

Email: tsilverstein@ffmp.ca

CHAITONS LLP

5000 Yonge Street 10th Floor
Toronto, ON M2N 7E9

Harvey Chaiton

Tel: 416-218-1129
Email: harvey@chaitons.com

George Benchetrit

Tel: 416-218-1141
Email: george@chaitons.com

TRUDEL JOHNSTON & LESPÉRANCE

750, Cote de la Place d'Armes, Bureau 90
Montréal, QC H2Y 2X8
Fax: 514-871-8800

Philippe Trudel

Tel: 514-871-8385, x203
Email: philippe@tjl.quebec

Bruce Johnston

Tel: 514-871-8385, x202
Email: bruce@tjl.quebec

André Lespérance

Tel: 514-871-8805
Email: andre@tjl.quebec

	<p>KUGLER KANDESTIN s.e.n.c.r.l., LLP 1 Place Ville-Marie, Suite 1170 Montréal, QC H3B 2A7</p> <p>Gordon Kulger Tel: 514-360-2686 Email: gkugler@kklex.com</p> <p>Robert Kugler Tel: 514-360-8882 Email: rkugler@kklex.com</p> <p>Lawyers for Conseil québécois sur le tabac et la santé, Jean-Yves Blais and Cécilia Létourneau (Quebec Class Action Plaintiffs)</p>
AND TO:	<p>KLEIN LAWYERS LLP 100 King Street West, Suite 5600 Toronto, ON M5X 1C9</p> <p>Douglas Lennox Tel: 416-506-1944 Email: dlennox@callkleinlawyers.com</p> <p>KLEIN LAWYERS LLP 400 – 1385 West 8th Avenue Vancouver, BC V6H 3V9</p> <p>David A. Klein Email: dklein@callkleinlawyers.com</p> <p>Nicola Hartigan Tel: 604-874-7171 Email: nhartigan@callkleinlawyers.com</p> <p>Lawyers for the representative plaintiff, Kenneth Knight, in the certified British Columbia class action, <i>Knight v. Imperial Tobacco Canada Ltd.</i>, Supreme Court of British Columbia, Vancouver Registry No. L031300</p>
AND TO:	<p>JENSEN SHAWA SOLOMON DUGID HAWKES LLP 800, 304 – 8 Avenue SW Calgary, AB T2P 1C2 Fax: 403-571-1528</p> <p>Carsten Jensen, QC Tel: 403-571-1526 Email: jensenc@jssbarristers.ca</p>

	<p>Sabri Shawa, QC Tel: 403-571-1527 Email: shawas@jssbarristers.ca</p> <p>Stacy Petriuk Tel: 403-571-1523 Email: petriuks@jssbarristers.ca</p> <p>PALIARE ROLAND ROSENBERG ROTHSTEIN LLP 155 Wellington Street West, 35th Floor Toronto, ON M5V 3H1</p> <p>Kenneth T. Rosenberg Email: ken.rosenberg@paliareroland.com</p> <p>Lilly Harmer Email: lily.harmer@paliareroland.com</p> <p>Massimo (Max) Starnino Email: max.starnino@paliareroland.com</p> <p>CUMING & GILLESPIE 4200, 825 – 8th Avenue SW Calgary, AB T2P 1G1</p> <p>Laura M. Comfort Email: laura@cglaw.ca</p> <p>Lawyers for His Majesty the King in Right of Alberta</p>
<p>AND TO:</p>	<p>HIS MAJESTY THE KING IN RIGHT OF ALBERTA 9th Fl. Peace Hills trust Tower 10011 – 109th Street Edmonton, AB T5J 3S8</p> <p>Doreen Mueller Email: doreen.mueller@gov.ab.ca</p>
<p>AND TO:</p>	<p>STEWART MCKELVEY 1741 Lower Water Street, Suite 600 Halifax, NS B3J 0J2 Fax: 902-420-1417</p> <p>David Wedlake Tel: 902-444-1705 Email: dwedlake@stewartmckelvey.com</p>

	<p>Eryka Gregory Tel: 902-44401747 Email: egregory@stewartmckelvey.com</p> <p>Lawyers for Sobeys Capital Incorporated</p>
AND TO:	<p>CASSELS BROCK & BLACKWELL LLP Suite 3200, Bay Adelaide Centre – North Tower 40 Temperance Street Toronto, ON M5H 0B4</p> <p>Shayne Kukulowicz Tel: 416-860-6463 Fax: 416-640-3176 Email: skukulowicz@cassels.com</p> <p>Joseph Bellissimo Tel: 416-860-6572 Fax: 416-642-7150 Email: jbellissimo@cassels.com</p> <p>Monique Sassi Tel: 416-860-6886 Fax: 416-640-3005 Email: msassi@cassels.com</p> <p>Lawyers for Ernst & Young Inc, in its capacity as court-appointed monitor of Rothmans, Benson & Hedges, Inc.</p>
AND TO:	<p>ERNST & YOUNG INC. Ernst & Young Tower 100 Adelaide Street West P.O. Box 1 Toronto, ON M5H 0B3</p> <p>Murray A. McDonald Tel: 416-943-3016 Email: murray.a.mcdonald@parthenon.ey.com</p> <p>Brent Beekenkamp Tel: 416-943-2652 Email: brent.r.beekenkamp@parthenon.ey.com</p> <p>Edmund Yau Tel: 416-943-2177 Email: edmund.yau@parthenon.ey.com</p>

	<p>Matt Kaplan Tel: 416-932-6155 Email: matt.kaplan@parthenon.ey.com</p> <p>Monitor of Rothmans, Benson & Hedges, Inc.</p>
AND TO:	<p>GOWLING WLG (CANADA) LLP 1 First Canadian Place 100 King Street West, Suite 1600 Toronto, ON M5X 1G5 Fax: 416-862-7661</p> <p>Clifton Prophet Tel: 416-862-3509 Email: clifton.prophet@gowlingwlg.com</p> <p>Steven Sofer Tel: 416-369-7240 Email: steven.sofer@gowlingwlg.com</p> <p>Nicholas Kluge Tel: 416-369-4610 Email: nicholas.kluge@gowlingwlg.com</p> <p>Lawyers for Philip Morris International Inc.</p>
AND TO:	<p>PALIARE ROLAND ROSENBERG ROTHSTEIN LLP 155 Wellington Street West, 35th Floor Toronto, ON M5V 3H1</p> <p>Kenneth T. Rosenberg Email: ken.rosenberg@paliareroland.com</p> <p>Lilly Harmer Email: lily.harmer@paliareroland.com</p> <p>Massimo (Max) Starnino Email: max.starnino@paliareroland.com</p> <p>ROEBOTHAN MCKAY MARSHALL Paramount Building 34 Harvey Road, 5th Floor St. John's NL A1C 3Y7 Fax: 709-753-5221</p>

	<p>Glenda Best Tel: 705-576-2255 Email: gbest@wrmlaw.com</p> <p>HUMPHREY FARRINGTON McCLAIN, P.C. 221 West Lexington, Suite 400 Independence, MO 64050</p> <p>Kenneth B. McClain Tel: 816-836-5050 Email: kbm@hfmlegal.com</p> <p>Lawyers for His Majesty the King in Right of Newfoundland</p>
AND TO:	<p>WESTROCK COMPANY OF CANADA CORP. 15400 Sherbrooke Street East Montreal, QC H1A 3S2</p> <p>Dean Jones Tel: 514-642-9251 Email: dean.jones@westrock.com</p>
AND TO	<p>FINANCIAL SERVICES REGULATORY AUTHORITY OF ONTARIO (FSRA) Legal and Enforcement Division 25 Sheppard Avenue West, Suite 100 Toronto, Ontario M2N 6S6</p> <p>Michael Spagnolo Legal Counsel Tel: 647-801-8921 Email: michael.spagnolo@fsrao.ca</p>
AND TO:	<p>KAPLAN LAW 393 University Avenue, Suite 2000 Toronto, ON M5G 1E6</p> <p>Ari Kaplan Tel: 416-565-4656 Email: ari@kaplanlaw.ca</p> <p>Counsel to the Former Genstar U.S. Retiree Group Committee</p>

AND TO:	<p>McMILLAN LLP Brookfield Place 181 Bay Street, Suite 4400 Toronto, ON M5J 2T3</p> <p>Wael Rostom Tel: 416-865-7790 Email: wael.rostom@mcmillan.ca</p> <p>Emile Catimel-Marchand Tel: 514-987-5031 Email: emile.catimel-marchand@mcmillan.ca</p> <p>Lawyers for The Bank of Nova Scotia</p>
AND TO	<p>MERCHANT LAW GROUP LLP c/o #400 – 333 Adelaide St. West Toronto, ON M5V 1R5 Fax: 613-366-2793</p> <p>Evatt Merchant, QC Tel: 613-366-2795 Email: emerchant@merchantlaw.com</p> <p>Lawyers for the Class Action Plaintiffs (MLG)</p>
AND TO:	<p>LABSTAT INTERNATIONAL INC. 262 Manitou Drive Kitchener, ON N2C 1L3</p> <p>Andrea Echeverria Tel: 519-748-5409 Email: aecheverria@labstat.com</p>
AND TO:	<p>CERNOS FLAHERTY SVONKIN LLP 220 Bay Street, Suite 700 Toronto, ON M5J 2W4 Fax: 647-725-5440</p> <p>Patrick Flaherty Tel: 416-855-0403 Email: pflaherty@cfscounsel.com</p> <p>Bryan D. McLeese Tel: 416-855-0414 Email: bmcleese@cfscounsel.com</p>

	<p>Clair Wortsman Email: cwortsman@cfscounsel.com</p> <p>STOCKWOODS LLP 77 King Street West, Suite 4130 TD North Tower, P.O. Box 140, TD Centre Toronto, ON M5K 1H1 Fax: 416-593-9345</p> <p>Brian Gover Tel: 416-593-2489 Email: briang@stockwoods.ca</p> <p>Justin Safayeni Tel: 416-593-3494 Email: justins@stockwoods.ca</p> <p>Lawyers for R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International Inc.</p>
AND TO:	<p>COZEN O'CONNOR LLP Bay Adelaide Centre – North Tower 40 Temperance Street, Suite 2700 Toronto, Ontario M5H 0B4</p> <p>Steven Weisz Tel: 647-417-5334 Fax: 416-361-1405 Email: sweisz@cozen.com</p> <p>INCH HAMMOND PROFESSIONAL CORPORATION 1 King Street West, Suite 500 Hamilton, ON L8P 4X8</p> <p>John F.C. Hammond Tel: 905-525-4481 Email: hammond@inchlaw.com</p> <p>Lawyer for Grand River Enterprises Six Nations Ltd.</p>
AND TO:	<p>STROSBERG WINGFIELD SASSO LLP 1561 Ouellette Avenue Windsor, ON M8X 1K5 Fax: 866-316-5308</p>

	<p>William V. Sasso Tel: 519-561-6222 Email: william.sasso@swo litigation.com</p> <p>David Robins Tel: 519-561-6215 Email: david.robins@swo litigation.com</p> <p>Lawyers for The Ontario Flue-Cured Tobacco Growers' Marketing Board, plaintiffs in Ontario Superior Court of Justice Court File No. 1056/10CP (Class Proceedings)</p>
AND TO:	<p>ATTORNEY GENERAL OF CANADA Department of Justice Canada Ontario Regional Office, Tax Law Section 120 Adelaide Street West, Suite 400 Toronto, ON M5H 1T1 Fax: 416-973-0810</p> <p>Edward Park Tel: 647-292-9368 Email: edward.park@justice.gc.ca</p> <p>Kevin Dias Email: kevin.dias@justice.gc.ca</p> <p>Lawyers for the Minister of National Revenue</p>
AND TO:	<p>LAX O'SULLIVAN LISUS GOTTLIEB LLP Suite 2750, 145 King Street West Toronto, ON M5H 1J8</p> <p>Jonathan Lisus Tel: 416-598-7873 Email: jlisus@lolg.ca</p> <p>Matthew Gottlieb Tel: 416-644-5353 Email: mgottlieb@lolg.ca</p> <p>Nadia Champion Tel: 416-642-3134 Email: ncampion@lolg.ca</p>

	<p>Andrew Winton Tel: 416-644-5342 Email: awinton@lolg.ca</p> <p>Lawyers for the Court-Appointed Mediator</p>
AND TO:	<p>FOGLER, RUBINOFF LLP Suite 3000, P.O. Box 95 Toronto-Dominion Centre 77 King Street West Toronto, ON M5K 1G8 Fax: 416-941-8852</p> <p>Vern W. DaRe Tel: 416-941-8842 Email: vdare@foglers.com</p> <p>CANADIAN CANCER SOCIETY 116 Albert Street, Suite 500 Ottawa, ON K1P 5G3 Fax: 613-565-2278</p> <p>Robert Cunningham Tel: 613-762-4624 Email: rob.cunningham@cancer.ca</p> <p>Lawyers for Canadian Cancer Society</p>
AND TO:	<p>BLANEY MCMURTRY LLP 2 Queen Street East, Suite 1500 Toronto, ON M5C 3G5</p> <p>David R. Mackenzie Tel: 416-597-4890 Email: dmackenzie@blaney.com</p> <p>David Ullmann Tel: 416-596-4289 Email: dullmann@blaney.com</p> <p>Alexandra Teodorescu Tel: 416-596-4279 Email: ateodorescu@blaney.com</p> <p>Lawyers for La Nordique Compagnie D'Assurance du Canada</p>

AND TO:	ST-PIERRE LÉTOURNEAU 2600, boulevard Laurier, porte760 Quebec, QC G1V 4T3 Marc-André Maltais Tel: 418-657-8702, ext. 3107 Email: marc-andre.maltais1@retraitequebec.gouv.qc.ca Lawyers for Retraite Québec
AND TO:	LECKER & ASSOCIATES 4789 Yonge Street, Suite 514 Toronto, ON M2N 0G3 Kimberley Sebag Email: ksebag@leckerslaw.com Lawyer for Imperial Tobacco claimant
AND TO:	McMILLAN LLP 181 Bay Street, Suite 4400 Toronto, ON M5J 2T3 Fax: 416-865-7048 Brett Harrison Tel: 416-865-7932 Email: brett.harrison@mcmillan.ca Tushara Weerasooriya Tel: 416-865-7890 Email: tushara.weerasooriya@mcmillan.ca Guneev Bhinder Tel: 416-307-4067 Email: guneev.bhinder@mcmillan.ca Lawyers for the Province of Quebec
AND TO:	ATTORNEY GENERAL OF CANADA Department of Justice Canada Ontario Regional Office, L.E.A.D. 120 Adelaide Street West, Suite 400 Toronto, ON M5H 1T1 Victor Paolone Tel: 647-256-7548 Email: victor.paolone@justice.gc.ca

AND TO:	<p>McMILLAN LLP Brookfield Place 181 Bay Street, Suite 4400 Toronto, ON M5J 2T3 Fax: 416-865-7048</p> <p>Stephen Brown-Okruhlik Tel: 416-865-7043 Email: stephen.brown-okruhlik@mcmillan.ca</p> <p>Lawyers for Citibank Canada</p>
AND TO:	<p>BORDEN LADNER GERVAIS LLP Bay Adelaide Centre, East Tower 22 Adelaide Street West, Suite 3400 Toronto, ON M5H 4E3 Fax: 416-367-6749</p> <p>Alex MacFarlane Tel: 416-367-6305 Email: amacfarlane@blg.com</p> <p>James W. MacLellan Tel: 416-367-6592 Email: jmaclellan@blg.com</p> <p>Bevan Brooksbank Tel: 416-367-6604 Email: bbrooksbank@blg.com</p> <p>Lawyers for Chubb Insurance Company of Canada</p>
AND TO:	<p>INDUSTRY CANADA, LEGAL SERVICES 235 Queen Street, 8th Floor, East Tower Ottawa, ON K1A 0H5</p> <p>Adrian Scotchmer Tel: 613-720-6142 Email: adrian.scotchmer@justice.gc.ca</p>
AND TO:	<p>ROCHON GENOVA LLP Barristers • Avocats 121 Richmond Street West, Suite 900 Toronto, ON M5H 2K1 Fax: 416-363-0263</p>

	<p>Joel P. Rochon Tel: 416-363-1867 x222 Email: jrochon@rochongenova.com</p> <p>Lawyers for Suzanne Jacklin, Barbara Bourassa on behalf of the Estate of Mitchell David Bourassa, Roderick Dennis McDermid, Linda Dorion, Thelma Adams, Ben Sample and Deborah Kunta, in their capacity as Representative Plaintiffs in certain proposed class proceedings</p>
AND TO:	<p>WAGNERS 1869 Upper Water Street, Suite PH301 3rd Floor, Pontac House, Historic Properties Halifax, NS B3J 1S9 Fax: 902-422-1233</p> <p>Raymond F. Wagner, K.C. Tel: 902-425-7330 Email: raywagner@wagners.co</p> <p>Kate Boyle Tel: 902-425-7330 Email: kboyle@wagners.co</p> <p>Maddy Carter Tel: 902-425-7330 Email: mcarter@wagners.co</p> <p>Lauren Harper Tel: 905-425-7330 Email: lharper@wagners.co</p> <p>Representative Counsel</p>
AND TO:	<p>REVENU QUÉBEC 1600, boul. René-Lévesque Ouest Secteur R23DGR Montréal, QC H3H 2V2</p> <p>Alain Casavant Email: alain.casavant@revenuquebec.ca</p>
AND TO:	<p>PELLETIER D'AMOURS 1, Complexe Desjardins Tour Sud, 12e étage Montreal, QC H5B 1B1</p>

	<p>Geneviève Chabot Email: genevieve.chabot@dgag.ca</p> <p>Lawyers for Desjardins Assurances</p>
AND TO:	<p>SMART & BIGGAR / FETHERSTONHAUGH 55 Metcalfe Street, Suite 1000 P.O. Box 2999, Station D Ottawa, ON K1P 5Y6</p> <p>Kohji Suzuki Email: ksuzuki@smartbiggar.ca</p> <p>Francois Guay Email: fguay@smartbiggar.ca</p> <p>Christian Bolduc Email: cbolduc@smartbiggar.ca</p> <p>Melanie Powers Email: mlpowers@smartbiggar.ca</p> <p>Matthew Burt Email: meburt@smartbiggar.ca</p> <p>Lawyers for, and creditor of, Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited</p>
AND TO:	<p>KORNBLUM LAW PROFESSIONAL CORPORATION 508 Lawrence Avenue West Toronto, ON M6A 1A1</p> <p>Attention: Susanne Macneall Email: s.macneall@kornblum.ca</p> <p>Lawyers for Mr. Girsh Nair</p>
AND TO:	<p>TYR LLP 488 Wellington Street West, Suite 300-302 Toronto, ON M5V 1E3</p> <p>James Bunting Tel: 647-519-6607 Email: jbunting@tyrllp.com</p>

	<p>Sam Cotton Tel: 613-862-9264 Email: scotton@tyrllp.com</p> <p>Lawyers for the Heart and Stroke Foundation</p>
AND TO:	<p>HEART AND STROKE FOUNDATION 2300 Yonge Street Toronto, ON M4P 1E4</p> <p>Emily Sternberg Email: emily.sternberg@heartandstroke.ca</p>
AND TO:	<p>TYR LLP 488 Wellington Street West, Suite 300-302 Toronto, ON M5V 1E3</p> <p>James Doris Tel: 647-519-5840 Email: jdoris@tyrllp.com</p> <p>Lawyers for the U.S. Department of Justice</p>
AND TO:	<p>GOODMANS LLP Bay Adelaide Centre – West Tower 333 Bay Street, Suite 3400 Toronto, ON M5H 2S7 Tel: 416-979-2211 Fax: 416-979-1234</p> <p>Gale Rubenstein Email: grubenstein@goodmans.ca</p> <p>Peter Ruby Email: pruby@goodmans.ca</p> <p>Joseph Pasquariello Email: jpasquariello@goodmans.ca</p> <p>Lawyers for PricewaterhouseCoopers Inc. as Liquidator of Northumberland General Insurance Company</p>

<p>Courtesy Copy To:</p>	<p>DEBTWIRE 1501 Broadway, 8th Floor New York, NY 10036</p> <p>John Bringardner Tel: 646-378-3143 Email: john.bringardner@acuris.com</p> <p>Global Legal Editor</p>
-------------------------------------	--

Email Service List

rthornton@tgf.ca; lwilliams@tgf.ca; rnicholson@tgf.ca; mgrossell@tgf.ca; jfinnigan@tgf.ca; rohare@tgf.ca; rchakrabarti@tgf.ca; paucasey@deloitte.ca; waleung@deloitte.ca; jnadon@deloitte.ca; philreynolds@deloitte.ca; pamela.huff@blakes.com; linc.rogers@blakes.com; jake.harris@blakes.com; nancy.thompson@blakes.com; cmills@millერთhompson.com; hsibre@millერთhompson.com; baziz@bluetreadadvisors.com; dbyers@stikeman.com; mkonyukhova@stikeman.com; lmercer@stikeman.com; dglendinning@osler.com; mwasserman@osler.com; jmacdonald@osler.com; mdelellis@osler.com; clockwood@osler.com; mdick@osler.com; mcalvaruso@osler.com; nmacparland@dwpv.com; csethi@dwpv.com; rgao@dwpv.com; bjarvis@dwpv.com; rnicholls@dwpv.com; avisvanatha@dwpv.com; aperley@dwpv.com; jennifer.feldsher@morganlewis.com; david.shim@morganlewis.com; greg.watson@fticonsulting.com; paul.bishop@fticonsulting.com; jeffrey.rosenberg@fticonsulting.com; kamran.hamidi@fticonsulting.com; carter.wood@fticonsulting.com; jgage@mccarthy.ca; hmeredith@mccarthy.ca; psteep@mccarthy.ca; tcourtis@mccarthy.ca; dtempler@mccarthy.ca; mireille.fontaine@lrm.com; sbomhof@torys.com; aslavens@torys.com; aangle@torys.com; mica.arlette@pwc.com; tyler.ray@pwc.com; eizengam@bennettjones.com; zweigs@bennettjones.com; mightonj@bennettjones.com; gillp@bennettjones.com; andre.michael@siskinds.com; jim.virtue@siskinds.com; jsleon1591@gmail.com; mike@peerlesslaw.com; peter.lawless@gov.bc.ca; ngoldstein@ksvadvisory.com; bkofman@ksvadvisory.com; jwong@ksvadvisory.com; jacqueline.wall@ontario.ca; afishman@ffmp.ca; mmeland@ffmp.ca; msiminovitch@ffmp.ca; jdolman@ffmp.ca; nbrochu@ffmp.ca; tsilverstein@ffmp.ca; harvey@chaitons.com; george@chaitons.com; philippe@tjl.quebec; bruce@tjl.quebec; andre@tjl.quebec; gkugler@kklex.com; rkugler@kklex.com; dlennox@callkleinlawyers.com; dklein@callkleinlawyers.com; nhartigan@callkleinlawyers.com; jensenc@jssbarristers.ca; shawas@jssbarristers.ca; petriuks@jssbarristers.ca; ken.rosenberg@paliareroland.com; lily.harmer@paliareroland.com; max.starnino@paliareroland.com; laura@cglaw.ca; doreen.mueller@gov.ab.ca; beatrice.loschiavo@paliareroland.com; natalia.botelho@paliareroland.com; michelle.jackson@paliareroland.com; dwedlake@stewartmckelvey.com; egregory@stewartmckelvey.com; skukulowicz@cassels.com; jbellissimo@cassels.com; msassi@cassels.com; ahoy@cassels.com; murray.a.mcdonald@parthenon.ey.com; brent.r.beekenkamp@parthenon.ey.com; edmund.yau@parthenon.ey.com; matt.kaplan@parthenon.ey.com; clifton.prophet@gowlingwlg.com; steven.sofer@gowlingwlg.com; nicholas.kluge@gowlingwlg.com; gbest@wrmmlaw.com; kbm@hfmlegal.com; dean.jones@westrock.com; michael.spagnolo@fsrao.ca; ari@kaplanlaw.ca; wael.rostom@mcmillan.ca; emile.catimel-marchand@mcmillan.ca; emerchant@merchantlaw.com; jtim.ccaa@merchantlaw.com; aecheverria@labstat.com; pflaherty@cfscounsel.com; bmcleese@cfscounsel.com; cwortsman@cfscounsel.com; briang@stockwoods.ca; justins@stockwoods.ca; sweisz@cozen.com; hammond@inchlaw.com; william.sasso@swslitigation.com; david.robins@swslitigation.com; edward.park@justice.gc.ca; kevin.dias@justice.gc.ca; jlisus@lolg.ca; mgottlieb@lolg.ca; ncampion@lolg.ca; awinton@lolg.ca; vdare@foglers.com; rob.cunningham@cancer.ca; dmackenzie@blaney.com;

* For any additions or questions, please contact Nancy Thompson at nancy.thompson@blakes.com

dullmann@blaney.com; ateodorescu@blaney.com; marc-andre.maltais1@retraitequebec.gouv.qc.ca; ksebag@leckerslaw.com; john.bringardner@acuris.com; brett.harrison@mcmillan.ca; tushara.weerasooriya@mcmillan.ca; guneev.bhinder@mcmillan.ca; victor.paolone@justice.gc.ca; stephen.brown-okruhlik@mcmillan.ca; amacfarlane@blg.com; jmaclellan@blg.com; bbrooksbank@blg.com; adrian.scotchmer@justice.gc.ca; jrochon@rochongenova.com; raywagner@wagners.co; mcarter@wagners.co; lharper@wagners.co; kboyle@wagners.co; alain.casavant@revenuquebec.ca; genevieve.chabot@dgag.ca; ksuzuki@smartbiggar.ca; fguay@smartbiggar.ca; cbolduc@smartbiggar.ca; mlpowers@smartbiggar.ca; meburt@smartbiggar.ca; s.macneall@kornblumlaw.ca; jbunting@tyrllp.com; scotton@tyrllp.com; emily.sternberg@heartandstroke.ca; jdoris@tyrllp.com; john.bringardner@acuris.com; grubenstein@goodmans.ca; pruby@goodmans.ca; jpasquariello@goodmans.ca;

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

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., IMPERIAL TOBACCO CANADA LIMITED
AND IMPERIAL TOBACCO COMPANY LIMITED, AND ROTHMANS, BENSON & HEDGES INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

RESPONDING FACTUM OF THE HEART AND STROKE
FOUNDATION OF CANADA

Tyr LLP
488 Wellington Street West
Suite 300-302
Toronto, ON M5V 1E3

James Bunting (LSO# 48244K)
Tel: 647.519.6607
Email: jbunting@tyrllp.com

Sam Cotton (LSO# 84324T)
Tel: 613.862.9264
Email: scotton@tyrllp.com

Lawyers for Heart & Stroke Foundation of Canada