

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERICAL 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.**

Applicant

FACTUM OF THE PROPOSED FUTURE TOBACCO HARM STAKEHOLDERS
(Motion for Leave to Bring a Motion to Appoint Representative Counsel for FTH
Stakeholders April 14, 2023)

March 31, 2023

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TO: THE COMMON SERVICE LIST
See Schedule "C" Attached

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PART I - OVERVIEW

1. This motion concerns the protection of a group of millions of individuals who will be directly impacted by the outcome of these proceedings. This group is either not currently represented at all, or is represented by counsel in an inherent conflict of interest. The central question on this motion is whether the Court should grant leave to hear a motion for the appointment of counsel to protect the rights and interests of this group, or instead refuse to even consider whether they should be represented due to alleged process/logistical issues raised by the tobacco companies' monitors (the "**Monitors**"). The Monitors' position prioritizes form, which can be managed, over substance.

2. Tyr LLP has been engaged by The Heart and Stroke Foundation of Canada ("**HSF**") to seek an order appointing Tyr as representative counsel for the Future Tobacco Harm Stakeholders ("**FTH Stakeholders**") in the within proceedings under the *Companies' Creditors Arrangement Act* ("**CCAA**") (the "**Proceedings**"). Pursuant to the direction of this Court dated February 14, 2023, the proposed FTH Stakeholders bring this motion seeking leave to bring a motion to appoint Tyr LLP as representative counsel.

3. The FTH Stakeholders are comprised of millions of Canadians who will purchase or consume tobacco products or be exposed to their use following the commencement of these Proceedings or any agreed claims bar date (the "**post-petition period**"). These individuals will be a central source by which any proposed plan of arrangement and compromise (a "**Proposed Plan**") is funded.¹

¹ It is clear that the applicants in these proceedings (the "**Tobacco Companies**") do not, and will not, have the funds on-hand to make a meaningful payment to all of the Claimants. Incontrovertibly, any Proposed Plan will rely upon the emergence of the Tobacco Companies from these proceedings and the continued sale of tobacco products to the FTH Stakeholders.

4. The interests and needs of the FTH Stakeholders are not being represented in these Proceedings, or in the on-going mediation process (the “**Mediation**”) before the Honourable W. Winkler, O.C., OOnt, Q.C. (the “**Mediator**”).

5. This is concerning because a Proposed Plan will be reliant upon the FTH Stakeholders becoming or continuing to be addicted to the Tobacco Companies’ products, and unable to stop purchasing them. It is the purchases of this addicted group of individuals that will generate substantial funds that will be used to pay the Tobacco Companies’ creditors, including class members and governments that have brought claims against the Companies (the “**Claimants**”). Put differently, the necessary funding of any plan will be built, at least in significant part, on the backs of the FTH Stakeholders and their dependency on the Tobacco Companies’ products.

6. Settlements of comparable litigation in the United States acknowledge the harm to individuals who are in circumstances analogous to the FTH Stakeholders by creating funds to support and facilitate drug prevention and cessation programs.² Any such funds or programs are essential to protecting the interests of the FTH Stakeholders, and to ensuring that the Canadian public views the Proposed Plan as effective, fair, and comprehensive. None of the current participants in the Mediation can fully, fairly and objectively advocate for the creation of any such funds or programs. Specifically, the Tobacco Companies and their insurers will seek to pay as little as possible, while the

² See Dietrich Knauth, Jonathan Stempel and Tom Hals, “Sacklers to pay \$6 billion to settle Purdue opioid lawsuits,” Reuters, March 4, 2022, available at: <https://www.reuters.com/business/healthcare-pharmaceuticals/sacklers-will-pay-up-6-bln-resolve-purdue-opioid-lawsuits-mediator-2022-03-03/>; 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>, both articles describing the procedural posture and contours of the respective settlements, including the public focus on preventative measures contained within the settlements.

Claimants will seek to maximize their recoveries. Put simply, there are no participants in these Proceedings providing objective and independent representation of the important rights and interests of the FTH Stakeholders.

7. The appointment of representative counsel for the FTH Stakeholders, subject to the customary supervision and oversight by this Court, is the most effective means of ensuring that the interests of the FTH Stakeholders are considered, addressed, and properly weighed among the constellation of the other stakeholders' interests.

8. The Monitors assert that leave should be denied, and that this Court should not even consider whether it is appropriate to appoint representative counsel. In effect, they argue that: (i) it is too cumbersome and too late to consider whether the interests of the FTH Stakeholders are represented and protected; (ii) it is too cumbersome and too late for the interests of this group of millions of individuals to be adequately represented within the ongoing Mediation; and (iii) it is too cumbersome and too late to ensure that any plan arising out of these Proceedings is reached through discussions with all involved and impacted stakeholders.

9. The Monitors' position should not be accepted, including because:

(a) The importance of the FTH Stakeholders' substantive interests outweighs any concerns or prejudice resulting from the alleged delay in filing this motion.

(b) The Monitors' position does not address the fundamental issue. There is no evidence or assertion from the Monitors that they were aware of the conflict

of interest in the Representative Counsel's mandate prior to the filing of the motion for an order appointing representative counsel for the FTH Stakeholders. There is no evidence demonstrating that the interests of the FTH Stakeholders are fairly, effectively, and independently represented in these proceedings without the appointment of representative counsel.

- (c) Complaint about delay in bringing this motion is problematic where the motion is brought to appoint counsel for an unrepresented party, and where it is not the responsibility of not-for-profit organizations to ensure that directly impacted stakeholders are represented and to identify conflicts of interest.
- (d) These Proceedings have been ongoing for over four years. It is not at all clear that the appointment of representative counsel for the FTH Stakeholders would do anything other than provide the perspective of a group with a meaningful interest. Any delay is trivial compared to the duration of these Proceedings.
- (e) Considering the importance of these Proceedings to all Canadians, it is critical that justice not only be done, but that it is perceived to be done. Denying leave reasonably raises concerns about the fairness of any resulting resolution. In the broader context, including the importance that Canadians see the process as being inclusive, fair and comprehensive, the FTH Stakeholders should be represented and have an opportunity to

participate in the Mediation under the guidance of the Mediator, rather than for opposition to occur.

PART II - FACTS

A. Background to the Proceedings/Mediation

10. It has been definitively established that tobacco use dramatically increases the risk of developing heart disease and stroke. Smoking contributes to the buildup of plaque in the arteries, increases the risk of blood clots, reduces the oxygen in the blood, and taxes the cardiovascular system.³ Tobacco use also causes many other diseases.

11. In 2019, the Quebec Court of Appeal released its decision upholding a \$15 billion judgment against the Tobacco Companies. In response, they sought creditor protection by commencing these CCAA Proceedings.

12. In light of the complexity of achieving a plan of arrangement in the context of this case, the Court appointed the Honourable Warren K. Winkler, Q.C., OOnt, O.C., as the Court-Appointed Mediator.⁴

13. The Mediator's mandate under the Mediation Orders is to mediate a global plan of arrangement and compromise for the Tobacco Companies.

14. On December 9, 2019, Justice McEwen made a Representative Counsel Appointment Order (the "**Order**"), which appointed Representative Counsel for TRW Claimants, defined in Schedule A to the Order as: "all individuals...who assert or may be

³ Affidavit of Diego Marchese, sworn September 19, 2022 (the "**Marchese Affidavit**"), para. 18, Motion Record of the Heart and Stroke Foundation of Canada ("**HSFC Motion Record**"), Tab 2, p. 38.

⁴ Orders granted by the Honourable Justice McEwen dated April 5, 2019, in each of the three above-captioned files (the "**Mediation Orders**").

entitled to assert a claim or cause of action...in respect of...(ii) the historical or ongoing use of or exposure to Tobacco Products...”.

B. The FTH Stakeholders

15. Tyr LLP was engaged by HSF to seek an order appointing representative counsel for the FTH Stakeholders. Such order includes that a three-person volunteer advisory committee work with Tyr LLP to represent the interests of the FTH Stakeholders. To be clear, HSF is not arguing that a new claim should be made for the FTH Stakeholders, nor is it seeking to be appointed directly, on its own behalf.

16. HSF’s position is substantially different from that advanced by the Canadian Cancer Society (“**CCS**”) in their September 24, 2019 motion, wherein CCS sought to participate directly, in order to offer their expertise on substantive issues in the Proceedings. HSF does not seek status as a participant in the Proceedings and is not seeking to be represented itself, either directly or indirectly. Rather, HSF Seeks to appoint representative counsel to protect an important stakeholder group that is not currently represented.⁵

17. The FTH Stakeholders are the millions of individuals who will purchase or consume tobacco products, or be exposed to tobacco by-products, in the post-petition period. These individuals, who may not have suffered harm as at the commencement of the Proceedings, have no claim that is provable *during* the CCAA Proceedings. However, they are a crucial stakeholder because it is they who will shoulder a significant portion of

⁵ There is also therefore no incongruence with HSF’s September 20, 2019 letter in support of CCS’s motion, which confirmed that HSF did not intend to seek to participate on its own behalf in the CCAA Proceedings.

the burden (or accrue the benefit) from the type of Proposed Plan that can be expected to be presented to this Court for consideration and approval.

18. As noted above, any Proposed Plan that provides for the Tobacco Companies emerging from the CCAA Proceedings will be structured so that post-petition cash flow will be used to fund the settlements and agreements in the Proposed Plan. The Tobacco Companies simply did not have sufficient funds at the commencement of the Proceedings to satisfy the entirety of the claims against them. Accordingly, any resolution of the Proceedings will necessarily involve the use or allocation of cash flow generated from individuals who continue to use tobacco products and who start using tobacco products during or following these CCAA Proceedings (*i.e.*, the FTH Stakeholders).⁶

19. The FTH Stakeholders are not typical consumers who voluntarily purchase products that benefit them. They are the preteens, teenagers and other vulnerable individuals who begin or continue to use tobacco products during the post-petition period. Regardless of the context in which an individual begins to use tobacco, most of the FTH Stakeholders will become addicted and will not be able to quit easily. Despite the injury to their health, the preponderance of the FTH Stakeholders will not be able to stop purchasing tobacco products without assistance.⁷

20. In addition, the injury that will be caused to the FTH Stakeholders will result in further losses to governments and taxpayers across Canada from the associated health

⁶ Marchese Affidavit, para. 5, HSFC Motion Record, Tab 2, pp. 34-35.

⁷ Marchese Affidavit, paras. 28 and 30, HSFC Motion Record, Tab 2, pp. 41-42.

care costs and burdens on the health care system, as well as the ill-effects on families and dependents that accompanies tobacco related illnesses and deaths.⁸

21. Currently, there is no party or representative counsel that is adequately representing the interests of the FTH Stakeholders. None of the Monitors have claimed to recognize the existence of this group of stakeholders, let alone considered their interests. All of the parties participating in the Mediation are in a conflict of interests with the FTH Stakeholders, given that each of the current Claimants are incentivized to maximize future cash flows (and, thus, to ensure that there are numerous consumers of tobacco products in the future) either so that they can continue in operations (the Tobacco Companies) or so that they can recover more on their claims (the Claimants). There is no one focused on protecting the real, substantial interests of the FTH Stakeholders, which is to best preserve their personal health (and public health writ large).

PART III - THE ISSUE

22. The issue on this motion is whether leave should be granted to hear a motion to appoint Tyr LLP as representative counsel for the FTH Stakeholders, including to participate in the Mediation.

23. Leave should be granted. The interests of the FTH Stakeholders are not currently being represented in these CCAA Proceedings or in the Mediation. It is both appropriate and necessary to the ultimate fairness of the Proposed Plan that representative counsel

⁸ Marchese Affidavit, para. 27, HSFC Motion Record, Tab 2, pp. 40-41.

be, at the very least, granted leave to argue for their appointment to represent the interests of the FTH Stakeholders.

PART IV - LAW AND ARGUMENT

A. The Law

24. The Court has broad discretion to control and manage these CCAA Proceedings. Pursuant to that discretion, this Court has directed that leave must be obtained to bring the motion to appoint Tyr LLP as representative counsel. The Mediator has likewise been enabled to “[a]dopt a process which in his discretion, he considers appropriate to facilitate negotiation of a global settlement”, including deciding which stakeholders and other persons to consult as part of the Mediation.

25. The Court is empowered pursuant to s. 11 of the CCAA to appoint representatives on behalf of a party in CCAA proceedings, a practice which has become increasingly common but which is not tied to a particular test for leave.⁹

26. Factors considered by the Court in granting orders to appoint representative counsel include: (i) the vulnerability and resources of the group sought to be represented, (ii) any benefit to the companies under CCAA protection, (iii) any social benefit to be derived from the representation of the group, (iv) the balance of convenience and whether it is fair and just, and (v) whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also

⁹ *Companies' Creditors Arrangement Act* (R.S.C., 1985, c. C-36), s. 11. See *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re*, [1998 CanLII 14907](#) (ON SC); *Muscletech Research and Development Inc. (Re)*, [2007 CanLII 5146](#) (ON SC); *Canwest Publishing Inc.*, [2010 ONSC 1328](#) (CanLII).

prepared to act for the group seeking the order.¹⁰ As explained by this Court, “[a]s the issue of whether to appoint a representative counsel is one of equity, there can be no hard and fast rules governing any particular case, but these factors need be considered.”¹¹ Given that this decision is discretionary, the Court must ultimately conduct an exercise in weighing the relevant factors.

27. As the Court did not mandate the application of any specific test when considering whether to grant leave to bring a motion for a representative appointment order, the most significant factor for this Court to consider is whether there appears to be an unrepresented interest that is appropriate for representation within this CCAA proceeding. If this is found to be the case, then the Court should grant leave unless there are exceptional factors or circumstances that outweigh the substantial value and importance of having a valid and interested constituency represented within the Proceedings.

28. In the case at hand, the significant and substantial interests of the FTH Stakeholders are not represented and there are no exceptional factors that outweigh the value and importance of having this group represented.

B. The Valid Interests of the FTH Stakeholders Cannot Currently be Fairly Represented

29. As mentioned, Representative Counsel represents the interests of the TRW Claimants, defined as:

¹⁰ *Canwest Publishing Inc.*, [2010 ONSC 1328](#) (CanLII) at para [21](#); *Imperial Tobacco Canada Ltd., Re*, 2020 ONSC 61 at para 26, *Abbreviated Book of Authorities of the Heart and Stroke Foundation of Canada (“HSFC BOA”)*, Tab 1; *Urbancorp Inc. (Re)*, [2016 ONSC 5426](#) (CanLII) at para [21](#); *Mountain Equipment Co-Operative (Re)*, [2020 BCSC 2037](#) (CanLII) at para [23](#).

¹¹ *Urbancorp Toronto Management Inc.*, 2016 ONSC 5426 at [para. 12](#).

all individuals (including their respective successors, heirs, assigns, litigation guardians and designated representatives under applicable provincial family law legislation) who assert or may be entitled to assert a claim or cause of action as against one or more of the Applicants, the ITCAN subsidiaries, the BAT Group, the JTIM Group or the PMI Group, each as defined below, or persons indemnified by such entities, in respect of:

- i. the development, manufacture, importation, production, marketing, advertising, distribution, purchase or sale of Tobacco Products (defined below),
- ii. the historical or ongoing use of or exposure to Tobacco Products; or
- iii. any representation in respect of Tobacco Products,

in Canada or in the case of the Applicants, anywhere else in the world...

30. The definition of TRW Claimants is limited in time to only those with current and existing entitlements to claims. The words “may be entitled” are tethered to a temporal group of individuals as at the point of the CCAA filings or some other time-based limit – there can be no release of unknown Claimants, and therefore there must be a point after which no further Claimants are included within the settlement. Given that the FTH Stakeholders are defined as those who have yet to suffer tobacco-related harms, their claims in respect of use of or exposure to tobacco products will arise only at a future date. The FTH Stakeholders are thus not TRW Claimants, and they are therefore not represented.

31. In the alternative, even if TRW Claimants were interpreted broadly and without temporal limit to include the FTH Stakeholders, that would place Representative Counsel for the TRW Claimants in an untenable conflict of interest. Representative Counsel would, on the one hand, represent the interests of those who have suffered harm in the past (*i.e.*,

the class of individuals that will presumably be entitled to compensation under any resulting settlement). On the other hand, Representative Counsel would represent individuals who will be harmed in the future and who will be funding, at least partially, compensation paid to those TRW Claimants who have suffered harm in the past. There will be an inevitable tension between maximizing compensation to those entitled to it under the settlement and protecting the interests of those who have not yet been harmed, but will be harmed in the future (*i.e.*, the FTH Stakeholders). This conflict of interest means that Representative Counsel cannot adequately represent the FTH Stakeholders.

32. Accordingly, the interests of the FTH Stakeholders are either currently not represented in these Proceedings, or Representative Counsel appointed to represent them is intrinsically conflicted. It is therefore appropriate that representative counsel be appointed for the FTH Stakeholders, at least for the purpose of the ongoing Mediation, to ensure that any resulting settlement considers and reflects an appropriate balancing of their interests.

i. The Interests of the FTH Stakeholders are Valid and Worthy of Consideration

33. The FTH Stakeholders have direct interests that are impacted by these Proceedings, including interests based on the nature and quality of any preventative programs implemented by a Proposed Plan, and the quantum earmarked for rehabilitative and preventative measures. The FTH Stakeholders' direct interests are in addition to their interests as social stakeholders who will also be indirectly affected by the outcome of the Proceedings. They are members of communities impacted by tobacco use and tax paying Canadians funding healthcare services. Both direct and indirect interests as stakeholder

have been recognized in law as legitimate, and desirable for inclusion and consideration within CCAA proceedings.¹²

34. As stated, there can be no sufficient recovery for those who have been harmed in the past without the continuing sale of tobacco products to those who have yet to suffer the consequences of tobacco use. Even Imperial Tobacco has recognized "[a]t 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."¹³ Clearly, Imperial Tobacco and the other Tobacco Companies recognize that the CCAA Proceedings are for the benefit of their past, current and future customers, and the interests of their future customers who will inevitably suffer harm going forward should not be ignored.

35. It is both appropriate and necessary that the Court consider how the future injury that will be inflicted upon the FTH Stakeholders is to be balanced and mitigated against the wishes of the Claimants in these CCAA Proceedings to be compensated for the injuries caused in the past.

¹² See *1979 Debentureholders v. BCE*, [2008 SCC 69](#) (CanLII), [2008] 3 SCR 560 at para [66](#) [*BCE*] (recognizing that in considering the best interests of the corporation, boards of directors are to have regard to the broader constituency of stakeholders in the corporation); *Century Services Inc. v. Canada (Attorney General)*, [2010 SCC 60](#) (CanLII), [2010] 3 SCR 379 at para [60](#) (commenting that 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"); *Anvil Range Mining Corp., Re*, 1998 CarswellOnt 5319, 7 C.B.R. (4th) 51 at para 9 (clarifying that a court-appointed officer's mandate must "hav[e] an eye for the social consequences" of the reorganization process), HSCF BOA, Tab 2.

¹³ Initial Order Factum of ITCAN and ITCO, March 12, 2019, para. 7 [emphasis added], available at: <http://cfcanada.fticonsulting.com/imperialtobacco/docs/Initial%20Order%20Factum%20of%20ITCAN%20and%20ITCO.pdf>.

36. All the existing Claimants, as creditors, are in a conflict of interests with the FTH Stakeholders, since they are incentivized to maximize the future cash flows of the Tobacco Companies, which is the primary means by which they can maximize recovery on their claims. By definition, this necessitates ensuring that there are as many consumers of tobacco products in the future as possible, and that their consumption of these products be as intensive as possible.

37. For these reasons, the incentives of the Claimants and the FTH Stakeholders are opposed to one another. In order for any settlement reached to be truly equitable, and reflective of all harm caused by the Tobacco Companies' products, all stakeholders need to be included in its negotiation. It is therefore imperative that the Court, at minimum, provide the FTH Stakeholders with an opportunity to seek to participate in these Proceedings.

C. There Are No Exceptional Circumstances Justifying a Denial of Leave

38. Fundamentally, the Monitors' challenge to HSF's position – and presumably their attempt to point to an “exceptional circumstance” that would justify the denial of leave – is that the delay in bringing this motion is insurmountable. The delay argument does not constitute an exceptional basis on which to refuse to even consider whether a representative order should be made to protect the interests of what is an unrepresented and critical stakeholder in the Proceedings. This is true for several reasons.

39. First, any perceived delay in bringing this motion for leave is irrelevant compared to the substantive interest at issue. The FTH Stakeholders continue to be unrepresented, despite having had a direct interest in these Proceedings since they were commenced.¹⁴

40. It is not the responsibility of a non-profit organization to have identified and sought to represent an unrepresented stakeholder. If the delayed inclusion of the FTH Stakeholders results in any adverse impact to the Proceedings, which appears improbable, then the weight of that impact rests with the court-appointed Monitors and/or other participants. It does not lie with a non-profit.

41. Second, in the absence of real insight into the Proceedings, it is impossible to ascertain whether the lack of representation (or conflicted representation) of the FTH Stakeholders has been addressed, or even acknowledged, by the Monitors who are properly placed to do so. No evidence has been provided on this point, and it is unclear if the conflict in Representative Counsel's mandate has even been recognised. Rather, the Monitors' contention that the FTH Stakeholders participation at this point would upend the process implies that, to date, the interests of this group are not independently and fairly represented.

42. Third, these Proceedings have been in progress for over four years. The Tobacco Companies have requested ten extensions to the stay of proceedings initially granted on March 8, 2019, and on March 30, 2023 were granted a further stay until September 29, 2023. In the court filings, neither the Tobacco Companies nor the Monitors have proposed

¹⁴ Ironically, it may be that the FTH Stakeholders are the only ones who continue to suffer harm during these Proceedings, without any mitigation accruing from the date of their commencement.

any end-date to the Proceedings. It is therefore unlikely that a motion to appoint counsel for the FTH Stakeholders would be the factor that inhibits headway. No concrete evidence has been provided regarding the way in which the FTH Stakeholders' appointment would impact the alleged progress made. It is difficult to assess the Monitors' claim that an additional participant at this stage would compromise the process in the absence of evidence of progress, the existence of which is disputed by certain parties.¹⁵

43. Fourth, rather than cause delay, the pro bono advisory committee that is proposed to advise representative counsel for the FTH Stakeholders will add momentum to the Proceedings. Their only motivation is a fair and quick outcome that protects the interests of a group that is currently unrepresented. The committee will be incentivized to make progress as quickly as possible, and will galvanize other parties to do the same, to the benefit of all Claimants who have suffered significant damages but have not yet received compensation.

44. Fifth, the appointment of representative counsel would validate the process for all stakeholders, by ensuring that the public on behalf of whom the Proceedings are conducted is confident in the fairness of any resulting Plan.¹⁶ It is preferable that the FTH Stakeholders' interests are addressed now, rather than in any potential future public opposition to a Proposed Plan.

¹⁵ See March 20, 2023 Affidavit of Philippe Trudel (Exhibit 2 to March 20, 2023 Motion Record of the Quebec Class Action Plaintiffs).

¹⁶ *Nortel Networks Corporation (Re)*, [2009 CanLII 26603](#) (ON SC) at para [13](#); *Imperial Tobacco Canada Ltd., Re*, 2020 ONSC 61 at para 43, HSFC BOA, Tab 1; *League Assets Corp. (Re)*, [2013 BCSC 2043](#) (CanLII) at para [76](#).

45. Recent experience in similar cases involving settlements with manufacturers profiting from products that caused significant harm to public health demonstrates the need to ensure that the public can have tangible measures by which they can verify that all interests were considered and protected. For example, when a proposed settlement was announced in U.S. insolvency cases involving Purdue Pharma, it faced severe public backlash. The failure to consider all relevant stakeholders in the proposed settlement led to widespread dissatisfaction from the public, state and local governments, charities, and healthcare groups, and ultimately delayed and lengthened the proceedings.¹⁷

46. In that case, a revised settlement (increased from USD 4.5 billion to USD 6 billion) was entered into by Purdue Pharma that provided for substantial funding to address opioid reduction and prevention. The revised settlement included an additional USD 276,888,888.87 “devoted exclusively to opioid-related abatement, including support and services for survivors, victims and their families.”¹⁸

47. Similarly, the global settlement entered into in 2022 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, as well as to forward-looking preventative programs including “a

¹⁷ See Brian Mann and Martha Bebinger, “Purdue Pharma, Sacklers reach \$6 billion deal with state attorneys general,” NPR, March 3, 2022, available at: <https://www.npr.org/2022/03/03/1084163626/purdue-sacklers-oxycotin-settlement>.

¹⁸ *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 BOA, Tab 3.

new monitoring system to prevent communities from again being flooded with high-risk medications.”¹⁹

48. In sum, it is the exclusion, rather than the inclusion of Tyr LLP as representative counsel, that will hinder the progress of the CCAA Proceedings. Without the representation of the FTH Stakeholders, the Plan cannot genuinely reflect the public interest. This motion is requesting only an opportunity to argue for the representation of a fundamental stakeholder so that any resulting Plan exemplifies the multifaceted social compromise that it is meant to embody.

PART V - RELIEF REQUESTED

49. For the reasons set out above, HSF respectfully requests that the Court grant leave to hear a motion seeking to have Tyr LLP appointed as representative counsel to the FTH Stakeholders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of March, 2023.



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¹⁹ 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>.

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**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re*, [1998 CanLII 14907](#) (ON SC)
2. *Muscletech Research and Development Inc. (Re)*, [2007 CanLII 5146](#) (ON SC)
3. *Canwest Publishing Inc.*, [2010 ONSC 1328](#)
4. *Imperial Tobacco Canada Ltd., Re*, 2020 ONSC 61
5. *Urbancorp Inc. (Re)*, [2016 ONSC 5426](#)
6. *Mountain Equipment Co-Operative (Re)*, [2020 BCSC 2037](#)
7. *1979 Debentureholders v. BCE*, [2008 SCC 69 \(CanLII\)](#), [2008] 3 SCR 560
8. *Century Services Inc. v. Canada (Attorney General)*, [2010 SCC 60 \(CanLII\)](#), [2010] 3 SCR 379
9. *Anvil Range Mining Corp., Re*, 1998 CarswellOnt 5319, 7 C.B.R. (4th) 51
10. *Nortel Networks Corporation (Re)*, [2009 CanLII 26603](#) (ON SC)
11. *League Assets Corp. (Re)*, [2013 BCSC 2043](#)

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

Companies’ Creditors Arrangement Act

[R.S.C., 1985, c. C-36](#)

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.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Rights of suppliers

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

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

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the [Bankruptcy and Insolvency Act](#) or the [Winding-up and Restructuring Act](#);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

- (a)** the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b)** in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has effect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

11.05 [Repealed, 2007, c. 29, s. 105]

Member of the Canadian Payments Association

11.06 No order may be made under this Act that has the effect of preventing a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the [Canadian Payments Act](#) or the by-laws or rules of that Association.

11.07 [Repealed, 2012, c. 31, s. 420]

Restriction — certain powers, duties and functions

11.08 No order may be made under section 11.02 that affects

- (a)** the exercise or performance by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the [Bank Act](#), the [Cooperative Credit Associations Act](#), the [Insurance Companies Act](#) or the [Trust and Loan Companies Act](#);
- (b)** the exercise or performance by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the [Canada Deposit Insurance Corporation Act](#); or
- (c)** the exercise by the Attorney General of Canada of any power, assigned to him or her by the [Winding-up and Restructuring Act](#).

Stay — Her Majesty

11.09 (1) An order made under section 11.02 may provide that

- (a)** Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the [Income Tax Act](#) or any provision of the [Canada Pension Plan](#) or of the [Employment Insurance Act](#) that refers to subsection 224(1.2) of the [Income Tax Act](#) and provides for the collection of a contribution, as defined in the [Canada Pension Plan](#), an employee's premium, or employer's premium,

as defined in the [Employment Insurance Act](#), or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

- (i) the expiry of the order,
- (ii) the refusal of a proposed compromise by the creditors or the court,
- (iii) six months following the court sanction of a compromise or an arrangement,
- (iv) the default by the company on any term of a compromise or an arrangement, or
- (v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the [Income Tax Act](#), or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

- (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the [Income Tax Act](#), or
- (ii) is of the same nature as a contribution under the [Canada Pension Plan](#) if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the [Canada Pension Plan](#) and the provincial legislation establishes a *provincial pension plan* as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

When order ceases to be in effect

(2) The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

- (a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under
 - (i) subsection 224(1.2) of the [Income Tax Act](#),
 - (ii) any provision of the [Canada Pension Plan](#) or of the [Employment Insurance Act](#) that refers to subsection 224(1.2) of the [Income Tax Act](#) and provides for the collection of a contribution, as defined in

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

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

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

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

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the Income Tax Act,

(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

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

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

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

Operation of similar legislation

(3) An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

- (a)** subsections 224(1.2) and (1.3) of the [Income Tax Act](#),
- (b)** any provision of the [Canada Pension Plan](#) or of the [Employment Insurance Act](#) that refers to subsection 224(1.2) of the [Income Tax Act](#) and provides for the collection of a contribution, as defined in the [Canada Pension Plan](#), an employee's premium, or employer's premium, as defined in the [Employment Insurance Act](#), or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or
- (c)** any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the [Income Tax Act](#), or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the [Income Tax Act](#) in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the [Canada Pension Plan](#) in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

11.1 (1) In this section, **regulatory body** means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Regulatory bodies — order under section 11.02

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Exception

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

11.11 [Repealed, 2005, c. 47, s. 128]

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

- (b)** how the company's business and financial affairs are to be managed during the proceedings;
- (c)** whether the company's management has the confidence of its major creditors;
- (d)** whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e)** the nature and value of the company's property;
- (f)** whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g)** the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

- (a)** an agreement entered into on or after the day on which proceedings commence under this Act;
- (b)** an eligible financial contract; or
- (c)** a collective agreement.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

- (a)** whether the monitor approved the proposed assignment;
- (b)** whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

11.31 [Repealed, 2005, c. 47, s. 128]

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Removal of directors

11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or

arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Bankruptcy and Insolvency Act matters

11.6 Notwithstanding the Bankruptcy and Insolvency Act,

(a) proceedings commenced under Part III of the Bankruptcy and Insolvency Act may be taken up and continued under this Act only if a proposal within the meaning of the Bankruptcy and Insolvency Act has not been filed under that Part; and

(b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the Bankruptcy and Insolvency Act but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

(i) the operation of subsection 50.4(8) of the Bankruptcy and Insolvency Act, or

(ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the Bankruptcy and Insolvency Act.

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the Bankruptcy and Insolvency Act.

Restrictions on who may be monitor

(2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

(a) if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(b) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

Court may replace monitor

(3) On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*, to monitor the business and financial affairs of the company.

No personal liability in respect of matters before appointment

11.8 (1) Despite anything in federal or provincial law, if a monitor, in that position, carries on the business of a debtor company or continues the employment of a debtor company's employees, the monitor is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

(a) that is in respect of the employees or former employees of the company or a predecessor of the company or in respect of a pension plan for the benefit of those employees; and

(b) that exists before the monitor is appointed or that is calculated by reference to a period before the appointment.

Status of liability

(2) A liability referred to in subsection (1) shall not rank as costs of administration.

Liability of other successor employers

(2.1) Subsection (1) does not affect the liability of a successor employer other than the monitor.

Liability in respect of environmental matters

(3) Notwithstanding anything in any federal or provincial law, a monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(a) before the monitor's appointment; or

(b) after the monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the monitor's gross negligence or wilful misconduct.

Reports, etc., still required

(4) Nothing in subsection (3) exempts a monitor from any duty to report or make disclosure imposed by a law referred to in that subsection.

Non-liability re certain orders

(5) Notwithstanding anything in any federal or provincial law but subject to subsection (3), where an order is made which has the effect of requiring a monitor to remedy any environmental condition or environmental damage affecting property involved in a proceeding under this Act, the monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed or during the period of the stay referred to in paragraph (b), the monitor

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a) or within ten days after the order is made or within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the monitor to contest the order, or

(ii) the court having jurisdiction under this Act for the purposes of assessing the economic viability of complying with the order; or

(c) if the monitor had, before the order was made, abandoned or renounced any interest in any real property affected by the condition or damage.

Stay may be granted

(6) The court may grant a stay of the order referred to in subsection (5) on such notice and for such period as the court deems necessary for the purpose of enabling the monitor to assess the economic viability of complying with the order.

Costs for remedying not costs of administration

(7) Where the monitor has abandoned or renounced any interest in real property affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

Priority of claims

(8) Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remedying any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any other real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge

(a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and

(b) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.

Claim for clean-up costs

(9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

Disclosure of financial information

11.9 (1) A court may, on any application under this Act in respect of a debtor company, by any person interested in the matter and on notice to any interested person who is likely to be affected by an order made under this section, make an order requiring that person to disclose any aspect of their economic interest in respect of a debtor company, on any terms that the court considers appropriate.

Factors to be considered

(2) In deciding whether to make an order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclosure;

(b) whether the disclosed information would enhance the prospects of a viable compromise or arrangement being made in respect of the debtor company; and

(c) whether any interested person would be materially prejudiced as a result of the disclosure.

Meaning of *economic interest*

(3) In this section, ***economic interest*** includes

- (a)** a claim, an eligible financial contract, an option or a mortgage, hypothec, pledge, charge, lien or any other security interest;
- (b)** the consideration paid for any right or interest, including those referred to in paragraph (a); or
- (c)** any other prescribed right or interest.

SCHEDULE "C"

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.**

Applicants

**COMMON SERVICE LIST
(as at February 9, 2023)**

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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.

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

Proceeding commenced at TORONTO

**FACTUM OF THE HEART AND STROKE
FOUNDATION OF CANADA
(RETURNABLE APRIL 14, 2023)**

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