

CAMPAIGN FOR JUSTICE ON TOBACCO FRAUD

CAMPAGNE POUR OBTENIR JUSTICE FACE À LA FRAUDE DU TABAC

February 8, 2023

By Registered Mail and E-mail

The Honourable Doug Downey, MPP
Ministry of the Attorney General
McMurtry-Scott Building
11th Floor
720 Bay Street
Toronto, ON M7A 2S9

Dear Minister:

Re: Motion by the Heart and Stroke Foundation of Canada to intervene in the *Companies' Creditors Arrangement Act* mediation between the provinces, Quebec Class Action creditors, and tobacco manufacturers related to the recovery of health care costs caused by industry wrongful behaviour

On September 19, 2022, the Heart and Stroke Foundation of Canada (Heart Foundation) filed a Motion in the Ontario Superior Court of Justice requesting an order to appoint the law firm Tyr LLP as “representative counsel” for “Future Tobacco Harm Stakeholders” (FTH Stakeholders), those smokers who continue to smoke after any settlements that could flow from the mediation process.

Given the late hour that the Heart Foundation sought to intervene in the mediation process, nearly four years after the manufacturers filed for bankruptcy protection and years after the Court refused to grant full intervener status to the Canadian Cancer Society, we doubt that the Court will open the door for the Heart Foundation through counsel Tyr LLP to act on behalf of the interests of millions of addicted Canadian smokers who would remain in the market post any mediated settlement.

Nevertheless, because the decision with regard to the Heart Foundation intervention has yet to be made, for reasons outlined below we wish to be on record in support of the provinces, the class action creditors and the Court should they decide to oppose the Heart Foundation intervention. In the unlikely event that the Heart Foundation is granted intervener status, we strongly oppose its counsel, Tyr LLP, being appointed as “representative counsel for the FTH stakeholders.... in order to ensure that the interests of the FTH stakeholders are appropriately addressed and balanced in any proposed plan of arrangement and compromise that is presented to this Honourable Court....”.

Reasons for the attempted Heart Foundation intervention

Given the unlikely chance of the Heart Foundation/Tyr LLP being granted intervener status, what might be the real reasons behind this charity's attempted intervention? We suspect it is intended to establish the Heart Foundation in the minds of the decision takers in the mediation process and in the eyes of the Court as a major player in the decades of prevention related advocacy that has led to the decline in tobacco consumption in Canada. We will argue that this is not the case.

Second, we hold that the attempted intervention is designed to position the Heart Foundation as one of or perhaps the central organization in any decision-taking body charged with the responsibility of dispensing monies from any yet to be established Fund for tobacco control arising out of the mediation process. To be blunt, in language of the street, the Heart Foundation Motion and affidavit by executive Diego Marchese have all the earmarks of a cash grab.

These are harsh assessments. However, before outlining the reasons for the severe criticism, we wish to point out the Heart Foundation statements with which we concur. For the record, we agree with the Heart Foundation that:

- it is likely that the manufacturers will be saddled with an award that will require payments that “will be premised on the tobacco companies continuing to sell tobacco products, and their cash flows following the commencement of these proceedings ... will be used to pay the settled claims”;
- “the FTH stakeholders [are].... exactly that group of individuals who will shoulder the largest burdens by any Proposed Plan”;
- “any fund must be adequate to meaningfully address the future harm that will be suffered by the FTH Stakeholders”;
- “millions of FTH Stakeholders are not being represented in the CCAA Proceedings or the Mediation...” [this assumes, probably accurately, that their interests are not being advanced by the provinces];
- “in the settlements with tobacco companies in the US, those settlements included funds that were dedicated to funding programmes to reduce tobacco use”.

Reasons for opposition to the Heart Foundation Motion

1. The Heart Foundation is not the right organization to play a central role in the establishment and operation of any body charged with directing the activities and dispensing of funds for the reduction of tobacco morbidity and mortality. The Heart Foundation has not been “a pioneer in advocacy” in tobacco control as the motion claims nor is it “a leader in [tobacco related] disease prevention”.

Tobacco related disease is said to be responsible for over 30 per cent of all heart and stroke morbidity and mortality. Yet despite being perhaps the most financially endowed of all of the charities and other non-profit agencies working in tobacco control, it has

failed for decades to invest meaningful funds or human resources into tobacco-related primary prevention of tobacco diseases.

2. Several tobacco control organizations, including the Non-Smokers' Rights Association, the Canadian Cancer Society, Quebec Coalition for Tobacco Control, Action on Smoking and Health and the Campaign for Justice on Tobacco Fraud (CJTF) campaigned for years to encourage Canadian governments to hold tobacco companies accountable in criminal and /or civil law for negligence and fraud. This wrongful behaviour has caused or contributed to over two million tobacco industry-related deaths over six decades. The Heart Foundation made few if any meaningful advocacy contributions to initiatives designed to build public support for the provincial lawsuits and subsequent legal proceedings that have opened the door for the Heart Foundation's Motion now before the Court. (See example of CJTF advocacy in *The Globe and Mail* on the provincial tobacco-related health care cost recovery lawsuits at the following link http://justiceontobaccofraud.ca/downloads/en/Globe%20ad%20scan%20PUB_CJTF_ad_Open_Letter_8_97x20_IMP.pdf)

Nor has the Heart Foundation placed any meaningful resources behind the goal of these agencies to ensure that any settlement from the mediation produces changed industry behaviour, undoubtedly the most important goal of the above organizations.

3. In assessing the legitimacy of the criticism levelled at the Heart Foundation in this submission, we point to the landmark campaign from 1986-1988 for Canada's world precedent-setting *Tobacco Products Control Act*. In their national best-selling book, *Second Opinion: What's Wrong with Canada's Health Care System and How to Fix It*, health experts Dr. Michael Rachlis and Carol Kushner wrote that in 1987 and 1988 the tobacco industry waged a fierce and expensive campaign to block the passage of landmark legislation to regulate the Canadian tobacco industry. They asked:

*“Who was on the other side? You might have expected strong leadership to come from the organizations of health professionals, who see the effects of smoking every working day – groups like the Canadian Medical Association, the Canadian Nurses Association, and the Canadian Public Health Association. And since smoking causes over one-third of cancer and heart disease deaths, and two-thirds of respiratory deaths, you might also have expected the Cancer Society, the **Heart and Stroke Foundation**, and the Lung Association to be prominent in supporting this legislation. The annual budgets for these three voluntary organizations total more than \$100 million [in present value dollars \$257 million]. Yet until very late in the day, the battle against tobacco was waged largely by a group whose annual budget is only \$400,000 [emphasis added].*

This “David” in the struggle against the giant tobacco industry is the Non-Smokers' Rights Association (NSRA). Garfield Mahood, its executive director, and David Swenor, its legal counsel, are widely regarded as the most effective one-two lobbying

tandem in the country. Dr. Alan Blum, former editor of the *New York State Medical Journal*, says that the NSRA has had more impact than any other anti-smoking organization anywhere. And the *United States Tobacco Reporter*, an industry trade paper, called them one of fiercest lobby groups in the world!”

The Heart Foundation was not a significant participant in this campaign, certainly not “a pioneer in advocacy”.

4. Moreover the Heart Foundation was not a significant agency involved in the advocacy that led to passage of Canada’s *Tobacco Act* in 1997 and the global precedent-setting tobacco package warning system in 2001. Yet with this Motion, the Heart Foundation is attempting via the mediation process to be at the centre of decision taking about how monies in any Fund would be distributed. That the Heart Foundation has a laser eye focused on the money is revealed by the Motion when Tyr LLP writes “Fund is established, governed, and used (sic) will be a critical component in ensuring that the rights and interests of the FTH Stakeholders are adequately addressed and balanced...”
5. Throughout its Motion, the Heart Foundation stresses that FTH Stakeholders, post-mediation, arguably most, will continue to suffer from tobacco industry product addiction. The Heart Foundation Motion says:
 - “most of those who do become addicted cannot easily quit. This, despite the harm to their health, most if not all of the FTH Stakeholders will not be able to stop purchasing tobacco products...”;
 - “any Proposed Plan will be funded in part through their addictions”;
 - “Most, if not all smokers want to quit, have stated an intention to quit, and wish they had never started” evidence of addiction;
 - “locked into a cycle of addiction”.

The Heart Foundation concedes that the Fund would largely be financed “through FTH Stakeholder addictions”. Yet the Heart Foundation’s major response to this drug addiction problem is a singular concentration on smoking cessation.

For greater emphasis, smoking cessation programs upon which the Heart Foundation focuses are tertiary, not primary prevention measures. Primary prevention involves keeping new starters off of the market, confronting the industrial source of the tobacco epidemic and its marketing. Smoking cessation attempts to take smokers out of the tobacco market after they become addicted.

Tobacco manufacturers are comfortable with the health community putting disproportionate resources into smoking cessation. They know they can bring starters onto the market faster than well-intentioned health interests are able to persuade them to quit. Focusing tobacco control efforts on cost ineffective cessation, according to one prominent physician, “is like bailing the boat while others drill holes in the bottom”.

This flaw in its strategic approach to the reduction of tobacco industry caused heart and stroke disease by itself should be sufficient to disqualify the Heart Foundation and Tyr LLP from being “Representative Counsel” for FTH Stakeholders.

6. In its Motion, the Heart Foundation boasts of its leadership in prevention and advocacy but smoking cessation places the responsibility for the tobacco epidemic and tobacco’s harm on individual behaviour rather than on corporate negligence and fraud. This is not leadership.

Half of the addicted FTH Stakeholders will die prematurely from tobacco industry products. This cries out for an intelligent public health response. The practice of public health is all about harm reduction and the mitigation of risks wherever they are found whether from AIDS, SARS or Covid-19.

Harm reduction, for those FTH Stakeholders that the Heart Foundation concedes will not leave the tobacco market, means satisfying their psychological and pharmacological needs for nicotine via lower risk non-combustion tobacco products. It is the combustion of tobacco and the resultant tars that cause most of tobacco illness and death.

Health Canada acknowledges the health benefits of non-combustion harm reduction products yet nowhere in the Heart Foundation Motion or its appended executive affidavit is harm reduction even mentioned. Despite the fact that FTH Stakeholders would benefit from harm reduction, the Heart Foundation continues to focus on tertiary prevention, cost-ineffective smoking cessation campaigns, and fails to invest in or even talk about the relative risks of combustion and non-combustion tobacco products. Nor does the charity research or talk about how lower risk products could be brought to the market in ways that eliminate or minimize risks to youth. Yet the Motion in question presents to the Court that this charity is most qualified to work in the best interests of FTH Stakeholders.

7. To be effective, the managers of any at-arms-length-from-government tobacco control Fund established in mediation will have to work collaboratively, not just with the two other major health charities with interests in reducing tobacco diseases, the Canadian Cancer Society and the Canadian Lung Association. Unfortunately, the Heart Foundation has a history of non-collaboration, of working secretly with the above charities while ignoring the non-profit groups that have delivered the on-the-ground public support for real and effective tobacco policy reform. (see *Second Opinion* referenced above).

To the detriment of public health, the Heart Foundation also has a lengthy history of non-involvement in or absence of meaningful financial or personnel contributions toward public policy initiatives to reduce tobacco diseases. Attendance at tobacco control planning sessions by lower or mid-level staff without decision-taking authority or ability to commit funding or other resources to primary prevention initiatives merely creates another level of red tape and insulation of senior agency executives from the non-profit

groups that have driven past policy changes and law reform. This is not meaningful involvement. Follow the money. It is serious financial and personnel investment that proves commitment. The Heart Foundation is on or near the top of the list of non-collaborative and non-meaningfully involved interests present at the tobacco control table.

8. The Heart Foundation would have the Court, provincial governments and class action creditors believe that success with its Motion would be in the best interests of **future** smokers. The sincerity of its commitment to **future** addicted Stakeholders might best be judged by its reaction to and/or its absence of support for **current** addicted and harmed tobacco users who fought successfully for over 20 years in the Quebec courts for justice and compensation related to tobacco industry negligence and fraud.

A true commitment to **future** addicted FTH Stakeholders might have been shown by the Heart Foundation through strong public support and intense behind the scenes advocacy on behalf of the financial interests of the **current** Quebec class action creditors –nearly 700 of them now deceased --and the over \$13 billion owed to them. The absence of meaningful support for the Quebec class action plaintiffs suggests what might be expected if the Heart Foundation through Tyr LLP had responsibility to act on behalf of **future** addicted Stakeholders.

9. The Heart Foundation would have us believe that if Tyr LLP is allowed to enter the mediation as “representative counsel for the FTH Stakeholders” that Tyr LLP would be independent of the interests, goals and directions of the Heart Foundation. This strains credulity. Tyr LLP acts for the Heart Foundation. Claiming that there would be Tyr LLP separation from the Heart Foundation would be akin to the arm claiming separation from the elbow or that the saltshaker would not appear on the table with pepper. The Heart Foundation collaborated with or more likely directed Tyr LLP in the drafting of the Motion. The law firm knows the goals and game plan of the Heart Foundation. Asking participants in this mediation to believe in a fictional firewall between the Heart Foundation and Tyr LLP acting for the future Stakeholders is akin to asking interested parties inside and outside the mediation process to believe in the Tooth Fairy.
10. The Heart Foundation’s plan for the creation of a “Proposed Advisory Committee” to advise Tyr LLP would also come with an obvious bias. The Heart Foundation executive’s affidavit claims “the Advisory Committee will not be participating on the Advisory Committee in their capacity as a representative of any organization”. Once again, the provinces, the class action participants and the Court are being asked to believe, as Alice is told by the Queen in *Through the Looking Glass*, to believe in “impossible things”. Here we are being asked to believe that these three Heart Foundation /Tyr LLP yet to be identified advisors would not be thoroughly briefed on the issues at hand and be knowledgeable about the goals of the Heart Foundation’s attempted intervention.

The expectation that those involved in the mediation might believe in the fantastical is yet another reason to reject the Heart Foundation Motion.

In conclusion Minister, we argued earlier that the Heart Foundation's Motion and attempted intervention is all about money, certainly not health advocacy and primary prevention. It is about positioning the health charity to be influential in the creation and governance of any tobacco control Fund established in the mediation process. The Heart Foundation admits that

“Ensuring that any Proposed Plan provides for an appropriate and well-governed Fund will allow HSF to spend less money on public education/ information, advocacy, and research to address tobacco-related health issues....[grammatical errors in the original]”.

With perfect clarity, this passage spells out what the Heart Foundation's attempted intervention is all about. It seems clear that its goal is to have the Fund underwrite needed tobacco control initiatives in order to enable the Heart Foundation to spend less of its own revenues on tobacco use prevention and harm reduction for future addicted smokers. In such a case the litigation and subsequent mediation might not provide any new resources for tobacco control over and above the inadequate amount that the Heart Foundation currently spends. Of course being at the centre of decisions as to the setup of the Fund would give it an inside track to any Fund monies.

This shell game would take place even though the Heart Foundation has never invested meaningful funding and personnel for needed critical leadership on the tobacco issue. Just as the tobacco industry has only been forced to pay “pennies on the dollar” in claims by governments over criminal conduct and civil misbehaviour related to smuggling, the Heart Foundation has only invested pennies on dollars available to it on primary prevention.

More disturbing, this has taken place while 30 per cent of heart-related morbidity and mortality has been caused by tobacco industry products. We have said repeatedly that the Heart Foundation has not invested “meaningful” financial and human resources on entirely preventable diseases which are at the centre of the Heart Foundation's professed mandate. Would it be reasonable to expect this charity to earmark 30 percent of the millions in revenue at its disposal to address the preventable epidemic? Or should it be 10 percent? Would 2 percent be reasonable? That would be \$2 million out of every \$100 million in donation revenues. Whatever percentage that is deemed reasonable or “meaningful”, the Heart Foundation, we argue, is not allocating meaningful funds to tobacco disease primary prevention. And the Motion under consideration will not correct this problem.

The Campaign for Justice on Tobacco Fraud is a national health advocacy organization incorporated under the *Canada Not-for profit Incorporations Act*.

End note

In its Motion, the heart charity includes information about its history and about Tyr LLP lawyers advancing its Motion in order to give weight to the opinion they are advancing on behalf of the Heart Foundation. In a similar vein, biographic notes about the signatories to this critique are appended.

Sincerely,



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CC: Sylvia Jones, Minister of Health