

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**COMMERCIAL LIST**

IN THE MATTER OF THE *INSURANCE COMPANIES ACT*, R.S.C. 1991 c. 47,  
AS AMENDED, AND THE *MUTUAL PROPERTY AND CASUALTY  
INSURANCE COMPANY WITH NON-MUTUAL POLICYHOLDERS  
CONVERSION REGULATIONS*, SOR/2015-168

AND IN THE MATTER OF A PLAN OF CONVERSION OF  
ECONOMICAL MUTUAL INSURANCE COMPANY  
ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

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Commercial List Court File No. CV-16-11425-00CL

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**PART I: OVERVIEW**

1. In this process the Court is in the unusual position of choosing counsel for two stakeholder groups that will be impacted by a demutualization of the Economical Mutual Insurance Company (“Economical”). Each group needs counsel to act for it in a negotiation of the allocation of the benefits of the demutualization. Phase 3 of the conversion process requires the appointment of counsel for mutual and non-mutual policyholders to assist them in negotiating the benefits that each group will receive from the demutualization. At stake is equity with a book value of approximately \$1.78 billion as at December 31, 2015 (and likely a market value in excess of that) that is to be allocated between the two policyholder groups by way of a negotiated agreement.

2. Torys brings this motion to be appointed counsel for the non-mutual policyholders. The negotiations required in this matter will be challenging. This is particularly so for the non-mutual policyholders as Economical has previously taken the position in its submission to the government that mutual policyholders should receive substantially all of the demutualization benefits.

3. Torys submits that this Court should appoint counsel who has the expertise, experience and judgment to effectively represent each stakeholder group. All the firms applying are well known and have good lawyers. The Court's task is to choose the firms best suited for these particular assignments.

4. Torys brings experience in insurance company demutualizations, deep expertise in the regulations of financial institution and decades of experience with commercial transactions, mediation and dispute resolution. It is well placed to effectively represent the interest of the non-mutual policyholders. An appointment of Torys as counsel to the non-mutual policyholders will result in first-rate representation at a price that is reasonable and reflective of the value that Torys will provide.

## **PART II: FACTS**

### **Background**

5. As part of Economical's demutualization process and in accordance with the order of Hainey, J. dated July 15, 2016, interested firms were directed to bring a motion before the Court to be appointed counsel to either eligible mutual policyholders or eligible non-mutual policyholders.

6. Torys LLP, Gowling WLG LLP ("Gowlings") and Siskinds LLP applied to represent non-mutual policyholders; McCarthy Tetrault LLP ("McCarthys") applied to represent the mutual policyholders; and Goodmans LLP and Thornton Grout Finnigan LLP ("TGF") applied to represent either group. Goodmans has since abandoned its motion and is no longer seeking appointment.

7. After filing motion records, all firms including Torys were requested by Economical to provide an undertaking in respect of other engagements relating to the demutualization.<sup>1</sup> Torys,<sup>2</sup> Gowlings<sup>3</sup> and TGF<sup>4</sup> gave undertakings. Torys' undertaking was that it would not accept an

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<sup>1</sup> Responding Motion Record of Economical Mutual Insurance Company ("Economical MR"), Tab 1A.

<sup>2</sup> Economical MR, Tab 1F.

<sup>3</sup> Economical MR, Tab 1B.

<sup>4</sup> Economical MR, Tab 1C.

engagement by someone seeking to interfere with Economical's demutualization process.<sup>5</sup> Siskinds<sup>6</sup> and McCarthys<sup>7</sup> declined to give any undertaking. Siskinds was not willing to give an undertaking, citing its belief that there is a risk of an ineffective or unsuccessful negotiation or an unfair result to the non-mutual policyholders. If that risk materializes, Siskinds wishes to be available to act as counsel for non-mutual policyholders.

8. As explained in more detail below, Torys has put together a proposed team with the knowledge, experience, and skills required to successfully represent the non-mutual policyholders and bring this matter to a successful conclusion. The team put forward by Torys is described at paragraphs 9-19 and examples of relevant experience of Torys team members are described at paragraphs 20-36.

### **Members of the Proposed Torys Team**

9. Torys proposes a team made up of the top-rated experienced lawyers in financial regulation, commercial transactions and negotiations. Each member of the proposed team brings a depth of expertise relevant to this mandate that is second to none.

10. **Blair Keefe** would lead the file and act as the financial institutions regulatory lead and expert on demutualizations. Blair heads the Torys Financial Institutions Group. His practice focuses solely on corporate and regulatory issues relating to financial institutions, including mergers and acquisitions and corporate finance. Blair was the lead regulatory lawyer and played a pivotal role in both the Manulife and Sun Life demutualizations, as well as the Canadian aspects of the Metropolitan Life demutualization (these transactions are explained in more detail below). For the last five years, Blair has been advising Gore Mutual Insurance Company, a property and casualty insurer, on strategic initiatives, including a possible demutualization under the regulations at issue in this case. Blair also provided advice on virtually every significant financial institution transaction (including the restructuring of Royal Trustco) and dispute involving regulatory issues in which Torys has been involved in the past two decades.<sup>8</sup>

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<sup>5</sup> Economical MR, Tab 1F.

<sup>6</sup> Economical MR, Tab 1E.

<sup>7</sup> Economical MR, Tab 1D.

<sup>8</sup> Affidavit of Blair Keefe, para. 23, Torys Motion Record ("Torys MR"), Tab 2, pp. 15-16.

11. **Richard Balfour** would be a key senior advisor on the Torys team and would help develop creative solutions and structure a successful transaction. Richard would also be advising on governance of the policyholder committee. Richard is a demutualization expert and brilliant problem-solver, having led both the Sun Life demutualization and the TMX initial public offering. Richard has led some of the most innovative transactions that Torys has been involved in. He was a key developer of the structure for the Thomson Reuters dual listed company. He led Sun Life's Clarica acquisition and its disposition of its interest in CI Financial Income Fund to Scotiabank. Together with Sharon Geraghty, he led the TMX/LSEG/Maple Group transaction. He also advised on governance, legislative and policy issues arising on the initial public offering of Hydro One shares and led the creation of the international courier industry joint venture involving Germany, France, The Netherlands, Sweden, Canada and TNT Limited.<sup>9</sup>

12. Richard's practice focuses on corporate and securities law, and he has substantial experience as lead counsel in mergers and acquisitions, both public and private, and both Canadian and international; public and private offerings of securities, both Canadian and international, including privatizations and demutualizations; and advising securities regulators and governments on regulation of securities markets, including legislative drafting.<sup>10</sup>

13. **Sharon Geraghty** would be responsible for deal execution. Sharon acted for Royal Trustco in its restructuring and for Trilon on its sale of London Life to Great West Life, led the initial public offering for Ontario of Hydro One shares, acted for CanWest on the restructuring of WIC and for Sky Dome in its restructuring and sale, and together with Richard Balfour, led the TMX/LSEG/Maple Group transactions. She also led the team acting for Manulife on its financings during the financial crisis and was closely involved with the team advising Manulife in the securities class actions concerning its disclosure of risk management and equity market risk associated with its variable annuity products. She is currently responsible for the firm's relationship with Sun Life Financial, National Bank, TMX, Rogers Communications and other clients.<sup>11</sup>

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<sup>9</sup> Affidavit of Blair Keefe, para. 24, Torys MR, Tab 2, pp. 16.

<sup>10</sup> Affidavit of Blair Keefe, para. 25, Torys MR, Tab 2, p. 16.

<sup>11</sup> Affidavit of Blair Keefe, para. 26, Torys MR, Tab 2, p. 16.

14. Sharon is a leading practitioner in the areas of mergers and acquisitions, corporate governance and securities law. She has led domestic and cross-border acquisitions, takeover bids and plans of arrangement in both public and private markets. Sharon regularly acts for multinational corporations in a wide range of industries. Sharon also advises companies, directors and shareholders on corporate governance and securities compliance matters. In all these roles, Sharon has engaged in complex, multi-party negotiations.<sup>12</sup>

15. **The Hon. Frank Iacobucci** joins the Torys team as lead mediator. Frank, together with Sheila Block and Blair Keefe, would play a key role in assisting the court in considering applicants for the policyholder committee and would advise on the approach to negotiations with the other policyholder committee.<sup>13</sup>

16. Frank joined Torys as Counsel in September 2004 after retiring as a Justice of the Supreme Court of Canada. Frank advises government and business on important legal and policy matters. Frank will bring to the team a unique perspective as a former member of the Ontario Securities Commission, Deputy Minister of Justice and Deputy Attorney General, lead director and chair of the Nominating and Governance Committee of Tim Hortons and chair of the Board of Torstar Corporation and chair of its Nominating and Governance Committee. Frank currently acts as the Conduct Review Advisor for Canada Pension Plan Investment Board, reporting to the Chair of the Board on code of conduct and ethics issues.<sup>14</sup>

17. **Sheila Block** is the Chair of our litigation practice and a well-known counsel. Sheila would manage the court process and advise on all litigation matters arising on the file. She will be assisting the Court in considering applicants for the policyholder committee, together with Frank Iacobucci and Blair Keefe, and in developing the committee's governance structure to ensure a fair and reasonable governance and reporting process is established for the non-mutual policyholder committee.<sup>15</sup>

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<sup>12</sup> Affidavit of Blair Keefe, para. 27, Torys MR, Tab 2, p. 17.

<sup>13</sup> Affidavit of Blair Keefe, para. 28, Torys MR, Tab 2, p. 17.

<sup>14</sup> Affidavit of Blair Keefe, para. 29, Torys MR, Tab 2, p. 17.

<sup>15</sup> Affidavit of Blair Keefe, para. 30, Torys MR, Tab 2, p. 17.

18. Sheila acted as lead counsel on two important policyholder cases. She gained deep familiarity with policyholder rights and disputes, having successfully defended Manulife in its demutualization class action and acted for Great West Life and London Life in the successful defence of a policyholder class action by participating policyholders alleging inappropriate use of the assets of the participating account in the financing of the acquisition of London Insurance Group. The cases are described in more detail below.<sup>16</sup>

19. Sheila has acted for clients as diverse as Québec, Barrick Gold, Coors, Ontario First Nations, former Toronto Mayor Mel Lastman, the NHL Players Association, and Associate Chief Justice Lori Douglas. Sheila also teaches advocacy to lawyers in Canada and internationally.<sup>17</sup>

### **Torys' Deep Experience in Demutualization Transactions**

20. Torys has deep relevant experience in demutualization transactions to draw on for this matter. Torys lawyers have been at the centre of demutualization activity in Canada, leading the two largest demutualizations of Canadian insurance companies and the Canadian aspects of the second largest U.S. demutualization. Proposed members of the Torys team were closely involved in the development of the regulations that will govern Economical's demutualization and have advised the next largest mutual property and casualty insurer when it considered demutualization under those regulations. Torys has also litigated some of the most challenging cases relating to demutualizations and policyholder rights.<sup>18</sup>

### ***Torys' Lead Role in Sun Life and Manulife Demutualizations***

21. Torys acted as counsel to Sun Life Assurance Company in its demutualization, which included a C\$1.8 billion global initial public offering of common shares. Torys also acted as counsel to Manulife Financial in its demutualization, which included a C\$2.5 billion global initial public offering of common shares. These transactions were the two largest demutualizations of Canadian insurance companies and among the most complex of any demutualizations in the world, given the number of countries in which the companies carried on

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<sup>16</sup> Affidavit of Blair Keefe, para. 31, Torys MR, Tab 2, pp. 17-18.

<sup>17</sup> Affidavit of Blair Keefe, para. 32, Torys MR, Tab 2, p. 18.

<sup>18</sup> Affidavit of Blair Keefe, para. 3, Torys MR, Tab 2, p. 7.

business. At the time that these transactions were initiated, no regulations existed and Torys worked closely with government officials to develop a regime for demutualizations which largely became the template for the regulations applicable to Economical's proposed demutualization.<sup>19</sup>

22. On both demutualization transactions, Torys lawyers worked closely with company management and the appointed and independent actuaries to develop allocation formulas that were considered fair and equitable to all policyholders, were resoundingly approved by policyholders and resulted in the creation of two leading Canadian public companies. Both Sun Life and Manulife remain Torys clients.<sup>20</sup>

23. The Torys lawyers on the proposed team for this matter were the lead lawyers on the Sun Life and Manulife demutualizations. None of the key lawyers on the Sun Life and Manulife demutualization teams have left to join a competing law firm. Torys is therefore able to draw from those key lawyers in proposing the team for this matter.<sup>21</sup>

24. Two key members of the proposed team, Blair Keefe and Richard Balfour took lead roles on the demutualizations. Blair Keefe was in charge of regulatory matters in both transactions. Richard Balfour led the Torys team in the Sun Life demutualization and was seconded full time to Sun Life for over two years during its demutualization process.<sup>22</sup>

#### ***Torys' Other Experience with Demutualization and Policyholder Rights***

25. The deep demutualization experience of Torys lawyers extends beyond the Sun Life and Manulife transactions. For example, Blair Keefe was closely involved in the development of the regulations that will govern Economical's demutualization, commenting on the proposed regulations, meeting with government officials and representatives and advising Gore Mutual, the next largest mutual property and casualty insurer subject to the regulations, in its consideration of strategic alternatives, including a demutualization. Ultimately, Gore decided that demutualization was not in the company's best interests. The retainer with Gore commenced

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<sup>19</sup> Affidavit of Blair Keefe, para. 9, Torys MR, Tab 2, p. 9.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

early in 2011 and ended on April 21, 2016, by which time Gore had decided not to pursue a demutualization.<sup>23</sup> Torys also advised Metropolitan Life on the Canadian aspects of its demutualization.<sup>24</sup>

26. In addition, Richard Balfour led the initial public offering of shares of TSX Group (now TMX Group), historically a non-share capital, member-owned company, on the initial public offering of common shares that implemented its demutualization. This made TSX Group the first publicly traded North American stock exchange.<sup>25</sup>

27. As described at paragraph 18, Torys acted on significant policyholder litigation matters which has given the proposed team a deep understanding of policyholder rights and the relationship between insurers and their policyholders. As noted above, Torys successfully defended Manulife in the trial of an Ontario class action commenced by its Barbados policyholders seeking demutualization benefits. Torys won the subsequent appeal to the Ontario Court of Appeal and successfully resisted leave to appeal to the Supreme Court of Canada.<sup>26</sup>

28. As well, Torys acted for Great West Life and London Life in the class action by participating policyholders contesting the financing of the acquisition of London Insurance Group. Blair Keefe provided regulatory advice on both the Manulife and the Great West Life class actions.<sup>27</sup>

### **Torys' Experience in Regulatory Matters Affecting Financial Institutions**

29. In addition to its transactional, advisory and litigation experience with demutualization and policyholder rights, Torys has deep knowledge of the financial regulatory environment.

30. Torys has long been recognized as having one of the leading financial institutions practices in Canada. Torys clients include the six largest Canadian banks, the three largest life

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<sup>23</sup> Torys received permission from Gore Mutual to disclose this engagement.

<sup>24</sup> Affidavit of Blair Keefe, paras. 10-11, Torys MR, Tab 2, p. 10.

<sup>25</sup> Affidavit of Blair Keefe, para. 11, Torys MR, Tab 2, p. 10; Supplementary Affidavit of Blair Keefe, para. 18, Supplementary Torys Motion Record, Tab 1, p. 5.

<sup>26</sup> Affidavit of Blair Keefe, para. 12, Torys MR, Tab 2, p. 10.

<sup>27</sup> *Ibid.*

insurance companies, several major property and casualty insurers, and a multitude of other financial institutions.<sup>28</sup>

31. The work of Torys lawyers for financial institutions includes mergers and acquisitions, financings and other major corporate transactions, and dispute resolution across a wide range of issues. The proposed Torys team members have a keen interest in the insurance business as a result of acting extensively for insurers, and have dealt closely with their directors, senior management, actuaries and auditors. As a result, the proposed team has a strong understanding of the complex regulatory and financial framework in which insurance companies operate and have worked through many challenging actuarial and accounting issues with them.<sup>29</sup>

32. Blair Keefe is one of the few lawyers in Canada whose practice focuses exclusively on regulatory matters affecting financial institutions. In spite of the highly competitive nature of the sector, several major Canadian institutions regularly seek his advice on regulatory matters of significance to them and government officials and regulators often consult with him on new developments. Torys lawyers are also frequently retained by industry associations, such as the Canadian Bankers Association and the Canada Life and Health Insurance Association, as well as the compensation funds for the life insurance industry and the property and casualty industry.<sup>30</sup>

### **Torys' Experience in Mediation and Dispute Resolution**

33. The proposed Torys team includes senior advisors with the proven experience and judgment necessary to assist in managing the negotiation process between the policyholder committees. Members of the proposed Torys team have acted on numerous confidential mediations and have negotiated settlements in many difficult and hotly contested cases.<sup>31</sup>

34. In addition, the Hon. Frank Iacobucci has worked on high profile, public mediations in his role as Canada's representative leading discussions toward a resolution of the legacy of Indian residential schools and his continuing work representing Ontario in its negotiations on the Ring of Fire. He also acted for Ontario in its negotiations with the Asubpeeschoseewagong First

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<sup>28</sup> Affidavit of Blair Keefe, para. 14, Torys MR, Tab 2, p. 11.

<sup>29</sup> *Ibid.*

<sup>30</sup> Affidavit of Blair Keefe, para. 15, Torys MR, Tab 2, p. 11.

<sup>31</sup> Affidavit of Blair Keefe, para. 16, Torys MR, Tab 2, p. 11.

Nation (or Grassy Narrows First Nation) concerning forestry issues and in Ontario's negotiations with the Saugeen First Nation concerning commercial fishery issues. He is frequently sought out as a private mediator for difficult and sensitive cases.<sup>32</sup>

### **Torys' Lead Role in Some of the Most Complex and Innovative Matters in Canada**

35. The members of the proposed Torys team have been engaged in many projects requiring them to find solutions to novel problems, handle complex transactions and resolve the toughest disputes. Below are only a few examples of the complex and innovative matters in which Torys lawyers have been involved:

- (a) The only successful major restructuring in the past 25 years of a publicly traded Canadian financial institution holding company, Royal Trustco, while it was under intense financial pressure. Its high quality assets were sold to Royal Bank of Canada, with the troubled assets remaining with Royal Trustco and its capital structure being reorganized through a plan of arrangement that required approval from holders of numerous classes of share and debt securities in multiple jurisdictions. (Proposed Torys team members involved: Sharon Geraghty, Blair Keefe)
- (b) The acquisition by Thomson Corporation of Reuters Group, to form Thomson Reuters, in which Richard Balfour and other Torys lawyers developed Canada's first "dual listed company" structure, under which the two companies remained separate legal entities with separate stock exchange listings but were managed and operated, under a complex set of arrangements, as if they were a single economic enterprise. (Proposed Torys team member involved: Richard Balfour)
- (c) The \$1.83 billion initial public offering of Hydro One Limited (and subsequent C\$1.97 billion second tranche), including restructuring the ownership and governance of Hydro One, managing competing stakeholder interests and public policy issues, and negotiating the proposed merger of one of its urban utilities with three other urban utilities owned by multiple municipalities and a pension

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<sup>32</sup> Affidavit of Blair Keefe, para. 16, Torys MR, Tab 2, pp. 11-12.

fund. Torys also negotiated agreements under which Ontario sold shares to Hydro One's two major unions and an agreement in principle under which Ontario proposes to sell additional Hydro One shares to a consortium of 133 First Nations. (Proposed Torys team members involved: Sharon Geraghty, Richard Balfour, Sheila Block)

- (d) The creation of an international courier industry joint venture with postal administrations of Germany, France, The Netherlands, Sweden and Canada, as well as TNT Limited, then an Australian public company. This was the first step taken by postal administrations into the courier business, a development that ultimately transformed that industry and led to widespread postal privatizations, including those in Germany and The Netherlands. It is also one of the very few instances in which a Canadian law firm has acted for foreign governments in a major business transaction. (Proposed Torys team member involved: Richard Balfour)
- (e) TMX Group's proposed merger with London Stock Exchange Group and its eventual sale by way of a take-over bid and plan of arrangement to Maple Group, a consortium of Canadian financial institutions. The transactions occurred in a highly scrutinized public process that took place over years and involved negotiating with multiple regulators to resolve complex regulatory and public policy issues. (Proposed Torys team members involved: Richard Balfour, Sharon Geraghty)
- (f) The acquisition by Manulife of John Hancock and the subsequent restructuring of its Canadian operations, including Maritime Life. (Proposed Torys team member involved: Blair Keefe) Torys also acted on Manulife's C\$2.5 billion offering of common shares and \$3 billion loan by a consortium of Canadian banks during the financial crisis. (Proposed Torys team members involved: Sharon Geraghty, Blair Keefe)
- (g) Sun Life's over C\$7 billion acquisition of Clarica Life (a previously demutualized insurance company), and Sun Life's acquisition and eventual disposition of its

ownership stake in CI Financial Income Fund (now CI Financial) to Scotiabank. (Proposed Torys team member involved: Richard Balfour)

- (h) Infrastructure Ontario's assessment and development of the structure for "Supercorp", which was to have been the holding company and operator of the four major business corporations of the Province of Ontario (Hydro One, OPG, OLG and the LCBO) and a publicly listed company. Supercorp would have been a unique combination of ownership by government and private sector shareholders if the Province had ultimately determined to proceed with the transaction. (Proposed Torys team member involved: Richard Balfour)
- (i) CanWest Global's take-over bid for WIC Communications and the competing bid by Shaw Communications, the ensuing litigation before three securities commissions and the Ontario courts, and the subsequent restructuring agreement to divide WIC's assets on a tax effective basis between its shareholders and the competing bidders. (Proposed Torys team members involved: Sharon Geraghty, Sheila Block).<sup>33</sup>

36. The Torys teams on those matters drew on the firm's collective technical, mediation, negotiation and crisis management skills, together with their patience and determination, to bring each to a successful conclusion. The proposed team for this transaction draws extensively from the lawyers who led those matters, maximizing the potential to deploy relevant experience and expertise.<sup>34</sup>

### **Torys' Fee Proposal**

#### ***There is Significant Uncertainty in this Transaction***

37. The parties will face significant uncertainties from now until a successful end to the engagement. Those uncertainties are largely driven by the process laid out in the regulations governing the demutualization. In particular:

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<sup>33</sup> Affidavit of Blair Keefe, para. 18, Torys MR, Tab 2, pp. 12-14.

<sup>34</sup> Affidavit of Blair Keefe, para. 18, Torys MR, Tab 2, p. 14.

- (a) ***Complex, unprecedented transaction:*** Demutualizations are always complex, but this one has no precedent. The process was developed with the small number of Canadian mutual property and casualty insurers with both mutual and non-mutual policyholders in mind and is unique. It will require strong leadership, a nimble and experienced team and the commitment of experts and team members available on short notice. Torys has demonstrated success on numerous innovative matters. The path to success usually involves unforeseen twists and becomes apparent only as the process unfolds.
- (b) ***Parties must reach agreement:*** Normally the company being demutualized drives the process and presents a deal to stakeholders for approval. However, here the committees for the two groups of policyholders will also play a central role and must reach agreement for the transaction to proceed. There will be differences of view that have to be reconciled. Neither group can control the approach that the other will take or the avenues that the other will insist be pursued.
- (c) ***Unique client composition:*** Counsel will take instructions from a committee that has not yet been formed and whose background and experience are unknown. The committee must respond to whatever unfolds, which will not be in its control. Its responsibilities are unique, because the process is novel. The committee members will require counsel's advice and judgment to help them meet those responsibilities, as well as regular briefings and reporting. It will retain experts and will require assistance in reviewing their advice. All phases of the process could be difficult and time consuming. For example, all non-mutual policyholders (over 630,000) are eligible to apply to be part of the policyholder committee. To put this into perspective, 1/2 of one percent of these eligible policyholders is 3,000 policyholders. It is hard to predict how many will apply, but the applications will have to be evaluated in a fair and transparent process and a small number of applicants would need to be interviewed in person before we would feel that we would be in a position to assist the court in considering who would be appropriate members of the committee. In addition, the Company is required to publish the names of the selected legal counsel on its website, which could result

in a significant volume of questions and inquiries from eligible policyholders. As a result, the precise scope of this work cannot be predicted in advance.<sup>35</sup>

38. As a result of those uncertainties, no firm that applied to represent the non-mutual policyholders has put forward a concrete estimate of the amount of fees it expects to bill. However, Torys has the experience from previous engagements, including demutualization transactions, to put forward the range explained below.

***Torys' Rate Proposal and Fee Estimate***

39. Torys proposes to charge a blended rate of \$575 per hour for lawyers and \$175 per hour for other professional timekeepers such as articling students and paralegals, in each case excluding tax and disbursements. This will allow the committee to obtain the expert advice it needs, access our deep bench strength and benefit from the continuous oversight of our senior team members, all at the same predictable hourly cost that is substantially below the regular hourly rates of all the key, senior members of our team.<sup>36</sup>

40. As an alternative, if Economical has established a fee discount arrangement for its counsel, Torys would be willing to adopt that.<sup>37</sup>

41. Torys fees for this matter would depend on how much work is required. For reasons noted above, that is highly uncertain and depends on other parties and matters outside the control of the non-mutual policyholder committee and its counsel.<sup>38</sup> If the two policyholder groups come to a quick resolution, the fees will be very modest. However, given that this could well be a challenging negotiation process, Torys makes the following estimate on the assumption that a quick resolution will not occur.

42. Based on other large projects on which Torys worked in the past, and recognizing that this matter will represent only part of the legal work required for the demutualization, Torys estimates that the total number of professional hours required by the firm could range from 3,200

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<sup>35</sup> Affidavit of Blair Keefe, para. 33, Torys MR, Tab 2, pp. 18-19.

<sup>36</sup> Affidavit of Blair Keefe, para. 34, Torys MR, Tab 2, p. 19.

<sup>37</sup> *Ibid.*

<sup>38</sup> Affidavit of Blair Keefe, para. 35, Torys MR, Tab 2, pp. 19-20.

to 5,400 hours, with about 80% of those being by lawyers and the balance by articling students and paralegal staff. Estimated fees based on this range of hours would be in the range of \$1.6 to \$2.7 million.<sup>39</sup> If the matter were brought to a conclusion more quickly, the fees would be lower.<sup>40</sup>

**There are no Conflicts that Prevent Torys from Acting for Non-Mutual Policyholders**

43. Torys does not act for the mutual policyholders or any group of them in connection with Economical's proposed demutualization. No member of the proposed Torys team has a policy with Economical. There are also no Torys partners (including their spouses or children living with them) who are mutual policyholders with Economical. Two Torys partners and their spouses are eligible non-mutual policyholders with Economical. Although that does not raise a conflict of interest if Torys is appointed as counsel to the non-mutual policyholders, Torys will, if appointed, put ethical walls in place restricting those partners from accessing confidential information regarding this engagement.<sup>41</sup>

***Torys is not Acting For or Opposite Economical***

44. Torys is not currently acting on any matter opposite Economical or adverse to its interests. Specifically, Torys is not acting for any potential purchaser of the shares or a majority of the assets of Economical, its successors or assigns. Torys also does not currently act for Economical.<sup>42</sup>

***No Conflict as a result of Torys' Relationships with Other P&C Companies.***

45. Torys acts for and opposite other property and casualty insurers in the normal course of its business. To protect client information, Torys proposes to provide a list of these matters on a confidential basis, with permission of the court. That list has been reviewed by Torys' internal

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<sup>39</sup> *Ibid.*

<sup>40</sup> For example, if Gowlings' time estimate of 577 hours is considered, Torys blended rate fees would be \$285,614 assuming 80% of that time is spent by lawyers and 20% of that time is spent by other professionals. In contrast, Gowlings' fee proposal for the same amount of time is \$375,000.

<sup>41</sup> Affidavit of Blair Keefe, para. 37, Torys MR, Tab 2, p. 20.

<sup>42</sup> Affidavit of Blair Keefe, para. 39, Torys MR, Tab 2, p. 21.

conflicts and risk management experts, and there is no reason to believe that any of the matters on which Torys acts raise a conflict of interest if Torys acted for the non-mutual policyholders.<sup>43</sup>

***No Conflict as a Result of Previous Engagement For Gore Mutual Insurance Company***

46. There were four objections to the appointment of Torys raising claims of a conflict of interest that appear to be based on erroneous facts and assumptions. The objections appear to stem from Torys' previous engagement for Gore Mutual Insurance Company, another P&C insurer, that engaged Torys as counsel during its review of strategic initiatives, including a possible demutualization.<sup>44</sup> That retainer is now at an end and Torys does not currently work for Gore in any capacity.<sup>45</sup>

47. Mr. Beaupre raised a concern that Torys is in conflict because "Gore was strong in its opposition to Economical's decision to demutualize".<sup>46</sup> This is simply not the case. While Gore stated at various times that it had no current plans to pursue demutualization at that time, at no time did Gore take the position that other property and casualty insurance companies such as Economical should not demutualize.<sup>47</sup>

48. Similarly, Mr. Hobson asserts that Gore "opposed enactment of the regulations permitting Economical to apply for demutualization..."<sup>48</sup> That is also not the case, in fact Gore commented publicly, that it was in favour of the regulations:

We are very much in favour of the swift implementation of a framework for demutualization in order to resolve this uncertainty. Finalization of such a framework will allow us and other mutual P&C companies to move forward with a focus on the success of our respective businesses.<sup>49</sup>

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<sup>43</sup> Affidavit of Blair Keefe, para. 38, Torys MR, Tab 2, p. 21.

<sup>44</sup> Objection of Allan Beaupre, Economical Supplementary Responding Motion Record, Tab 1B, p. 33; Objection of Don & Jackie Dickson, Economical Supplementary Responding Motion Record, Tab 1B, pp. 34-45; Objection of Richard Hobson, Economical Supplementary Responding Motion Record, Tab 1B, p. 46; Objection of Philip Rason, Economical Supplementary Responding Motion Record, Tab 1B, p. 47.

<sup>45</sup> Supplementary Affidavit of Blair Keefe, para. 3, Supplementary Torys Motion Record, Tab 1, p. 2.

<sup>46</sup> Objection of Allan Beaupre, Economical Supplementary Responding Motion Record, Tab 1B, p. 33.

<sup>47</sup> Supplementary Affidavit of Blair Keefe, para. 4, Supplementary Torys Motion Record, Tab 1, p. 2.

<sup>48</sup> Objection of Richard Hobson, Economical Supplementary Responding Motion Record, Tab 1B, p. 46.

<sup>49</sup> Letter from Gore Mutual Insurance Company to Department of Finance dated July 31, 2011, Supplementary Torys Motion Record, Tab 1A, p. 8.

It reiterated the same view almost four years later:

We are pleased to see that the Draft Regulations have been published, and look forward to their timely finalization. This will allow all federally regulated P&C companies to move forward in a more certain regulatory environment, whether or not they choose to demutualize.<sup>50</sup>

49. Mr. Rason objects to the appointment of Torys on the basis that it “acted in the past for Gore Mutual in their efforts to make all of the policyholders equal”.<sup>51</sup> This is also not the case. In fact, Gore Mutual was against making all policyholders equal. As noted in its submission to the Department of Finance:

[I]t would not be appropriate or effective from a governance perspective if all policyholders of mutual P&C companies with a dual policyholder structure become voting policyholders. We believe that policyholders who have only been committed to the company on a short-term basis are less likely to participate in the governance of the company. Extending the right to vote to all policyholders of mutual P&C companies that have previously maintained a dual policyholder structure would impose a significant administrative and financial burden on those companies without necessarily resulting in improved governance.<sup>52</sup>

50. Mr. and Ms. Dickson, speaking through VC & Co. Advisory Ltd., a company which claims to speak on behalf of approximately 100 mutual policyholders,<sup>53</sup> assert that Gore would be “significantly advantaged by Economical failing in its demutualization efforts.”<sup>54</sup> In fact, Gore’s decision not to demutualize came as a result of a long and considered review. Gore ultimately decided not to demutualize, but that decision and the reasons for it have no bearing on the negotiation of the benefits that should flow on a demutualization of Economical to its non-mutual and mutual policyholders. Gore is a very different company in size, number of mutual policyholders and focus areas from Economical. Torys has no reason to believe that

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<sup>50</sup> Letter from Gore Mutual Insurance Company to Department of Finance dated March 30, 2015, Supplementary Torys Motion Record, Tab 1A, p. 17.

<sup>51</sup> Objection of Philip Rason, Economical Supplementary Responding Motion Record, Tab 1B, p. 47.

<sup>52</sup> Letter from Gore Mutual Insurance Company to Department of Finance dated July 31, 2011, Supplementary Torys Motion Record, Tab 1A, p. 9.

<sup>53</sup> Email from Michael Woollcombe (VC & Co.) to Don & Jackie Dickson dated September 2, 2016, attached to Objection of Don & Jackie Dickson, Economical Supplementary Responding Motion Record, Tab 1B, p. 34.

<sup>54</sup> *Ibid*, Economical Supplementary Responding Motion Record, Tab 1B, p. 35.

Economical's demutualization, whether successful or otherwise, will affect Gore's strategic plans.<sup>55</sup>

51. VC & Co. also point to Mr. Keefe's registration as a consultant lobbyist for Gore to assert that Torys is in a conflict of interest.<sup>56</sup> Mr. Keefe registered as a lobbyist pursuant to section 5(1)(b) of the *Lobbying Act* as a precautionary measure in the event that he would need to arrange a meeting with a designated public office holder on Gore's behalf. That need did not arise and the registration was not used. It expired shortly after Torys' mandate for Gore came to an end.<sup>57</sup>

### **PART III: ARGUMENT**

#### **Proposed Torys Team has the Knowledge, Experience and Judgement to Represent the Non-Mutual Policy Holders**

52. Torys understands how important this demutualization is to Economical and its stakeholders. If Torys is selected as counsel, it will aim to use its lawyers' expertise and judgment, to help bring this process to a successful resolution as efficiently as possible.<sup>58</sup> Given their experience as described above, the proposed Torys lawyers bring deep expertise relevant to this mandate as the most experienced team in the demutualization space.

53. The proposed team has exceptional experience in demutualizations and other relevant matters. Torys team members have collaborated together for many years, knowing how to draw on the strength of the entire firm. They enjoy working together to solve complex legal problems.<sup>59</sup>

54. Torys proposes its team of senior lawyers at a cost that fairly reflects the value it can deliver both to the non-mutual policyholders and to the process.

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<sup>55</sup> Supplementary Affidavit of Blair Keefe, paras. 8-10, Supplementary Torys Motion Record, Tab 1, p. 3; Press Release of Gore Mutual Insurance Company dated January 8, 2016, Supplementary Torys Motion Record, Tab 1C, p. 27.

<sup>56</sup> Email from Michael Woollcombe (VC & Co.) to Don & Jackie Dickson dated September 2, 2016, attached to Objection of Don & Jackie Dickson, Economical Supplementary Responding Motion Record, Tab 1B, p. 36.

<sup>57</sup> Supplementary Affidavit of Blair Keefe, para. 12, Supplementary Torys Motion Record, Tab 1, p. 4.

<sup>58</sup> Affidavit of Blair Keefe, para. 40, Torys MR, Tab 2, p. 21.

<sup>59</sup> Affidavit of Blair Keefe, para. 4, Torys MR, Tab 2, p. 8.

***Torys is Best Placed to Lead Complex Principled Negotiations***

55. Due to the regulatory context, principled negotiations will be critical to this case. There is no alternative to negotiations and no process by which Economical's demutualization could be arbitrated, litigated or otherwise refereed, unless the parties agree to do so. If negotiations fail, there is no "plan B": the only possible outcome is that the demutualization process would be aborted, leaving significant policyholder value locked in the company. For that reason, counsel to non-mutual policyholders need to have significant experience in complex and principled commercial negotiations. Experience in litigated disputes, including court supervised restructuring and class actions, will be of limited utility as there is no litigation option and, unlike a restructuring under the *Companies' Creditors Arrangement Act*, no access to a court to referee the process.

56. In this complex and unprecedented matter, there will be a need for both innovation and a deep understanding of demutualizations and their underlying principles, and the insurance industry as a whole. From the significant experience gained in the Sun Life and Manulife demutualizations and Torys' role in advising Gore Mutual on the regulations that will govern Economical's proposed demutualization, Torys lawyers are aware of important differences between the life insurance company demutualizations and the demutualization being undertaken by Economical. The principles worked out by Torys lawyers for the life insurance company demutualizations will be important and no doubt invaluable background, but there will need to be substantive changes to deal with the differences between the life insurance and the property and casualty insurance businesses, their histories and the economic circumstances affecting policyholders.<sup>60</sup>

57. Negotiations with mutual policyholders may also be complicated by the expectations created by Economical in its submission to the Department of Finance when regulations were being discussed. Economical dedicated a significant portion of its submission to the proposition that the mutual policyholders own the company and are entitled to all demutualization benefits.<sup>61</sup>

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<sup>60</sup> Affidavit of Blair Keefe, para. 20, Torys MR, Tab 2, pp. 14-15.

<sup>61</sup> Affidavit of Blair Keefe, para. 21, Torys MR, Tab 2, pp. 15.

58. While the Department of Finance rejected that proposition put forward in Economical's submission, the submission would have been read by many of the mutual policyholders, making the case for why they should receive all or substantially all of the demutualization benefits. In the negotiations, it may well be that counsel for non-mutual policyholders will need to critically evaluate those assertions and present cogent analysis countering such expectations in order to come to a resolution that will provide a fair and equitable distribution of Economical's value. Given its experience in this area, Torys is well positioned to take on this analysis.<sup>62</sup>

59. No other firm that applied to represent the non-mutual policyholders has the depth of demutualization experience of the proposed Torys team. The senior Torys lawyers who led the demutualization transactions are still at Torys, are part of the proposed Torys team and are ready to take a lead role in the negotiations with the mutual policyholders' committee.<sup>63</sup>

60. It is evident that with this background, negotiations could be challenging. The Hon. Frank Iacobucci has the expertise, gravitas and a record of success in negotiations and mediations in difficult circumstances. For example, in the various negotiations with the First Nations, The Hon. Frank Iacobucci negotiated in the context of historical grievances, political complexities and other sensitive circumstances. Nevertheless, he achieved successes through principled negotiations. His unmatched skillset will be a great benefit to the non-mutual policyholders in this engagement. Reaching a resolution will be beneficial to both groups of policyholders.

61. Should negotiations be unsuccessful, and should the two policy committees agree to pursue mediation or arbitration, Torys has the experience gained from acting in litigation related to policyholder rights to effectively represent the non-mutual policyholders before a mediator or arbitrator.

### **Proposed Torys Fees are Reasonable**

62. The fees proposed by Torys have been calculated making realistic assumptions based on decades of experience. As noted above, estimating actual time to be spent is very difficult. TGF and Siskinds provided no such estimates. Torys' proposal is fair, reasonable and provides

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<sup>62</sup> *Ibid.*

<sup>63</sup> Affidavit of Blair Keefe, para. 9, Torys MR, Tab 2, p. 9.

Economical with more certainty in respect of fees than the proposals of the other firms applying to represent the non-mutual policyholders.

63. As noted in paragraphs 39 and 42, Torys proposes to charge \$575 per hour for lawyers and \$175 for other professionals. This estimate assumes that the total number of professional hours required would range from 3,200 to 5,400 hours, with about 80% of those being by lawyers and the balance by articling students and paralegal staff. If that assumption is realized, estimated fees would be in the range of \$1.6 to \$2.7 million.

*Estimate of Hours Required for this Assignment*

64. Torys used empirical data from other complex files to find benchmarks its estimate of total hours. The Manulife demutualization,<sup>64</sup> the Royal Trustco restructuring and sale and the TMX proposed merger with LSEG and sale to the Maple Group were major complex transactions for which Torys lawyers were also responsible for implementation. As Torys would not be involved in the implementation of this demutualization, Torys took 20% of the time spent on those comparator transactions to estimate the hours required for this assignment.<sup>65</sup>

65. Torys also has the experience of a complex negotiation conducted for 133 First Nations with the Ontario government. Torys represented the 133 First Nations in negotiations with Ontario over gaming revenue. It was a complicated, protracted negotiation, and serves as a good benchmark for the uniqueness and complexity of the negotiation likely to be held between the policyholder committees in the Economical demutualization. The hours spent on the gaming revenue negotiations fall within the assumed range of hours used for the estimate made in this case.<sup>66</sup>

66. Additionally, assuming Economical would trade at its book value, the fees based on this estimate range between less than 0.1% to 0.15% of that amount. However, Torys' experience

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<sup>64</sup> Sun Life demutualization was excluded from this comparison because it involved a number of other pre-demutualization transactions and therefore substantially exceeded the average on the other deals.

<sup>65</sup> Affidavit of Blair Keefe, para. 35, Torys MR, Tab 2, pp. 19-20.

<sup>66</sup> *Ibid.*

with demutualization suggests that Economical would trade above its book value, and the estimated fees, as a percentage of the value of the company, would be even lower.

67. Torys also recognizes that the Court will supervise this process and can order an adjustment of fees payable by Economical if hours are not justified. Torys is prepared to justify all billed time on this file to Economical and to the Court.

68. Although no attempt at an estimate was made by any other firm that is applying, the proposal by Siskinds to take a success fee of a maximum of 5% of the benefits achieved for the non-mutual policyholders<sup>67</sup> will potentially result in a payment of tens of millions of dollars to that firm. For context, the total book value of Economical that is to be split between mutual and non-mutual policyholders is \$1.78 billion, and 5% of that amount is \$89 million. For Siskinds to match the top range of Torys' estimate with a 5% success fee, the non-mutual policyholders would have to receive only \$54 million on the \$1.78 billion of the total. In addition, Siskinds asks for hourly payments. It has proposed a cap of \$500,000, but only for the year 2016. No cap on fees is proposed for 2017,<sup>68</sup> when Torys expects the vast majority of the work to take place.

69. Siskinds' fee proposal is also uncertain because the success fee is subject to negotiation between Siskinds on one side and the non-mutual holders and Economical on the other.<sup>69</sup>

70. The rates and fees proposed by Gowlings do not provide sufficient certainty to Economical as they are subject to further negotiations if Gowlings exceeds 1,538 hours of work.<sup>70</sup> Significantly, Economical has no way of knowing what hourly rates Gowlings proposes to charge after the first 1,538 hours. In Torys' experience with similar mandates, that amount of hours is likely to be exceeded, which is why the Torys hourly rates will not change, regardless of the amount time spent on this matter.

71. Based on the Gowlings' time estimate of 577 hours, total fees charged by Torys would be lower than fees charged by Siskinds and Gowlings. It is difficult to compare Torys fees with

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<sup>67</sup> Affidavit of Michael Robb, paras. 50-51, Siskinds Motion Record, Tab 2, pp. 23-24.

<sup>68</sup> Affidavit of Michael Robb, para. 49, Siskinds Motion Record, Tab 2, p. 23.

<sup>69</sup> Affidavit of Michael Robb, para. 51, Siskinds Motion Record, Tab 2, p. 24.

<sup>70</sup> Affidavit of Peter Lukasiewicz, para. 39, Gowing WLG Motion Record, Tab 2, p. 15.

TGF fees as TGF did not propose a blended rate. The average of TGF's proposed rates, including the proposed 12.5% discount, is \$658.44 per hour, which is substantially higher than the \$575 per hour blended rate proposed by Torys.

*Alternative Two-Step Process*

72. As it is critical to select the right counsel and important to have counsel operate under a fair and reasonable fee arrangement, if Torys' fee proposal is not acceptable but Torys is otherwise best suited to represent the non-mutual policyholders, the Court is respectfully requested to consider following a two-step process.

73. Under that approach, the Court would first assess the merits of the various proposed counsel, their teams and expertise and choose the firms with the best qualifications. Next, the Court would assess the reasonableness of the various fee proposals and choose one or more fee proposals that the Court finds superior. The Court could then allow the teams with the best qualifications to respond to the fee proposals that the Court has determined are superior. This would allow the Court to pick the most meritorious team that is willing to adopt one of the superior fee proposals.

**No Conflict of Interest that Would Prevent Torys from Acting for the Non-Mutual Policyholders**

74. As explained above at paragraphs 43-51, the four objections received by this court are premised on facts which are simply incorrect. The interests of Gore Mutual are in no way tied to the interests of the non-mutual policyholders of Economical. However, even if the interests of a former client of Torys were somehow at odds with the interests of the non-mutual policyholders (which they are not), no Torys lawyer would countenance consideration of matters not in the best interests of the non mutual policyholders in the discharge of a retainer on their behalf.<sup>71</sup> Indeed preferring the interests of a former client would violate professional standards.

75. Torys is a law firm that is independent of all past clients. Torys does not currently have an engagement with Gore or any other client that would raise a conflict if Torys acted for the

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<sup>71</sup> Supplementary Affidavit of Blair Keefe, para. 13, Supplementary Torys Motion Record, Tab 1, p. 4.

non-mutual policyholders. If Torys is appointed as counsel to the non-mutual policyholders, Torys' interest and mandate will be to achieve a resolution that is fair and equitable to them.<sup>72</sup>

76. Torys also does not act for or against Economical. Gowlings, including two lawyers on its proposed team, currently act for Economical on numerous unrelated matters.<sup>73</sup> It appears that Gowlings has retainers with Economical across the corporate, litigation and intellectual property departments of the firm. As a result, an appointment of Gowlings to act for the non-mutual policyholders may raise an appearance of a conflict of interest as Economical has publicly taken that position that the mutual policyholders are entitled to all of the demutualization benefits.

***VC& Co. Advisory Ltd. Has a Conflict of Interest with the Non-Mutual Policyholders***

77. One of the objections to the appointment of Torys was drafted by VC & Co. Advisory Ltd., a firm that acts on behalf of approximately 100 mutual policyholders. Under its terms with the mutual policyholders that it represents, VC& Co. will receive 12.5% of any amount those mutual policyholders will receive from Economical.<sup>74</sup>

78. Non-mutual policyholders need excellent representation to achieve a resolution that is fair and equitable to them. The financial interests of VC & Co., are in opposition to that objective. VC & Co.'s financial interest is to minimize the allocation to the non-mutual policyholders, thus maximizing the share awarded to the mutual policyholders and increasing the amount of its fee.<sup>75</sup>

79. In addition, Torys has no knowledge of whether the policyholders objecting to its appointment are mutual policyholders or non-mutual policyholders, other than Mr. and Ms. Dickson, who appear to be among the approximately 100 mutual policyholders who have engaged VC & Co. Economical declined to provide this information in response to request from Torys.<sup>76</sup> It is possible that some of the remaining three objectors are also mutual policyholders.

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<sup>72</sup> Supplementary Affidavit of Blair Keefe, para. 11, Supplementary Torys Motion Record, Tab 1, pp. 3-4.

<sup>73</sup> Affidavit of Peter Lukasiewicz, para. 32, Gowling WLG Motion Record, Tab 2, p. 13.

<sup>74</sup> Proxy Circular on VC& Co. Advisory Ltd., Supplementary Torys Motion Record, Tab 1D, p. 35.

<sup>75</sup> Supplementary Affidavit of Blair Keefe, para. 16, Supplementary Torys Motion Record, Tab 1, p. 4.

<sup>76</sup> Supplementary Affidavit of Blair Keefe, para. 17, Supplementary Torys Motion Record, Tab 1, p. 5.

80. Torys is not applying to represent the mutual policyholders. As a result, mutual policyholders have very few, if any, grounds to object to the appointment of Torys as counsel for the non-mutual policyholders. Like VC & Co., it is in the mutual policyholders' financial interest for the non-mutual policyholders to be represented by counsel who would be ineffective at achieving a fair and equitable resolution.

**PART IV: ORDER REQUESTED**

81. Torys respectfully requests an order appointing it as Counsel for eligible non-mutual policyholders of the Economical Mutual Insurance Company.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 12th day of September, 2016



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Applicant, Torys LLP

IN THE MATTER OF THE INSURANCE COMPANIES ACT, R.S.C. 1991 c. 47, AS AMENDED, AND  
THE MUTUAL PROPERTY AND CASUALTY INSURANCE COMPANY WITH NON-MUTUAL  
POLICYHOLDERS CONVERSION REGULATIONS, SOR/2015-168

Court File No. CV-16-11425-00CL

AND IN THE MATTER OF A PLAN OF CONVERSION OF ECONOMICAL MUTUAL INSURANCE  
COMPANY

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

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**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**COMMERCIAL LIST**  
Proceeding commenced at TORONTO

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**FACTUM OF TORYS LLP**

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