

CITATION: In the Matter of a Plan of Compromise or Arrangement of JTI-Macdonald,
Imperial Tobacco and Rothmans, 2023 ONSC 2347
COURT FILE NOS.: CV-19-615862-00CL, CV-19-616077-CL and CV-19-616779-00CL
DATE: 20230623

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
In the Matter of the *Companies' Creditors*) *James Bunting and Maria Naimark,*
Arrangement Act, R.S.C. 1985, c. C-36, as) Counsel for the Moving Party, the Heart
amended) and Stroke Foundation of Canada in
) connection with its motion for leave to
AND) appoint Tyr LLP as representative counsel
) for the Future Tobacco Harm Stakeholders
In the Matter of a Plan of Compromise or)
Arrangement of JTI-Macdonald Corp.) *Robert Thornton and Leanne Williams,*
) Counsel for JTI-Macdonald Corp.
AND)
) *Deborah Glendinning, Craig Lockwood,*
In the Matter of a Plan of Compromise or) *Marc Wasserman and Marleigh Dick,*
Arrangement of Imperial Tobacco Canada) Counsel for Imperial Tobacco
Limited and Imperial Tobacco Company Limited)
) *James Gage, Heather Meredith and*
AND) *Natasha Rambaran,* Counsel to Rothmans,
) Benson & Hedges Inc.
In the Matter of a Plan of Compromise or)
Arrangement of Rothmans, Benson & Hedges) *Linc Rogers and Pamela Huff,* Counsel for
Inc.) Deloitte Restructuring Inc. in its capacity
) as Monitor of JTI-Macdonald Corp.
)
) *Natasha MacParland, Chanakya Sethi,*
) *Rui Gao and Benjamin Jarvis,* Counsel for
) FTI Consulting Canada Inc. in its capacity
) as court-appointed Monitor of Imperial
) Tobacco Canada Limited and Imperial
) Tobacco Company Limited
)
) *Jane Dietrich,* Counsel for Ernst & Young
) Inc. in its capacity as court-appointed
) Monitor of Rothmans, Benson & Hedges
) Inc.
)
) *Avram Fishman and Mark Meland,*
) Conseil québécois sur le tabac et la santé,

-) Jean-Yves Blais and Cécilia Létourneau
-) (Quebec Class Action Plaintiffs)
-)
-) *Robert Cunningham*, Counsel for the
-) Canadian Cancer Society
-)
-) *Maria Konyukhova*, Counsel for British
-) American Tobacco p.l.c., B.A.T.
-) Industries p.l.c. and British American
-) Tobacco (Investments) Limited
-)
-) *Amanda McInnis and Steven J. Weisz*,
-) Counsel for Grand River Enterprises Six
-) Nations Ltd.
-)
-) *Jacqueline Wall*, Counsel for His Majesty
-) the King in Right of Ontario
-)
-) *Adam Slavens*, Counsel for JT Canada
-) LLC Inc. and PricewaterhouseCoopers
-) Inc. in its capacity as receiver of JTI-
-) Macdonald TM Corp.
-)
-) *Alex Fernet Brochu*, Counsel for La
-) Nordique compagnie d'assurance du
-) Canada
-)
-) *Kate Boyle and Raymond Wagner*,
-) Representative Counsel for the Pan-
-) Canadian Claimants
-)
-) *Heather Fisher and Nicholas Kluge*,
-) Counsel for Philip Morris International
-) Inc.
-)
-) *Guneev Bhinder*, Counsel for Province of
-) Québec
-)
-) *Jeff Leon*, Counsel for the Provinces of
-) British Columbia, Manitoba, New
-) Brunswick, Nova Scotia, Prince Edward
-) Island and Saskatchewan, in their
-) capacities as plaintiffs in the HCCR
-) Legislation claims
-)
-)

) *Patrick Flaherty and Bryan McLeese,*
) Counsel for R.J. Reynolds Tobacco
) Company and R.J. Reynolds Tobacco
) International Inc.
)
) *Douglas Lennox,* Counsel for
) representative plaintiff, Kenneth Knight,
) in the certified British Columbia class
) action, *Knight v. Imperial Tobacco*
) *Canada Ltd.*, Supreme Court of British
) Columbia, Vancouver Registry No.
) L031300
)
) *William V. Sasso,* Counsel for the Ontario
) Flue-Cured Tobacco Growers’ Marketing
) Board
)
) *Jonathan Lisus and Nadia Campion,*
) Counsel for the court-appointed Mediator,
) The Honourable Mr. Winkler, O.C., O.On,
) K.C.
)
)
) **Heard: April 14, 2023**

MCEWEN, J.

REASONS FOR DECISION

[1] The Heart and Stroke Foundation of Canada (“HSF”) seeks leave to bring a motion to appoint Tyr LLP (“Tyr”) as representative counsel for the Future Tobacco Harm Stakeholders (“FTH Stakeholders”) in the within Applications.

[2] The motion is opposed by the three Monitors: Deloitte Restructuring Inc. in its capacity as court-appointed Monitor of JTI-Macdonald Corp. (“JTIM”); FTI Consulting Canada Inc. in its capacity as court-appointed Monitor of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited (“Imperial”); and Ernst & Young Inc. in its capacity as court-appointed Monitor of Rothmans, Benson & Hedges Inc. (“RBH”) (collectively the “Monitors”). The Province of Québec supports the Monitors. Neither JTIM, Imperial, RBH nor any other stakeholder take a position on this motion for leave. For the reasons that follow, I dismiss the HSF’s motion.

BACKGROUND

[3] In March 2019, JTIM, Imperial and RBH (collectively the “Applicants”) filed for protection pursuant to the provisions of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985,

c. C-36 (the “CCAA”). They sought, amongst other things, a resolution of several significant current and future litigation claims.

[4] I have been case-managing these three separate, but co-ordinated, Applications since that time (the “CCAA Proceedings”). The CCAA Proceedings are enormously complex. They involve multiple, significant tobacco-related actions brought against the Applicants as well as a number of potential tobacco-related claims that are currently unasserted or unascertained. These include ongoing class action proceedings as well as the outstanding judgment of the Court of Appeal of Quebec that largely upheld an earlier trial decision and awarded approximately \$13.5 billion to the Quebec class action plaintiffs. Additionally, there are numerous ongoing proceedings involving government-initiated litigation.

[5] In April 2019, shortly after the CCAA Proceedings were initiated, I appointed the former Chief Justice for Ontario, The Honourable Warren K. Winkler O.C., O.Ont, K.C. (the “Court-Appointed Mediator”) to mediate a global settlement of all claims against the Applicants, both current and future (the “Mediation”). Pursuant to the Appointment Order, the Court-Appointed Mediator is empowered to, amongst other things, adopt a process which in his discretion, he considers appropriate to facilitate negotiation of a global settlement, as well as deciding which stakeholders or other persons, if any, he considers appropriate to consult as part of the Mediation.

[6] It is noteworthy that in September 2019, the Canadian Cancer Society (“CCS”) brought a motion seeking an order allowing it to participate in the Mediation. Amongst other things, the CCS argued that although it was not a creditor, it was an important public health stakeholder in the CCAA Proceedings. Therefore, it had a direct financial interest in the CCAA Proceedings, since any settlement would impact the financial resources to be devoted to patients, education and research to reduce tobacco use. In furtherance of its argument, the CCS submitted that it was well-positioned to advance tobacco control measures for inclusion in a settlement. The HSF provided a letter supporting the CCS’s motion, while noting that it did not intend to bring a motion before the Court to participate in the CCAA Proceedings.

[7] I allowed the CCS limited participation in the CCAA Proceedings, but I did not allow it to participate in the Mediation. While I accepted that the CCS was a social stakeholder, I found that it did not have a direct financial interest in the CCAA Proceedings as it was neither a creditor nor a debtor. While I also accepted that the CCS had extensive experience as a health charity, and it was open to it to liaise with the government and other stakeholders outside of the Mediation, I had given the Court-Appointed Mediator broad discretion to shape the Mediation process. This included broad discretion to consult with a wide variety of persons or entities that he considered appropriate. I further noted that it was important to allow the Court-Appointed Mediator, who has vast experience in this area, the ability to carry on with the flexibility outlined in my Appointment Order in these very complicated and significant CCAA Proceedings.

[8] As part of my decision concerning the CCS’s limited participation in the CCAA Proceedings I ordered that, if the CCS wished to initiate its own motion, it required leave that could be requested in writing, on notice to the Applicants and other stakeholders.

[9] Thereafter, in December 2019, the Monitors brought a motion seeking advice and direction with respect to orders appointing representative counsel regarding the unasserted and

unascertained claims. They proposed that representative counsel – the law practice of Wagner & Associates Inc. (“Wagners”) – advance claims on behalf of individuals, with some limited exceptions that do not apply to the within motion, who have asserted claims or may be entitled to assert claims for Tobacco-Related Wrongs (respectively the “TRW Claims” and “TRW Claimants”).

[10] As I noted in my decision dated December 6, 2019 (the “December Decision”), the thrust of the motion was that the multiplicity of actions against the Applicants across Canada did not provide comprehensive representation for all individuals in the CCAA Proceedings. It was therefore necessary to have representation for all the TRW Claimants so that they could be properly represented with respect to the primary goal of the CCAA Proceedings: a pan-Canadian global settlement. This would benefit the Applicants, the TRW Claimants and all stakeholders. I granted the relief sought by the Monitors and ordered that Wagners, as an experienced class action litigation firm, was well-qualified to act.

[11] The Order appointing Wagners provided the firm with a broad mandate to represent the TRW Claimants defined in Schedule “A” to the Order. Of importance to the within motion is the following partial definition of TRW Claimants set out in Schedule “A”:

“TRW Claimants” means **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,

[Emphasis added.]

[12] Over the past four years, the Mediation has been conducted by the Court-Appointed Mediator. Pursuant to the provisions of the Order Setting out the Attendance at Mediation Protocol, the Court-Appointed Mediator has continued to designate and require the attendance of persons or entities that he deems necessary as well as excluding persons or entities that he does not believe to be necessary.

[13] The Court-Appointed Mediator, in accordance with the Court-Appointed Mediator Communication and Confidentiality Protocol Endorsement continues to update the Court on the Mediation process.

[14] At the recent Stay Extension Motion I granted a further six-month stay to September 29, 2023. I noted in my Endorsement that the Mediation continues to progress and the Applicants and the stakeholders are optimistic that a resolution of these extremely significant and complicated CCAA Proceedings is in sight.

[15] Consistent with my decision concerning motions brought by the CCS, the HSF sought leave to bring this motion to act as the representative plaintiff for FTH Stakeholders. By way of my February 14, 2023 Endorsement, I ordered, over the objections of the HSF, that the leave motion be heard in advance of the motion itself, assuming leave was granted.

THE TEST FOR LEAVE

Position of the Parties

[16] The HSF and the Monitors disagree as to what test for leave should be applied in this case.

[17] The HSF submits that this Court has broad discretion pursuant to s. 11 of the CCAA to manage the CCAA Proceedings. Generally, s. 11 provides this Court with the jurisdiction to make any order that it considers appropriate in the circumstances.

[18] The HSF therefore submits that, based on s. 11, this Court has the jurisdiction to appoint representatives on behalf of a stakeholder in a CCAA matter. It further submits that the factors to be considered by the Court are those set out in *Canwest Publishing Inc. (Re)*, 2010 ONSC 1328, 65 C.B.R. (5th) 152, at para. 21:

- The vulnerability and resources of the group sought to be represented.
- Any benefit to the companies under CCAA protection.
- Any social benefit to be derived from representation of the group.
- The facilitation of the administration of the proceedings and efficiency.
- The avoidance of a multiplicity of legal retainers.
- The balance of convenience and whether it is fair and just including to the creditors of the estate.
- Whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order.
- The position of other stakeholders and the Monitor.

[19] In the context of the motion before me, the HSF argues that the most significant factor for this Court to consider is whether there appears to be an unrepresented interest that is appropriate for representation within the CCAA Proceedings. If this is the case, the HSF submits that this

Court ought to 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 CCAA Proceedings.

[20] The HSF concedes that this test has not previously been applied by any court; however, given the unique circumstances of this case and the provisions of the *CCAA*, it is a reasonable test and ought to be applied.

[21] The Monitors disagree.

[22] First, they submit that the HSF, as a stakeholder seeking leave, bears the onus to persuade the Court that leave ought to be granted: see *Village Green Lifestyle Community Corp., Re* (2007), 27 C.B.R. (5th) 199 (Ont. S.C.), at para. 12.

[23] Further, the Monitors argue that although there is no specific test for leave to bring a motion, whether under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 or in the insolvency context, general insolvency principles should guide this Court, including the baseline considerations that a court should always bear in mind when exercising *CCAA* authority¹ and the test under the *CCAA* for “comeback” relief.

[24] In the insolvency context, the Monitors further rely upon the decision in *Century Services Inc.* wherein the Supreme Court of Canada noted, at para. 59, that judicial discretion must be exercised in furtherance of the *CCAA*’s purposes.

[25] They also submit that, as outlined by the Supreme Court of Canada in *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at para. 49, citing *Century Services Inc.*, at paras. 69, 70, the aforementioned fundamental principle underlines three basic considerations that a supervising judge must keep in mind when addressing any request for relief:

- (i) whether the order sought is “appropriate in the circumstances”;
- (ii) whether the party seeking relief has been acting “in good faith”; and
- (iii) whether the party seeking relief has been acting “with due diligence”.

[26] Building upon those principles, the Monitors submit that the first branch of the test set out in *Callidus*, i.e., whether the order sought is appropriate in the circumstances, ought to be expanded to include the considerations on the test for comeback relief. They therefore propose the following test for leave should be applied:

- (i) whether the party seeking relief has been acting in good faith by bringing the motion;
- (ii) whether the party seeking relief has been acting with due diligence;

¹ *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 70.

- (iii) whether there has been a change in circumstances that would necessitate the variance to existing orders; and
- (iv) whether the proposed variance will prejudice the progress of the CCAA Proceedings.

[27] The Monitors say the comeback relief test is appropriate because the HSF asks the Court to vary two of its earlier orders. The first being the Amended and Restated Initial Orders (the “ARIOs”) wherein the Monitors submit that the HSF seeks to add new parties to the Mediation. The second being the Representative Council Order wherein the HSF seeks to appoint Tyr as additional representative counsel.

[28] The comeback relief test applies when an interested party applies to a CCAA court to vary an initial order. The factors that guide the Court’s analysis in this respect are:

- (i) “recourse through the comeback clause is available when circumstances change”, meaning that recourse is unavailable when there are no changed circumstances;
- (ii) “comeback motions must be made *post haste* because of delay prejudice and the mounting prejudice caused by the momentum of proceeding itself”; and
- (iii) comeback relief “cannot prejudicially affect the position of the parties who have relied *bona fide* on the previous order in question.”

See *Canada v. Canada North Group Inc.*, 2017 ABQB 550, 60 Alta. L.R. (6th) 103, at paras. 50, 56, 68, *aff’d* 2019 ABCA 314, 93 Alta. L.R. (6th) 29, *aff’d* 2021 SCC 30, 28 Alta. L.R. (7th) 1.

[29] With that background, the Monitors proposed the four-part test set out in para. 26 above. In relying upon the aforementioned test, the Monitors highlight that a leave test precludes any analysis of the merits of the ultimate motion and the merits should not be addressed on a motion for leave.

Analysis

[30] I prefer the leave test put forth by the Monitors and will employ that test in these Reasons.

[31] As can be seen from the above, the HSF and the Monitors agree that this Court has broad discretion to control and manage the CCAA Proceedings. They diverge, however, as to how the test ought to be applied.

[32] The HSF focuses on the factors set out in granting a representative order in *Canwest* and submits that while the Court did not mandate the application of any specific test, the most significant factor is whether there appears to be an unrepresented interest that is appropriate for representation. The HSF then goes further to say that if this is the case, 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 in the CCAA Proceedings. The Monitors, on the other hand, while agreeing that there is no specific test for leave, focus on general insolvency principles. They rely on the aforementioned three-part test in *Callidus*, which

they have expanded upon, that sets out baseline considerations in which the applicant bears the burden of proof.

[33] In reviewing the aforementioned case law and the submissions of the parties, I disagree with the HSF that where there is an unrepresented interest, and employing the other factors in *Canwest*, the Court should grant leave unless there are exceptional factors or circumstances. This flips the onus and there is no authority for not only shifting the onus, but also finding that exceptional factors or circumstances are required.

[34] I am of the view that at a leave motion in these CCAA Proceedings that the four-part test set out by the Monitors ought to be applied. I base this conclusion primarily on the fact that, as mentioned above, this is a motion for leave, not the motion itself. The ultimate merits of the motion should not be considered at this stage.

[35] This is precisely where the two tests diverge, and why I prefer the Monitors' test. The Monitors' test speaks to procedural factors that this Court ought to consider. That is appropriate on a motion for leave.

[36] The Monitors' test focuses on the procedural considerations on a motion for leave. For example, whether existing orders may be varied; whether the proposed variance will prejudice parties; and whether parties have exercised due diligence are all procedural considerations that do not stray into a merits analysis.

[37] Finally, the Monitors' test is consistent with the Supreme Court of Canada's jurisprudence on CCAA matters. The Supreme Court of Canada is clear in that the factors set out in *Callidus* are to be followed by judges when exercising their discretionary authority.

[38] On the other hand, the test proposed by the HSF blends these two considerations. In this regard, parts of the test stray into an analysis of the ultimate merits of the proposed motion. Such factors will be considered if leave on the motion is granted. It is also worth pointing out that the Court in *Canwest*, the primary authority relied upon by the HSF, was considering the motion itself for whether the representatives should be appointed, and not whether leave should be granted to bring the motion. Whether the Court should grant leave to bring the motion is the focus of the analysis here.

[39] It is also worth pointing out that procedural aspects of the HSF's test set out in *Canwest* overlap with the Monitors' test. Factors like the balance of convenience and the facilitation of the administration of the proceedings and efficiency are still generally considered under the Monitors' test.

[40] Further, in my view, when determining whether an order granting leave is appropriate in the circumstances, I must consider whether the existing ARIOs ought to be varied to add a new stakeholder to the Mediation and whether the Representative Counsel Order ought to be varied to add Tyr. This requires an examination of the nature of the FTH Stakeholders and whether it is appropriate to appoint Tyr as representative counsel on their behalf and insert them into the Mediation, over four years after the Mediation has begun and in its latter stages.

[41] It is with these factors in mind that I will conduct my analysis below.

APPLICATION OF THE TEST FOR LEAVE

The Position of the HSF

[42] In support of its motion for leave, the HSF submits that it is important for this Court to understand that it is not seeking leave to be added as a party to or to participate in the CCAA Proceedings. Instead, the HSF submits that this is simply a motion for leave to bring a motion for a representation order over a group of individuals, the FTH Stakeholders, who have a direct interest in the outcome of this proceeding and who are unrepresented. It is not proposed that the HSF will represent this group; instead, the FTH Stakeholders will be represented by Tyr which will receive advice from an independent, *pro-bono* committee.

[43] In this regard, the HSF makes three primary submissions.

[44] First, it submits that the FTH Stakeholders are a significant stakeholder group that is unrepresented in the Mediation. In this regard, the HSF submits that Wagners, in representing the interests of the TRW Claimants as defined above, does not represent the proposed FTH Stakeholders.

[45] The HSF submits that s. 19(1) of the CCAA claims can only be compromised if they predate the filing. Section 19(1) reads as follows:

19(1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

- (a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of
 - (i) the day on which proceedings commenced under this Act, and
 - (ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and
- (b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

[46] Based on the aforementioned wording and the wording contained in the Appointment Order concerning the definition of TRW Claimants, the HSF submits that there is no temporal connection since the FTH Stakeholders are individuals who have yet to suffer tobacco-related

harms since they are comprised of millions of Canadians who will purchase or consume tobacco products or be exposed to their use following the commencement of these CCAA Proceedings or any agreed claims bar date. The HSF submits that these future FTH Stakeholders will become addicted to tobacco, be unable to quit, and that this group has an important interest that is currently unrepresented. Their interests do not align with the current stakeholders in that current stakeholders, including the TRW Claimants, seek to maximize funding for their claims which will be funded, at least partially, by FTH Stakeholders.

[47] The HSF further submits that due to the addictive nature of tobacco, the FTH Stakeholders will suffer harm while they continue to fund, in part, relief sought by other stakeholders including the TRW Claimants.

[48] The HSF lastly submits on this point that even if it could be argued that the FTH Stakeholders and the TRW Claimants could be represented by Wagners, that scenario would present a conflict of interest since the future FTH Stakeholders would be funding the settlement of the TRW Claimants, while experiencing their own addictions.

[49] In these circumstances, the HSF submits that there is currently no one who independently represents the interests of the FTH Stakeholders.

[50] Second, the HSF argues that the interests of the FTH Stakeholders are substantial, important and worthy of at least hearing a motion to determine whether they ought to be included as stakeholders and represented by Tyr, including at the Mediation.

[51] The HSF submits that the FTH Stakeholders have a direct interest since the Applicants will not have sufficient money to fund a settlement and will rely upon post-petition cash flows which will be funded, in part, by FTH Stakeholders.

[52] The HSF further submits that the FTH Stakeholders are further directly impacted by the CCAA Proceedings and that they have a direct interest in the nature and quality of preventative programs that will be implemented through a proposal or settlement, thus making them social stakeholders as well.

[53] Either way, the HSF submits that the FTH Stakeholders have a critical interest that is worth addressing and considering at a motion.

[54] Third, the HSF submits that, based on its test for leave, there are no exceptional circumstances not to hear a motion to appoint it representative counsel. Here, the HSF attempts to refute a number of submissions made by the Monitors. The HSF, as previously noted, submits that it is important to realize that it is not seeking to be added as a party or to have direct participation in the CCAA Proceedings. Rather, it brings this motion for leave to bring a motion for a representation order over the FTH Stakeholders to be represented by Tyr, which will receive advice from an independent, *pro-bono* committee. The HSF therefore submits that its proposed motion is entirely different from the motion the CCS brought that sought direct participation in the Mediation on its own behalf.

[55] The HSF further submits that this is not a motion to vary, as submitted by the Monitors, the ARIOs. Rather the intent in seeking a representation order is to empower and enhance the Mediation and the exercise of the Court-Appointed Mediator's powers within the Mediation.

[56] Additionally, the HSF submits that the test for comeback relief cited above by the Monitors (which, as noted, I agree with) is inapplicable in the context of this motion as they are not fair and relevant considerations given the current lack of representation of the FTH Stakeholders. Specifically, the HSF disputes the Monitors' contention that the HSF delayed in seeking to appoint Tyr as representative counsel for the FTH Stakeholders. The HSF submits there has been no delay as the FTH Stakeholders are unrepresented, have never been represented and as such cannot be accused of having delayed in bringing this motion. As for the argument that the HSF delayed in bringing the motion, it cannot be reasonably argued that the responsibility to identify a group (the FTH Stakeholders) who would have an interest in the CCAA Proceedings should be left to a not-for-profit organization such as the HSF. The HSF argues that other stakeholders could have identified this gap and any alleged delay cannot be laid at the feet of the HSF who does not have insight into the Mediation process.

[57] Overall, therefore, the HSF submits that leave ought to be granted as the public will perceive it as important to properly canvass the interests of an important stakeholder group. Consideration of the motion and the potential appointment of the FTH Stakeholders also precludes potential objections to a settlement when this matter returns to be sanctioned by the Court. In this regard, the HSF points to the recent case involving Purdue Pharma where a proposed settlement announced in the U.S. faced public backlash and lengthened the proceedings: 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>; *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>.

[58] Ultimately, in the *Purdue Pharma* case, a revised settlement included significant additional funds of approximately USD \$277 million devoted exclusively to opioid-related abatement, including support and service for survivors, victims and their families.

[59] In these circumstances, the HSF submits that it is fair and reasonable to at least allow it an opportunity to argue the motion to appoint Tyr as representative counsel for the FTH Stakeholders. This will add to the constellation of interests that are necessary to resolve the CCAA Proceedings.

The Monitors' Position

[60] The Monitors first stress that pursuant to my earlier Order, the leave motion was to be heard prior to the HSF's motion. Accordingly, only the test for leave applies and it is premature to discuss the merits of the HSF's motion. The focus should only be placed on the threshold requirements and the four principles they submit underlie the basic considerations that a

supervising judge must keep in mind when addressing a request for leave in any CCAA matter as set out in para. 26 above.

[61] First, insofar as good faith is concerned, the Monitors concede that the HSF is proceeding in good faith. They submit, however, that the HSF fails to meet the other requirements.

[62] Second, insofar as due diligence is concerned, the Monitors point out that in December 2019, they brought a motion to appoint Wagners on behalf of the TRW Claimants as an effective tool to represent claims that were unascertained or unasserted.

[63] The Monitors submit that had a stakeholder, such as the HSF, thought that the scope of the Representative Counsel Order was not broad enough or that there was a conflict to respond to, that they would have brought a motion to have this Court decide the issue. The Monitors dispute the HSF's contention that as a not-for-profit organization it was not their obligation at the time to respond. Further, the Monitors argue that if the HSF's submission was self-evident, they should and would have known of it at that time.

[64] The Monitors further submit that the HSF delivered a letter of support with respect to the CCS's motion in September 2019 in which the CCS sought to participate in the Mediation which is very similar to the relief now sought by the HSF, albeit on behalf of the FTH Stakeholders. There is no material difference between the HSF's motion and the motion earlier brought by the CCS as both seek to advocate on behalf of other individuals. Based on the foregoing, the Monitors submit that the HSF has not acted with due diligence and in essence seeks to relitigate the issue as to whether a third party should be inserted into the Mediation.

[65] Third, the Monitors argue that there has been no change of circumstances that would justify variances to the ARIOs. The Monitors submit that the FTH Stakeholders are partly or entirely represented in the mediation. The Monitors submit that the definition of TRW Claimants includes the FTH Stakeholders and that it captures "all individuals ... who assert or may be entitled to assert a claim or cause of action against one or more of the Applicants ... in respect of ... the historical or ongoing use of or exposure to Tobacco Products". Based on the plain wording of the above definition, the Monitors submit that this includes the FTH Stakeholders who are, by their own definition, "people who will purchase – consume tobacco products or be exposed to their use following commencement of these proceedings/or claims bar date."

[66] The Monitors further point to the December Decision wherein Wagners was appointed on behalf of the TRW Claimants and particularly paragraphs 30 and 42 where I state as follows:

[30] The social benefits of access to justice, in the facilitating of a complex restructuring, are met. At this time many of the TRW Claims are unascertained and unasserted. As such, many of the TRW Claimants are likely unaware of these CCAA proceedings. The Representation Order sought would further promote access to justice by giving the TRW Claimants a powerful, single voice in the process.

...

[42] I agree with the Tobacco Monitors that a single point of contact is critical in these proceedings. As I have previously indicated, these restructurings are amongst the most complex in CCAA history for a number of reasons, which include the vast number and size of the complicated tobacco-related actions that have been, or could be, commenced against the Applicants.

[67] Based on the foregoing, the Monitors submit that this Court specifically anticipated that the TRW Claims included those that were unascertained and unasserted including those that had been, or could be, commenced against the Applicants. They also point to the fact that I further noted that a single point of contact was critical insofar as the TRW Claims were concerned.

[68] The Monitors alternatively argue that even if certain members of the FTH Stakeholders were not captured within the definition of the TRW Claimants, their interests are adequately represented in the Mediation and that this has been acknowledged by the HSF in its factum where it states that the concerns of the FTH Stakeholders are ultimately about “public health writ large”. The Monitors submit that the interests of the public at large can be adequately accounted for and addressed by many different participants in the Mediation, including the provinces who represent public and social interests, including harm reduction; Wagners, who represent the individuals who assert or may be entitled to assert claims; the Monitors, who are officers of the court and have the obligation to consider the interests of all stakeholders; and the Court-appointed Mediator who has been provided with the broad discretion to consult with a variety of persons as he considers appropriate. Further, in this regard, the Monitors submit that what the HSF is really seeking to do is add new parties to the Mediation and therefore vary the ARIOs. The HSF’s request is functionally the same as the CCS’s earlier request and that as a result, Tyr, an additional representative counsel, would be inserted.

[69] Further, with respect to the HSF’s submission that the FTH Stakeholders are in a conflict with respect to other TRW Claims, the Monitors submit that the HSF is passing off speculation as evidence and the HSF’s affiant, Diego Marchese, an Executive Vice-President with the HSF, is not part of the Mediation. As such, he does not know the positions the parties have taken, particularly the TRW Claimants, or what action they have taken thereafter. In any event, the Monitors submit it is premature to even consider any issues of conflict since we are still at the leave stage and issues such as conflict are not yet engaged.

[70] Insofar as s. 19(1) of the CCAA is concerned, the Monitors submit that this motion does not raise any issues under s. 19(1). There is no claims bar date, no stakeholder is asking that these claims be compromised and the goal of the Mediation is to reach a settlement. Further, as noted, the Order appointing Wagners as counsel for the TRW Claimants provides for future claims or causes of action.

[71] Fourth, perhaps most significantly, the Monitors also submit that the belated introduction of the FTH Stakeholders jeopardizes the significant progress that has been achieved to date in the Mediation which, as noted, is hopefully entering its final stages. Accordingly, there is prejudice to the progress of the CCAA Proceedings.

[72] The Monitors submit, relying in part upon the decision of this Court in *Target Canada Co. Re.*, 2016 ONSC 316, 32 C.B.R. (6th) 48, at para. 31 that the CCAA process is one of building

blocks. Stays are granted, plans are developed and orders are made. If parties wish to change the terms of such orders, such developments could run counter to the building block approach that underpins the proceedings. The Monitors submit that this is particularly true in the within case which has been ongoing for over four years, with good progress and optimism that a successful resolution is in sight. The Monitors submit that the Court should not risk disrupting the progress and potentially delaying resolution by compelling the participation of a new stakeholder at this late stage. They stress that this is particularly so where the Court-Appointed Mediator has not exercised his discretion or judgment to include the FTH Stakeholders or made any recommendations in this regard to this Court. The Monitors also point out that several parties have expressed serious concerns about the length of time the Mediation is taking and introducing a new stakeholder will almost certainly exacerbate those concerns.

[73] Last, the Monitors submit that even if leave is denied, the HSF will still retain the ability to participate in these proceedings as a social stakeholder in many meaningful ways as this Court has previously recognized the value of social stakeholders. It should not, however, be permitted to seek special treatment at this late stage by forcing the FTH Stakeholders into the Mediation and asking this Court to second guess the discretion and judgment of the Court-Appointed Mediator.

[74] The fact that the HSF speculates that it is better to insert the FTH Stakeholders now than have them appear at a sanction hearing is not only speculative, but does not form part of the test for obtaining leave to bring this motion. There is simply no evidence before the Court to support an order including the FTH Stakeholders.

[75] Based on the foregoing, the Monitors submit that the HSF's motion is an impermissible attempt to alter the *status quo* where there has been no change in circumstances, the HSF has not moved promptly and that the proposed variance would prejudice the progress of the CCAA Proceedings.

Analysis

[76] In considering whether leave ought to be granted, as noted, I have accepted the four-part test urged upon me by the Monitors which I reiterate below:

- (i) whether the HSF is proceeding in good faith by bringing this motion;
- (ii) whether the HSF has acted with the requisite due diligence in doing so;
- (iii) whether there has been a change in circumstances that would necessitate the variance to existing orders; and
- (iv) whether the proposed variance would not prejudice the progress of the CCAA Proceedings.

[77] For the reasons that follow I accept the arguments put forth by the Monitors.

[78] I begin by noting that there is no question that the HSF satisfies part (i) of the aforementioned test. The HSF has been acting in good faith in seeking the representation order.

It is a well-established not-for-profit charity. The HSF is also a leader in disease prevention which includes activities at preventing harm caused by smoking.

[79] Second, insofar as the requirement of due diligence is concerned, while I am not being critical of the HSF, I cannot conclude that they have acted with due diligence in the circumstances of this case and particularly the well-known, ongoing Mediation. As I have indicated, the Mediation has been proceeding for over four years. The HSF did have the ability to bring its motion sooner, which I have compared to the CCS motion, of which the HSF was well aware.

[80] Third, I accept that there has not been a change of circumstances.

[81] In this regard, the definition of TRW Claimants is broad enough to include the FTH Stakeholders which is evidenced in the December Decision in which I specifically appoint Wagners on behalf of the TRW Claimants to include individuals that are not currently represented, scattered across the country and do not have the ability or resources to advance this claim in these complex CCAA Proceedings. This would include, as defined in the representation order, individuals who assert or may be entitled to assert claims with respect to a broad range of alleged wrongs generally relating to tobacco-related personal harm. I pause here to note that when I delivered my December Decision and approved the resulting order, I was clearly of the view that the definition of TRW Claimants was to include future claims. This was reflected in my December Decision that specifically included unascertained and unasserted claims, as set out in paragraph 30 of that decision and reproduced above at paragraph 68. This definition captures claims by the FTH Stakeholders.

[82] Additionally, in any event, I accept the Monitors' submissions that even if the FTH Stakeholders are not captured within the definition of the TRW Claimants, their interests are adequately represented in the Mediation.

[83] Further, insofar as any potential conflict of interest is concerned, even if I was to consider it at the leave stage, there is no evidentiary basis to advance this submission. Unquestionably, Wagners, on behalf of the TRW Claimants, will represent a number of different constituencies. Neither Wagners nor the Court-appointed Mediator or the Monitors have identified any conflicts about which I should be concerned.

[84] Mr. Marquese deposes at para. 8 of his affidavit that "I understand that as a result of the nature of the claims being addressed in these proceedings, that a likely component of any Proposed Plan would be the establishment of a fund that will be used to make future payments for public or social purposes or programs in lieu of the ability to make payments directly to claimants." He generally goes on to further depose that, based on his understanding how the fund is established, governed and used will be a critical component in ensuring that the rights and interests of FTH Stakeholders are adequately addressed and that all parties participating in the CCAA Proceedings and Mediation are in conflict with FTH Stakeholders.

[85] Mr. Marquese does not cite any basis for his understanding, which almost entirely undermines his purported evidence. Further, I do not know how he could have such insight into the confidential Mediation in which the HSF is not a party. Nothing to date has been brought forward to this Court to support Mr. Marquese's understanding or belief. Based on my own

knowledge of the ongoing Mediation and Mr. Marquese's understandable lack of insight, I do not accept that the FTH Stakeholders operate in a conflict with other stakeholders and particularly do not act in conflict with the TRW Claimants.

[86] I am further of the view that my decision does not run contrary to the provisions of s. 19(1) of the CCAA. I accept the Monitors' submissions above and the claims of the FTH Stakeholders, to the extent they may exist, are no different in nature than other unascertained and unasserted claims of any TRW Claimants.

[87] Fourth, insofar as the issue of prejudice is concerned, as I have indicated, the Mediation appears to be reaching its latter stages after four years. Substantial progress has been made. This has been confirmed by both the Court-appointed Mediator and the Monitors. A resolution is in sight.

[88] I am very hesitant to introduce new participants at this late stage, which will, in my view, almost certainly complicate matters in circumstances where the Monitors and Court-appointed Mediator have not identified any concerns. In this regard I am satisfied that the ultimate order sought by the HSF would likely prejudice the progress of the CCAA Proceedings.

[89] In reaching this conclusion, I emphasize that the HSF retains its ability to participate in the CCAA Proceedings as a social stakeholder and if difficulties arise with respect to what the HSF has identified as the FTH Stakeholders, the matter may return to the Court.

[90] I conclude by noting two things. First, once again, I have tremendous faith in the Court-Appointed Mediator to address any concerns or conflicts as alleged by the HSF and bring them to the Court if, in fact, they exist. Second, even if I was to accept the test for leave proposed by the HSF and consider the *Canwest* factors, I would come to the same conclusion for the reasons above.

DISPOSITION

[91] The HSF's motion for leave to bring a motion seeking to have Tyr appointed as representative counsel to the FTH Stakeholders is dismissed.



McEwen J.

Date: June 23, 2023

CITATION: In the Matter of a Plan of Compromise
or Arrangement of JTI-Macdonald, Imperial Tobacco
and Rothmans, 2023 ONSC 2347

COURT FILE NOS.: CV-19-615862-00CL,
CV-19-616077-CL and CV-19-616779-00CL

DATE: 20230623

**ONTARIO
SUPERIOR COURT OF JUSTICE**

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.

REASONS FOR DECISION

McEwen J.

Released: June 23, 2023