

CITATION: 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, 2020 ONSC 61
COURT FILE NOS.: CV-19-615862-00CL, CV-19-616077-00CL, and CV-19-616779-00CL

DATE: 20200103

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
In The Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, As Amended) *Robert I. Thornton, John Finnigan and Leanne M. Williams*, counsel for the Applicant, JTI-Macdonald Corp.)
)
AND:) *Deborah Glendinning and Craig Lockwood*,)
) counsel for the Applicant, Imperial Tobacco)
In The Matter of a Plan of Compromise or) Canada Limited and Imperial Tobacco)
Arrangement of JTI-Macdonald Corp.) Company Limited)
)
AND:) *Paul Steep, James Gage and Heather Meredith*, counsel for the Applicant,)
) Rothmans, Benson & Hedges Inc.)
In The Matter of a Plan of Compromise or)
Arrangement of Imperial Tobacco Canada)
Limited and Imperial Tobacco Company)
Limited) *Avram Fishman, Mark E. Meland, Andre Lesperance, Bruce Johnston and Harvey Chaiton*, counsel for Quebec Class Action)
) Plaintiffs)
AND:)
) *Jacqueline Wall*, counsel for Her Majesty)
In The Matter of a Plan of Compromise or) The Queen In Right of Ontario)
Arrangement of Rothmans, Benson &)
Hedges Inc.)
)
) *Lily Harmer*, counsel for Her Majesty The)
) Queen In Right of Alberta and)
) Newfoundland & Labrador)
)
) *Michael Eizenga*, counsel for the)
) Consortium)
)
) *Nicholas Kluse*, counsel for Philip Morris)
) International Inc.)
)
) *Natasha MacParland*, counsel for FTI)
) Consulting Canada Inc., Monitor of Imperial)
) Tobacco Canada Limited and Imperial)
) Tobacco Company Limited)

-) Tobacco Canada Limited and Imperial
-) Tobacco Company Limited
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-) *Linc Rogers*, counsel for Deloitte
-) Restructuring Inc., Monitor of JTI-
-) Macdonald Corp.
-)
-) *Jane Dietrich*, counsel for Ernst & Young
-) Inc., Monitor of Rothmans, Benson &
-) Hedges Inc.
-)
-) *Adam Slavens*, counsel for the Receiver of
-) JTI-Macdonald Corp. and JTIM Canada
-) LCC
-)
-) *Douglas Lennox*, counsel in certified British
-) Columbia Class Action
-)
-) *Robert Cunningham*, counsel for Canadian
-) Cancer Society
-)
-) *Joel Rochon* and *Peter Jervis*, counsel for
-) Moving Counsel
-)
-) *Nadia Champion*, counsel for Court-
-) Appointed Mediator

HEARD: December 6, 2019

REASONS FOR DECISION

MCEWEN J.

OVERVIEW

[1] JTI-Macdonald Corp. (“JTIM”), Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited (“Imperial”), and Rothmans, Benson & Hedges Inc. (“RBH”) (collectively “the Applicants”) have filed for protection pursuant to the provisions of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the “CCAA”) seeking a resolution of the multiple, significant litigation claims.

[2] These CCAA proceedings are complex in nature and involve a number of significant tobacco-related actions that have been brought against the Applicants as well as a number of potential tobacco-related claims which are currently unasserted or unascertained.

[3] On December 6, 2019 the three Monitors (Deloitte Restructuring Inc. in its capacity as court-appointed Monitor of JTIM, FTI Consulting Canada Inc. in its capacity as court-appointed Monitor of Imperial and Ernst & Young Inc. in its capacity as court-appointed Monitor of RBH) (collectively the “Tobacco Monitors”) brought a joint motion in all three Applications seeking advice and directions with respect to orders appointing Representative Counsel regarding the unasserted and unascertained claims. The Tobacco Monitors proposed that Representative Counsel – The Law Practice of Wagner & Associates, Inc. (“Wagners”) – would advance claims on behalf of individuals (the “TRW Claimants”), with some limited exceptions described below, who have asserted claims or may be entitled to certain claims for a Tobacco-Related Wrong (the “TRW Claims”).

[4] The thrust of the joint motion is that the multiplicity of actions against the Applicants across Canada do not provide comprehensive representation for all individuals in these CCAA proceedings.

[5] It is therefore necessary to have representation for all of the TRW Claimants so that they may be properly represented with respect to the primary goal of these CCAA proceedings – a pan-Canadian global settlement. This will benefit the TRW Claimants, the Applicants and all stakeholders.

[6] The proposed Representative Counsel, Wagners, would represent all individuals outside of those claims that are currently the subject of a previously certified class action. There are currently three certified class actions. Two by the Quebec Class Action Plaintiffs (“QCAP”) and one in British Columbia (the “Knight Class Action”) (collectively the “Certified Class Actions”).

[7] At the hearing of the joint motion, Rochon Genova LLP and The Merchant Law Group (collectively “Moving Counsel”) sought permission to appear as co-counsel with Wagners. Moving Counsel seek to become involved in these Applications since The Merchant Law Group issued eight tobacco-related statements of claim, all of which are uncertified (the “Uncertified Actions”), as follows:

- *Suzanne Jacklin v. Canadian Tobacco Manufacturers’ Council et al.*, No. 53974/12 (Ontario)
- *Barbara Bourassa on behalf of the estate of Mitchell David Bourassa v. Imperial Tobacco Canada Limited et al.*, No. 10-2780 (British Columbia)
- *Roderick Dennis McDermid v. Imperial Tobacco Canada Limited et al.*, No. 10-2769 (British Columbia)
- *Linda Dorion v. Canadian Tobacco Manufacturers’ Council et al.*, No. 0901-08964 (Alberta)

- *Thelma Adams v. Canadian Tobacco Manufacturers' Council et al.*, No. 916 (Saskatchewan)
- *Thelma Adams v. Canadian Tobacco Manufacturers' Council et al.*, No. 1036 (Saskatchewan)
- *Ben Semple v. Canadian Tobacco Manufacturers' Council et al.*, No. 312869 (Nova Scotia)
- *Deborah Kunta v. Canadian Tobacco Manufacturers' Council et al.*, No. CI09-01- 61479 (Manitoba)

[8] Moving Counsel seek to represent the interests of the proposed class members in the Uncertified Actions. In essence, Moving Counsel would partner together, with Rochon Genova LLP acting as lead counsel within their team. Moving Counsel would then act on behalf of individuals who could be included in the Uncertified Actions, while Wagners would act for the remaining individuals in Canada (outside of the Certified Class Actions above).

[9] On December 9, 2019 I granted the Tobacco Monitors' motion and denied the request of Moving Counsel to act as co-counsel with Wagners, with Reasons to follow.

[10] I am now taking the opportunity to provide those Reasons.

THE ADJOURNMENT REQUEST

[11] At the commencement of the motion, Moving Counsel sought an adjournment. It was opposed by the Tobacco Monitors, the Applicants, Quebec, the provinces of British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan (collectively "the Consortium"), QCAP and the Knight Class Action. No stakeholder supported the adjournment request.

[12] The basis for the adjournment request was as follows:

- Rochon Genova LLP had just been retained by The Merchant Law Group on December 4, 2019.
- Moving Counsel wanted to file additional materials to support the position that they be allowed to act.
- Moving Counsel had an important role to play in the ongoing *CCAA* proceedings.
- It was important that the individuals in the Uncertified Actions have their own representation.
- Only a short adjournment was required and there would be no prejudice to the other stakeholders.

[13] After hearing submissions I denied the adjournment request subject to the caveat that if something arose during argument with respect to the appointment of Representative Counsel that, in my view, required an adjournment, I would reconsider the issue. No such issue arose.

[14] In denying the request for an adjournment I accepted the submissions of the Tobacco Monitors and supporting stakeholders as follows:

- The Merchant Law Group had been advised verbally of the motion on November 21, 2019.
- The motion materials were served on both The Merchant Law Group and Rochon Genova LLP on November 25, 2019, with supporting reports being delivered on November 26, 2019, all within the timelines required by the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
- The Initial Orders in both the JTIM and RBH proceedings provided timelines for service of motions which were met by the Tobacco Monitors' counsel.
- Neither The Merchant Law Group, nor Rochon Genova LLP, complied with the portions of the Initial Orders with respect to the required timelines to file responding materials to a motion.
- A short adjournment would be next to impossible given the number of counsel involved and the pending holiday season.
- There would be prejudice if the motion was adjourned. Significant progress has been made in the court-ordered mediation before the Honourable Warren Winkler, Q.C. This mediation was at a critical stage and any delays would upset significant milestones, some of which have occurred between the date of the hearing and the release of these Reasons.

[15] Moving Counsel did not file any materials to support the request for an adjournment although, in my view, they had a reasonable amount of time to do so. They were, however, able to provide fulsome affidavit evidence in support of their position that they ought to be retained to represent individuals in the Uncertified Actions commenced by The Merchant Law Group.

[16] In these circumstances, an adjournment was not warranted or necessary given the affidavit filed by Moving Counsel and the well-informed submissions they were able to make after the adjournment request was denied.

THE TOBACCO MONITORS' MOTION TO APPOINT REPRESENTATIVE COUNSEL

[17] I will first deal with whether Representative Counsel ought to be appointed and then whether Moving Counsel ought to be able to represent those individuals potentially able to claim in the Uncertified Actions.

[18] At the outset it bears noting that no stakeholder opposes the Tobacco Monitors' motion to appoint Wagners as Representative Counsel to represent all TRW Claimants. The Applicants and

significant stakeholders such as the Consortium, QCAP and the Knight Class Action consent. Other significant stakeholders, being Ontario, Quebec, Alberta and Newfoundland & Labrador, expressly do not oppose.

Jurisdiction

[19] I accept the Tobacco Monitors' submission that Canadian courts have jurisdiction to appoint Representative Counsel in insolvency proceedings pursuant to both s. 11 of the *CCAA* and r. 10.01 of the *Rules of Civil Procedure*. Section 11 of the *CCAA* affords this court broad discretion to make "any order that it considers appropriate in the circumstances" while r. 10.01(f) permits this court to "appoint one or more persons to represent any person or class of persons who are ... unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served."

[20] On a number of occasions courts have used the aforementioned provisions to appoint counsel to represent a broad range of litigants in complicated *CCAA* proceedings: see *Cash Store Financial Services, Re*, 2014 ONSC 4567; *Montreal, Maine & Atlantic Canada Co., Re* (April 4, 2014), Doc. 450-11-000167-134 (Q.C.S.C.); and *Sears Canada Inc., Re* (January 25, 2018), Court File No. CV-17-11846-00CL (Ont. S.C.).

[21] Based on the above, I am satisfied that I have the jurisdiction to appoint Representative Counsel to represent the TRW Claimants in these proceedings. No one took issue with this court having jurisdiction.

The TRW Claims

[22] The Tobacco Monitors, as noted, propose that Representative Counsel will represent individuals with TRW Claims in all provinces and territories to the extent that they are not currently represented in the Certified Class Actions. These would include various residual tobacco-related disease claims that fall outside the certified class definitions in the Certified Class Actions, claims that are currently the subject of the Uncertified Actions and the tobacco-related claims for which no individual or class proceedings have been commenced. Of course, it would not include the provinces' health cost recovery claims nor the existing, uncertified commercial class actions in Ontario which have been commenced by the tobacco growers and producers.

[23] In order to achieve a pan-Canadian global settlement, the Tobacco Monitors submit it is necessary to appoint Representative Counsel to ensure that the TRW Claims, as defined, are addressed in an efficient, timely and consistent manner. The TRW Claimants are scattered across the country. Most do not have any representation and likely do not have the ability or resources to advance their claims in these complex *CCAA* proceedings.

[24] As mentioned, The Merchant Law Group has commenced Uncertified Actions in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Nova Scotia. No class proceedings or individual proceedings have been commenced in New Brunswick, Newfoundland & Labrador, Prince Edward Island or any of the Territories.

[25] Overall, the TRW Claimants, as defined in the draft order, are 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 injury. I accept that the broad definition of the TRW Claimants is satisfactory and it can be refined at a later period.

It is Appropriate to Appoint Representative Counsel

[26] In determining whether it is appropriate to appoint Representative Counsel, I agree with the Tobacco Monitors' submission that the relevant factors are set out in *Canwest Publishing Inc.*, 2010 ONSC 1328, at para. 21, as follows:

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

[27] In this case I accept that all of the factors have been met.

[28] The TRW Claimants, as noted, are vulnerable individuals in complex proceedings where they are unorganized and likely lack resources. The Applicants and indeed all stakeholders will benefit from a pan-Canadian settlement.

[29] Without Representative Counsel the administration of these proceedings would be cumbersome and perhaps undoable. The appointment of Representative Counsel will facilitate efficiency and make the proceedings more cost effective by providing a clear mechanism for communicating with the TRW Claimants.

[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.

[31] A multiplicity of legal retainers between several counsel is also obviated which will save time and money. The TRW Claimants would also be assisted by Representative Counsel acting as a single point of contact among all of the other stakeholders, the Applicants and the Tobacco Monitors.

[32] The balance of convenience and fairness favour the retainer of Representative Counsel as no firm is currently advancing a certified class action and is prepared to act for the TRW Claimants. None of the other stakeholders object and significant stakeholders consent to the orders sought.

[33] Wagners has the necessary expertise. Once again, no one opposes the appointment of Wagners as Representative Counsel. This includes Moving Counsel, notwithstanding their position that they be appointed as co-counsel with Wagners.

[34] Wagners, which is based in Halifax, is recognized as a leading class action law firm. I am satisfied that, as a result of their experience in the area, they have demonstrated the necessary expertise in class action matters to represent the TRW Claimants. Additionally, I am satisfied that the method proposed by the Tobacco Monitors infuses the necessary degree of independence in Wagners so that they can vigorously represent the TRW Claimants.

[35] Last, Wagners is not conflicted in this matter and will take the necessary steps to ensure that no conflicts arise.

MOVING COUNSEL SHOULD NOT BE APPOINTED AS CO-COUNSEL

Position of Moving Counsel

[36] While Moving Counsel do not oppose Wagners being appointed as Representative Counsel, they submit that they ought to be appointed as co-counsel for the following reasons:

- The court should be hesitant to displace The Merchant Law Group who is counsel of record in the eight Uncertified Actions.
- Rochon Genova LLP, who would be lead counsel, is well qualified to assist.
- Involving Moving Counsel would provide “additional firepower” on behalf of the TRW Claimants, which would be of benefit to them.
- Moving Counsel should not be denied the right to represent the plaintiffs in the Uncertified Actions simply because the actions have not been certified. Rochon Genova LLP has represented plaintiffs in similar circumstances, such as the proposed class members in the well-known *Lac-Mégantic* matter.
- In circumstances where Wagners’ appointment is unopposed, Moving Counsel would enjoy greater independence and be in a better position to advocate on behalf of the proposed class members in the Uncertified Actions.

Position of the Tobacco Monitors

[37] The Tobacco Monitors primarily submit as follows:

- The Merchant Law Group is not in a solicitor-client relationship with individuals outside of the eight individuals named in the Uncertified Actions.
- Wagners would represent all TRW Claimants equally and impartially.
- It is important to have a single point of contact. This will ensure efficiency and clarity, and control costs.
- The within motion is not a carriage motion. Therefore, only the *Canwest* factors ought to apply.
- Wagners, pursuant to the terms of the proposed order, can retain additional counsel of its choosing to assist, if need-be.
- Rochon Genova LLP would be acting in a conflict of interest since it already represents plaintiffs bringing claims against Imperial.
- Adding Moving Counsel as co-counsel will only complicate matters, add delay and is contrary to the wishes of the Applicants and significant stakeholders in a scenario where no stakeholder supports the position taken by Moving Counsel.

Analysis

[38] I accept the position of the Tobacco Monitors and the supporting submissions of the Consortium and QCAP.

[39] First, I accept that based on the authority set out in *Pearson v. Inco. Ltd.* (2001), 57 O.R. (3d) 278 (S.C.), leave to appeal to Div. Ct. refused [2002] O.J. No. 2134 (S.C.) (at paras. 13 and 18), The Merchant Law Group is not in a solicitor-client relationship with the proposed class members in the Uncertified Actions. In fact, The Merchant Law Group, on its own website, states that potential class members who provide contact information are not creating a solicitor-client relationship.

[40] We are therefore left with the situation where The Merchant Law Group, and ultimately Moving Counsel, represent eight individual clients at this point in time.

[41] Further, it cannot be ignored that The Merchant Law Group has taken no steps to advance the Uncertified Actions it has commenced. All eight of them have remained dormant since they were issued between 2009 to 2012. Moving Counsel has filed no materials to suggest otherwise. In these circumstances it can hardly be said that any meaningful steps have been taken to the benefit of proposed class members.

[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.

[43] I further agree with the Tobacco Monitors that the most efficient and cost-effective way to deal with the TRW Claimants is to appoint a single law firm which can deal with all of the claims in an even-handed manner throughout Canada. To add Moving Counsel at this stage would unduly complicate matters and add expense and delay. This is particularly true where The Merchant Law Group has taken no steps over several years and now Moving Counsel would have to quickly prepare and become involved as co-counsel representing a discrete group different from the TRW Claimants that would be represented by Wagners. The legal team proposed by Moving Counsel in its filed affidavit has already changed and one of the counsel proposed is no longer prepared to act.

[44] Additionally, Moving Counsel submits that they be paid in the discretion of the Court-Appointed Mediator at the end of the proceedings, which adds an element of uncertainty and added expense in a situation where Wagners has agreed to work for an hourly rate.

[45] These matters are far different from the *Lac-Mégantic* case due to their national scope and number of significant and varied claims. Further, in *Lac-Mégantic*, there was no proposal similar to the one being made by the Tobacco Monitors.

[46] In this regard, it is also important to repeat that this is a purely procedural motion to provide representation for the TRW Claimants to promote a pan-Canadian settlement. It is not a carriage motion.

[47] Rochon Genova LLP would also have to deal with its current conflict, for which it provides no clear path.

[48] Overall, I am of the view that when all significant stakeholders support, or do not oppose, the appointment of Wagners, and based on the above analysis and submissions by the Tobacco Monitors, the far preferable path is to have Wagners represent all of the TRW Claimants. To add Moving Counsel would unduly complicate matters and would not provide any benefit to the TRW Claimants. Indeed, Moving Counsel propose that they would represent only those individuals potentially within the Uncertified Actions which could lead to division, complication and expense. It could also cause delay if Moving Counsel and Wagners could not agree on important matters. All of these risks are unnecessary and remedied by Wagners acting on behalf of all TRW Claimants.

[49] Taking into consideration all of the factors in appointing Representative Counsel and the very complicated nature of these proceedings, I am of the view that Wagners, an experienced class action litigation firm, is well qualified to be appointed as Representative Counsel. It is preferable that Wagners alone be appointed and be given the discretion, as set out in the draft order, to retain others to assist if necessary.

[50] In this regard, I conclude by stating that there is no reason to believe that Wagners would be any less vigorous in its representation of the TRW Claimants as would Moving Counsel or any other law firm. There is no basis for this submission. The Tobacco Monitors, as court officers, have made a very reasonable recommendation after a long consultation process with the Applicants and all of the stakeholders.

DISPOSITION

[51] Based on the foregoing, as per my December 9, 2019 Endorsement, the Tobacco Monitors' joint motion appointing Representative Counsel in these proceedings was granted. The request of Moving Counsel to appear as co-counsel was denied. The Orders were therefore signed as per the drafts filed in all three Applications.

A handwritten signature in black ink, appearing to read "McEwen J.", is written over a horizontal line. The signature is stylized and cursive.

McEwen J.

Released: January 03, 2020

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In The Matter of a Plan of Compromise or Arrangement of JTI-Macdonald Corp.

AND:

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AND:

In The Matter of a Plan of Compromise or Arrangement of Rothmans, Benson & Hedges Inc.

REASONS FOR DECISION

McEwen J.

Released: January 03, 2020