Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **JTI-MACDONALD CORP.**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Applicants

**JOINT FACTUM OF THE MONITORS,
FTI CONSULTING CANADA INC., IN ITS CAPACITY AS MONITOR OF IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED; DELOITTE RESTRUCTURING INC., IN ITS CAPACITY AS MONITOR OF JTI-MACDONALD CORP.; and ERNST & YOUNG INC., IN ITS CAPACITY AS MONITOR OF ROTHMANS, BENSON & HEDGES INC.**

(MOTION FOR LEAVE BY HEART AND STROKE FOUNDATION OF CANADA RETURNABLE APRIL 14, 2023)

April 6, 2023

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AND TO: **THE COMMON SERVICE LIST**

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PART I – OVERVIEW

1. More than four years after these CCAA proceedings began, and more than three years into the Court-ordered Mediation, the Heart and Stroke Foundation of Canada ("**HSF**") seeks leave to bring a motion for "rights of participation" in the Mediation and for the appointment of new representative counsel for a group of individuals that HSF calls "Future Tobacco Harm Stakeholders" (the "**FTH Group**").[1]

2. Despite the important charitable work of HSF, the Monitors respectfully suggest that the Court exercise its discretion to deny HSF leave to bring its motion. Three principal factors warrant that result.

3. *First*, HSF has not acted with due diligence in bringing its motion. HSF has known of these proceedings since at least September 2019, which is more than three years ago. Yet HSF has failed to justify its belated attempt to alter the framework that this Court carefully crafted to guide these proceedings to their conclusion through a mediated global settlement. Indeed, HSF's factum shows that the ultimate relief it seeks on behalf of the FTH Group is substantially identical to what the Canadian Cancer Society ("**CCS**") sought in 2019, even though HSF told the Court that it would *not* participate in these proceedings. The Court should not entertain HSF's attempt to re-litigate an issue that the Court has already determined.

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[1] Capitalized terms not defined herein shall have the meaning given to them in the Joint Submissions of the Tobacco Monitors, which are appended to their Reports: Fourteenth Report of FTI Consulting Inc.; Twelfth Report of Ernst & Young Inc.; Thirteenth Report of Deloitte Restructuring Inc.

4. *Second*, there has been no change in circumstances that would warrant a change to the discretion granted to the Court-Appointed Mediator to control the Mediation process or to the framework governing the Representative Counsel under the Court's orders issued in 2019. HSF does not attempt to show otherwise.

5. *Third*, HSF's motion risks disrupting the progress that has been achieved in the Mediation. Coming to the Court with speculative concerns, HSF seeks to add a new party to the Mediation when a potential resolution of these complex proceedings is in sight. HSF seeks to do so even though the neutral, highly experienced Court-Appointed Mediator—who has broad discretion to consult any persons as he considers appropriate—has not solicited the organization's involvement. The Court should decline HSF's invitation to the Court to second-guess the Mediator's independent judgment and potentially prejudice the important progress that the parties have achieved.

6. HSF argues that the threshold requirements for leave asserted by the Monitors "prioritize[ ] form ... over substance".[2] That assertion is misplaced. In ordering that HSF seek leave, this Court confirmed that threshold requirements must be met *before* considering whether amendments should be made to the existing process. To do so does not place form over substance. To the contrary, this approach recognizes the gatekeeper function of the Court before it entertains significant substantive changes requested by a stranger to the Mediation proceedings. HSF's alternative approach asks the Court

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[2] HSF's Factum dated March 31, 2023 ("**HSF Factum**") at para. 1.

effectively to resolve the merits of its ultimate motion now. The Court should reject that approach.

7. Even if this Court is prepared to consider HSF's approach, HSF's contentions about the lack of representation for the FTH Group or a purported conflict between existing participants in the Mediation and the FTH Group are presumptive and erroneous. They have no basis in fact and are based on speculation about the Mediation. In substance, HSF's motion boils down to an attempt to speak for "public health writ large".[3] But the public's broader interest in these proceedings is already represented, including by the Provinces, the existing Representative Counsel, the independent Monitors, and the independent Court-Appointed Mediator, who is broadly empowered to consult social stakeholders. If HSF is dissatisfied with any eventual settlement in these proceedings, it and other social stakeholders can seek to present their views when such settlement is presented to the Court. In the meantime, HSF should not be granted leave to upset the Court-ordered Mediation at this late stage in the proceeding.

PART II – SUMMARY OF FACTS

8. The relevant background to HSF's leave motion is explained in the Monitors' joint position on HSF's leave motion, which is appended to their reports delivered on March 14, 2023.[4] We summarize the key events below.

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3 HSF Factum at para. 21.

4 Fourteenth Report of FTI Consulting Inc.; Twelfth Report of Ernst & Young Inc.; Thirteenth Report of Deloitte Restructuring Inc.

A. March 2019: The Applicants File Under the CCAA

9. In March 2019, the Applicants filed for protection under the CCAA. These three separate, but coordinated proceedings, individually are among the most complex insolvency proceedings in Canadian history. This complexity is exacerbated by the large number of overlapping legal actions and the significant damages claims against the Applicants. Claims are projected to exceed $800 billion.[5]

B. April 2019: This Court Appoints Former Chief Justice Winkler as Mediator

10. In April 2019, shortly after these proceedings began, this Court appointed the former Chief Justice for Ontario, the Honourable Warren K. Winkler, O.C., O.Ont., K.C., B.A., LL.B, LL.M., LL.D. (Hon.), to mediate a global settlement of the claims against the Applicants.[6] As HSF recognizes, the Court-Appointed Mediator was empowered to "[a]dopt a process which in his discretion, he considers appropriate to facilitate negotiation of a global settlement", including deciding which stakeholders and other persons, if any, "the Court-Appointed Mediator considers [it] appropriate" to consult as part of the Mediation.[7]

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5 Website of the Court-Appointed Mediator regarding the Mediation: http://tobaccolitigationmediator.com/.

6 RBH Second Amended and Restated Initial Order at para. 39; Imperial Second Amended and Restated Initial Order at para. 39; JTI-Macdonald Second Amended and Restated Initial Order at para. 40.

7 See, for example, RBH Second Amended and Restated Initial Order at paras. 40(a) and (c); Imperial Second Amended and Restated Initial Order at paras. 40(a) and (c); JTI-Macdonald Second Amended and Restated Initial Order at paras. 41(a) and (c); HSF Factum at para. 24.

11. The Mediation began shortly after former Chief Justice Winkler's appointment. In the roughly four years since April 2019, the Court-Appointed Mediator has conducted many mediation sessions, facilitated the exchange of information and engaged in meaningful discussions with the Applicants and key stakeholders. As the Court recently noted, the parties are making "good progress"[8] in the Mediation and "there is optimism that a successful resolution is in sight".[9]

C. September 2019: CCS Seeks to Participate in the Mediation

12. In September 2019, CCS sought leave to bring a motion to participate in the Mediation, among other things.[10] CCS argued that, although it was not a creditor, it was an important public health stakeholder and had a direct financial interest in these proceedings and the Mediation because, in its view, any settlement could impact the financial resources to be devoted to patients, education, and research to reduce tobacco use.[11] CCS argued that it was well-positioned to "advanc[e] tobacco control measures for inclusion in a settlement".[12]

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8 Endorsement of Justice McEwen dated September 29, 2022.

9 Endorsement of Justice McEwen dated March 30, 2023.

10 Responding Motion Record of the Canadian Cancer Society dated September 24, 2019 ("**CCS Motion Record**").

11 Affidavit of Shawn Chirrey, sworn September 24, 2019 ("**Chirrey Affidavit**") at paras. 4, 7, 13 and 19, CCS Motion Record at Tab 2, pp. 7, 9 and 11.

12 Notice of Motion of CCS dated September 24, 2019 ("**CCS Notice of Motion**") at para. 13, CCS Motion Record at Tab 1, p. 3.

13. HSF provided a letter of support for CCS's motion. In the letter, HSF stated that while it supported CCS's participation, HSF itself "does not intend to bring a motion before the Court to participate in the proceedings".[13]

14. This Court denied the CCS motion in October 2019. The Court found that CCS was "neither a creditor nor a debtor" even though, "like many other persons" it "may be indirectly impacted by a settlement".[14] Thus, the Court saw "no reason" to vary the Amended and Restated Initial Orders, which granted the Court-Appointed Mediator "broad discretion to conduct the mediation process", including broad discretion to consult anyone as he considers it appropriate.[15]

15. The Court noted that CCS was "free to file materials in response to filings made by other stakeholders" and "it is open to CCS to liaise with the government and other stakeholders outside the mediation process if it deems it desirable to do so".[16]

D. December 2019: The Court Appoints Representative Counsel for TRW Claimants

16. In December 2019, this Court appointed The Law Practice of Wagner & Associates, Inc. as Representative Counsel for individual claimants who had suffered a

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13 Letter of Support from HSF dated September 20, 2019, Exhibit "A" to the Chirrey Affidavit, CCS Motion Record at Tab 2A, p. 27.

14 Endorsement of Justice McEwen dated October 18, 2019; Unofficial Transcript of the Endorsement of Justice McEwen dated October 18, 2019.

15 Endorsement of Justice McEwen dated October 18, 2019; Unofficial Transcript of the Endorsement of Justice McEwen dated October 18, 2019.

16 Endorsement of Justice McEwen dated October 18, 2019; Unofficial Transcript of the Endorsement of Justice McEwen dated October 18, 2019.

tobacco-related wrong and were not already represented by counsel in a certified class action.[17] Thus, Representative Counsel was appointed to represent, among others, "all individuals … who … may be entitled to assert a claim or cause of action … in respect of … (ii) the historical or ongoing use of or exposure to Tobacco Products …" ("**TRW Claimants**").[18]

17. Representative Counsel has been actively participating in the Mediation since their appointment.

E. September 2022: HSF Seeks to Participate in the Mediation and to Appoint New Representative Counsel

18. In September 2022—more than three years after the Mediation began and almost three years after the Representative Counsel Order was granted—HSF moved for "rights of participation" in the Mediation and the appointment of new representative counsel for the FTH Group.[19]

19. HSF defines the FTH Group as "the millions of individuals who will purchase or consume tobacco products, or be exposed to tobacco by-products, in the post-petition period" or "individuals who continue to use tobacco products and who start using tobacco

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17 Representative Counsel Order dated December 9, 2019.

18 Representative Counsel Order dated December 9, 2019 at para. 3 and Schedule "A" thereto.

19 Notice of Motion of HSF ("**HSF Notice of Motion**") at paras. 1(a) and 2, HSF Motion Record at Tab 1, p. 2. Paragraph 1(a) of the HSF Notice of Motion notes that the full terms of the representative counsel request are set out in a proposed draft order. To date, no draft order has been provided.

products during or following these CCAA Proceedings".[20] HSF is not itself a member of the FTH Group, but claims to speak on behalf of these individuals.

20. Following a case conference, this Court determined on February 14, 2023 that HSF should seek leave to file its motion to ensure that threshold procedural requirements were satisfied before the Court turned to the merits of the motion.[21] Indeed, the Court concluded: "I agree with Monitors' counsel that the leave motion should be heard in advance of the motion itself (assuming leave is granted) for the reasons set out in their Aide Memoire".[22] The Monitors' Aide Memoire underscored the importance of ensuring that HSF abided by threshold procedural requirements, including that HSF acted with due diligence and that there has been a change in circumstances that warranted varying the existing court orders.[23]

21. This motion for leave followed.

PART III – STATEMENT OF ISSUES, LAW & AUTHORITIES

22. The sole issue is whether the Court should grant leave to HSF to bring its motion seeking to participate in the Mediation and for the appointment of new representative counsel. In the Monitors' view, the Court should deny leave.

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20 HSF Factum at paras. 17-18.

21 Endorsement of Justice McEwen dated February 14, 2023.

22 Endorsement of Justice McEwen dated February 14, 2023.

23 Joint Aide Memoire of the Monitors dated February 10, 2023.

A. Legal Standard

23. As HSF acknowledges in its factum, this Court has "broad discretion to control and manage these CCAA proceedings".[24] Whether to grant a stakeholder leave to file a motion is therefore a decision left to the Court's sound discretion.[25]

24. As the stakeholder seeking leave, the law is clear that HSF bears the burden to "persuade the Court that leave ought to be granted".[26] HSF tries to avoid this burden by flipping the onus, asserting that it should be granted leave absent "exceptional circumstances".[27] HSF cites no authority for shifting the burden in this way.

25. Although there is no specific test for leave to bring a motion, whether under the *Rules of Civil Procedure* or in the insolvency context, general insolvency principles should guide the Court, including: (i) "baseline considerations that a court should always bear in mind when exercising CCAA authority";[28] and (ii) the test for CCAA comeback relief.

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24 HSF Factum at para. 24.

25 *Village Green Lifestyle Community Corp., Re*, 2007 CarswellOnt 654 (S.C.J.) at para. 12.

26 *Village Green Lifestyle Community Corp., Re*, 2007 CarswellOnt 654 (S.C.J.) at para. 12. It is trite law that the party seeking relief in any context bears the burden of satisfying the Court that such relief should be granted. See, for example, *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 69 (commenting that on applications for initial CCAA and subsequent orders, that "[t]he burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence").

27 HSF Factum at para. 27.

28 *Century Services Inc. v. Canada*, 2010 SCC 60 at para. 70.

(i) Baseline Considerations in the CCAA Context: Good Faith and Due Diligence

26. In the insolvency context, the Supreme Court of Canada has emphasized that "[j]udicial discretion must … be exercised in furtherance of the CCAA's purposes".[29] This fundamental principle underlies three "baseline considerations" that a supervising judge must keep in mind when addressing any request for relief (including discretionary relief) in the context of CCAA proceedings, being: (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".[30] As noted, the party seeking relief "bears the burden of demonstrating" the satisfaction of all three criteria.[31]

27. Each of these baseline considerations is relevant in evaluating HSF's motion for leave. To assess the first baseline consideration of appropriateness at the leave stage, this Court should be guided by the analogous test for comeback relief, as discussed below.

(ii) Test in Analogous Circumstances: Change in Circumstances and Impact on the Progress of these CCAA Proceedings

28. The well-established test for comeback relief is an appropriate guide here because HSF asks the Court to vary its earlier orders in at least two respects.

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29 *Century Services Inc. v. Canada*, 2010 SCC 60 at para. 59.

30 *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 49; *Century Services Inc. v. Canada*, 2010 SCC 60 at para. 70.

31 *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 49.

29. *First*, HSF seeks to add new parties to the Mediation and therefore vary the Amended and Restated Initial Orders. This Court determined in the context of the CCS motion that adding a new party to the Mediation would involve varying the Mediation provisions of the Amended and Restated Initial Orders.[32] In particular, the Amended and Restated Initial Orders contemplate that the Mediator will have "broad discretion to consult with a wide variety of persons as he considers appropriate", as HSF acknowledges.[33] HSF's request is functionally the same as CCS's request because it too asks the Court to inject a new party into the Mediation and thus fetter the discretion the Court has already entrusted to the Mediator.

30. *Second*, HSF seeks to appoint an additional representative counsel for the newly proposed FTH Group notwithstanding the existing framework under the Representative Counsel Order. As explained further below at paragraphs 46 to 47, the interests of the FTH Group are already represented in the Mediation. Regardless of whether the FTH Group is or is not included within the definition of TRW Claimants, the Representative Counsel Order provides that the "definition [of TRW Claimants] may be amended following consultation among the Court-Appointed Mediator, the [ ] Monitors and Representative Counsel and as approved by further order of this Court".[34] HSF has intentionally not pursued that option but seeks to appoint entirely new representative

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32 Endorsement of Justice McEwen dated October 18, 2019; Unofficial Transcript of the Endorsement of Justice McEwen dated October 18, 2019.

33 Endorsement of Justice McEwen dated October 18, 2019; Unofficial Transcript of the Endorsement of Justice McEwen dated October 18, 2019; HSF Factum at para. 24.

34 Representative Counsel Order dated December 9, 2019 at para. 3.

counsel whose proposed mandate would overlap with that of the existing Representative Counsel.

31. When an interested party applies to a CCAA court to vary an initial order—typically known as "comeback relief"[35]—the court's decision to entertain the motion is guided by several factors. As explained in one leading decision:

(a) "recourse through the comeback clause is available when circumstances change", meaning that recourse is unavailable when there are no changed circumstances;[36]

(b) "comeback motions must be made *post haste* because of delay prejudice and the mounting prejudice caused by the momentum of proceeding itself";[37] and

(c) comeback relief "cannot prejudicially affect the position of the parties who have relied *bona fide* on the previous order in question".[38]

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35 Comeback relief can also be sought pursuant to provisions (or "comeback clauses") in an initial order entertaining such relief. The orders here include such clauses. See Imperial Second Amended and Restated Initial Order at para. 63; RBH Second Amended and Restated Initial Order at para. 67; JTI-Macdonald Second Amended and Restated Initial Order at para. 69.

36 *Canada v. Canada North Group Inc.*, 2017 ABQB 550 at para. 50, aff'd 2019 ABCA 314, aff'd 2021 SCC 30.

37 *Canada v. Canada North Group Inc.*, 2017 ABQB 550 at para. 56, aff'd 2019 ABCA 314, aff'd 2021 SCC 30.

38 *Canada v. Canada North Group Inc.*, 2017 ABQB 550 at para. 68, aff'd 2019 ABCA 314, aff'd 2021 SCC 30.

32. Some of these criteria overlap with the overarching principles underpinning the CCAA discussed above, including the requirement of due diligence.[39] The test for comeback relief also includes at least two elements that are directly relevant and applicable to the present context: (i) the requirement to show a change in circumstances; and (ii) the requirement to show the absence of any prejudice on other parties.

33. To summarize, based on familiar insolvency principles and applying the test for comeback relief, the Court must be satisfied that: (i) HSF is proceeding in good faith by bringing this motion; (ii) HSF has acted with the requisite due diligence in doing so; (iii) there has been a change in circumstances which would necessitate the variance to existing orders; and (iv) the proposed variance will not prejudice the progress of these proceedings.

34. By contrast, HSF proposes a leave test that essentially previews the merits of HSF's ultimate motion and does not address these threshold requirements for leave.[40] That approach conflicts with this Court's endorsement ordering that HSF seek leave, as discussed above at paragraph 20.[41]

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39 The requirement of due diligence is similarly found in the test to vary an order under the *Rules of Civil Procedure.* Rule 37.14(1) allows the Court to vary an order on a motion by an affected party who received no notice or insufficient notice of the proceedings. Importantly, the affected party must move "forthwith" after they become (or could have become aware) of the order. See: *Crystallex International Corp. (Re)*, 2018 ONSC 2443 at paras. 18, 26-28, leave to appeal ref'd 2018 ONCA 778, Abbreviated Joint Book of Authorities of the Monitors ("**Monitors' BOA**") at Tab 2.

40 HSF Factum at para. 27.

41 Endorsement of Justice McEwen dated February 14, 2023.

B. HSF Should Not Be Granted Leave

35. Applying the proper factors for leave, the Court should deny leave. HSF has not acted with due diligence in bringing its motion, there is no change in circumstances that warrants the relief HSF seeks, and the proposed relief risks hindering the progress of these proceedings. The Court need not reach a conclusion on the issue of good faith (and the Monitors take no position on that issue) because each of the other factors, standing alone, is dispositive.

(i) HSF Has Failed to Act with Due Diligence

36. HSF could and should have brought its motion years earlier. It chose not to do so, and only now seeks to insert itself into the Mediation at this advanced stage. This consideration weighs heavily against granting leave.

37. As explained by the Supreme Court of Canada, "[c]onsistent with the CCAA regime generally, the due diligence consideration discourages parties from sitting on their rights".[42] This is because "[a] party's failure to participate in CCAA proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the CCAA regime".[43] In short, "[l]ying in the weeds is not an option".[44]

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42 *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 51.

43 *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 51.

44 *Air Canada, Re*, 2004 CarswellOnt 1843 (S.C.J. (Comm. L.)) at para. 3, Monitors' BOA at Tab 1.

38. Here, HSF has clearly failed to act in a diligent and timely fashion. HSF was aware of these CCAA proceedings and of the Mediation in 2019, or more than three years ago. It even delivered a letter of support for CCS's motion, which sought essentially identical relief.

39. Rather than explain why it took three years to bring this motion, HSF offers two arguments to try to sidestep the due diligence requirement. Neither is compelling.

40. *First*, HSF argues that the due diligence requirement should not apply because it is a non-profit organization that "ha[s] identified and sought to represent an unrepresented stakeholder".[45] In making that assertion, HSF has assumed the existence of an unrepresented stakeholder. As discussed below, that is not the case because any interests of the FTH Group can be addressed by the existing process through representation by existing participants. In any event, the charity work of HSF and other non-profit organizations, while important, does not provide an exception to fundamental requirements of law.

41. *Second*, HSF asserts that its position is "substantially different" than that advocated years ago by CCS because CCS sought to participate "on its own behalf" while HSF now seeks the appointment of representative counsel to participate on behalf of the FTH Group.[46] That assertion places form over substance. HSF acknowledges that its objective is to ensure that any settlement in the Mediation will include a fund "earmarked

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45 HSF Factum at para. 40.

46 HSF Factum at paras. 15-16.

for rehabilitative and preventative measures" akin to those established in the United States.[47] Yet that is precisely what CCS, supported by HSF, sought when it requested leave to advocate for "patient services" and "public education/information" based on "U.S. tobacco settlements".[48] The only difference between HSF's motion and CCS's motion is that HSF purports to disclaim any direct interest in the Mediation, and instead presumptuously asserts the right to speak for an ill-defined group of individuals of which it is admittedly not even a member.[49]

42. To be clear, for the purposes of this leave motion, the Monitors take no position on the appropriateness of a fund to support rehabilitative and preventive programs as part of any eventual settlement. Rather, the point is limited to observing that HSF seeks to re-litigate whether a third party should be inserted into the Mediation to advocate for such an outcome, three years after the Court concluded—with HSF's knowledge—that the answer is no.

(ii) There is No Change in Circumstances

43. HSF's motion necessarily involves varying the Mediation provisions of the Amended and Restated Initial Orders and the Representative Counsel Order, as explained above. HSF has not pointed to any change in circumstances over the last several years which would justify the requested variances.

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47 HSF Factum at paras. 6 and 33.

48 CCS Notice of Motion at paras. 5-6, CCS Motion Record at Tab 1, pp. 2-3.

49 HSF Factum at paras. 15-16.

44. HSF asserts that the FTH Group reflect "an unrepresented interest that is appropriate for representation within this CCAA proceeding".[50] HSF also contends that to the extent that the FTH Group is already represented in these proceedings, existing Representative Counsel have an "untenable conflict of interest".[51] These claims do not represent a change in circumstances. Instead, they reflect an attempt to sidestep the leave test and ask the Court to preview the merits of HSF's ultimate motion.

45. For the reasons discussed above, this Court should reject HSF's invitation to do so. In any event, HSF's allegations have no factual basis for at least two reasons.

46. *First*, at least some of the FTH Group likely fall within the TRW Claimants represented by existing Representative Counsel. By HSF's own definition, the FTH Group includes individuals who will continue to smoke in the future, meaning that at least some of them may have been already smoking during the period when they would have cognizable claims against the Applicants.[52] But the TRW Claimants include certain individuals with a claim in respect of the "ongoing use of or exposure" to tobacco products.[53] As a result, such individuals within the FTH Group have been represented in these proceedings for the past several years.

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50 HSF Factum at para. 27.

51 HSF Factum at para. 31.

52 HSF Factum at paras. 18-19; see also *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358 at paras. 650 and 656 (holding that tobacco users who began smoking before the "knowledge date" of March 1, 1996 would have cognizable claims).

53 Representative Counsel Order dated December 9, 2019 at para. 3 and Schedule "A" thereto.

47. *Second*, even if certain members of the FTH Group are not captured within the TRW Claimants, their interests are adequately represented in the Mediation. Indeed, HSF appears to acknowledge in its factum that the concerns of the FTH Group are ultimately about "public health writ large".[54] The interests of the public at large can be adequately accounted for and addressed by the many different participants in the Mediation, including:

(a) the Provinces, who are well poised to represent the public interest and social interest in harm reduction;[55]

(b) Representative Counsel, who represent the interests of individuals who assert or may be entitled to assert a claim in respect of the historical and ongoing use of or exposure to tobacco products;

(c) the Monitors, who are officers of the Court and who have the obligation to act independently and consider the interests of all stakeholders; and

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54 HSF Factum at para. 21.

55 HSF notes that settlements of "comparable litigation in the United States" resulted in the creation of funds geared toward cessation and harm reduction. See HSF Factum at para. 6. Such funds established in the U.S. tobacco litigation were implemented and administered at the request and under the supervision of the governments that brought suit, not any charity organizations. See, *e.g.*, Tobacco Master Settlement Agreement (Jan. 2019 printing), https://naagweb.wpenginepowered.com/wp-content/uploads/2020/09/2019-01-MSA-and-Exhibits-Final.pdf.

(d) the Court-Appointed Mediator, who has "broad discretion to consult with a wide variety of persons as he considers appropriate".[56]

(iii) HSF's Participation Risks Hindering the Progress of These Proceedings

48. Finally, the belated introduction of HSF or its designate into these proceedings, including the Mediation, could jeopardize the progress that has been achieved to date.

49. In an effort to mediate a global settlement of claims among many stakeholders, the Court-Appointed Mediator has been facilitating discussions between the Applicants and other Mediation participants for more than three years. HSF attempts to downplay the impact that its participation would have on the Mediation process by arguing that there is no "evidence of progress".[57] As a result of the confidential nature of the Mediation, such an assertion by HSF is entirely speculative. By contrast, the Monitors—who act as independent officers of the Court—have been reporting regularly on the progress in the Mediation within the bounds of the confidentiality protocol ordered by the Court.[58] The Court is also empowered to itself discuss the progress in the Mediation with the Court-Appointed Mediator.[59]

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56 Endorsement of Justice McEwen dated October 18, 2019; Unofficial Transcript of the Endorsement of Justice McEwen dated October 18, 2019.

57 HSF Factum at para. 42.

58 See Endorsement of Justice McEwen dated May 24, 2019 at para. 3.

59 See Endorsement of Justice McEwen dated May 24, 2019 at para. 1.

50. Contrary to HSF's claims, and as this Court observed in its recent endorsements for extensions of the stay period, the Mediation participants are making "good progress" and "there is optimism that a successful resolution is in sight".[60] The Court should not risk disrupting that progress and potentially delaying resolution by compelling the participation of a new actor at this late stage, particularly when the Court-Appointed Mediator has not exercised his discretion or judgment to include them.

51. The risk of introducing new participants at this late stage is especially acute because, as HSF points out, several parties have expressed serious concerns about how long the Mediation is taking.[61] Introducing a new mediation participant now will almost certainly exacerbate those concerns.

(iv) HSF Has Adequate Alternative Opportunities to Participate

52. Even if the Court denies HSF leave to bring its motion, HSF will retain the ability to participate in these proceedings in other meaningful ways. The Court has previously recognized the value that "social stakeholders" bring to this case.[62] As a social stakeholder, however, what HSF should not be permitted to do is seek special treatment for itself by forcing its participation in the Mediation at this late stage and asking the Court to second-guess the discretion and judgment of the Court-Appointed Mediator.

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60 Endorsement of Justice McEwen dated September 29, 2022; Endorsement of Justice McEwen dated March 30, 2023.

61 HSF Factum at para. 42.

62 Endorsement of Justice McEwen dated October 18, 2019; Unofficial Transcript of the Endorsement of Justice McEwen dated October 18, 2019.

PART IV – ORDER REQUESTED

53. The Monitors respectfully request an order denying leave for HSF to bring its motion to participate in the Mediation and to appoint new representative counsel for the FTH Group.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of April, 2023.

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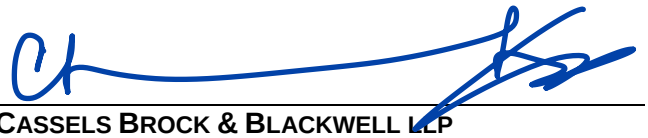

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *9354-9186 Québec inc. v. Callidus Capital Corp*., 2020 SCC 10
2. *Air Canada, Re*, 2004 CarswellOnt 1843 (S.C.J. (Comm. L.))
3. *Canada v. Canada North Group Inc.*, 2017 ABQB 550, aff'd 2019 ABCA 314, aff'd 2021 SCC 30
4. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
5. *Crystallex International Corp. (Re)*, 2018 ONSC 2443, leave to appeal ref'd 2018 ONCA 778
6. *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé,* 2019 QCCA 358
7. *Village Green Lifestyle Community Corp., Re*, 2007 CarswellOnt 654 (S.C.J.)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Rule 37.14 *Rules of Civil Procedure*

Setting Aside, Varying or Amending Orders

Motion to Set Aside or Vary

37.14 (1) A party or other person who,

(a) is affected by an order obtained on motion without notice;

(b) fails to appear on a motion through accident, mistake or insufficient notice; or

(c) is affected by an order of a registrar,

may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion. R.R.O. 1990, Reg. 194, r. 37.14 (1); O. Reg. 132/04, s. 9.

(2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just. R.R.O. 1990, Reg. 194, r. 37.14 (2).

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., IMPERIAL TOBACCO CANADA LIMITED, IMPERIAL TOBACCO COMPANY LIMITED, AND ROTHMANS, BENSON & HEDGES INC.

Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

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SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

JOINT FACTUM OF THE MONITORS

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