

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

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 AND ARRANGEMENT OF  
ROTHMANS, BENSON & HEDGES INC.

Applicant

TWELFTH REPORT OF THE MONITOR  
MARCH 14, 2023

INTRODUCTION

1. On March 22, 2019, Rothmans, Benson & Hedges Inc. (“**RBH**”, the “**Company**” or the “**Applicant**”) applied for and obtained an initial order (the “**Initial Order**”) under the *Companies' Creditors Arrangement Act* (“**CCAA**”) that, amongst other things, (i) granted a stay of proceedings in favour of the Applicant and a limited stay of proceedings in favour of members of the PMI Group from certain proceedings and Other Pending Litigation, and (ii) appointed EYI as Monitor of the Applicant in this CCAA proceeding (the “**CCAA Proceeding**”).
2. On April 25, 2019, this Court issued a further amended and restated Initial Order (the “**Second Amended and Restated Initial Order**”) and amongst other things, extended a limited stay of proceedings to the Other Defendants. Pursuant to an Order dated September 29, 2022, the Stay Period was extended to March 31, 2023.
3. On December 9, 2019, this Court issued an Order appointing The Law Practice of Wagner & Associates, Inc. to represent in these proceedings the TRW Claimants (as defined in the Fourth Report of the Monitor, dated November 26, 2019).
4. A number of issues in this CCAA Proceeding overlap with the CCAA proceedings of JTI-Macdonald Corp. (“**JTIM**”) in which Deloitte Restructuring Inc. is court-appointed monitor (the “**JTIM Monitor**”) and the CCAA proceedings of Imperial Tobacco Canada

Limited and Imperial Tobacco Company Limited (collectively, the “**ITL Applicants**”) in which FTI Consulting Canada Inc. is court-appointed monitor (the “**ITL Monitor**”). The Monitor, the JTIM Monitor and ITL Monitor will be collectively referred to herein as the Tobacco Monitors and the CCAA proceedings of RBH, JTIM and the ITL Applicants (the “**Applicants**”) will be collectively referred to as the Tobacco CCAA Proceedings.

## **PURPOSE**

5. The purpose of this twelfth report of the Monitor (the “**Twelfth Report**”) is to provide information to this Court with respect to the motion of The Heart and Stroke Foundation of Canada (the “**HSF**”) for leave to bring a motion, for among other things:
  - i) appointing Tyr LLP as representative counsel for “Future Tobacco Harm Stakeholders” who, after the granting of the Initial Orders in these proceedings, “will purchase or use tobacco products, or will be exposed to their use”; and
  - ii) granting the proposed representative counsel “rights of participation” in the on-going Court-ordered Mediation.

(collectively, the “**HSF Motion**”).

## **TERMS OF REFERENCE**

6. In preparing this Twelfth Report and making the comments herein, the Monitor has been provided with, and has relied upon, unaudited financial information, books and records and financial information prepared by the Applicant, the Affidavits (as defined below), and discussions with RBH management (collectively, the “**Information**”). Except as described in this Twelve Report:
  - i) the Monitor has reviewed the Information for reasonableness, internal consistency and use in the context in which it was provided. However, the Monitor has not audited, or otherwise attempted to verify the accuracy or completeness of such information in a manner that would wholly or partially comply with Generally Accepted Auditing Standards (“**GAAS**”) pursuant to the Chartered Professional Accountants of Canada Handbook and, accordingly, the Monitor expresses no

opinion or other form of assurance contemplated under GAAS in respect of the Information; and

- ii) some of the information referred to in this Twelfth Report consists of forecasts and projections. An examination or review of the financial forecast and projections, as outlined in Chartered Professional Accountants of Canada Handbook, has not been performed.
7. Future oriented financial information referred to in this Twelfth Report was prepared based on the Company's estimates and assumptions. Readers are cautioned that since projections are based upon assumptions about future events and conditions that are not ascertainable, the actual results will vary from the projections, even if the assumptions materialize, and the variations could be significant.
  8. Unless otherwise indicated, the Monitor's understanding of factual matters expressed in this Twelfth Report concerning Applicant and its business is based on the Information, and not independent factual determinations made by the Monitor.
  9. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars.
  10. Capitalized terms used but not otherwise defined in this Twelfth Report are defined in the prior affidavits of Mindaugas Trumpaitis and Peter Luongo in connection with these proceedings (collectively, the "**Affidavits**"), the Proposed Monitor's Pre-filing Report dated March 22, 2019 and the Monitor's prior reports (together, "**Monitor's Reports**") and the Second Amended and Restated Initial Order.
  11. Copies of the Monitor's Reports, including a copy of this Twelfth Report, and all motion records and Orders in the CCAA Proceedings are available on the Monitor's website at [www.ey.com/ca/rbh](http://www.ey.com/ca/rbh). The Monitor has also established a toll-free phone number that is referenced on the Monitor's website so that parties may contact the Monitor if they have questions with respect to the CCAA Proceeding.

## OVERVIEW OF THE APPLICANT

12. The Applicant is a private company with its head office in Toronto, Ontario. The ultimate parent of the Applicant is PMI. The Applicant's two primary business segments include:
- i) **Traditional Cigarette and Tobacco Product Business** – the Applicant is the second largest supplier of traditional tobacco products in the tax-paid Canadian market. It manufactures and sells cigarettes and fine-cut tobacco, and distributes pipe tobacco and cigar products; and
  - ii) **Reduced Risk Product Business: IQOS and Vaping Products** – the Applicant sells and distributes IQOS and vaping products to consumers via 3<sup>rd</sup> party retail outlets, as well as via an online platform. IQOS is an electronic device that generates a nicotine-containing aerosol by heating tobacco products manufactured for use with the IQOS device.
13. The Applicant provides employment or consultant work to approximately 749 employees and 51 contractors in Canada.<sup>1</sup>

## MOTION BY THE HEART AND STROKE FOUNDATION OF CANADA

14. The Tobacco Monitors have worked co-operatively together in respect of the Tobacco Monitors' response to the HSF Motion. Appendix "A" hereto contains the common submissions of the Tobacco Monitors in this regard.

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<sup>1</sup> As of August 31, 2022

## **CONCLUSION AND RECOMMENDATION**

15. For the reasons set out in Appendix “A”, the Monitor is of the view that leave should not be granted for HSF to bring the HSF Motion. As such, the Monitor respectfully recommends that the Court does not grant the requested order granting leave.

**ERNST & YOUNG INC.**  
**In its capacity as Monitor of**  
**Rothmans, Benson & Hedges Inc.**

Per:

A handwritten signature in black ink, appearing to read "Murray A. McDonald". The signature is written in a cursive style with a long horizontal stroke extending to the right.

Murray A. McDonald  
Chairman

## APPENDIX “A”

### A. OVERVIEW

1. In this Appendix, unless otherwise defined, all capitalized terms shall have the respective meanings specified in the glossary attached hereto as Schedule “A”.
2. This Appendix is filed by the Monitors in the Tobacco CCAA Proceedings in response to the motion for leave (the “**Leave Motion**”) brought by the Heart and Stroke Foundation of Canada (the “**HSF**”) returnable April 14, 2023.
3. By the Leave Motion, HSF asks the Court to hear a motion, for among other things:
  - a. the appointment of Tyr LLP as representative counsel for “Future Tobacco Harm Stakeholders” who, after the granting of the Initial Orders in these proceedings, “will purchase or use tobacco products, or will be exposed to their use”;<sup>1</sup> and,
  - b. granting the proposed representative counsel “rights of participation” in the on-going Court-ordered Mediation.<sup>2</sup>(collectively, the “**HSF Motion**”).
4. For the reasons as detailed below, the Monitors jointly oppose the granting of leave for HSF to bring the HSF Motion.

### B. BACKGROUND

5. These Tobacco CCAA Proceedings were commenced in March of 2019 and are some of the most complex proceedings in the history of the CCAA due in large part to the number of tobacco-related legal actions and Pending Litigation against the Applicants, including: a class action by Quebec plaintiffs and a corresponding decision of the Quebec Superior Court issued May 27, 2015 which was corrected on June 9, 2015 (and upheld by the Court of Appeal in March 2019) which awarded damages in excess of \$13.5 billion; health care cost recovery actions brought by all ten provincial governments; numerous proposed and certified class actions for tobacco-related harm; at least six

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<sup>1</sup> Affidavit of Diego Marchese sworn September 19, 2022 (the “**Marchese Affidavit**”) at para. 5, [Motion Record of the Heart and Stroke Foundation Canada dated February 28, 2023](#), (the “**HSF Motion Record**”) at Tab 2.

<sup>2</sup> Notice of Motion of the Heart and Stroke Foundation, at Para. 2 and 1(a), [HSF Motion Record](#), at Tab 1. Para 1(a) of the HSF Notice of Motion (Leave 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.

actions brought by individual and commercial plaintiffs and a number of potential claims or actions currently unasserted or unascertained.

6. In order to advance the complex negotiations among numerous stakeholders, the Amended and Restated Initial Orders provided for, among other things, the appointment of the Court-Appointed Mediator who may “[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.<sup>3</sup>
7. In order to address unrepresented and unidentified potential claimants in these complex proceedings, the Court also made the Representative Counsel Appointment Order on December 9, 2019 in each of the Tobacco CCAA Proceedings which appointed the Representative Counsel for the TRW Claimants who are defined to include “*all individuals...who assert or 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...*”<sup>4</sup>.
8. The HSF Motion, which seeks “rights of participation” in the Mediation and appointment of representative counsel for Future Tobacco Harm Stakeholders, if granted would necessarily vary the Amended and Restated Initial Orders and the Representative Counsel Appointment Order.
9. Pursuant to an endorsement dated February 14, 2023, the Court held that HSF was required to bring the Leave Motion prior to scheduling the HSF Motion, if leave is granted.<sup>5</sup> The Court agreed with the submissions of the Monitors that the HSF should meet certain procedural requirements prior to advancing the substantive issues in the HSF Motion.
10. The purpose of this Appendix is to provide the Court with information that the Monitors are of the view will assist the Court in considering the Leave Motion and whether circumstances exist which could justify varying or amending the Amended and Restated Initial Orders or the Representative Counsel Appointment Order, including:
  - a. whether HSF has acted with due diligence in bringing the HSF Motion given the passage of time since the commencement of these Tobacco CCAA Proceedings, the ongoing Mediation, and the appointment of Representative Counsel;

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<sup>3</sup> See for example paragraphs 40(a) and (c) of the [RBH Second Amended and Restated Initial Order](#).

<sup>4</sup> [Order \(Appointment of Representative Counsel\) dated December 13, 2019](#) at para 3.

<sup>5</sup> [Endorsement of Justice McEwen dated February 14, 2023](#)

- b. whether there has been a change in circumstances that would merit a variation of the prior orders of this Court;
- c. whether the HSF Motion would unduly hinder the progress of these Tobacco CCAA Proceedings; and
- d. the Monitors' comments and recommendations in respect of the foregoing matters.

**a. Due Diligence**

- 11. As noted, these Tobacco CCAA Proceedings were commenced more than 4 years ago in March of 2019. HSF has been aware of these Tobacco CCAA Proceedings at least since September of 2019.
- 12. The Canadian Cancer Society (“CCS”) sought leave to bring a motion dated September 24, 2019, seeking, among other things, the participation of CCS in the Mediation (the “CCS Motion”).<sup>6</sup>
- 13. In support of the CCS Motion, the CCS included a letter from the HSF dated September 20, 2019 which states that the HSF:

does not intend to bring a motion before the Court to participate in the proceedings, and supports the Canadian Cancer Society bringing a motion to the Court to be able to participate in the proceedings before the Court, and to participate in the mediation process that has been authorized by the Court regarding the tobacco companies.<sup>7</sup>

- 14. In the CCS Motion, the CCS argued that although it was not a creditor, it was an important public health stakeholder and had a direct financial interest in the Tobacco CCAA Proceedings and Mediation since any settlement reached will impact the financial resources to be devoted to patients, education and research. CCS also argued that it had unique knowledge, expertise and experience

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<sup>6</sup> [Responding Motion Record of the Canadian Cancer Society dated September 24, 2019](#) (“CCS Motion Record”).

<sup>7</sup> Letter of Support from HSF dated September 20, 2019, Chirrey Affidavit at Exhibit “A”, [CCS Motion Record](#), at Tab 2A page 27



to participate in the Mediation and pointed to its analysis of the U.S. tobacco settlements in 1997 and 1998.<sup>8</sup>

15. The Court dealt with the CCS Motion in an endorsement dated October 19, 2019 (the “**CCS Endorsement**”) as follows:

...with respect to mediation, I am not prepared to allow CCS to participate at this time. As noted, it is neither a creditor nor a debtor. I accept that CCS has extensive experience as a health charity 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.

Further, I have given the Hon. Mr. Winkler broad discretion to conduct the mediation process. This includes broad discretion to consult with a wide variety of persons as he considers appropriate.

I see no reason, at this time, to vary that order. It is important to allow the Hon. Mr. Winkler, who has vast experience in this area, the ability to carry on with the flexibility outlined in my Orders in these very complicated and significant matters.”<sup>9</sup>

16. The HSF Motion is dated September 19, 2022, which is three years after it wrote its letter stating that it would not participate in these Tobacco CCAA Proceedings. It is also three years after the Court denied a similar request of CCS, a similarly situated non-creditor charity, to participate in the Mediation, because among other reasons, the Court-Appointed Mediator had the discretion to control the Mediation and no reason was found to vary that order.
17. The Representative Counsel Appointment Order was also made more than 3 years ago. The HSF Motion is predicated on the proposition that additional representative counsel is necessary for various reasons. The Monitors are of the view that such relief would require the variation of the Representative Counsel Appointment Order to modify the scope of representation prescribed by that order. Regardless of the merits of HSF’s arguments, there is no reason that any such arguments could not have been made by HSF in December of 2019.
18. HSF has provided no explanation for its decision to now try to insert itself, directly or indirectly, into the Tobacco CCAA Proceedings and the Mediation or for its significant delay in bringing the HSF Motion.

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<sup>8</sup> Affidavit of Shawn Chirrey, sworn September 24, 2019 (“**Chirrey Affidavit**”), at paras 4, 7, 13 and 19, [CCS Motion Record](#) at Tab 2

<sup>9</sup> [Endorsement of Justice McEwen dated October 18, 2019](#).

**b. No Change in Circumstances**

19. As noted, the Court-Appointed Mediator was authorized to control his own process and to decide which stakeholders or other persons that he considers appropriate to be part of that process.<sup>10</sup> The HSF has not provided any evidence about any new events or any change in circumstances over the last 3 to 4 years which would justify varying of the Mediation provisions in the Amended and Restated Initial Orders to compel the Court-Appointed Mediator to include an additional party.
20. The HSF Motion references (i) the background of the HSF; (ii) the harm caused by smoking; (iii) the cash position of the Applicants at the time of the initial application; and (iv) the U.S. tobacco settlements in 1997 and 1998. None of these facts constitute new circumstances that arose or changed since 2019.
21. In 2019, the Court also granted the Representative Counsel Appointment Order which appointed Representative Counsel for all present and future claimants with respect to use of or exposure to tobacco products.
22. The Monitors are of the view that the HSF is seeking a variation of the Representative Counsel Appointment Order to carve out “Future Tobacco Harm Stakeholders” without any evidence of a change in circumstances that would justify such a variation.
23. The Monitors also note that the HSF has made an allegation of a “conflict” between various stakeholders in the Mediation. This allegation is unsupported by any evidence. Nevertheless, this argument could have been raised by the HSF in 2019 and making it now does not constitute a change in circumstances.

**c. Hindering the Progress of these Tobacco CCAA Proceedings**

24. These Tobacco CCAA Proceedings are in their fifth year. The on-going Mediation also started in 2019 to deal with complex negotiations between multiple parties over significant claims.
25. Each of the Monitors has consistently reported since the commencement of the Mediation that the Court-Appointed Mediator has continued to conduct Mediation meetings, facilitate the exchange of information and engage in meaningful discussions with the Applicants and key stakeholders. The Monitors have reported that the parties continue to advance the Mediation and the Court noted

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<sup>10</sup> See for example paragraphs 40(a) and (c) of the [RBH Second Amended and Restated Initial Order](#).

in its last endorsement for an extension of the stay period that “good progress” is being made in the Mediation.<sup>11</sup>

26. Absent a request from the Court-Appointed Mediator for additional parties to participate in the Mediation, the Monitors are concerned that the forced introduction of another party into the Mediation could be disruptive and/or undermine any progress that has been achieved to date.

**C. THE TOBACCO MONITORS’ COMMENTS AND RECOMMENDATIONS**

27. The Monitors acknowledge that the HSF plays an important and leading role in advocacy, education and the funding of research regarding heart disease and strokes.
28. The Monitors also note that CCS was accepted by the Court as a “social stakeholder” with the ability to participate in the Court proceedings. In this regard, HSF has not been precluded from appearing or making submissions to the Court in these Tobacco CCAA Proceedings nor is the HSF being deprived of an opportunity to comment on any plan or resolution that may come before the Court for approval.
29. However, participation in the Tobacco CCAA Proceedings is entirely different from the Court fettering the discretion of a very experienced Court-Appointed Mediator who is in control of the Mediation and mandating participation of an additional party, be it HSF or its designate. This is especially true where the Mediation has been ongoing for more than 3 years under the sole discretion of the Court-Appointed Mediator.
30. The Monitors believe the HSF has not acted with due diligence in bringing the HSF Motion nor has there been a material change in circumstances that justifies varying prior orders of the Court. Further, forcing the Court-Appointed Mediator to include another stakeholder (financial, social or otherwise) in the Mediation may in fact be disruptive to the process and hinder any progress.
31. In the circumstances, the Monitors submit that the Leave Motion ought to be dismissed.

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<sup>11</sup> [Endorsement of Justice McEwen dated September 29, 2022.](#)

## SCHEDULE A

### GLOSSARY

“**Amended and Restated Initial Orders**” means (i) the initial order of Imperial granted on March 12, 2019, as amended and restated as of April 5, 2019 and further amended on April 25, 2019; (ii) the initial order of JTIM granted on March 8, 2019, as amended and restated as of April 5, 2019 and further amended on April 25, 2019; and (iii) the initial order of Rothmans granted on March 22, 2019, as amended and restated as of April 5, 2019 and further amended on April 26, 2019.

“**Applicants**” means, collectively, Imperial, JTIM and Rothmans.

“**CCAA**” means the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

“**Court**” means the Ontario Superior Court of Justice (Commercial List).

“**Court-Appointed Mediator**” means the Honourable Warren K. Winkler K.C., acting as an officer of the Court and as a neutral third party to mediate a pan Canadian global settlement in the context of these Tobacco CCAA Proceedings.

“**Deloitte**” means Deloitte Restructuring Inc.

“**EY**” means Ernst & Young Inc.

“**FTI**” means FTI Consulting Canada Inc.

“**Imperial**” means collectively, ITCAN and Imperial Tobacco Company Limited.

“**ITCAN**” means Imperial Tobacco Canada Limited.

“**JTIM**” means JTI-Macdonald Corp.

“**Mediation**” means the mediation conducted by the Court-Appointed Mediator pursuant to the Amended and Restated Initial Orders.

“**Monitors**” means FTI, EY and Deloitte collectively.

“**Pending Litigation**” has the meaning ascribed in the Amended and Restated Initial Orders.

“**Representative Counsel**” means The Law Practice of Wagner & Associates, Inc.

“**Representative Counsel Appointment Order**” means the order granted on December 9, 2010 appointing the Representative Counsel.

“**Rothmans**” means Rothmans Benson & Hedges Inc.

“**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,

in Canada or in the case of the Applicants, anywhere else in the world, including, without limitation, claims for contribution or indemnity, personal injury or tort damages, restitutionary recovery, non-pecuniary damages or claims for recovery grounded in provincial consumer protection legislation but specifically excluding claims:

- (i) in any person's capacity as a trade supplier, contract counterparty, employee, pensioner, or retiree;
- (ii) captured by any of the following commercial class actions:
  - (A) *The Ontario Flue-Cured Tobacco Growers' Marketing Board v. JTI-Macdonald Corp.*, Court File No. 64462 CP (London, Ontario);
  - (B) *The Ontario Flue-Cured Tobacco Growers' Marketing Board v. Rothmans, Benson & Hedges Inc.*, Court File No. 1056/10CP (London, Ontario);
  - (C) *The Ontario Flue-Cured Tobacco Growers' Marketing Board v. Imperial Tobacco Canada Ltd.*, Court File No. 64757 CP (London, Ontario);
- (iii) captured by any of the following class actions:
  - (A) *Conseil québécois sur le tabac et la santé et al. v. JTI-Macdonald Corp. et al.*, Court File No. 500-06-000076-980 (Montreal, Quebec);
  - (B) *Cécilia Létourneau et al. v. Imperial Tobacco Canada Ltd., et al.*, Court File No. 500-06-000070-983 (Montreal, Quebec);
  - (C) *Kenneth Knight v. Imperial Tobacco*, Court File No. L031300 (Vancouver, British Columbia).

**“Tobacco CCAA Proceedings”** means the 3 proceedings commenced by the Amended and Restated Initial Orders.

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

**TWELFTH REPORT OF ERNST & YOUNG INC.**

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