

**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.**

Applicant

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**REPLY FACTUM OF THE PROPOSED FUTURE TOBACCO HARM STAKEHOLDERS**  
(Motion for Leave to Bring a Motion to Appoint Representative Counsel for FTH  
Stakeholders April 14, 2023)

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April 11, 2023

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**TO: THE COMMON SERVICE LIST**  
See Schedule "C" Attached

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## PART I - OVERVIEW

1. This factum replies to the joint factum of the tobacco companies' court-appointed Monitors dated April 6, 2023 (the "**Monitors' Factum**"). Capitalized terms not defined in this factum have the meaning given to them in the main factum of the proposed representative counsel dated April 3, 2023 (the "**Main Factum**").

2. The Monitors misapprehend the nature of the relief sought in this motion, by asserting that HSF seeks "leave to bring a motion for "rights of participation" in the Mediation".<sup>1</sup> It is abundantly clear that HSF is not seeking to be added as a party or to participate in these Proceedings. This is a motion for leave to bring a motion for a representation order over a group of millions of individuals with a direct interest in the outcome of this Proceeding who are not represented (i.e., the FTH Stakeholders). It is not even proposed that HSF will represent this group. Rather, this group will be represented by Tyr LLP which will receive advice from an independent, pro-bono committee. The details of this committee and other matters related to the proposed representation order will be explored in a motion on the merits, if leave is granted, but it is simply incorrect to suggest as the Monitors do that HSF is seeking to participate directly in this Proceeding.

3. Having misapprehended the nature of this motion, the Monitors proceed to advance a series of positions that erroneously build on this error. In short, the Monitors' opposition to the FTH Stakeholders is based on a concern with the timing, rather than with the substance, of the FTH Stakeholders' desired participation. As canvassed in the Main Factum, this is peripheral to the issue – the FTH Stakeholders continue to be

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<sup>1</sup> Joint Factum of the Monitors dated April 6, 2023 ("**Monitors' Factum**") at para. 1.

unrepresented. The fact of this circumstance remaining unchanged weighs in favour of granting leave rather than against.

4. As elaborated on below, this Court should be interested in whether the FTH Stakeholders are unrepresented; and if they are not, whether there is a conflict of interest in the TRW Claimants counsel simultaneously representing the FTH Stakeholders and the TRW Claimants.

**A. HSF Does Not Seek Direct Participation, and Delay is Not Relevant**

5. Building on the incorrect assertion that HSF seeks direct participation rights, the Monitors erroneously allege that HSF's delay in filing this motion is a full answer to its request to seek participation status now. It is, however, abundantly clear that this motion concerns the representation of an unrepresented group (the FTH Stakeholders), not HSF.

6. Complaint about delay is problematic where, as here, the motion is brought to appoint counsel for an unrepresented group. Any such delay does not rest at the feet of a non-profit organization in a Proceeding to which it is not a party. Moreover, referencing delay distracts from the central issue that should be remedied – lack of, or conflicted, representation for the FTH Stakeholders. This issue is ongoing, and this oversight cannot somehow be legitimized by the passage of time.

**B. The Monitors Have Not Engaged on the Central Issues**

7. The Monitors' submissions largely redirect away from the key questions that should be under consideration. First, the Monitors characterize HSF's position as speculating about "the lack of representation for the FTH Group or a purported conflict

between existing participants in the Mediation”.<sup>2</sup> Second, the Monitors suggest without particulars or any evidentiary support that “any interests of the FTH Group can be addressed by the existing process through representation by existing participants.”<sup>3</sup>

8. Factually, the Monitors position is incorrect. The material before this Court fully grounds the lack of representation, and the alternate position that if the FTH Stakeholders are represented by the TRW Claimants counsel, there is a conflict of interest. No facts have been advanced to dislodge this evidence, much less to show that it is erroneous.

9. The majority of FTH Stakeholders will become reliant on tobacco products *after* these Proceedings have concluded (including because they have become readdicted, relocated to Canada after having become addicted in another jurisdiction, commenced consumption of the Applications’ products after having used a brand of another, smaller company, or had their claims precluded by changes in legislation).

10. For this group, which is outside the definition of TRW Claimants, there is no representation, and the Monitors do not claim otherwise. Counsel for the TRW Claimants has also not filed a factum or taken any position on this motion. They have not confirmed that they are representing the FTH Stakeholders, and/or that there is no conflict of interest if they are doing so.

11. It is apparent on the record before this Court that there is, at the very least, a serious and meritorious issue that a group of millions of individuals are not represented by independent counsel. In fact, the Monitors nowhere confirm that the FTH Stakeholders

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<sup>2</sup> Monitors’ Factum at para. 7.

<sup>3</sup> Monitors’ Factum at para. 40.

are actually and fully represented by Representative Counsel. The farthest the Monitors go is asserting that "at least some of the FTH Group likely fall within the TRW Claimants,"<sup>4</sup> as the definition includes certain individuals with a claim in respect of the "ongoing use of or exposure to" tobacco products.<sup>5</sup> This is far from an assurance that the interests of the FTH Stakeholders will be adequately represented and does nothing to address the conflict explored in the Main Factum.

12. In fact, each of the parties suggested by the Monitors to be addressing or representing the FTH Stakeholders<sup>6</sup> are incapable of doing so effectively: the Provinces are safeguarding their interests as creditors and seeking to maximize their recovery, and Representative Counsel for the TRW Claimants do not represent the FTH Stakeholders – even if counsel for the TRW Claimants technically represent a small fraction of this group, they are conflicted in that representation.

13. Moreover, regarding the submission that the FTH Stakeholders are ill-defined, it bears noting that: (i) the Monitors acknowledge that there is a group of at least some people who are interested in the outcome but not represented; and (ii) it is obvious that in establishing any settlement there will be a cut off period for which claims are made and releases are granted. That period will very likely be from the date of initial filing. The FTH Stakeholders are thus not ill-defined; the specific temporal banding of this group simply requires confirmation from the court-appointed Monitors, who are well-aware of its parameters.

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<sup>4</sup> Monitors' Factum at para. 46 (emphasis added).

<sup>5</sup> [Representative Counsel Order dated December 9, 2019](#) at para. 3 and Schedule "A" thereto.

<sup>6</sup> Monitors' Factum at para. 7.

14. Finally, it is unfair and insufficient to claim that the only recourse for this unrepresented group of FTH Stakeholders is to do nothing, wait until a settlement is reached, and then “present their views when such settlement is presented to the Court”.<sup>7</sup> This suggestion does nothing to ensure a fair and comprehensive mediation process. Conversely, it gives up on attempting to ensure one, arguing that while there might be flaws in the settlement and the way in which it was reached, it is preferable to point out those flaws at a time when it is likely too late for them to be remedied. A proactive and more comprehensive approach that prevents the omission of a substantial stakeholder group should be preferred in a case of this nature.

**C. The Monitors’ Focus on the Canadian Cancer Society is Misdirected: This Motion Does Not Seek to Relitigate Matters**

15. The Monitors attempt to paint this motion for a representative order with the same brush as the Canadian Cancer Society’s (“**CCS’s**”) prior motion. The two are not at all the same, and the Monitors’ steadfast effort to characterize them as comparable is troubling.

16. The unchallenged evidence before this Court is that HSF seeks the appointment of representative counsel for the FTH Stakeholders working with a three person advisory committee, and that the members of the advisory committee “will not be participating on the Advisory Committee in their capacity as a representative of any organization, nor will they have any obligations to any organizations that would require them to report on their participation on the Advisory Committee, these CCAA Proceedings, or the Mediation.”<sup>8</sup> The Monitors did not challenge this statement and cannot now properly or in compliance

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<sup>7</sup> Monitors’ Factum at para. 7.

<sup>8</sup> Affidavit of Diego Marchese, sworn September 19, 2022 (the “**Marchese Affidavit**”) at paras. 44-45, Motion Record of the Heart and Stroke Foundation of Canada (“**HSF Motion Record**”), Tab 2, p. 47.

with basic rules of evidence make the assertion 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...”.<sup>9</sup> Statements of this nature call into question the legitimacy and intent of the HSF in seeking to address a representation gap and should be entirely disregarded based on the evidence before the Court, which shows without question that HSF is not seeking and (if the motion is successful) will not have any right (directly or indirectly) to participate in these Proceedings or the Mediation.

17. Stripped away of the unfortunate rhetoric and unsubstantiated accusations, the Monitors’ submission that HSF is attempting to “re-litigate an issue”<sup>10</sup> falls away.

**D. HSF is Not Seeking to Vary Any Orders of The Court and the Test for Comeback Relief is Inapplicable**

18. The Monitors’ submissions about HSF allegedly seeking to vary the Amended and Restated Initial Orders and restricting the discretion of the Mediator appear to largely be issues that the Court would consider at a secondary stage if leave is granted and a motion to appoint representative counsel is heard.

19. HSF in no way seeks for the Court to vary any of its prior orders, and the only support the Monitors’ have for this claim is that HSF purportedly aims to “fetter” the Mediator’s discretion.<sup>11</sup> This is incorrect.

20. The intent in seeking a representation order is to empower and enhance the Mediation process and the exercise of the Mediator’s powers within. The Monitors largely

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<sup>9</sup> Monitors’ Factum at para. 41.

<sup>10</sup> Monitors’ Factum at para. 3.

<sup>11</sup> Monitors’ Factum at para. 29.

miss the point when they suggest that the Mediator has not solicited the involvement of the FTH Stakeholders.<sup>12</sup> Because the FTH Stakeholders are not represented, there is no party that the Mediator can exercise his discretion to consult with in order to obtain the perspective, insight, and position of this group.

21. It is also of no comfort to suggest that other parties can adequately represent the interests of the FTH Stakeholders, as those other parties all have interests that diverge from this group. Appropriate mitigation measures should assess the size of the estate, the expected occurrence of future addiction and the cost associated with addressing this addiction. Properly and objectively protecting the interests of the FTH Stakeholders therefore requires balancing the interest of TRW Claimants who have already suffered harm against the interests of future smokers who will suffer similar harm going forward but who are, today, the economic conduit to fund the post petition cashflow that will compensate the TRW Claimants. For this reason, among others, engaging with the FTH Stakeholders at the mediation stage should be preferred to any alternative, including possible challenges to a proposed settlement on the basis that a large and important group of stakeholders was not consulted during the Mediation or court process.

22. Finally, the test for comeback relief set out by the Monitors is inapplicable in the context of this motion.<sup>13</sup> The factors under the test for comeback relief (changes in circumstance, delay in bringing the motion, and prejudice to parties who have relied on

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<sup>12</sup> Monitors' Factum at para. 5.

<sup>13</sup> Monitors' Factum at paras. 31-33.

the existing order) are not fair or relevant considerations, as explained. The lack of representation (or conflicted representation) persists.

#### **E. Monitors' Submissions About Progress in the Mediation**

23. The participation of representative counsel on behalf of the FTH Stakeholders will hasten, rather than impede a settlement because it would ensure that when a settlement is reached, it is rightly viewed as fair and wholistic by the public. The alternative is, as the Monitors suggest, that criticisms are heard for the first time when the settlement is presented to this Court, potentially leading to time-consuming and costly renegotiation. Efficiency cannot be a replacement for efficacy in this context, and convenience cannot trump completeness, particularly where the seriousness of having suffered bodily harm at the hands of the entity in receivership is enshrined in statute as an important consideration.<sup>14</sup>

24. Moreover, any reliance by the Monitors on progress made in the Mediation to justify the exclusion of representation for the FTH Stakeholders is problematic. There is no means for proposed representative counsel to assess, verify or respond to the Monitors' claims about progress in the Mediation or the alleged impact on the Mediation of appointing representative counsel now. It is problematic, however, for the confidential nature of the Proceedings to be used as both a shield (insulating the Monitors from the sharing of any concrete information regarding the status of representation of the FTH Stakeholders) and a sword (allowing the Monitors to claim that a settlement is so near that any new representation at this point would hamper progress).

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<sup>14</sup> *Companies' Creditors Arrangement Act* (R.S.C., 1985, c. C-36), [s. 19\(2\)\(b\)](#).

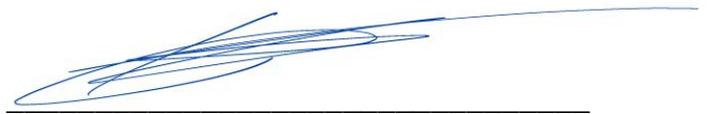
25. Fundamentally, whatever progress has been made and whatever the perceived delay would be on the Mediation in appointing representative counsel now, such impact will be significantly outweighed by the benefit from including the interests of the FTH Stakeholders in the Mediation.

## **PART II - CONCLUSION**

26. The Monitors continue to rely primarily on an assertion that delay in bringing this motion is sufficient to override the substantive rights and interests of the FTH Stakeholders. This is not in keeping with the fundamental aims of CCAA proceedings, or reflective of the crucial importance of these particular Proceedings to all Canadians.

27. HSF shares the Monitors concern for an expedient, fair, and comprehensive settlement to what are exceedingly complex and multifaceted Proceedings. It is emphasized again that the appointment of representative counsel for the FTH Stakeholders will enhance and support the ultimate goal in these Proceedings that any resulting Plan or settlement will be seen to exemplify the multifaceted social compromise that it is meant to embody.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of April, 2023.



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**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

N/A

**SCHEDULE “B”**  
**TEXT OF STATUTES, REGULATIONS & BY-LAWS**

**Companies’ Creditors Arrangement Act (R.S.C., 1985, c. C-36)**

**Claims**

**Claims that may be dealt with by a compromise or arrangement**

- **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).

**Exception**

**(2)** A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim’s compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

- **(a)** any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;
- **(b)** any award of damages by a court in civil proceedings in respect of
  - **(i)** bodily harm intentionally inflicted, or sexual assault, or
  - **(ii)** wrongful death resulting from an act referred to in subparagraph (i);

- **(c)** any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;
- **(d)** any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or
- **(e)** any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).

**SCHEDULE C - COMMON SERVICE LIST**

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

**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 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**

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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.

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

Proceeding commenced at TORONTO

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**REPLY FACTUM OF THE HEART AND STROKE  
FOUNDATION OF CANADA  
(RETURNABLE APRIL 14, 2023)**

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