

**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 PROPOSED PLAN OF COMPROMISE OR
ARRANGEMENT OF ROTHMANS, BENSON & HEDGES INC.**

Applicant

**RBH SUBMISSIONS REGARDING
CLAIMS PROCEDURE ORDER AND MEETING ORDER
(Returnable October 31, 2024)**

1. The plan of compromise and arrangement proposed by the Court-Appointed Mediator¹ and Monitor in respect of RBH (the “**Proposed Plan**”) contemplates that the three Tobacco Companies will pay an aggregate Global Settlement Amount of \$32.5 billion to finally resolve the Tobacco Claims against them. However, it does not allocate responsibility for the Global Settlement Amount as between the Tobacco Companies (together with related matters, the “**Allocation Issue**”) – an issue of paramount importance since the outset of these CCAA proceedings. Instead, section 5.2 of the Proposed Plan states that the Allocation Issue remains unresolved.

2. As has been clear for years, the Allocation Issue must be resolved for the Proposed Plan to be sanctioned and implemented.

¹ Capitalized terms used and not otherwise defined herein have the meanings given to them in the Proposed Plan.

3. RBH is committed to resolving the Allocation Issue in a timely manner, consensually if possible, to avoid the risk of delay to the Sanction Hearing. RBH stands ready to continue to work with the Court-Appointed Mediator, Monitor and, to the extent they wish to participate, the other Tobacco Companies in that regard. The CCAA provides the Court with wide latitude to determine how the Allocation Issue gets resolved.

4. Notwithstanding that the Allocation Issue has yet to be resolved, the Court-Appointed Mediator and Monitor seek to advance the CCAA process in the meantime by obtaining a claims procedure order and meeting order. If the Court is inclined to grant that relief, RBH does not wish to stand in the way of progressing these proceedings.

5. To be clear, however, in doing so RBH continues to reserve all of its rights with respect to the Proposed Plan, including any objections to the Proposed Plan that RBH may wish to make at the Sanction Hearing. Solely for the avoidance of doubt, RBH has not agreed to the Proposed Plan with the Allocation Issue unresolved.

A. Allocation Must Be Resolved

6. It is crucially important for the Allocation Issue to be resolved in a timely manner to enable the CCAA process to move forward for the benefit of all and allow the Proposed Plan to be sanctioned and implemented.

7. Although RBH is not opposing the relief being sought by the Court-Appointed Mediator and Monitor on this motion, RBH has set out herein a high-level review of why the Allocation Issue must be resolved for the Proposed Plan to be sanctioned and implemented, including:

- (a) a description of why the Proposed Plan requires allocation;

- (b) a brief overview of why RBH is entitled to an allocation; and
- (c) a brief outline of why the Contribution Provisions (defined below) do not represent an allocation and why they would produce unreasonable results without an allocation, incapable of being sanctioned.

a. Proposed Plan Requires Allocation

8. Allocation among the Tobacco Companies is a fundamental issue that has been obvious since the outset of these CCAA proceedings. The Proposed Plan makes clear that an allocation of the Global Settlement Amount is required and that the Allocation Issue must be resolved:

- (a) Section 5.2 of the Proposed Plan explicitly states that the allocation of the Global Settlement Amount as between the Tobacco Companies “remains unresolved”;²
- (b) the Proposed Plan refers to each Tobacco Company’s “share” of the Annual Contributions and Reserved Amounts³ and its “share” of any Upfront Contribution;⁴
- (c) Section 5.9 of the Proposed Plan states that the obligations of the Tobacco Companies are “several” and “not joint and several”, which only makes sense if each Tobacco Company is responsible for the share of the Global Settlement Amount allocated to it:

² Court-Appointed Mediator’s and Monitor’s CCAA Plan of Compromise and Arrangement concerning, affecting and involving Rothmans, Benson & Hedges Inc. dated October 17, 2024 (“**Proposed Plan**”), Schedule “B” to the Notice of Motion of the Monitor dated October 17, 2024 (“**Notice of Motion**”), Motion Record of the Monitor dated October 17, 2024 (“**Motion Record**”), Tab 1B, CaseLines Master [E350](#).

³ Proposed Plan, ss. 5.11 and 11.1(h), CaseLines Master [E411](#), [E433](#).

⁴ Proposed Plan, s. 13.11, CaseLines Master [E446](#).

5.9 Several Liability

The obligations of the Tobacco Companies under their CCAA Plans to pay their respective Upfront Contributions, Annual Contributions and Reserved Amounts for deposit into the Global Settlement Trust Account and Supplemental Trust Account, shall be several and not joint and several.⁵

(d) the Proposed Plan references \$750 million of cash to be retained by the Tobacco Companies in aggregate⁶ – which requires an allocation of this amount to be retained by the Tobacco Companies.

9. Similarly, the Monitor makes clear in its motion record that allocation is still required, noting that the Proposed Plan “provides for a Global Settlement Amount of \$32.5 billion *(liability for which is to be allocated among the Tobacco Companies)*.”⁷

10. Allocation is plainly required by the Proposed Plan and must be resolved.

b. RBH Entitled to an Allocation

11. A fair and reasonable allocation is a crucial component when two or more parties are sharing the burden. RBH should be entitled to an apportionment of alleged responsibility of the claims asserted against it and the other Tobacco Companies as a matter of law. See for example section 1 of the Ontario *Negligence Act*, which provides as follows:

Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are

⁵ Proposed Plan, s. 5.9, CaseLines Master [E411](#).

⁶ Proposed Plan, s. 5.4, CaseLines Master [E408](#).

⁷ Notice of Motion, para. 14, Motion Record, Tab 1, CaseLines Master [E330](#) [emphasis added].

respectively found to be at fault or negligent.⁸

12. See also sections 7 and 8 of the *Tobacco Damages and Health Care Costs Recovery Act* (Ontario) (“**THCCR**”),⁹ which provide for the apportionment of liability for damages caused by tobacco related wrongs among defendants. The THCCR lists the factors that a court may consider in apportioning liability, including the length of time the defendant engaged in the conduct, the extent to which a defendant assumed a leadership role in manufacturing the type of tobacco product and the market share of the defendant in the relevant tobacco product.¹⁰

c. Contribution Provisions Not an Allocation and Would Produce Unreasonable Results

13. The contribution provisions in the Proposed Plan (the “**Contribution Provisions**”) contemplate payments by the Tobacco Companies of their aggregate cash on hand (consisting of cash existing at the time of filing plus cash accumulated during the proceedings), as well as ongoing payments based on the industry’s net income after tax (“**NIAT**”).

14. Such Contribution Provisions are not the same as an allocation. An allocation involves identifying the portion of the Global Settlement Amount attributable to each Tobacco Company either through a consensual agreement or through a determination based on each Tobacco Company’s alleged responsibility for the claims being settled and other relevant factors.

15. The Contribution Provisions do nothing of the sort.

⁸ *Negligence Act*, [R.S.O. 1990, c. N.1](#), s. 1.

⁹ *Tobacco Damages and Health Care Costs Recovery Act, 2009*, [SO 2009, c. 13](#).

¹⁰ *Tobacco Damages and Health Care Costs Recovery Act, 2009*, [SO 2009, c. 13](#) at s. 7(3).

16. Without an allocation, the Contribution Provisions also create additional issues because differences in the cash positions and NIAT of the Tobacco Companies may in part result from differences in intercompany payments and expenses.

17. Relative to Imperial and JTIM, RBH accumulated significantly more cash by the time of filing (RBH's cash represented more than 60% of the aggregate industry cash, inclusive of the Quebec Cash Security Deposits).¹¹ For its part, RBH was vigilant in maintaining its Canadian cash and cashflow in a fair and appropriate manner after the trial decision underlying the Quebec Judgment (defined below) was released in 2015, including by suspending dividends to its parent company.¹²

18. RBH also believes that it has a disproportionately large amount of cash accumulated during the proceedings and that its future NIAT will be disproportionately large relative to Imperial and JTIM, having regard to their respective market shares and any reasonable allocation of responsibility for the Global Settlement Amount. It appears to RBH that cash accumulation and NIAT calculations for the Tobacco Companies, each of which is a Canadian subsidiary of a global enterprise, may be impacted by intercompany arrangements.

19. Unless and until a reasonable allocation is applied, the Contribution Provisions would result in unreasonably outsized contributions by RBH as a result of: (i) the higher cash balance that RBH held in Canada at the time of the CCAA filing (relative to Imperial and JTIM); (ii) the

¹¹ In the pre-filing reports filed by each of the Monitors, as of the week ended March 24, 2019 (which is the first week when all three Tobacco Companies had commenced their CCAA Proceeding), RBH's cash (including its Quebec Cash Security Deposits) was forecasted at approximately \$1,989 million, Imperial's cash (including its Quebec Cash Security Deposits) was forecasted at approximately \$1,102 million and JTIM's cash was forecasted at approximately \$133 million: [Report of Ernst & Young Inc. as Proposed Monitor of RBH dated March 22, 2019](#), Appendix A; [Pre-Filing Report of FTI Consulting Canada Inc. as Proposed Monitor of Imperial dated March 12, 2019](#), para. 49, Appendix E; [Report of Deloitte Restructuring Inc. as Proposed Monitor of JTIM dated March 8, 2019](#), Appendix A.

¹² Affidavit of Peter Luongo sworn March 22, 2019 at para. 90.

cash accumulated by RBH during these CCAA proceedings (relative to Imperial and JTIM); and (iii) the higher proportion of NIAT generated by RBH compared to Imperial and JTIM relative to their respective market shares, which may reflect differences in respect of intercompany expenses and other intercompany payments.

20. In the March 1, 2019 decision of the Court of Appeal of Quebec that precipitated these CCAA proceedings (the “**Quebec Judgment**”), the Court of Appeal of Quebec upheld the findings of the trial judge in two class actions brought against the Tobacco Companies and awarded damages against them (the moral damages awarded in the *Blais* matter, the “**Damages Award**”).¹³ Although RBH strongly disagrees with the findings of liability and that any damages should have been awarded to the Plaintiffs, one aspect of the determination in the Quebec Judgment that has significant relevance to the issue at hand was the allocation of the Damages Award among the Tobacco Companies.

21. After considering evidence over the course of a trial lasting more than 250 days, including evidence of historical market share and conduct of each of the Tobacco Companies and other relevant factors, the Court allocated responsibility for the Damages Award on the basis of 20% to RBH, 67% to Imperial and 13% to JTIM.¹⁴ This allocation was not disturbed on appeal.¹⁵

22. By comparison, if the Contribution Provisions applied without any allocation, it would mean that:

¹³ *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, [2019 QCCA 358](#).

¹⁴ *Létourneau c. JTI-MacDonald Corp.*, [2015 QCCS 2382](#) at paras. [1011-1012](#), [1016](#), [1214](#).

¹⁵ *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, [2019 QCCA 358](#) at para. [102](#).

(a) RBH would pay over 60% of the first \$2.5 to \$3 billion dollars of the proposed \$32.5 billion Global Settlement Amount because RBH held more than 60% of the industry cash at the CCAA filing date, including deposits;¹⁶

(b) RBH would pay about 40% or more of the next \$10 billion of the proposed \$32.5 billion Global Settlement Amount because that is the percentage of industry cash RBH has accumulated post-filing;¹⁷

(c) RBH would pay about 40% of the last \$20 billion of the proposed Global Settlement Amount because, based on the Monitors' estimates of industry NIAT (the Metric used to determine industry Annual Contributions), RBH NIAT represents about 40% of the industry NIAT from which the last \$20 billion will be paid.¹⁸

23. Overall, it is anticipated that the RBH contributions determined by the Contribution Provisions alone would represent approximately 43% of the Global Settlement Amount based on the Monitors' projections in Section 16.1 of the Proposed Plan.¹⁹

24. This amount is grossly in excess of any reasonable apportionment of alleged responsibility to RBH in respect of the Global Settlement Amount and precisely why the Proposed Plan requires an allocation.

¹⁶ *Supra*, note 11.

¹⁷ In the most recent reports filed by each of the Monitors, as of the week ended April 6, 2025, RBH's cash (including its Quebec Cash Security Deposits) was forecast at approximately \$6,004 million, Imperial's cash (including its Quebec Cash Security Deposits) was forecast at approximately \$5,553 million and JTIM's cash was forecast at approximately \$1,615 million, meaning the post-filing cash accumulation would be approximately \$4,015 million for RBH, \$4,451 million for Imperial and \$1,482 million for JTIM: Seventeenth Report of Ernst & Young Inc. as Monitor of RBH dated October 25, 2024, Appendix B, CaseLines Master [E1440](#); Nineteenth Report of FTI Consulting Canada Inc. as Monitor of Imperial dated October 25, 2024, Appendix C, CaseLines Master [E1808](#); Supplement to the Seventeenth Report of Deloitte Restructuring Inc. as Monitor of JTIM dated October 25, 2024, Appendix B, CaseLines Master [E1891](#).

¹⁸ Proposed Plan, s. 16.1, CaseLines Master [E456](#).

¹⁹ Proposed Plan, s. 16.1, CaseLines Master [E456](#).

25. Without an allocation, the disparity between the outcome based solely on the Contribution Provisions and the outcome based on any reasonable calculation of RBH's actual responsibility for the Global Settlement Amount would make the Proposed Plan unfair and unreasonable.

26. It would be particularly unfair and unreasonable when one considers that the Proposed Plan contemplates outsized contributions from RBH and then permits Imperial and JTIM to issue dividends (or intercompany interest payments) up to 15% of its NIAT annually.

27. Without an appropriate allocation, RBH would essentially be subsidizing its co-defendants, including in respect of dividends or other intercompany payments, at a rate of more than twice the liability apportioned to it in the Quebec Judgment and significantly more than any potential apportionment of alleged responsibility. Such a result would not only be unreasonable, it would be egregious; it cannot be sanctioned.

d. If no Allocation, Proposed Plan Cannot be Sanctioned or Implemented

28. Finally, if the Allocation Issue was not appropriately resolved at the time of the Sanction Hearing and RBH were to oppose the Proposed Plan, the Proposed Plan could not be sanctioned or implemented, including because:

- (a) the Proposed Plan distributes funds to holders of unproven, contingent and highly contested claims, which were only subject to a "negative notice" process for voting purposes only;
- (b) the Proposed Plan would not constitute a mutual compromise or arrangement;

(c) the CCAA does not provide a basis on which to bind the debtor company and it would be unfair and unreasonable to do so; and

(d) the Proposed Plan would be practically unworkable.

B. Conclusion

29. For the reasons set out herein, it is critical for the Allocation Issue to be resolved promptly and RBH reserves all rights with respect to the Proposed Plan, including, as necessary, the right to object to the Proposed Plan at the Sanction Hearing if there has been no reasonable allocation agreed or determined at that time.

30. RBH, for its part, is committed to resolving the issue in a timely manner to avoid the risk of substantial objections at the Sanction Hearing as well as the potential for further complications and delay.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of October, 2024.

McCarthy Tétrault LLP
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**SCHEDULE “A”
LIST OF AUTHORITIES**

Jurisprudence

1. *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, [2019 QCCA 358](#)
2. *Létourneau c. JTI-MacDonald Corp.*, [2015 QCCS 2382](#)

SCHEDULE “B” RELEVANT STATUTES

Negligence Act, RSO 1990, c N.1

Extent of liability, remedy over

1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

Tobacco Damages and Health Care Costs Recovery Act, 2009, SO 2009, c 13

Apportioning liability

Scope

7 (1) This section applies to an action for damages, or the cost of health care benefits, alleged to have been caused or contributed to by a tobacco related wrong other than an action for the recovery of the cost of health care benefits on an aggregate basis. 2009, c. 13, s. 7 (1).

Two or more defendants

(2) If a plaintiff is unable to establish which defendant caused or contributed to the exposure described in clause (b) and, as a result of a breach of a common law, equitable or statutory duty or obligation,

(a) one or more defendants causes or contributes to a risk of disease by exposing persons to a type of tobacco product; and

(b) the plaintiff has been exposed to the type of tobacco product referred to in clause (a) and suffers disease as a result of the exposure,

the court may find each defendant that caused or contributed to the risk of disease liable for a proportion of the damages or cost of health care benefits incurred equal to the proportion of its contribution to that risk of disease. 2009, c. 13, s. 7 (2).

Considerations

(3) The court may consider the following in apportioning liability under subsection (2),

(a) the length of time a defendant engaged in the conduct that caused or contributed to the risk of disease;

- (b) the market share the defendant had in the type of tobacco product that caused or contributed to the risk of disease;
- (c) the degree of toxicity of any toxic substance in the type of tobacco product manufactured or promoted by a defendant;
- (d) the amount spent by a defendant on promoting the type of tobacco product that caused or contributed to the risk of disease;
- (e) the degree to which a defendant collaborated or acted in concert with other manufacturers in any conduct that caused, contributed to or aggravated the risk of disease;
- (f) the extent to which a defendant conducted tests and studies to determine the risk of disease resulting from exposure to the type of tobacco product;
- (g) the extent to which a defendant assumed a leadership role in manufacturing the type of tobacco product;
- (h) the efforts a defendant made to warn the public about the risk of disease resulting from exposure to the type of tobacco product;
- (i) the extent to which a defendant continued manufacture or promotion of the type of tobacco product after it knew or ought to have known of the risk of disease resulting from exposure to the type of tobacco product;
- (j) affirmative steps that a defendant took to reduce the risk of disease to the public; and
- (k) other considerations considered relevant by the court.

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
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Court File No: CV-19-616779-00CL

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

Proceeding commenced at Toronto

**SUBMISSIONS REGARDING
CLAIMS PROCEDURE ORDER AND
MEETING ORDER
(Returnable October 31, 2024)**

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