

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

FACTUM OF ROTHMANS, BENSON & HEDGES INC.
(OBJECTION TO PLAN SANCTION)
(Returnable January 29, 2025)

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PART I—INTRODUCTION

1. RBH commenced this CCAA Proceeding to explore the potential for a comprehensive resolution of vigorously-contested tobacco-related litigation against it in Canada. Following a five-year mediation process, including countless hours of negotiation and extensive efforts by all parties, the Court-appointed mediator (the “**Mediator**”) and Ernst & Young Inc., in its capacity as Monitor (the “**Monitor**”) submitted a proposed plan of arrangement (the “**Proposed Plan**”) that has the potential to achieve this objective.¹

2. Notwithstanding the Proposed Plan’s potential for all stakeholders, however, it cannot be sanctioned in its current form because one critical issue remains outstanding: allocation of the Tobacco Companies’ respective responsibilities for funding the Global Settlement Amount (together with related matters, the “**Allocation Issue**”). That is so even though the need to resolve the Allocation Issue has been known and acknowledged throughout the CCAA proceedings and even though the Proposed Plan itself contemplates allocation.

3. Without an appropriate allocation of the Global Settlement Amount among the Tobacco Companies, RBH would be required to contribute approximately *\$6.923 billion more* to the Global Settlement Amount relative to its share of responsibility as determined by the only court to have decided any of the litigation against the Tobacco Companies on its merits.

4. On a percentage basis, RBH would have to fund *45.6%* of the amount to be paid to the QCAPs from the Upfront Contribution, even though RBH’s responsibility for these very claims

¹ Capitalized terms used and not defined herein have the meanings given in the First Amended and Restated Court-Appointed Mediator’s and Monitor’s CCAA Plan of Compromise and Arrangement pursuant to the *Companies’ Creditors Arrangement Act* concerning, affecting and involving Rothmans, Benson & Hedges Inc. dated December 5, 2024 (“**Proposed Plan**”).

was already determined by the Quebec trial and appellate court to be **20%**. RBH would have to fund an estimated **41.3%** of the overall Global Settlement Amount, even though the asserted Claims of the other Claimants are largely based on the same alleged conduct over the same period as the QCAP Claims (and thus should be apportioned based on the same **20%** determination).²

5. The Proposed Plan, in fact, would require RBH to contribute billions more (and Imperial and JTIM billions less) relative to any other possibly relevant benchmark, including RBH's historic market share during the period of alleged misconduct (30.03%) or RBH's current market share (36.8%).³

6. The Proposed Plan, therefore, would force RBH to provide a multi-billion-dollar subsidy to Imperial and JTIM, including to secure releases to be provided to them and their affiliates. At the same time, Imperial and JTIM would be permitted to retain a material portion (15% to 30%) of their Net After-Tax Income and potentially a portion of the \$750 million Retained Cash (defined below), and use that to pay dividends, interest and other amounts to their parent companies and affiliates.

7. A plan that treats RBH so unfairly is not fair and reasonable and cannot be implemented. RBH is not presently in a position to consent to it.⁴

² Affidavit of Milena Trentadue, sworn January 20, 2025 ("**Trentadue Affidavit**"), Exhibit "A", Responding Record of Rothmans, Benson & Hedges Inc. dated January 20, 2024 ("**RBH Record**"), Tab 1A, CaseLines [A1256](#).

³ Trentadue Affidavit, Exhibit "A", Table 7, RBH Record, Tab 1A, CaseLines [A1260](#).

⁴ Trentadue Affidavit, para. 21, RBH Record, Tab 1, CaseLines [A1253](#).

8. Further, without RBH consent, there would not be strict compliance with all statutory requirements and there would be steps taken or contemplated that are not authorized by the CCAA. Among other things:

- (a) without RBH's consent, the Proposed Plan is not a compromise or arrangement between a debtor company and its creditors as required by the CCAA; and
- (b) contrary to express requirements of the CCAA, the Proposed Plan provides for the contingent, highly-contested claims of the Claimants to be admitted for distribution and settlement purposes in the context of the Proposed Plan when RBH has not accepted such claims for such purposes and they have not been determined by the Court. Only RBH has the statutory authority to admit such claims for distribution and settlement purposes in the context of the Proposed Plan.

9. To resolve the Allocation Issue and gain the support of RBH so the Proposed Plan is capable of being sanctioned, RBH proposes that the sanction order contain the provisions set out in **Schedule "A"** (the "**Allocation Provisions**"). In summary, the Allocation Provisions provide:

- (a) an allocation of responsibility for funding the *Upfront Contribution* on the basis that:
 - (i) the portion of the QCAP Settlement Amount funded from the Upfront Contribution (\$3.869 billion) is allocated according to the Quebec Judgment, which already determined RBH's allocation to be **20%**; and

- (ii) the balance of the Upfront Contribution (estimated to be \$8.587 billion) is allocated so that RBH pays no more than an amount that is in proportion to RBH's share of the Annual Contributions estimated by the Monitor in section 16.1 of the Proposed Plan for the first few years (i.e. **38.7%** for RBH). That is more favourable to the other Tobacco Companies than any possibly relevant benchmark;⁵ and
- (b) an allocation of the \$750 million of cash that the Tobacco Companies get to retain pursuant to the Proposed Plan (the "**Retained Cash**") in proportion to each Tobacco Company's cash-on-hand as of the end of the month prior to the Plan Implementation Date, subject to the "true-up" payment mechanism described below;
- (c) each Tobacco Company that does not fully fund its allocated share of the Upfront Contribution must make true-up payments to the Tobacco Company or Tobacco Companies who fund the shortfall (the "**True-Up Payable Amount**") from (i) their share of the Retained Cash and (ii) their share of Net After-Tax Income, until they have repaid the True-Up Payable Amount; and
- (d) no Tobacco Company may pay dividends or debt service to any affiliate until it has paid its True-Up Payable Amount, if applicable.

10. Even with the Allocation Provisions, RBH would still contribute substantially more relative to the allocation applied in the Quebec Judgment or any other possibly relevant

⁵ RBH does not take any position on the allocation as between Imperial and JTIM of the portion of the Upfront Contribution not allocated to RBH.

allocation benchmark. Moreover, the Allocation Provisions would not impose on Imperial and JTIM an allocation of the Annual Contributions. Nonetheless, the Allocation Provisions are acceptable to RBH as a compromise that would allow for implementation of the global settlement provided for in the Proposed Plan.

11. The “true-up” mechanism among the Tobacco Companies contemplated by the Allocation Provisions ensures that the allocation remains *within the Tobacco Companies’ ability to pay* and *does not impact the payments to be made to the Claimants pursuant to the Proposed Plan*. Until the Global Settlement Amount is paid, each of the Tobacco Companies would remain subject to the CCAA Plans and required to continue to make Annual Contributions each year. The Allocation Provisions would only affect the Retained Cash and the 15-30% portion of Net After-Tax Income that the Tobacco Companies retain each year. The parents and affiliates of the other Tobacco Companies would remain incentivized to continue to support the Tobacco Companies during the period they are paying their True-Up Payable Amount, as applicable, through the receipt of payments for intercompany services and trademark royalties consistent with existing arrangements.

12. The Allocation Provisions represent a reasonable, fair and practical balancing of interests. Their inclusion will allow RBH to consent to the Proposed Plan and make it capable of sanction. This will allow the global settlement included in the Proposed Plan – the product of lengthy negotiations in the court-supervised mediation – to be implemented promptly without change for the benefit of all stakeholders.

PART II—THE FACTS

A. Affected Claims Largely Based on Same Alleged Conduct Over Same Period

13. RBH commenced these CCAA proceedings to explore a comprehensive and orderly resolution to the numerous litigation and associated claims that had been commenced against it.⁶ The claims include:

- (a) **Quebec Class Actions**: Two class actions commenced against the Tobacco Companies involving (i) persons with lung cancer, throat cancer, or emphysema (*Blais*), or (ii) persons who claimed nicotine dependence (*Létourneau*), related to conduct between January 1, 1950 and November 20, 1998.⁷ Following a lengthy trial, Justice Riordan of the Superior Court of Quebec issued a judgment (the “**Quebec Judgment**”) awarding compensatory and punitive damages (the “**Damages Award**”) against RBH and the other Tobacco Companies.⁸ The Court of Appeal of Quebec largely upheld the Quebec Judgment on March 1, 2019 (the “**Quebec Appeal Judgment**”);⁹
- (b) **Dormant Class Actions**: Seven putative class actions against the Tobacco Companies (the “**Dormant Class Actions**”) largely based on the same alleged conduct over the same period as the Quebec Class Actions.¹⁰ The Dormant Class

⁶ Affidavit of Peter Luongo sworn March 22, 2019 at paras. [15-16](#) (“**Luongo Affidavit**”). Imperial and JTIM commenced their respective CCAA proceedings for the stated purpose of achieving a collective, orderly and fair resolution of these claims, see Affidavit of Eric Thauvette sworn March 12, 2019 at para. [15](#) (“**Initial Thauvette Affidavit**”); Affidavit of Robert McMaster sworn March 8, 2019 at paras. [9](#), [75](#).

⁷ *Létourneau c. JTI-MacDonald Corp.*, [2015 QCCS 2382](#) at paras. [1208](#), [1233](#) [**Quebec Judgment**]; *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, [2019 QCCA 358](#) at para. [1282](#) [**Quebec Appeal Judgment**].

⁸ *Quebec Judgment* at paras. [1207-1246](#).

⁹ *Quebec Appeal Judgment* at paras. [1280-1285](#).

¹⁰ See Exhibits “**S(IV)**” to “**S(X)**” to the Initial Thauvette Affidavit. The claims asserted in the Dormant Class Actions, among others, are PCC Claims under the Proposed Plan. As it does with the QCAPs, the Proposed Plan provides that PCCs

Actions are at different stages of early development. They are vigorously contested by RBH;¹¹ and,

- (c) **HCCR Actions**: Actions or claims asserted by all Canadian Provinces and Territories against the Tobacco Companies claiming hundreds of billions of dollars related to health care costs allegedly caused by the conduct of the Tobacco Companies.¹² The HCCR Actions are largely based on the same alleged conduct over the same period as the Quebec Class Actions.¹³ They are similarly in early stages of development and are also vigorously contested.¹⁴

B. Allocation Has Already Been Determined

14. In the Quebec Judgment, Justice Riordan allocated responsibility for the compensatory damages among the Tobacco Companies as follows: **67% to Imperial, 20% to RBH, and 13% to JTIM** (the “**Court-Determined Allocation**”).¹⁵

15. Justice Riordan ordered this allocation of responsibility after a trial of the Quebec Class Actions which lasted from March 12, 2012 to December 11, 2014. There were approximately 251 hearing days before Justice Riordan in that period.¹⁶ Over 20,000 exhibits were introduced.¹⁷ Over 70 witnesses provided evidence, including more than 20 experts.¹⁸ The

must demonstrate that they smoked the required number of cigarettes sold by the Tobacco Companies between January 1, 1950 and November 20, 1998: Proposed Plan, s. 8.1(c).

¹¹ Trentadue Affidavit at para. 8, RBH Record, Tab 1, CaseLines [A1249](#).

¹² Trentadue Affidavit at para. 9, RBH Record, Tab 1, CaseLines [A1249](#).

¹³ See Tabs 2A to 2J of the RBH Record, CaseLines [A1264](#).

¹⁴ Trentadue Affidavit at para. 9, RBH Record, Tab 1, CaseLines [A1249](#).

¹⁵ *Quebec Judgment* at paras. [1011-1012](#), [1016](#), [1214](#).

¹⁶ *Quebec Judgment* following para. [1253](#).

¹⁷ *Quebec Judgment* at FN [510](#).

¹⁸ *Quebec Judgment* at Schedules C-G.

evidence at the Quebec trial addressed (among other things) the alleged conduct of each of Imperial, RBH, JTIM, and certain of their predecessors in Quebec dating back to at least the 1950s.¹⁹

16. Justice Riordan also made a finding with respect to the average annual market share of the three Tobacco Companies over the *Blais* class period (1950-1998) as follows: ***Imperial had 50.38%, RBH had 30.03%, and JTIM had 19.95%***.²⁰ However, Justice Riordan rejected the plaintiffs' proposal to allocate responsibility for compensatory damages strictly by market share.²¹

17. Instead, Justice Riordan increased the proportion of the compensatory damages award Imperial had to pay relative to its average market share (and thereby reduced the proportion each of RBH and JTIM was required to pay relative to their market shares) based on factual findings concerning Imperial's conduct during the class period. After reviewing the evidence, Justice Riordan found that "[Imperial's] culpable conduct surpassed that of the other Companies... It was the industry leader on many fronts, including that of hiding the truth from – and misleading – the public."²²

18. With respect to punitive damages, Justice Riordan also assigned relatively less fault to RBH as compared to Imperial and JTIM.²³ Justice Riordan described Imperial as an "outlier",

¹⁹ *Quebec Judgment* at para. [5](#).

²⁰ *Quebec Judgment* at para. [1007](#). Note that the relevant market share is the market share during the relevant time period of the claim rather than current market share. See also *Tobacco Damages and Health Care Costs Recovery Act, 2009*, [SO 2009, c. 13](#) at s. [7\(3\)](#), which lists as a factor to be considered "the market share the defendant **had** in the type of tobacco product that caused or contributed to the risk of disease." [emphasis added].

²¹ *Quebec Judgment* at para. [1011-1012](#).

²² *Quebec Judgment* at para. [1009](#).

²³ Imperial was held liable for punitive damages representing 150% of its average annual before-tax earnings: *Quebec Judgment* at para. [1078](#). JTIM was held liable for punitive damages representing 125% of its average annual before-tax earnings: *Quebec Judgment* at para. [1104](#). RBH was held liable for 100% of its average annual before-tax earnings: *Quebec Judgment* at paras. [1090-1091](#).

describing facts that “weigh heavily on the gravity of [Imperial’s] faults and require a condemnation higher than the base amount.”²⁴ Justice Riordan allocated a higher proportion of the punitive damages to JTIM based on what he determined to be its “tangled web” of intercompany contracts that amounted to a “creditor-proofing exercise” and a “cynical, bad-faith effort by [JTIM] to avoid paying proper compensation” by artificially making it appear less profitable than it really is.²⁵

19. The Court-Determined Allocation was upheld unanimously by the Court of Appeal of Quebec in the Quebec Appeal Judgment.²⁶

C. Proposed Plan Requires Allocation

20. The Proposed Plan would resolve the extensive litigation against the Tobacco Companies that has spanned multiple decades and see funds flowing to Claimants in accordance with an agreed-upon allocation among the Claimants. To fund such payments and finally resolve the Tobacco Claims, the Proposed Plan contemplates that the Tobacco Companies will pay an aggregate Global Settlement Amount of \$32.5 billion.

21. The contribution provisions in the Proposed Plan (the “**Contribution Provisions**”) do not apportion responsibility for the Global Settlement Amount. Rather, they merely provide for the pre-allocation, aggregate settlement payments by the Tobacco Companies, consisting of: (i)

²⁴ *Quebec Judgment* at para. [1078](#).

²⁵ *Quebec Judgment* at paras. [1101-1104](#).

²⁶ *Quebec Appeal Judgment* at paras. [14-17](#), [102](#), [1134-1137](#), [1160-1162](#). Imperial did not seek to file an application for leave to the Supreme Court of Canada from the Quebec Appeal Judgment. See *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*, [2019 ONSC 2222](#) at para. [7](#). RBH and JTIM were stayed from bringing leave applications to the Supreme Court of Canada. While RBH vigorously disputed Justice Riordan’s findings of liability against RBH before the Court of Appeal of Quebec, and continues to dispute any underlying liability, Justice Riordan and the Court of Appeal of Quebec are the only courts to have rendered a judgment in any of the Tobacco Claims on the merits.

an upfront amount equal to their aggregate cash on hand less the Retained Cash; and (ii) ongoing annual payments based on the industry's Net After-Tax Income ("NATI").

22. As the Court has observed, and contrary to Imperial's assertion that the Allocation Issue was only introduced by RBH late in the mediation process, the allocation of responsibility for the Global Settlement Amount has been an obvious issue of paramount importance since the very outset of these CCAA proceedings.²⁷ Moreover, Imperial and JTIM's assertions that the Contribution Provisions themselves constitute an allocation and therefore the Allocation Issue does not need to be resolved are belied by, among other things:

- (a) the Proposed Plan itself, which includes an explicit statement that allocation "remains unresolved" and various other terms set out in **Schedule "B"** hereto that make clear that an allocation of responsibility for the Global Settlement Amount among the Tobacco Companies is required, none of which are addressed by the Contribution Provisions;
- (b) the reports of the Monitors, which state that the Allocation Issue remains unresolved, the Monitors do not take a position on it, and it must "either be agreed upon by the Tobacco Companies or decided by the Court";²⁸ and
- (c) the prior statements of the Court, which previously observed that "[a]t this stage of the proceedings it is clear that not all issues have been resolved.

²⁷ Trentadue Affidavit at paras. 13-14, RBH Record, Tab 1, CaseLines [A1250](#). As indicated, RBH would be content for the Court to consult the mediator about RBH's position on allocation throughout the mediation process.

²⁸ Twenty-Third Report of the Monitor (Ernst & Young Inc.) dated January 15, 2025 at paras. [18](#), [30](#); Twenty-Fifth Report of the Monitor (FTI Consulting Canada Inc.) dated January 15, 2025 at para. [15](#); Joint Factum of the Monitors (Ernst & Young Inc. and FTI Consulting Canada Inc.) dated January 22, 2025 at para. [12](#); Factum of the Monitor (Deloitte Restructuring Inc.) dated January 22, 2025 at para. [4](#).

Notably, there are outstanding issues as between the Tobacco Companies concerning the financial allocation of the settlement amount as between them...”²⁹

PART III—ISSUES AND THE LAW

23. The key issue on this motion is whether the Proposed Plan can be sanctioned without the Allocation Issue resolved. The answer is *no*. Despite the potential benefits of the settlement in the Proposed Plan for RBH’s creditors and stakeholders, it is not possible to sanction the Proposed Plan without the Allocation Provisions or another allocation that more fairly and equitably apportions responsibility for payment of the Global Settlement Amount. Without that, the plan sanction test is not met.

A. The Plan Sanction Test

24. The general requirements for court approval of a plan of compromise or arrangement under the CCAA are well established: (i) there must be strict compliance with all statutory requirements; (ii) nothing has been done or purported to be done that is not authorized by the CCAA; and (iii) the plan must be fair and reasonable.³⁰

B. The Plan is Not Fair and Reasonable

25. To be fair and reasonable, the plan must represent a reasonable and fair balancing of interests, in light of the circumstances of the case and commercial alternatives.³¹ The Court

²⁹ *Imperial Tobacco Limited*, [2024 ONSC 6061](#) at para. 13.

³⁰ *Laurentian University of Sudbury*, [2022 ONSC 5645](#) at para. 23 [*Laurentian*]; *Lydian International Limited (Re)*, [2020 ONSC 4006](#) at para. 22 [*Lydian*]; *Canadian Airlines Corp. (Re)*, [2000 ABQB 442](#) at para. 60 [*Canadian Airlines*].

³¹ *Laurentian* at para. 31; *Lydian* at para. 29; *Canadian Airlines* at para. 94.

should consider the rights of the parties in the absence of the plan and evaluate whether the plan treats the parties fairly in that their “rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights.”³²

26. The Proposed Plan does not meet this test as (i) in the absence of the Proposed Plan, RBH would be entitled to an apportionment of alleged responsibility between it and the other Tobacco Companies, (ii) an apportionment was already determined in the Quebec Judgment, (iii) the Proposed Plan would force RBH to contribute far more than the apportionment determined in the Quebec Judgment, or any other possibly relevant benchmark, and (iv) that over-contribution would result in RBH effectively subsidizing the other Tobacco Companies, including in relation to dividends, interest and other payments to their parent companies and affiliates.

(i) Allocation Provisions Required

i. RBH Entitled to Apportionment of Alleged Responsibility

27. If the alleged claims being settled by the CCAA Plan had been finally determined and amounts awarded, RBH would be entitled to an apportionment of responsibility between it and the other Tobacco Companies, and have a claim for contribution and indemnity against the other Tobacco Companies for any amounts paid above its apportionment of responsibility.

³² *Sammi Atlas Inc., Re*, [1998 CanLII 14900](#) at para. 4 (ON SC); *Olympia & York Developments Ltd. v. Royal Trust Co.*, 1993 CarswellOnt 182 at para. 50 (ON SC), cited in *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.*, [2003 BCCA 344](#) at para. 39.

28. The Ontario *Negligence Act* and comparable statutes in other jurisdictions provide for a mandatory apportionment of responsibility and claims over for contribution and indemnity.³³

29. Similarly, the Ontario *Tobacco Damages and Health Care Costs Recovery Act* and comparable statutes in other jurisdictions provide for an apportionment of responsibility and claims over for contribution and indemnity.³⁴ The legislation lists the factors that a court may consider in apportioning responsibility.³⁵

30. The purpose of apportioning responsibility is to ensure that “those who contributed to the loss share the financial responsibility in the proportions of their respective degrees of fault.”³⁶ An apportionment is a “basic policy” that “provides for *fairness* between the tortfeasors by allowing them to spread the damages in accordance with their liability.”³⁷ It is designed to prevent the “*unjust enrichment* that arises when a concurrent tortfeasor bears a disproportionate share of the plaintiff’s claim.”³⁸

³³ *Negligence Act*, [R.S.O. 1990, c. N.1](#), s. 1. See also: *Negligence Act*, [RSBC 1996, c. 333](#), s. 4; *Contributory Negligence Act*, [RSA 2000, c. C-27](#), s. 2; *The Contributory Negligence Act*, [RSS 1978, c. C-31](#), s. 3; *The Tortfeasors and Contributory Negligence Act*, [CCSM c. T90](#), s. 2; *Contributory Negligence Act*, [RSNS 1989, c. 95](#), ss. 3-4; Civil Code of Québec, [COLR c. CCQ-1991](#), s. 1478; *Contributory Negligence Act*, [RSNL 1990, c. C-33](#), s. 3; *Contributory Negligence Act*, [RSNB 2011, c. 131](#), s. 3; *Contributory Negligence Act*, [RSPEI 1988, c C-21](#), s. 2; *Contributory Negligence Act*, [RSY 2002, c. 42](#), s. 2; *Contributory Negligence Act*, [RSNWT 1988, c. C-18](#), s. 3; *Contributory Negligence Act*, [RSNWT \(Nu\) 1988](#), c C-18, s. 3.

³⁴ *Tobacco Damages and Health Care Costs Recovery Act*, 2009, [SO 2009, c. 13](#), ss. 7, 8. See also: *Tobacco Damages and Health Care Costs Recovery Act*, [SBC 2000, c. 30](#), ss. 7, 8; *Crown's Right of Recovery Act*, [SA 2009, c. C-35](#), ss. 47-48; *The Tobacco Damages and Health Care Costs Recovery*, [SS 2007, c T-14.2](#), ss. 8-9; *Tobacco-related Damages and Health Care Costs Recovery Act*, [COLR c R-2.2.0.0.1](#), ss. 22-23; *The Tobacco Damages and Health Care Costs Recovery Act*, [CCSM c T70](#), ss. 7-8; *Tobacco Damages and Health Care Costs Recovery Act*, [SNB 2006, c. T-7.5](#), ss. 7-8; *Tobacco Damages and Health-care Costs Recovery Act*, [SNS 2005, c. 46](#), ss. 8-9; *Tobacco Damages and Health Care Costs Recovery Act*, [RSPEI 1988, c T-3.002](#), ss. 7-8; *Tobacco Health Care Costs Recovery Act*, [SNL 2001, c T-4.2](#), s. 9.

³⁵ The factors include 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, see e.g.: *Tobacco Damages and Health Care Costs Recovery Act*, 2009, [SO 2009, c. 13](#) at s. 7(3).

³⁶ *Martin v. Listowel Memorial Hospital*, [2000 CanLII 16947](#) (ON CA) at para. [34](#).

³⁷ *Toronto Hydro v. Gonte and City of Toronto*, [2018 ONSC 4315](#) at paras. [37-39](#). See also: *McHugh v. 2209664 Ontario Inc.*, [2022 ONSC 3729](#) at para. [32](#); *Foniciello v. Bendall*, [2018 ONSC 1611](#) at paras. [39-42](#).

³⁸ *Placzek v. Green*, [2009 ONCA 83](#) at paras. [34-38](#). See also: *Fan Yang v. McInnes Cooper*, [2024 NSSC 308](#) at para. [56](#).

31. Therefore, if the Proposed Plan was not a consensual settlement (requiring agreement between the debtor and claimants) and instead was a court-ordered judgment, RBH would be entitled to an apportionment of responsibility, and one is necessary to ensure that the Proposed Plan is fair.

ii. Apportionment of Responsibility Already Determined

32. Allocation between the Tobacco Companies has already been judicially determined by the Quebec Courts in respect of the QCAPs on an extensive evidentiary record during a years-long trial. The Quebec Judgment allocated responsibility for the Damages Award on the basis of **20% to RBH, 67% to Imperial and 13% to JTIM**.³⁹ This determination of allocation was upheld on appeal in the Quebec Appeal Judgment.⁴⁰

33. The alleged claims of the other Claimants are largely based on the same alleged conduct over the same period as the QCAP Claims.⁴¹ Therefore, in the context of the Proposed Plan, the same Court-Determined Allocation should be applied to all Claims in determining a fair and reasonable apportionment of responsibility between the Tobacco Companies.

iii. Without an Allocation, the Proposed Plan Would Require RBH to Grossly Subsidize the Other Tobacco Companies and is Unfair and Unreasonable

34. Without an allocation, RBH would be over-contributing, without its consent, by approximately \$6.923 billion relative to the Court-Determined Allocation.

³⁹ *Quebec Judgment* at paras. [1011-1012](#), [1016](#), [1214](#).

⁴⁰ *Quebec Appeal Judgment* at paras. [14-17](#), [102](#), [1134-1137](#), [1160-1162](#).

⁴¹ See Exhibits "[S\(IV\)](#)" to "[S\(X\)](#)" to the Initial Thauvette Affidavit and Tabs 2A to 2J of the RBH Record, CaseLines [A1264](#).

a. Upfront Contribution

35. As set out in greater detail in **Schedule “C”**, based on the Monitors’ reports filed in the CCAA proceedings and the Monitor’s estimates in the Proposed Plan, (i) RBH held approximately 61.7% of the aggregate cash held by the Tobacco Companies at the outset of the CCAA proceedings, and (ii) RBH has generated about 40.5% of the aggregate cash generated by the Tobacco Companies during the CCAA proceedings despite having a lower market share.⁴²

36. RBH was vigilant in maintaining its Canadian cash and cashflow in a fair and appropriate manner after the Quebec Judgment was issued in 2015, including by suspending dividends to its parent company.⁴³ Similarly, RBH’s proportionately greater cash accumulation during the CCAA proceedings can only be explained by differences in intercompany arrangements that result in the other Tobacco Companies retaining less cash in Canada.

37. As set out in greater detail in **Schedule “D”**, if the Contribution Provisions applied without any allocation, it would mean that RBH would contribute approximately **45.6%** of the Upfront Contribution⁴⁴ rather than the **20%** already determined and upheld by the Court of Appeal of Quebec. This means that, relative to the Court-Determined Allocation:

⁴² Average market share during the CCAA proceedings was 36.8% for RBH, compared to 41.0% for Imperial and 22.0% for JTIM: Trentadue Affidavit at para. 19(c), RBH Record, Tab 1, CaseLines [A1252](#).

⁴³ Luongo Affidavit at para. [90](#).

⁴⁴ Trentadue Affidavit, Exhibit “A”, Table 2, RBH Record, Tab 1A, CaseLines [A1258](#).

- (a) in the case of approximately \$3.869 billion being paid to the QCAPs from the Upfront Contribution, ***RBH would be over-contributing by approximately \$0.989 billion***; and
- (b) in the case of the \$7.952 billion going to the PCCs and Provinces and Territories from the Upfront Contribution, ***RBH would be over-contributing by approximately \$2.033 billion***.⁴⁵

b. Annual Contributions

38. RBH's Annual Contributions under the Proposed Plan, which are based on its NATI, will also be disproportionately large relative to Imperial and JTIM. Based on the Monitors' estimates in the Proposed Plan, RBH's estimated NATI would constitute about **38.7%** of the aggregate estimated Annual Contributions in the CCAA Plan.⁴⁶ This means that, relative to the Court-Determined Allocation, in the case of the approximately \$20.044 billion going to the QCAPs, Provinces and Territories and PCCs from the Annual Contributions, ***RBH would be over-contributing by approximately \$3.748 billion***.⁴⁷

39. Overall, including both the Upfront Contribution and the Annual Contributions, RBH's Contributions determined by the Contribution Provisions alone, without an allocation, would represent approximately **41.3%** of the Global Settlement Amount, which is more than twice the Court-Determined Allocation.⁴⁸

⁴⁵ Trentadue Affidavit, Exhibit "A", Table 3, RBH Record, Tab 1A, CaseLines [A1258](#).

⁴⁶ Trentadue Affidavit, Exhibit "A", RBH Record, Tab 1A, CaseLines [A1256](#).

⁴⁷ Trentadue Affidavit, Exhibit "A", Table 5, RBH Record, Tab 1A, CaseLines [A1259](#).

⁴⁸ Trentadue Affidavit, Exhibit "A", RBH Record, Tab 1A, CaseLines [A1256](#).

40. Without an allocation, ***RBH would be over-contributing by approximately \$6.923 billion overall***, without its consent, to the settlement of contingent and highly-contested claims.⁴⁹

41. Even if it was appropriate to base responsibility on (i) the determination in the Quebec Judgment of each Tobacco Company's average market share during the relevant period,⁵⁰ or (ii) RBH's market share during the CCAA proceedings,⁵¹ under the Contribution Provisions RBH would still be required to contribute billions more than its share of the Upfront Contribution and Annual Contributions.⁵² Without an allocation, the Proposed Plan requires RBH to significantly over-contribute relative to the other Tobacco Companies under any possibly relevant allocation benchmark.

42. Given this gross disparity, it is perhaps not surprising that the Proposed Plan itself makes clear in multiple provisions that an allocation of the Global Settlement Amount is required and that the Allocation Issue must be resolved.⁵³

c. Gross Disparity Makes the Proposed Plan Unfair and Unreasonable

43. Without an allocation, the gross disparity between the outcome based solely on the Contribution Provisions and the outcome based on RBH's responsibility for the alleged misconduct during the relevant period makes the Proposed Plan unfair and unreasonable.

⁴⁹ Trentadue Affidavit, Exhibit "A", Table 7, RBH Record, Tab 1A, CaseLines [A1260](#).

⁵⁰ Imperial 50.38%, RBH 30.03%, and JTIM 19.95%: *Quebec Judgment* at para. [1007](#).

⁵¹ Imperial 41.5%, RBH 36.8% and JTIM 21.7%: Trentadue Affidavit at para. 19(c), RBH Record, Tab 1, CaseLines [A1252](#).

⁵² The over-contribution if it were appropriate to base responsibility on (i) market share during the relevant period (30.03%) would be \$3.673 billion, and (ii) market share during the CCAA Proceedings (36.8%) would be \$1.463 billion: Trentadue Affidavit, Exhibit "A", Table 7, RBH Record, Tab 1A, CaseLines [A1260](#).

⁵³ See Schedule "B".

44. It would be particularly unfair and unreasonable for RBH to be making outsized contributions when the Proposed Plan permits Imperial and JTIM to issue dividends (or make intercompany debt and interest payments) from the retained portions of their NATI over the entire Contribution Period.

45. Without an appropriate allocation, RBH would essentially be forced to subsidize its co-defendants, including for them to secure releases for their parents and affiliates and pay dividends or other intercompany debt payments to their affiliates, at a rate of more than twice the Court-Determined Allocation and significantly more than any potential apportionment of alleged responsibility. Such a result is unfair and unreasonable.

C. Statutory Requirements Not Met and Actions Taken that are Not Authorized

46. Without RBH's consent, the Proposed Plan cannot be sanctioned for the additional reason that it does not meet the first and second prongs of the sanction test. To determine whether there has been "strict compliance" with all statutory requirements, courts consider factors related to the technical requirements of the CCAA.⁵⁴ In considering whether any unauthorized steps have been taken, the court relies on the materials filed to ensure nothing contrary to the CCAA has occurred or is contemplated by the plan.⁵⁵

47. In this case, there has not been strict compliance with the CCAA, and the Proposed Plan contemplates steps that are unauthorized.

(i) No Compromise With And No Basis To Impose CCAA Plan On Debtor Company

⁵⁴ *Laurentian* at para. 24; *Lydian* at para. 24; *Canadian Airlines* at para. 62.

⁵⁵ *Nordstrom Canada Retail, Inc.*, 2024 ONSC 1622 at para. 24; *Canadian Airlines* at para. 64; *Canwest Global Communications Corp.*, 2010 ONSC 4209 at para. 17.

48. The Proposed Plan, in its current form and without an appropriate resolution of the Allocation Issue, is contrary to the core structures of the CCAA in at least three respects, including that it is contrary to the requirements of sections 4 and 6 of the CCAA.

49. **First**, unless RBH agrees to it, the Proposed Plan is not a compromise or arrangement between a debtor company and its creditors in the sense required by the CCAA. Section 4 of the CCAA provides that the proposal to be considered must be a compromise or arrangement proposed *between the debtor company* and its creditors.⁵⁶ Similarly, section 6 of the CCAA also refers to a “compromise or arrangement” that may be sanctioned by the court and, if so sanctioned, is binding.⁵⁷

50. Courts have considered what constitutes the requisite “compromise or arrangement” between a debtor company and its creditors and noted that it “must comprise a mutual or consensual agreement between the company and those of its creditors which the plan purports to bind.”⁵⁸

51. **Second**, a compromise or arrangement under the CCAA is, in essence, a contract between the debtor and its creditors.⁵⁹ Consent is a fundamental element of a contract. The CCAA does not contain a mechanism to bind the debtor if the fully functioning debtor does not consent to the CCAA plan. There is only a mechanism to impose a plan on a minority of dissenting creditors, with protections to ensure that the rights of dissenting creditors are not

⁵⁶ *Companies' Creditors Arrangement Act*, [RSC 1985, c C-36, s. 4](#) [CCAA]. [Section 5](#) of the CCAA provides a similar requirement in respect of secured creditors.

⁵⁷ CCAA, [s. 6\(1\)](#).

⁵⁸ *Ursel Investments Ltd., Re*, [1990 CanLII 7504](#) (SK KB) at para. [35](#).

⁵⁹ *SFC Litigation Trust v. Chan*, [2019 ONCA 525](#) at para. [57](#), leave to appeal to SCC dismissed, [2020 CanLII 224](#) (SCC), citing *Canadian Red Cross Society (Re)*, [2002 CanLII 49603](#) (ON SC), at paras. [12-13](#), affd [2003 CanLII 32040](#) (ON CA), leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 539; *Catalyst Capital Group Inc. v. VimpelCom Ltd.*, [2018 ONSC 2471](#), at para. [109](#), affd on other grounds [2019 ONCA 354](#).

unjustifiably confiscated.⁶⁰ Courts have made clear that the authority granted by the CCAA to alter the legal rights of dissenting creditors does not extend to the debtor company:

... it is clear that the C.C.A.A. grants a court the authority to alter the legal rights of parties **other than the debtor company** without their consent.⁶¹

52. *Third*, the Court plays a supervisory or “referee” role in this process but is not entitled to “usurp the role of the directors and management in conducting what are in substance the company’s restructuring efforts.”⁶² The Court has acknowledged that its function is not to “descend into the negotiating arena” or “second guess the business people with respect to the “business” aspect of the Plan, acknowledging that “the parties themselves know best what is in their interests in those areas.”⁶³

53. Here, the Proposed Plan is not a proposed “mutual or consensual” agreement. Rather, it is a construct advanced by the Mediator and Monitors for which there is no mutual consent. Although the Mediator and Monitors were authorized to *propose* a plan, there is simply no statutory mechanism to impose their CCAA plan on the debtor company, binding it to a contract to which it has not agreed. This is particularly so when, as in this case, the plan is a vehicle to implement the settlement of contingent and highly-contested claims.

(ii) Only The Debtor Company Has The Statutory Authority To Admit Creditor Claims For Distribution And Other Substantive Purposes

⁶⁰ *Olympia* at para. 72. These protections include: (i) a structure for classification of creditors; (ii) a process for valuation of creditor votes; (iii) a structure for a “double majority” voting approval; and (iv) court approval of the plan as fair and reasonable.

⁶¹ *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, [1988 CanLII 3570](#) (AB KB) at para. 27 [emphasis added].

⁶² *Stelco Inc. (Bankruptcy), Re*, [2005 CanLII 8671](#) (ON CA) at para. 44.

⁶³ *Canadian Airlines* at para. 97.

54. Section 20(1)(a)(iii) of the CCAA provides that in a CCAA case such as this, the amount of an unsecured claim is the amount that is either “admitted by the company” or determined by the Court.⁶⁴ The legislature was clear and unambiguous: it is not the monitor or a court-appointed mediator or the creditors themselves who are authorized to accept the amount of a claim for distribution and other substantive purposes of a plan; rather, it is the debtor company. As the Alberta Court of Appeal recognized:

A company which invokes the CCAA process retains a great deal of control over it. Under the CCAA claims process, **the company, not the monitor, initially accepts or rejects claims.**⁶⁵

55. It is critical that a debtor company maintain this right to accept the claims against it for the purposes of a compromise if the claims are not determined by the court because it is the debtor company paying or otherwise satisfying the creditor claims. If it was otherwise, claimants could assert large unproven contingent claims against a company and then propose a CCAA plan in which their unproven claims are accepted at face value at the expense of other stakeholders.

56. That would be an absurd and unfair result and is why the CCAA provides that the *debtor company* is the party with authority to accept the claim for distribution and other substantive purposes, failing which its validity and value must be determined by the Court.

57. The Proposed Plan fails to comply with this statutory requirement. The Affected Claims have only been subject to a “negative notice” claims process that was expressly for *voting*

⁶⁴ CCAA, [s. 20\(1\)\(a\)\(iii\)](#).

⁶⁵ *Alternative Fuel Systems Inc. v. Remington Development Corp.*, [2004 ABCA 31](#) at para. [52](#), cited in *8640025 Canada Inc. (Re)*, [2018 BCCA 93](#) at para. [34](#).

purposes only.⁶⁶ The Affected Claims remain unproven and are highly contested by RBH.⁶⁷ At this stage, they are merely *asserted* claims.

58. As a result, without RBH consent, the Proposed Plan fails to adhere strictly to the statutory requirements and is not authorized by the CCAA.

D. Relief Required to Make Proposed Plan Sanctionable

59. For the reasons set out above, the Proposed Plan cannot be sanctioned without RBH's consent. That requires a resolution of the Allocation Issue.

60. RBH is proposing the Allocation Provisions to address this issue. While the Allocation Provisions would require RBH to pay far more than its 20% Court-Determined Allocation or any other possibly relevant allocation benchmark, RBH would be willing to agree to this allocation in the circumstances to facilitate implementation of the Proposed Plan. The proposed Allocation Provisions provide as follows:

- (a) as between the Tobacco Companies:
 - (i) the Court-Determined Allocation of **20%** to RBH would apply to the portion of the QCAP Settlement Amount funded from the Upfront Contribution (approximately \$3.869 billion);
 - (ii) the balance of the Upfront Contribution (an estimated \$8.587 billion) would be allocated so that RBH pays a share in proportion to RBH's

⁶⁶ [Claims Procedure Order](#) dated October 31, 2024 at paras. 8, 13, 21; Proposed Plan, [s. 3.1.2](#).

⁶⁷ Trentadue Affidavit at paras. 8-9, RBH Record, Tab 1, CaseLines [A1249](#).

share of the Annual Contributions estimated by the Monitor in section 16.1 of the Proposed Plan (i.e. **38.7%** for RBH); and

- (iii) no allocation would be applied to the Annual Contributions;
- (b) a “true-up” mechanism whereby a Tobacco Company that does not fund its allocated share initially makes payments to RBH from its share of Retained Cash and retained NATI until RBH’s over-contribution has been satisfied; and
- (c) the \$750 million Retained Cash would be allocated based on each Tobacco Company’s cash-on-hand at the end of the month prior to the Plan Implementation Date, but subject to the “true-up” mechanism pursuant to which Imperial and JTIM’s shares of the Retained Cash would be paid to RBH as part of the “true-up”.

61. While RBH would still pay considerably more than its allocated percentage of 20% provided for in the Court-Determined Allocation even with the Allocation Provisions, RBH is willing to accept the allocation proposed in the Allocation Provisions in the circumstances. Among other things:

- (a) there is no question that the Court-Determined Allocation should apply to the QCAP Settlement Amount funded from the Upfront Contribution. The Quebec courts determined the allocation of responsibility for paying the QCAPs in respect of the QCAP Claims to be settled with these funds. There is no basis to deviate from this allocation;

- (b) in respect of the balance of the Upfront Contribution, RBH is willing to accept the 38.7% allocation to facilitate implementation of the global resolution, even though any possibly relevant allocation that might apply would be at least, or more, favourable to RBH:
- (i) it is almost twice the 20% Court-Determined Allocation to RBH;
 - (ii) it is substantially more than an allocation based on the 30.03% average market share of RBH during the period of alleged misconduct as determined in the Quebec Judgment;⁶⁸
 - (iii) it is more than an allocation based on the 36.8% approximate average market share of RBH during the CCAA proceedings;⁶⁹ and
 - (iv) it is equal to an allocation based on the projected relative NATI for RBH, which is estimated to be 38.7%. This is more favourable to Imperial and JTIM than any possibly relevant allocation benchmark.

62. Therefore, through the Allocation Provisions, RBH proposes a practical resolution pursuant to which it will consensually accept an allocation in excess of the amount determined by the Quebec Courts – all while ensuring, through the “true up mechanism”, that the allocation resolution is *within the ability to pay of the Tobacco Companies* and has *no impact on the Claimants*.⁷⁰

⁶⁸ *Quebec Judgment* at para. [1007](#).

⁶⁹ Trentadue Affidavit, para. 19(c), RBH Record, Tab 1A, CaseLines [A1252](#).

⁷⁰ Contrary to the assertions by Imperial and JTIM, including the Allocation Provisions in the CCAA Sanction Order would not undermine the votes that were previously made by the Claimants on the Proposed Plan. The Allocation Provisions

PART IV—ORDER REQUESTED

63. For the reasons set out above, RBH requests that this Court not grant the CCAA Sanction Order unless it includes the Allocation Provisions set out in Schedule “A” so that the Proposed Plan is sanctionable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of January, 2025.



McCarthy Tétrault LLP
Lawyers for Rothmans, Benson & Hedges Inc.

have no impact on the Claimants. The Proposed Plan expressly provided that the Allocation Issue remained unresolved ([s. 5.2](#)) and the Proposed Plan could be amended with the approval of the Court ([s. 20.4\(a\)](#)).

SCHEDULE "A"

ALLOCATION PROVISIONS – GLOBAL SETTLEMENT

THIS COURT ORDERS that:

- (a) responsibility for payment of the Upfront Contribution is allocated, as between the Tobacco Companies, on the basis that each Tobacco Company shall be responsible for paying the following portion of the Upfront Contribution, as applicable (in each case, such allocation being its "**Upfront Contribution Allocation**"):
 - (i) RBH – the sum of (A) 20% of the amount allocated from the Upfront Contribution to the QCAP Settlement Amount, and (B) 38.7% of the balance of the Upfront Contribution;
 - (ii) Imperial – the sum of (A) ●% of the amount allocated from the Upfront Contribution to the QCAP Settlement Amount, and (B) ●% of the balance of the Upfront Contribution;
 - (iii) JTIM – the sum of (A) ●% of the amount allocated from the Upfront Contribution to the QCAP Settlement Amount, and (B) ●% of the balance of the Upfront Contribution;
- (b) the \$750 million amount that is deducted in the calculation of the Upfront Contribution pursuant to section 5.4 of each of the CCAA Plans (the "**Retained Cash**") is allocated, as between the Tobacco Companies (in each case, such allocation being its "**Retained Cash Allocation**"), in the same proportions as each Tobacco Company's cash and cash equivalents generated from all sources as at the month end prior to the Plan Implementation Date (in each case, its "**Cash on Hand**" and its Cash on Hand less its Retained Cash Allocation, its "**Net Cash on Hand**") represent of the aggregate Cash on Hand of all Tobacco Companies. Subject to clauses (c) and (d), each Tobacco Company shall be entitled to retain its Retained Cash Allocation on the Plan Implementation Date and deal with it in accordance with section 5.11 of its

CCAA Plan on the same basis as its share of its own Net After-Tax Income and amounts received by it from the Supplemental Trust Account;

- (c) in the case of each Tobacco Company, to the extent its Upfront Contribution Allocation exceeds its Net Cash on Hand (such excess, if any, its “**True-Up Payable Amount**”), it will owe the True-Up Payable Amount to one or both of the other Tobacco Companies (as applicable in accordance with clause (d)) and, to the extent its Net Cash on Hand exceeds its Upfront Contribution Allocation (such excess, if any, its “**True-Up Receivable Amount**”), it shall be entitled to receive payment of the True-Up Receivable Amount from one or both of the other Tobacco Companies (as applicable in accordance with clause (d)). Prior to the Plan Implementation Date, the Monitors in consultation with the Tobacco Companies will determine, in respect of each Tobacco Company, its True-Up Payable Amount or True-Up Receivable Amount, as applicable, and report those amounts to the Tobacco Companies;
- (d) in the case of each Tobacco Company owing a True-Up Payable Amount:
 - (i) on the Plan Implementation Date it shall pay to its Monitor the lesser of (A) its Retained Cash Allocation and (B) its True-Up Payable Amount, and such amount shall be paid by the Monitor (X) in the case of only one Tobacco Company being entitled to a True-Up Receivable Amount, to that Tobacco Company, or (Y) in the case of two Tobacco Companies being entitled to a True-Up Receivable Amount, to each Tobacco Company in proportion to their respective True-Up Receivable Amounts;
 - (ii) on each date that it deposits an Annual Contribution to the Global Settlement Trust Account in accordance with section 5.6 of the applicable CCAA Plan or receives a portion of a Reserved Amount in accordance with section 5.5 of the applicable CCAA Plan, it shall pay to its CCAA Plan Administrator the lesser of (A) its retained portion of the Net After-Tax Income used to determine such Annual Contribution or the portion of the Reserve Amount received by it, as applicable, and (B) the remaining portion owing of its True-Up Payable Amount after any prior payments by it under this clause (d), and such amount

shall be paid by the CCAA Plan Administrator (X) in the case of only one Tobacco Company still being entitled to a remaining True-Up Receivable Amount after any prior payments to it under this clause (d), to that Tobacco Company, or (Y) in the case of two Tobacco Companies still being entitled to a remaining True-Up Receivable Amount after any prior payments to each of them under this clause (d), to each Tobacco Company in proportion to their respective remaining True-Up Receivable Amounts;

- (e) amounts received by a Tobacco Company in respect of its True-Up Receivable Amount may be retained by it and dealt with in accordance with section 5.11 of its CCAA Plan on the same basis as its share of its own Net After-Tax Income and amounts received by it from the Supplemental Trust Account;
- (f) in the case of each Tobacco Company owing a True-Up Payable Amount, it shall not make any Distribution (as defined below) until it has paid in full its True-Up Payable Amount. For the purpose of this clause (f), “**Distribution**” means, in respect of a Tobacco Company, any payment (whether in cash or property, and whether by actual payment or set-off) (A) of any dividend, return of capital or other distribution in respect of any equity interests in the capital of such Tobacco Company (but expressly excluding any distribution by way of the payment of dividends or dividend equivalents by the issuance of equity interests of such Tobacco Company), (B) on account of any repurchase, acquisition, redemption, retraction or other retirement or purchase for cancellation of any equity interests in such Tobacco Company, or of any options, warrants or other rights to acquire any of such equity interests in such Tobacco Company, or (C) of any principal of, or interest, premium or fees on, or related to, any indebtedness owing by such Tobacco Company to a Related Party of such Tobacco Company; and
- (g) after each receipt or payment (or series of them on the same date) made in accordance with clause (d), the CCAA Plan Administrators shall provide to the Tobacco Companies a report regarding the details of the receipt(s) and payment(s) and the remaining True-Up Receivable Amount or True-Up Payable Amount applicable to

each Tobacco Company. If any disputes arise regarding the calculation of a True-Up Receivable Amount or True-Up Payable Amount or a payment or entitlement to payment under clause (d), or a default occurs in the payment of an amount owing under clause (d) and, in any such case, the matter is not resolved consensually, the resolution of the dispute or consequences of the default will be determined by the CCAA Court on application by any of the affected Tobacco Companies or applicable CCAA Plan Administrators.

SCHEDULE “B”

ALLOCATION REFERENCES IN THE PROPOSED PLAN

1. Section 5.2 of the Proposed Plan explicitly states that the allocation of the Global Settlement Amount as between the Tobacco Companies “remains unresolved”.⁷¹
2. The Proposed Plan refers to each Tobacco Company’s “share” of the Annual Contributions and Reserved Amounts⁷² and its “share” of the Global Settlement Amount.⁷³
3. Allocation between the Claimants (which has been determined within the Proposed Plan) uses the same “share” terminology, confirming that references to “share” contemplate a required allocation.⁷⁴
4. Section 5.9 of the Proposed Plan states that the obligations of the Tobacco Companies are “several” and “not joint and several”, which makes sense only if each Tobacco Company is responsible for the share of the Global Settlement Amount allocated to it.⁷⁵
5. The Proposed Plan references \$750 million of cash to be retained by the Tobacco Companies in aggregate,⁷⁶ necessitating an allocation of this amount between the Tobacco Companies.
6. The Proposed Plan provides that the amount of the Miscellaneous Claims Fund may be increased from \$25 million to \$60 million if an agreement can be reached between the Tobacco Companies on allocating the incremental \$35 million between them.⁷⁷

⁷¹ Proposed Plan, [s. 5.2](#).

⁷² Proposed Plan, ss. [5.11](#) and [11.1\(h\)](#).

⁷³ Proposed Plan, s. [13.11](#).

⁷⁴ Proposed Plan, definition of “Impacted Claimants” and ss. [10.10](#), [12.1\(d\)](#), and [14.4\(n\)\(i\) and \(ii\)](#).

⁷⁵ Proposed Plan, s. [5.9](#).

⁷⁶ Proposed Plan, s. [5.4](#).

⁷⁷ Proposed Plan, s. [18.2.1](#).

SCHEDULE “C”

SUMMARY OF CASH AND MARKET SHARE POSITIONS

Table 1	RBH	Imperial	JTIM
Cash as of March 2019 (including Quebec security deposit)⁷⁸	\$1,989 million	\$1,102 million	\$133 million
Percentage of total cash on filing	61.7%	34.2%	4.1%
Projected cash as of December 2024 (including Quebec security deposits)⁷⁹	\$6,049 million	\$5,607 million	\$1,581 million
Percentage of cash as of December 2024⁸⁰	45.6%	42.5%	12.0%
Cash generated in CCAA proceedings (Cash as of December 2024 minus Cash as of March 2019)	\$4,060 million	\$4,505 million	\$1,448 million
Percentage of total cash generated in CCAA proceedings	40.5%	45.0%	14.5%
Average market share during CCAA proceedings⁸¹	36.8%	41.5%	21.7%

⁷⁸ 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](#).

⁷⁹ Proposed Plan, s. 16.1, s. 16.2, note 2.

⁸⁰ The percentage of cash held by each of the Tobacco Companies did not change materially in the actual cash figures as of January 5, 2025: Twenty-Fourth Report of the Monitor (Ernst & Young Inc.) dated January 22, 2025, [Appendix “A”](#); Twenty-Sixth Report of the Monitor (FTI Consulting Canada Inc.) dated January 22, 2025, para. 26; Twenty-Third Report of the Monitor (Deloitte Restructuring Inc.) dated January 22, 2025, para. 26.

⁸¹ Trentadue Affidavit at para. 19(c), RBH Record, Tab 1, CaseLines [A1252](#).

SCHEDULE “D”

ALLOCATION COMPARISONS

I: Comparison Between No Allocation and Court-Determined Allocation under *Blais*⁸²

Upfront Contribution to the QCAPs: \$3.869 billion⁸³

Table 2	Upfront Contribution, no allocation (%)	Upfront Contribution to QCAPs, no allocation (billions)	Upfront Contribution, Court-Determined Allocation (%)	Upfront Contribution to QCAPs, Court-Determined Allocation (billions)	Difference (billions)
RBH	45.6%	\$1.763	20%	\$0.774	\$0.989
Imperial	42.5%	\$1.643	67%	\$2.592	(\$0.949)
JTIM	12.0%	\$0.463	13%	\$0.503	(\$0.040)
Total	100%	\$3.869	100%	\$3.869	

Upfront Contribution to the PCCs and Provinces & Territories: \$7.957 billion⁸⁴

Table 3	Upfront Contribution, no allocation (%)	Upfront Contribution, no allocation (billions)	Upfront Contribution, Court-Determined Allocation (%)	Upfront Contribution, Court-Determined Allocation (billions)	Difference
RBH	45.6%	\$3.624	20%	\$1.590	\$2.033
Imperial	42.5%	\$3.376	67%	\$5.328	(\$1.951)
JTIM	12.0%	\$0.952	13%	\$1.034	(\$0.082)
Total	100%	\$7.952	100%	\$7.952	

⁸² The comparisons in this section do not include the portion of the Upfront Contributions and Annual Contributions that the proposed CCAA Plan indicates will be distributed to, or on account of, the Cy-Près Foundation, the Tobacco Producers, the *Knight* Class Action Plaintiffs, the Miscellaneous Claims Fund, the CCAA Plan Administration Reserve and PCC Compensation Plan Reserve which represent in aggregate \$1.135 billion of the \$32.5 billion Global Settlement Amount.

⁸³ Trentadue Affidavit, Exhibit “A”, Table 2, RBH Record, Tab 1A, CaseLines [A1258](#).

⁸⁴ Trentadue Affidavit, Exhibit “A”, Table 3, RBH Record, Tab 1A, CaseLines [A1258](#).

Total Upfront Contribution Overpayment by RBH relative to Court-Determined Allocation⁸⁵

Table 4	Overpayment by RBH to QCAP Upfront Contribution (billions) (Table 2)	Overpayment by RBH to PCC/Provinces/Territories Upfront Contribution (billions) (Table 3)	Total Overpayment by RBH re Upfront Contribution (billions)
RBH	\$0.989	\$2.033	\$3.022

Annual Contributions⁸⁶

Table 5	Annual Contributions, no allocation (%)	Annual Contributions, no allocation (billions)	Annual Contributions, Court-Determined Allocation (%)	Annual Contributions, Court-Determined Allocation (billions)	Difference
RBH	38.7%	\$7.757	20%	\$4.009	\$3.748
Imperial/JTIM	61.3%	\$12.287	80%	\$16.035	(\$3.748)
Total	100%	\$20.044	100%	\$20.044	

Total Overpayment by RBH relative to Court-Determined Allocation⁸⁷

Table 6	Overpayment by RBH to Upfront Payment (billions) (Table 4)	Overpayment by RBH to Annual Contributions (billions) (Table 5)	Total Overpayment by RBH (billions)
RBH	\$3.022	\$3.748	\$6.770

⁸⁵ Trentadue Affidavit, Exhibit “A”, Table 4, RBH Record, Tab 1A, CaseLines [A1259](#).

⁸⁶ Trentadue Affidavit, Exhibit “A”, Table 5, RBH Record, Tab 1A, CaseLines [A1259](#).

⁸⁷ Trentadue Affidavit, Exhibit “A”, Table 6, RBH Record, Tab 1A, CaseLines [A1259](#).

II: Comparison Between No Allocation and Historic Market Share, Current Market Share and NATI Allocation⁸⁸

Table 7		Court-Determined Allocation⁸⁹	Historic Market Share⁹⁰	Current Market Share⁹¹	NATI⁹²	CCAA Plan No Allocation
Upfront Contribution (\$12.456)	RBH Share (%)	20.0%	30.0%	36.8%	38.7%	45.6%
	RBH Share (billion)	\$ 2.491	\$ 3.737	\$ 4.583	\$ 4.820	\$ 5.680
	RBH Overpayment Compared to Court-Determined Allocation (billion)	\$ -	\$ 1.246	\$ 2.092	\$ 2.329	\$ 3.189
Global Settlement Amount (\$32.5)	RBH Share (%)	20.0%	30.0%	36.8%	38.7%	41.3%
	RBH Share (billion)	\$ 6.500	\$ 9.750	\$11.960	\$12.578	\$ 13.423
	RBH Overpayment Compared to Court-Determined Allocation (billion)	\$ -	\$ 3.250	\$ 5.460	\$ 6.078	\$ 6.923

III: Comparison Between Allocation Provisions and Court-Determined Allocation

RBH Allocation Pursuant to Allocation Provisions

Table 8	Total Contributions – Tobacco Companies (billions)⁹³	RBH Allocation (%)	RBH Allocation (billions)
Upfront Contribution – QCAPs (A)	\$ 3.869	20%	\$ 0.774
Remainder of Upfront Contribution (B)	\$ 8.587	38.7%	\$ 3.323
Total Upfront Contribution (A+B=C)	\$ 12.456		\$ 4.097
Annual Contributions (D)	\$ 20.044	38.7%	\$ 7.757
Total Contributions (C+D)	\$ 32.500		\$ 11.854

⁸⁸ Trentadue Affidavit, Exhibit “A”, Table 7, RBH Record, Tab 1A, CaseLines [A1260](#).

⁸⁹ Trentadue Affidavit, para. 19(a), RBH Record, Tab 1A, CaseLines [A1252](#).

⁹⁰ Trentadue Affidavit, para. 19(b), RBH Record, Tab 1A, CaseLines [A1252](#).

⁹¹ Trentadue Affidavit, para. 19(c), RBH Record, Tab 1A, CaseLines [A1252](#).

⁹² Trentadue Affidavit, para. 18, RBH Record, Tab 1A, CaseLines [A1251](#).

⁹³ Proposed Plan, [s. 16.1](#).

Overpayment by RBH Pursuant to Allocation Provisions Relative to Court-Determined Allocation

Table 9	Allocation Provisions (billions) (Table 8)	Court-Determined Allocation (20%) (billions) (Table 7)	RBH Overpayment (billions)
Upfront Contribution	\$ 4.097	\$ 2.491	\$ 1.606
Annual Contributions	\$ 7.757	\$ 4.009	\$ 3.748
Total Contributions	\$ 11.854	\$ 6.500	\$ 5.354

SCHEDULE “E”

LIST OF AUTHORITIES

1. *8640025 Canada Inc. (Re)*, [2018 BCCA 93](#)
2. *Alternative Fuel Systems Inc. v. Remington Development Corp.*, [2004 ABCA 31](#)
3. *Canadian Airlines Corp. (Re)*, [2000 ABQB 442](#), leave to appeal dismissed [2000 ABCA 238](#)
4. *Canadian Red Cross Society (Re)*, [2002 CanLII 49603](#) (ON SC), affirmed [2003 CanLII 32040](#) (ON CA)
5. *Canwest Global Communications Corp.*, [2010 ONSC 4209](#)
6. *Catalyst Capital Group Inc. v. VimpelCom Ltd.*, [2018 ONSC 2471](#), affirmed on other grounds [2019 ONCA 354](#).
7. *Fan Yang v. McInnes Cooper*, [2024 NSSC 308](#)
8. *Foniciello v. Bendall*, [2018 ONSC 1611](#)
9. *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, [2019 QCCA 358](#)
10. *Imperial Tobacco Limited*, [2024 ONSC 6061](#)
11. *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*, [2019 ONSC 2222](#)
12. *Laurentian University of Sudbury*, [2022 ONSC 5645](#)
13. *Létourneau c. JTI-MacDonald Corp.*, [2015 QCCS 2382](#)
14. *Lydian International Limited (Re)*, [2020 ONSC 4006](#)
15. *Martin v. Listowel Memorial Hospital*, [2000 CanLII 16947](#) (ON CA)
16. *McHugh v. 2209664 Ontario Inc.*, [2022 ONSC 3729](#)
17. *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.*, [1988 CanLII 3570](#) (AB KB)
18. *Nordstrom Canada Retail, Inc.*, [2024 ONSC 1622](#)

19. *Olympia & York Developments Ltd. v. Royal Trust Co.*, [1993 CanLII 8492](#) (ON SC), 1993 CarswellOnt 182 (WL)
20. *Placzek v. Green*, [2009 ONCA 83](#)
21. *Sammi Atlas Inc., Re*, [1998 CanLII 14900](#) (ON SC)
22. *SFC Litigation Trust v. Chan*, [2019 ONCA 525](#), leave to appeal to SCC dismissed, [2020 CanLII 224](#) (SCC)
23. *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.*, [2003 BCCA 344](#)
24. *Stelco Inc. (Bankruptcy), Re*, [2005 CanLII 8671](#) (ON CA)
25. *Toronto Hydro v. Gonte and City of Toronto*, [2018 ONSC 4315](#)
26. *Ursel Investments Ltd., Re*, [1990 CanLII 7504](#) (SK KB)

SCHEDULE “F”

RELEVANT STATUTES

Companies' Creditors Arrangement Act, [RSC 1985, c C-36](#)

Compromise with unsecured creditors

4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

Compromise with secured creditors

5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Determination of amount of claims

20 (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(a) the amount of an unsecured claim is the amount

...

(iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor.

Negligence Act, R.S.O. 1990, c. N.1⁹⁴

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. 13⁹⁵

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.

Two or more defendants

7 (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,

⁹⁴ The language in the comparable statutes in other jurisdictions cited at FN 33 of the Factum is generally similar and has been omitted to prevent duplication.

⁹⁵ The language in the comparable statutes cited at FN 34 of the Factum is generally similar and has been omitted to prevent duplication.

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.

Considerations

- 7 (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 ARRANGEMENT OF ROTHMANS, BENSON & HEDGES INC.

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

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

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT
(Sanction Order)
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