

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

**RESPONDING FACTUM – COUNSEL FOR THE TOBACCO PRODUCERS
(Sanction Hearing)**

January 27, 2025

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TO: **COMMON SERVICE LIST**

1. The Tobacco Producers seek permission to respond briefly to the submissions of Rothmans, Benson and Hedges Inc. (“RBH”) on the issue of allocation or re-allocation. The Tobacco Producers submit in the result that the CCAA Plans are fair and reasonable and should be sanctioned at this time even with the allocation issue unresolved.

2. Briefly, the Tobacco Producers’ Actions were commenced as class proceedings against RBH on November 5, 2009, Imperial on December 2, 2009, and JTIM on April 23, 2010. The Tobacco Producers pleaded breaches of contract arising from the admissions of RBH, Imperial and JTIM of involvement in smuggling their tobacco products into the domestic market, their misrepresentations in their annual audit reports as to the actual use of the tobacco purchased, and for failure to pay “Make-Up payments” as required by the Heads of Agreement under which Ontario flue-cured tobacco was sold during the period from 1986 – 1996.

3. The nature of the claims in the Tobacco Producers’ Actions was summarized by Justice H.A. Rady in *R. v. Imperial Tobacco Canada*, [2012 ONSC 6027](#) as follows:

[8] On December 2, 2009, the Tobacco Board and four individual tobacco farmers started a proposed class action against Imperial, seeking damages of \$50,000,000. The action was said to be on behalf of growers and producers who sold tobacco through the Tobacco Board between 1986 and 1996. Proposed class actions were also commenced against RBH on November 5, 2009 and JTI on April 23, 2010.

[9] For the purposes of the proposed class action, it is important to understand that the tobacco companies paid higher prices to producers for tobacco designated for domestic use than that destined for export or for duty free. As a result, the Tobacco Board claims the difference between the lower export price paid by Imperial to the Tobacco Board and the higher price that would have been paid for tobacco destined for domestic use, with respect to tobacco exported from Canada and then smuggled back in.

4. The Tobacco Producers’ Actions were stayed under the Initial Orders as amended and extended in common with all other creditors’ claims made against the Tobacco Companies. During the significant passage of time since the contracts at issue in the Tobacco Producers’ Actions, a

number of the Tobacco Producers have died and the remaining Tobacco Producers and their legal successors await recovery under the CCAA Plans. It is past time for final resolution of the Tobacco CCAA Proceedings for the benefit of the Tobacco Producers and the other stakeholders in the Tobacco CCAA Proceedings.

5. The Tobacco Producers have no involvement in or knowledge of any communications among the Tobacco Companies concerning issues of allocation or re-allocation. Since the outset of the Tobacco CCAA Proceedings the Tobacco Companies have proposed global settlement of all creditors' claims collectively, in effect presenting an industry-wide resolution to their industry-wide financial problems.

6. As noted in the aide memoire of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited ("Imperial") delivered on the allocation issue in respect of the Sanction Hearing, the Tobacco Companies' contributions under the CCAA Plans to the Global Settlement Amount are governed by two payment mechanisms for each of Imperial, Rothmans and JTIM: (i) the Upfront Contributions (Article 5.4), and (ii) the Annual Contributions (Article 5.6).

7. The Upfront Contributions are subject to a prescribed allocation as between the three Tobacco Companies under the terms of the CCAA Plan. Article 5.4 contemplates that the Tobacco Companies will each contribute the cash and cash equivalents generated from all sources by each Tobacco Company as at the month end prior to the Plan Implementation Date, plus the Cash Security Deposits, less then sum of \$750 million which shall be deducted from the aggregate amount.

8. The Annual Contributions are prescribed by Article 5.6 of the CCAA Plan, pursuant to which each Tobacco Company is required to contribute an equal percentage (*i.e.*, 85% in the first 5 years,

declining by 5% increments over the contribution period to a 70% threshold) of their respective Net After-Tax Income. These Annual Contributions will continue to be made by all three Tobacco Companies until the Global Settlement Amount is satisfied.

9. In the result, the Tobacco Companies have sought a global settlement on the basis that they would collectively contribute to the global settlement of their pre-CCAA obligations based upon their post CCAA earnings. That approach is clearly reflected in the common language of each of the Plans. The Tobacco Producers have voted in support of the Plans that set out this settlement structure.

10. The Tobacco Producers support the position of the Monitors of Imperial and RBH that the CCAA Plans are fair and reasonable under this structure because of, *inter alia*, (i) the unanimous creditor approval that it received, (ii) the absence of any alternative proposed that would produce greater recovery for the creditors, and (iii) the CCAA Plans allow the Tobacco Companies to continue as going concerns which will benefit their employees, suppliers and other stakeholders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

January 27, 2025

A handwritten signature in black ink, appearing to read "W. Sasso", written over a horizontal line.

William V. Sasso

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