

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

**FACTUM OF THE MOVING PARTY,
THE ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING BOARD**
(Motion for Declarations)

March 26, 2021

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PART I - OVERVIEW

1. The Ontario Flue-Cured Tobacco Growers' Marketing Board ("**Tobacco Board**") seeks to resolve its long-standing disputes set out in its legal proceedings (the "**Actions**") against Rothmans, Benson & Hedges Inc. ("**Rothmans**"), Imperial Tobacco Canada Limited ("**Itcan**"), and JTI-Macdonald Corp. ("**JTIM**") (collectively, the "**Tobacco Manufacturers**"). In the absence of the Court's declarations on the issues below, there is no reasonable prospect of the resolution of the Actions against the Tobacco Manufacturers.

2. The Tobacco Board seeks declarations that:

- (a) the Tobacco Board does not have a "**Tobacco Claim**" within the meaning of that term in the Initial Orders as amended and restated in the Tobacco CCAA Proceedings;
- (b) the Tobacco Board's claims against the Tobacco Manufacturers are debts or liabilities arising out of fraud or debts or liabilities resulting from obtaining property or services by false pretences or fraudulent misrepresentation that, under CCAA section 19(2)(c), (d) and (e), cannot be compromised without the consent of the Tobacco Board; and
- (c) the Tobacco Board does not have "commonality of interest" within the meaning of that term in CCAA section 22(2) with the defined **Tobacco Claimants** of the Tobacco Manufacturers.

3. The Tobacco Board's claim against each of the Tobacco Manufacturers is a "right or claim of a supplier relating to goods or services supplied to" the Tobacco Manufacturers that is expressly excluded from the definition of Tobacco Claim in the Initial Orders as amended and restated.

4. All other Claimants in the Tobacco CCAA Proceedings make Tobacco Claims. The Provinces and Territories claim under their health care costs recovery ("**HCCR**") legislation the costs, including the future costs, of health care services provided to those with tobacco-related diseases in their respective Provinces and Territories caused or contributed to by exposure to a tobacco product (the "**HCCR Claims**"). The remaining Claimants seek damages for "tobacco related wrongs" (the "**TRW Claims**") relating to the use of or exposure to cigarettes and other tobacco products. The HCCR Claims and the TRW Claims are defined collectively as the Tobacco Claims in the Initial Orders, as amended and restated.

5. In contrast to the Tobacco Claimants, the Tobacco Board as the exclusive supplier of Ontario flue-cured tobacco to the Tobacco Manufacturers under supply management regulations during the period January 1, 1986 to December 31, 1996 was an integral part of the tobacco industry. The Tobacco Board's commonality of interest in the Tobacco CCAA Proceedings is with the other suppliers of goods or services to the Tobacco Manufacturers rather than the Tobacco Claimants.

6. Under the "business as usual" directions mandated by the Court throughout the Tobacco CCAA Proceedings, the Tobacco Board is the only pre- and post-Initial Orders supplier of goods or services to the Tobacco Manufacturers that has not been paid or is not being paid in full for goods or services while the Tobacco Manufacturers operate under Court protection.

PART II – FACTS RELEVANT TO THE MOTION FOR DECLARATIONS

Tobacco Claim Definition in Initial Orders

7. **Tobacco Claim** is defined in identical language other than the identity of the Applicants in the Initial Orders in the Tobacco CCAA Proceedings. Paragraph 4(f) of the Rothmans' Second Amended and Restated Initial Order dated April 25, 2019, which is in effect at present, reads as follows:

(f) **"Tobacco Claim"** means any right or claim (including, without limitation, a claim for contribution or indemnity) of any Person against or in respect of the Applicant or any member of the PMI Group that has been advanced (including, without limitation, in the Pending Litigation), that could have been advanced or that could be advanced, and whether such right or claim is on such Person's own account, on behalf of another Person, as a dependent of another Person or on behalf of a certified or proposed class or made or advanced as a government body or agency, insurer, employer or otherwise under or in connection with:

- (i) applicable law, to recover damages in respect of the development, manufacture, production, marketing, advertising, distribution, purchase or sale of Tobacco Products, the use of or exposure to Tobacco Products or any representation in respect of Tobacco Products, in Canada or, in the case of the Applicant, anywhere else in the world; or
- (ii) the HCCR Legislation (as defined in the Luongo Affidavit),

excluding any right or claim of a supplier relating to goods or services supplied to, or the use of leased or licensed property by, the Applicant or any member of the PMI Group; and...(emphasis added)¹

The Tobacco Board as the exclusive supplier of Ontario flue-cured tobacco to the Tobacco Manufacturers is excluded from the definition of Tobacco Claim and/or Tobacco Claimant.

¹ Initial Order dated March 22, 2019, Amended and Restated Initial Order dated April 25, 2019 (“**Initial Order**”), para. 4(f), pp. 3-4 (pp. [6-7 pdf](#)).

8. The Tobacco Board is the only pre-filing or post-filing supplier of goods or services to Tobacco Manufacturers that has not been paid and/or is not receiving payment of its accounts in the Tobacco CCAA Proceedings.² The Actions are stayed nonetheless for the express purpose of permitting the Tobacco Manufacturers to work toward developing a plan of compromise or arrangement for a Pan-Canadian global settlement of the Tobacco Claims, being the sole stated purpose of the Mediation in the Tobacco CCAA Proceedings.³

Abridged History of the Actions Pre-Initial Order

9. The record of the Actions against the Tobacco Manufacturers prior to the Initial Orders detail the role of the Tobacco Board in the supply management system in place during the period January 1, 1986 to December 31, 1996, the contracts at issue between the Tobacco Manufacturers and the Tobacco Board, and the Tobacco Manufacturers' breaches of and misrepresentations made under those contracts.⁴

10. The application and motion records and extensive Court decisions in the Actions detail how the Tobacco Board was misled by the Tobacco Manufacturers' misrepresentations to the Tobacco Board (a) at the Tobacco Advisory Committee ("TAC") when their contracts were negotiated, (b) at the time of purchase of DFX tobacco, and (c) at the time of the Tobacco Manufacturers' filing of annual audit reports which falsely stated that the tobacco purchased from

² Affidavit of Harvey T. Strosberg Q.C. sworn Mar-16-2021 ("**Strosberg Affidavit**"), paras. 7-9, Motion Record of the Moving Party, The Ontario-Flue Cured Tobacco Growers' Marketing Board ("**Tobacco Board Record**"), Tab 4, p. 59 and Rothmans, ITCAN and JTIM Pleadings, Exhibits "A", "B" and "C" to Strosberg Affidavit, Tabs 4A-4C, pp. 83-105.

³ Sixth Report of the Monitor (E & Y for Rothmans) dated Sep-21-2020, para. 15, [p. 4](#).

⁴ Statement of Claim (Rothmans), paras. 3-7, 15-31, Exhibit "A" to Strosberg Affidavit, Tobacco Board Record, Tab 4A, pp. 86-86 and 89-93 and see Statement of claim (ITCAN), paras. 3-7, 15-31, Tobacco Board Record, Tab 4B, pp. 110-111 and 113-117 and Statement of claim (JTIM), paras. 3-7 and 16-32, Tobacco Board Record, Tab 4C, pp. 136-137 and 139-143.

the Tobacco Board for duty free and export (“**DFX**”) purposes was actually used for legitimate DFX purposes.⁵

11. The Tobacco Board’s claim is under commercial contracts made with the Tobacco Manufacturers. The Tobacco Board contracted with the Tobacco Manufacturers as the exclusive supplier of Ontario leaf tobacco on behalf of tobacco growers under the supply management regulations in effect during the period January 1, 1986 to December 31, 1996. The Tobacco Manufacturers paid less than the contract prices of “**domestic**” tobacco under the annual Heads of Agreement made between the Tobacco Board and the Tobacco Manufacturers during the period from January 1, 1986 to December 31, 1996.⁶

12. In further particular, the Tobacco Manufacturers purchased certain quantities of tobacco through the Tobacco Board at its auctions at lower prices for DFX purposes than the higher fixed price the Tobacco Manufacturers agreed to pay under the annual Heads of Agreement for tobacco used for cigarettes/tobacco products for the Canadian domestic market. The annual Heads of Agreement required the Tobacco Manufacturers to pay higher annual domestic prices for tobacco intended for cigarettes and other tobacco products for the Canadian domestic market.⁷

13. As set out in the Actions, the mischief complained of by the Tobacco Board concerned the cover up by the Tobacco Manufacturers of their involvement in smuggling of their own DFX

⁵ Statement of Claim (Rothmans), paras. 15-31, Exhibit “A” to Strosberg Affidavit, Tobacco Board Record, Tab 4A, pp. 89-93 and see Statement of claim (Itcan), paras. 15-31, Tobacco Board Record, Tab 4B, pp. 113-117 and Statement of claim (JTIM), paras. 16-32, Tobacco Board Record, Tab 4C, pp. 139-143.

⁶ (1) Statement of Claim (Rothmans), paras. 25-27, Exhibit “A” to Strosberg Affidavit, Tobacco Board Record, Tab 4A, pp. 91-92 and see Statement of claim (Itcan), paras. 25-27, Tobacco Board Record, Tab 4B, pp. 115-116 and Statement of claim (JTIM), paras. 26-28, Tobacco Board Record, Tab 4C, p. 142; (2) Affidavit of Fred Neukamm sworn Mar-17-2021 (“**Neukamm Affidavit**”), paras. 20-27, Tobacco Board Record, Tab 2, pp. 18-19; (3) Apr-29-1993 Heads of Agreement, Exhibit “A” to Neukamm Affidavit, Tobacco Board Record, Tab 2A, pp. 28-36.

⁷ Statement of Claim (Rothmans), paras. 15-21, Exhibit “A” to Strosberg Affidavit, Tobacco Board Record, Tab 4A, pp. 89-90 and see Statement of claim (Itcan), paras. 15-21, Tobacco Board Record, Tab 4B, pp. 113-114 and Statement of claim (JTIM), paras. 16-22, Tobacco Board Record, Tab 4C, pp. 139-140.

cigarettes back into the Canadian domestic market. The Tobacco Manufacturers filed false audit reports with the Tobacco Board to cover up their involvement in illegal tobacco smuggling and to avoid the contractual “make-up payments” to the Tobacco Board required to bring the auction prices paid during the year for DFX tobacco up to the domestic price agreed to be paid by the Tobacco Manufacturers for domestic tobacco for that year.⁸

Manufacturers’ Guilty Pleas and Comprehensive Agreement

14. Rothmans first disclosed its involvement in the smuggling of cigarettes and other tobacco products back into Canada much later than the annual Heads of Agreement in issue and following years of vigorous denial of any involvement in illegal smuggling. The disclosure was made in Rothmans’ admission to charges brought against it by Her Majesty the Queen in right of Canada under the *Excise Act*, RSC 1985 c. E-14 as amended.⁹

15. On July 31, 2008, Rothmans pleaded guilty to the charge that, contrary to section 240(1)(a) of the *Excise Act*, R.S.C. 1985, c. E-14, as amended, between January 1, 1989 and February 28, 1994, Rothmans did aid persons to sell and be in possession of tobacco manufactured in Canada that was not packaged and was not stamped in conformity with the *Excise Act* and its amendments and ministerial regulations.¹⁰

⁸ Statement of Claim (Rothmans), paras. 22-27 and 29-31, Tobacco Board Record, Tab 4A, pp. 90-93 and see Statement of claim (Itcan), paras. 22-27 and 29-31, Tobacco Board Record, Tab 4B, pp. 114-117 and Statement of claim (JTIM), paras. 23-28 and 30-32, Tobacco Board Record, Tab 4C, pp. 141-143.

⁹ (1) Strosberg Affidavit, para. 18, Tobacco Board Record, Tab 4, p. 61 and (2) Neukamm Affidavit, paras. 31-35, Tobacco Board Record, Tab 2, pp. 20-21.

¹⁰ (1) Strosberg Affidavit, para. 18, Tobacco Board Record, Tab 4, p. 61.

16. The reason that Rothmans did not package and stamp its products in conformity with the *Excise Act* is admitted in the Agreed Statement of Facts on Rothmans' guilty plea. The Rothmans' Agreed Statement of Facts on its guilty plea include the following:

2. Between the 1st day of January 1989, and the 18th day of February, 1994, Rothmans, Benson & Hedges aided persons to sell and to be in possession of tobacco manufactured in Canada that was not packaged and that was not stamped in conformity with the *Excise Act* and its amendments and the ministerial regulations, contrary to s. 240(1)(a) of the *Excise Act*.

8. ... Almost the entire contraband market for tobacco products involved certain of the First Nations reservations straddling the Canadian-American border in the provinces of Ontario and Quebec and, in particular, the St. Regis reservation/Akwesasne reserve.

9. It was common knowledge to Rothmans, Benson & Hedges and many others that the majority of the Canadian tobacco products exported and sold in the United States were smuggled back into the provinces of Ontario and Quebec to be sold and consumed by persons in those provinces.

10. Rothmans, Benson & Hedges was aware of the existence of distribution channels through which tobacco products were being smuggled back into Canada contrary to s. 240(1)(a) of the *Excise Act*.

11. Rothmans, Benson & Hedges used these distribution channels to enable persons to possess and sell tobacco products in Canada at prices which did not include duties and taxes. This was done with the intention of maintaining Rothman, Benson & Hedges' share of the Canadian tobacco market. [Emphasis added]¹¹

17. Rothmans was fined \$100 million for its admitted criminal activity. The fine was based on Rothmans' admission that it was involved in the avoidance of \$50 million in excise duties from December 12, 1989 to June 9, 1993, and excise duties and excise taxes from June 10, 1993 until February 28, 1994.¹²

¹¹ Strosberg Affidavit, para. 19, Tobacco Board Record, Tab 4, pp. 61-62; (2) Jul-4-2016 Div. Ct. Reasons for Judgment *Ontario Flue-Cured Tobacco Growers Marketing Board v Rothmans, Benson & Hedges, Inc.*, [2016 ONSC 3939](#), para. 63, Exhibit "H" to Strosberg Affidavit, Tobacco Board Record, Tab 4H, p. 268.

¹² Strosberg Affidavit, para. 20, Tobacco Board Record, Tab 4, p. 62.

18. In order to compensate the Federal and Provincial Governments for lost duties and taxes during the periods relating to the *Excise Act* charges, Rothmans had agreed earlier with Her Majesty the Queen in right of Canada and each of the Provinces to a civil settlement (the “**Comprehensive Agreement**”) to take effect upon the Court’s acceptance of its guilty plea.¹³ The Comprehensive Agreement required Rothmans to pay \$450,000,000 to the Federal and Provincial Governments to settle claims arising from Rothmans’ role in tobacco smuggling.¹⁴

19. Similar pleas, admissions and Comprehensive Agreements were made by ITCAN and JTIM.¹⁵

20. The claims of the Tobacco Board and various defences of the Tobacco Manufacturers are dealt upon at length by the Court in pre-Initial Order decisions, including:

- (a) *Ontario v. Imperial Tobacco Company Limited*, [2011 ONCA 525](#) (Goudge, Gillese and Jurianz, JJ.A., July 20, 2011);
- (b) *R. v. Imperial Tobacco Canada*, [2012 ONSC 6027](#) (Rady J., January 2, 2013);
- (c) *Ontario v. Imperial Tobacco Canada Limited*, [2013 ONCA 481](#) (Hoy A.C.J.O., Feldman and Simmons JJ.A., July 16, 2013);
- (d) *The Ontario Flue-Cured Tobacco Growers’ Marketing Board v. Rothmans, Benson & Hedges Inc.*, [2014 ONSC 3469](#) (Rady J., June 30, 2014);
- (e) *Ontario Flue-Cured Tobacco Growers’ Marketing Board v. Rothmans, Benson & Hedges*, [2016 ONSC 3939](#) (Divisional Court – Sachs, Horkins and Patillo JJ., July 4, 2016).
- (f) The application for leave to appeal the Divisional Court decision 2016 ONSC 3939 was dismissed by the Court of Appeal (Blair, Epstein and Huscroft JJ.A.) on November 4, 2016.¹⁶

¹³ Strosberg Affidavit, para. 21, Tobacco Board Record, Tab 4, p. 62.

¹⁴ Strosberg Affidavit, para. 22, Tobacco Board Record, Tab 4, p. 62.

¹⁵ Strosberg Affidavit, para. 24, Tobacco Board Record, Tab 4, p. 63.

¹⁶ Strosberg Affidavit, paras. 41-91, Tobacco Board Record, Tab 4, pp. 67-80 and Exhibits “D” to “H” to Strosberg Affidavit, Tobacco Board Record, Tabs 4D to 4H, pp. 159-276.

The Tobacco Board's Claim is Grounded on Intentional Breaches and Misrepresentations

21. The Tobacco Board and the Producers that it represents under its regulatory mandate have suffered financial loss or damages as the result of the Tobacco Manufacturers' intentional breaches and misrepresentations as to the use of the DFX tobacco purchased from the Tobacco Board, including their false audit statements confirming that the DFX tobacco purchased was used only for DFX products.¹⁷ The Actions arise from the Tobacco Manufacturers' cover up of their involvement in illegal smuggling activity.

22. When the Tobacco Manufacturers made these misrepresentations to the Tobacco Board concerning the use of DFX tobacco purchased from the Tobacco Board they knew that the cigarettes manufactured with the DFX tobacco purchased were intended to be smuggled back into Canada and sold illegally in the domestic market and the Tobacco Manufacturers did not package or stamp cigarettes and other tobacco products in conformity with the *Excise Act* to aid persons in their smuggling activities.¹⁸

Initial Orders Direct Business as Usual and Payment of Trade Creditors

23. Under the March 2019 Initial Orders, the Court granted the Tobacco Manufacturers the right to operate "business as usual" with all Claimants' proceedings stayed – including the Actions – and every Claimant was enjoined from pursuing any remedies against the Tobacco

¹⁷ (1) Strosberg Affidavit, paras. 12-16, Tobacco Board Record, Tab 4, pp. 16-61 and (2) Statement of claim (Rothmans), para. 7, Tobacco Board Record, Tab 4A, p. 87, and see Statement of claim (Itcan), para. 7, Tobacco Board Record, Tab 4B, p. 111 and Statement of claim (JTIM), para. 7, Tobacco Board Record, Tab 4C, p. 137.

¹⁸ Strosberg Affidavit, paras. 17-28, Tobacco Board Record, Tab 4, pp. 61-64.

Manufacturers and related persons or entities. That stay has remained in place for about two years and the Tobacco Manufacturers are seeking a further stay extension.¹⁹

24. Trade suppliers such as the Tobacco Board, who have any right or claim of a supplier relating to goods or services supplied to the Tobacco Manufacturers, are excluded from the definition of Tobacco Claims and Tobacco Claimants. The distinction between Tobacco Claimants and other creditors is expressly dealt with in the stay of proceedings sections of the Initial Orders. Paragraph 18 of the Rothman's Initial Order, as an example, states that no proceeding or enforcement process in any court or tribunal including, but not limited to an application for leave to appeal to the Supreme Court of Canada in the QCAP actions, as well as any other proceeding in relation to a Tobacco Claim are identified as a distinct type of claim that is stayed.²⁰

25. Similarly, paragraph 19 of the Rothman's Initial Order provides that during the stay period no proceeding in Canada that relates in any way to a Tobacco Claim shall be commenced or continued against Rothmans or any member of the PMI Group except with leave of the Court.²¹

26. In contrast, under paragraph 23 of the Rothman's Initial Order, all persons having agreements with Rothmans or statutory or regulatory mandates for the supply of goods and/or services are restrained from discontinuing or terminating the supply of such goods or services and are to be paid for their continuing supply of goods and services.²² This business as usual directive has been applied to suppliers of goods and services both before the Initial Order and following the Initial Order in these Tobacco CCAA Proceedings.

¹⁹ [September 29, 2020](#) Stay Extension Order - Stay Period extended to March 31, 2021.

²⁰ [Initial Order](#), para. 18, p. 10.

²¹ [Initial Order](#), para. 19, p. 10.

²² [Initial Order](#), para. 23, p. 12 ([p. 15 pdf](#)).

Tobacco Board is an Unpaid Goods or Services Supplier

27. Based on the record in the Tobacco CCAA Proceedings, the Court has been advised that the Tobacco Board is the sole supplier of goods or services whose unresolved Actions are stayed by the Initial Order. In contrast, the other goods and/or service suppliers to the Tobacco Manufacturers are being paid in the ordinary course of business.

28. With respect to the trade suppliers, Rothmans' Monitor Ernst & Young ("E & Y") has advised in its First Report dated April 3, 2019 that Rothmans, with the consent of its Monitor, intends to pay in the ordinary course the pre-filing claims of third party trade creditors.²³ In explanation of this proposed course of action, the Monitor advised the Court that Rothmans' considers such payments to be necessary and desirable for its ongoing operations while operating under Court protection from its creditors.

29. In its Fifth Report dated February 13, 2020, Ernst & Young ("E&Y") in its capacity as Rothmans' Monitor, reports:

The Monitor understands the Applicant [Rothmans], with the consent of the Monitor, **has paid in the ordinary course the pre-filing claims of third-party trade creditors**. The Applicant considers such payments to be necessary and desirable for the ongoing operations. The Monitor believes this course of action will preserve the Applicant's operations while it seeks to address the claims asserted against it in the Quebec Class Actions and Other Pending Litigation. (**emphasis** added)²⁴

30. In paragraph 42 of the Seventh Report of ITCAN's Monitor dated February 13, 2020, FTI Consulting reports on the Ryder Truck settlement of a monetary dispute with ITCAN. The Ryder Truck issue was settled directly by the parties, and the Monitor approved the settlement, as part of

²³ [April 3, 2019 First Report](#) of Rothman's Monitor (Ernst & Young), para. 24, p. 9.

²⁴ [February 13, 2020 Fifth Report](#) of Rothmans' Monitor (Ernst & Young), para. 28, p. 8.

the Court's "business as usual" directive in these CCAA proceedings, without prior report to or approval of the Court.²⁵

31. The above are simply examples of the application the Court's business as usual directive in the Tobacco CCAA Proceedings under which trade suppliers to the Tobacco Manufacturers have been paid hundreds of millions of dollars out of business revenues of each of the Tobacco Manufacturers since the Initial Orders while the Tobacco Manufacturers continue to operate under Court protection.

32. As further submitted below, the ongoing resolution of individual trade supplier claims directly with the Tobacco Manufacturers is the process that the Tobacco Board asks the Court to direct for the resolution of the Tobacco Board claims as the former exclusive supplier to the Tobacco Manufacturers of the essential ingredient in cigarettes and other tobacco products.

The CCAA Proceedings Focus on Tobacco Claims

33. On March 8, 2019, the Court granted the first of three Initial Orders that month that stayed existing civil actions, including the Actions. The Initial Orders were sought because of a Tobacco Claim, the March 1, 2019 Quebec Court of Appeal decision in the Quebec Class Action Plaintiffs ("QCAP") case, which substantially upheld the trial judgments of Justice Riordan dated May 27, 2015 in two class actions brought for cigarette smokers in Quebec.

34. Tobacco Claims remain the focus of the Tobacco CCAA Proceedings. In the April 5, 2019 amended and restated Initial Order ("First Amended and Restated Initial Order"), the Court ordered that "the Hon. Warren K. Winkler, Q.C. is appointed as an officer of the Court to act as a

²⁵ February 13, 2020 Seventh Report of Itecan's Monitor (FTI Consulting), para. 42, p. 12 ([p. 14 pdf](#))

neutral third party (the “**Court-Appointed Mediator**”) “to mediate a global settlement of the Tobacco Claims.”²⁶

35. The mandate for the Court-directed Mediation under the April 25, 2019 Initial Orders as amended and restated directs the Mediator in paragraph 40(c) to, *inter alia*, consult with all Persons with Tobacco Claims. No mandate is given to the Mediator to resolve claims of trade suppliers pre- or post-Initial Order that are excluded from the definition of Tobacco Claim.²⁷

36. In paragraphs 18 and 23 of Rothmans’ Peter Luongo affidavit, sworn September 18, 2020 and filed in support of Rothmans’ stay extension, he states that Rothmans is committed to engaging in the CCAA process and taking meaningful steps to seek to develop and implement a global resolution of the Tobacco Claims.²⁸

37. In paragraph 15 of the Sixth Report of Rothman’s Monitor dated September 20, 2020, E & Y reports on the Mediation process by advising that “the parties continue to work to advance the mediation process with the goal to facilitate a global settlement of the Tobacco Claims.”²⁹

38. In paragraph 65 of the Eighth Report of Itcan’s Monitor dated September 22, 2020 and filed in support of the stay extension motion, FTI Consulting states that the stay extension is necessary for Itcan to operate business in the ordinary course as it continues to engage in the Mediation “conducted by the Court-Appointed Mediator and to work toward developing a plan of compromise or arrangement for a Pan-Canadian global settlement of the Tobacco Claims.”³⁰

²⁶ Initial Order, para. 39, p. 17 ([p. 20 pdf](#)).

²⁷ Initial Order, para. 40(c), p. 18 ([p. 21, pdf](#)).

²⁸ Luongo Affidavit, paras. 18 and 23, pp. 4 and 6 ([pp. 12 and 14 pdf](#)).

²⁹ [September 20, 2020 Sixth Report](#) of Rothman’s Monitor (Ernst & Young), para. 15, p. 4.

³⁰ [September 22, 2020 Eighth Report](#) of Itcan's Monitor (FTI Consulting), para. 65, p. 18 ([p. 20 pdf](#)).

39. In paragraph 21 of the affidavit of Itcan's Eric Thauvette, sworn September 21, 2020 filed in support of the stay extension motion, he states that "the Applicants overriding objective remains the eventual global resolution of all Tobacco Claims."³¹

40. In paragraph 9 of the JTIM notice of motion for stay extension, JTIM states that extending the stay period is required to enable JTIM to continue to operate business in the ordinary course while participating in the mediation process in an effort to seek a collective resolution of the Tobacco Claims against it.³²

41. In paragraph 8 of the supporting affidavit sworn September 18, 2020 for the JTIM stay extension motion, William E. Aziz states that JTIM seeks the stay extension to provide it with "a period of stability within which to attempt to find a collective resolution of all of the Tobacco Claims asserted against it."³³

42. Whatever progress may or may not be made to date toward the global resolution of the Tobacco Claims is unknown to the Tobacco Board. In the two years since the Initial Orders in the Tobacco CCAA Proceedings were made, there has been no proposal by the Tobacco Manufacturers to settle the non-Tobacco Claim as a trade supplier made by the Tobacco Board on behalf of the Producers.³⁴

PART III – STATEMENT OF ISSUES AND THE LAW

43. The issues are:

³¹ September 21, 2020 Thauvette Affidavit, para. 21, p. 13 ([p. 40 pdf](#)).

³² September 18, 2020 JTIM Notice of Motion, para. 9, p. 3 ([p. 7 pdf](#)).

³³ September 18, 2020 Aziz Affidavit, para. 8, p. 2 ([p. 40 pdf](#)).

³⁴ Neukamm Affidavit, paras. 46-48, Tobacco Board Record, Tab 2, p. 24.

- (a) Does the Tobacco Board has a “Tobacco Claim” within the meaning of that term under the Initial Orders, as amended and restated, in the Tobacco CCAA Proceedings?
- (b) Are the Tobacco Board’s claims against the Tobacco Manufacturers debts or liabilities arising out of fraud, or debts or liabilities resulting from obtaining property or services by false pretences or fraudulent misrepresentation that under CCAA subsections 19(2)(c) and (d) cannot be compromised without the consent of the Tobacco Board?
- (c) Does the Tobacco Board’s claim against the Tobacco Manufacturers include a debt for interest owed in relation to the amounts referred to in CCAA section 19(2)(c) and (d) that under CCAA subsection 19(2)(e) cannot be compromised without the consent of the Tobacco Board?
- (d) Should the Tobacco Board’s Claim be properly placed in a separate class of creditors from the Tobacco Claims under CCAA section 22 for the purpose of meetings to be held in respect of a compromise or arrangement relating to the Tobacco Manufacturers’ creditors?

A. The Tobacco Board is a CCAA s. 19(2) Creditor

44. CCAA section 19(2) provides that certain types of claims cannot be compromised without the consent of that creditor. The subsection reads in part:

- (2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim’s

compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:...

(c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;

(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or

(e) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).

45. Under CCAA subsections 19(2)(c), (d) and (e), a compromise or arrangement may not deal with any claim that relates to debts or liabilities – such as the Actions – resulting from fraud, or obtaining property or services by false pretences or fraudulent misrepresentation, unless that creditor agrees to the compromise of its claim.

46. In *Arrangement relatif a Consultants SM inc.*³⁵(“*Consultants SM inc.*”), the Quebec Court of Appeal concluded that the language found in CCAA section 19(2)(d) and (e) is practically identical to the language found in paragraph 178(1)(e) of the *Bankruptcy and Insolvency Act* (“**BIA**”), applicable to the bankruptcy of a natural person, which specifies the debts in respect of which a bankrupt cannot be released and concluded that jurisprudence on the scope of this BIA provision was useful in interpreting CCAA s. 19(2). In order to be successful in a claim under CCAA section 19(2), the Quebec Court of Appeal determined that the creditor must establish on a balance of probabilities that:

(a) the debtor made a representation to the creditor;

³⁵ *Arrangement relatif a Consultants SM inc.*, [2020 QCCA 438](#), application for leave to appeal to SCC from the judgment granted October 29, 2020 in respect of set off issues raised in the case.

- (b) the representation was false;
- (c) the debtor knew that the representation was false; and
- (d) the false representation was made for the purpose of obtaining a good or service from the creditor.³⁶

47. Applied to the Tobacco Board's claims:

- (a) the Tobacco Manufacturers made representations at the time of (i) the annual Heads of Agreement, (ii) the purchase of DFX tobacco at the Tobacco Board's auctions, and (iii) the audit reports for the years of purchase, that the DFX tobacco was purchased to manufacture cigarettes and other tobacco products for sale in the DFX market and the Tobacco Manufacturers had used the DFX tobacco for that purpose;
- (b) the representations were patently false;
- (c) the Tobacco Manufacturers knew the representations were patently false; and
- (d) the false representations were made to obtain tobacco at the lower DFX prices from the Tobacco Board and to cover up the Tobacco Manufacturers' involvement in smuggling by enabling persons to possess and sell their cigarettes and other tobacco products in Canada at prices which did not include duties and taxes for the purpose of maintaining their share of the Canadian tobacco market.

48. The Court in *Consultants SM inc.* expanded on element (c) above – knowledge that the representation was false – in stating that proof of fraudulent intention can rarely be made directly and that it will often be necessary to have recourse to presumptions of fact.

³⁶ *Arrangement relatif a Consultants SM inc.*, [2020 QCCA 438](#), paras. 33-35, 74-76, 83, 103-104.

49. The Court in *Consultants SM inc.* added that “once the obligee has proved the falsity of a representation to the obligor, the presumption of good faith is neutralized and it is then incumbent on the latter to justify its conduct.”³⁷ Throughout the conduct of the Actions, the Tobacco Manufacturers have not even attempted to justify their misrepresentations concerning the use of the DFX tobacco purchased through the Tobacco Board.

50. To evidence the Tobacco Manufacturers’ fraudulent intention, the Tobacco Board relies, in part, on the Tobacco Manufacturers’ own admission that the representations to the Tobacco Board concerning the non-domestic use of DFX tobacco were false, and the further admission that Rothmans did not package and stamp certain of its cigarettes and tobacco products in conformity with the *Excise Act* to enable their sale in the Canadian domestic market.

B. Section 22 - Classes of Trade Creditors and Tobacco Claimants

51. CCAA sections 22(1) and (2) state as follows:

Classes of Creditors

Company may establish classes

22 (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Factors

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

³⁷ *Arrangement relatif a Consultants SM inc.*, [2020 QCCA 438](#), para. 35 and *Dupuis v. Cernato Holdings Inc.*, [2019 QCCA 376](#), para. 38.

- (b) the nature and rank of any security in respect of their claims;
- (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
- (d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

52. The underlying reason for dividing creditors into different classes is that creditors have different interests and they should only be permitted to bind other creditors with similar interests. The CCAA contemplates that a compromise or arrangement will be approved by the statutory majority of various classes of secured and unsecured creditors. In determining classes of creditors, under CCAA section 22(1) the Court is to consider the factors set out in CCAA section 22(2) which are essentially a codification of previous case law. In the seminal case on classification of creditors, it was determined that a proper class “must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interests.”³⁸

53. Classification of creditors must be crafted with the underlying purpose of the CCAA in mind, namely to facilitate the reorganization of an insolvent company through the negotiation and approval of a compromise or arrangement.

54. Applied to the Tobacco CCAA Proceedings, the collective resolution of the Tobacco Claims is the sole mandate given by this Court to the Mediator upon his appointment on April 25, 2019. The Tobacco Board accepts the advice to the Court from the Tobacco Manufacturers and

³⁸ *Sovereign Life Assur. Co. v. Dodd*, [1892] 2 Q.B. 573, 41 W.R. 4, 36 Sol. Jo. 644, 4 R 17 (C.A.) at p. 583.

their Court-appointed Monitors that their collective objective in the Mediation is to find a collective resolution of all of the Pan-Canadian Tobacco Claims.

55. The Tobacco Board's principal concern with this mandate is that the Tobacco Board, as a supplier to the Tobacco Manufacturers, does not make a Tobacco Claim and is excluded from any meaningful participation in any process with the objective of a Pan-Canadian global settlement of the Tobacco Claims.

56. The minority must be protected in the judicial balancing act that is the Tobacco CCAA Proceedings. The Tobacco Board is a minority of one, being the only Claimant with a non-Tobacco Claim. There is no mediation process for anything other than Tobacco Claims and the Tobacco Board has no status in that mediation process.

57. The seminal question – whether the Tobacco Board is entitled to be treated in the Tobacco CCAA Proceedings in the same or similar manner as other trade suppliers to the Tobacco Manufacturers under the Court's "business as usual" directive – must be resolved before there is any prospect of meaningful settlement discussions between the Tobacco Board and the Tobacco Manufacturers.

58. Importantly, the Tobacco Board does not seek to be placed in its own creditor class with a goal of positioning itself to have veto power to defeat a proposed plan for Pan-Canadian and/or global resolution of Tobacco Claims.

59. To the contrary, the Tobacco Board does not make a Tobacco Claim and has no place in any compromise or arrangement for the resolution of a claim it does not make on its own behalf or on behalf of the Producers.

60. Moreover, the Tobacco Board's claim is "small potatoes"³⁹ in relation to the Tobacco Claims, representing a fraction only of a single percentage point of the damages sought by the Tobacco Claimants advancing the public sector HCCR Claims or private sector TRW Claims. The separate resolution of the Tobacco Board's claim for the benefit of the Producers that it represents cannot possibly have any material effect on the prospects of settlement of the Tobacco Claims.

61. Instead of veto, the Tobacco Board asks that it be excluded entirely from the process relating to either the creation of or creditor approval of a Pan-Canadian global settlement of the Tobacco Claims, consistent with the Court's exclusion of "any right or claim of a supplier relating to goods or services supplied to" the Tobacco Manufacturers arising from the definition of Tobacco Claim in the Initial Orders.

62. It has been about 30 years since the events at issue in the Tobacco Board Actions. The Producers represented by the Tobacco Board are getting older and some have passed away⁴⁰ with no progress toward resolution of the claims made on their behalf. The declarations sought by the Tobacco Board are urgently required to permit the Tobacco Board to bring their long-standing claims to a meaningful resolution.

PART IV – ORDER SOUGHT

63. On this motion, the Tobacco Board therefore seeks this Court's declarations and directions that:

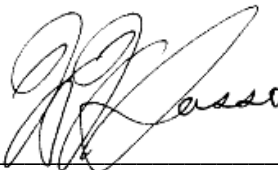
³⁹ Strosberg Affidavit, para. 11, Tobacco Board Record, Tab 4, p. 60.

⁴⁰ Neukamm Affidavit, paras. 36-42, Tobacco Board Record, Tab 2, pp. 21-23; (2) Affidavit of Andy Jacko sworn Mar-17-2021, paras. 7-8, Tobacco Board Record, Tab 3, p. 54.

- (a) the Tobacco Board does not have a **Tobacco Claim** within the meaning of that term in the Initial Orders, as amended and restated, in the Tobacco CCAA Proceedings;
- (b) the Tobacco Board's claims are debts or liabilities arising out of fraud, or debts or liabilities resulting from obtaining property or services by false pretences or fraudulent misrepresentation that, under CCAA subsections 19(2)(c) and (d), cannot be compromised without the consent of the Tobacco Board;
- (c) the Tobacco Board's claims includes a debt for interest owed in relation to the amounts referred to in CCAA section 19(2)(c) and (d) that, under CCAA subsection 19(2)(e), cannot be compromised without the consent of the Tobacco Board; and
- (d) the Tobacco Board is to be placed in a separate class of creditors from the Tobacco Claimants under CCAA section 22 for the purpose of meetings to be held in respect of a compromise or arrangement relating to the creditors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 26, 2021



STROSBERG SASSO SUTTS LLP
Lawyers for The Ontario Flue-Cured Tobacco
Growers' Marketing Board, Moving
Party/Claimant

SCHEDULE “A” – LIST OF AUTHORITIES

1. *Arrangement relatif a Consultants SM inc.*, [2020 QCCA 438](#)
2. *Dupuis v. Cernato Holdings Inc.*, [2019 QCCA 376](#)
3. *Sovereign Life Assur. Co. v. Dodd*, [1892] 2 Q.B. 573, 41 W.R. 4, 36 Sol. Jo. 644, 4 R 17 (C.A.)

SCHEDULE “B” – STATUTORY REFERENCES

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

Claims

Claims that may be dealt with by a compromise or arrangement

- **19 (1)** Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are
 - **(a)** claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of
 - **(i)** the day on which proceedings commenced under this Act, and
 - **(ii)** if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and
 - **(b)** claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

Exception

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

- **(a)** any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;
- **(b)** any award of damages by a court in civil proceedings in respect of
 - **(i)** bodily harm intentionally inflicted, or sexual assault, or
 - **(ii)** wrongful death resulting from an act referred to in subparagraph (i);
- **(c)** any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;
- **(d)** any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or

- **(e)** any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).

Classes of Creditors

Company may establish classes

22 (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Factors

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

- **(a)** the nature of the debts, liabilities or obligations giving rise to their claims;
- **(b)** the nature and rank of any security in respect of their claims;
- **(c)** the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
- **(d)** any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

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 COMPROMIS 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.**

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
PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE MOVING PARTY,
THE ONTARIO FLUE-CURED TOBACCO
GROWERS' MARKETING BOARD
(MOTION FOR DECLARATIONS)

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