

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
(Fee Approval Motion – Counsel for the Tobacco Producers' Fee)

January 22, 2025

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TO: **COMMON SERVICE LIST**

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PART I - OVERVIEW

1. This is a motion for an order approving the Counsel for the Tobacco Producers’ Fee (as defined in the CCAA Plans) and directing payment of \$3,138,314.49 to Strosberg Wingfield Sasso LLP in Trust from the Tobacco Producers’ Settlement Amount.

2. For consistency of reference, the definitions from the CCAA Plans are used throughout this factum and are adopted for this Fee Approval Motion.

3. The request for the Counsel for the Tobacco Producers’ Fee is made in accordance with the February 11, 2009 Contingency Fee Agreement (for the Tobacco Producers’ Actions) and the April 4, 2019 CCAA Proceedings Fee Agreement between the Ontario Flue-Cured Tobacco Growers’ Marketing Board (“**Tobacco Board**”) and Counsel for the Tobacco Producers (Strosberg Wingfield Sasso LLP, formerly Strosberg Sasso Sutts LLP and Sutts Strosberg LLP (“**SS**”).

4. The Counsel for the Tobacco Producers’ Fee, as requested, is calculated as follows:

Particulars	Total
Contingency Fee Retainer - Tobacco Producers’ Actions (25% of \$15,000,000)	\$3,750,000.00
<i>Less Credit</i> – Fees recovered for Costs	<i>\$ 141,960.98</i>
<i>Less Credit</i> – Fees paid under the CCAA Proceedings Fee Agreement	<i>\$ 831,018.75</i>
Sub-total Fees	<u>\$2,777,020.27</u>
Disbursements	<u>\$ 249.19</u>
Total Fees & Disbursements	\$2,777,269.46
HST on Fees & Disbursements (13% on \$2,777,269.46 = \$361,045.03)	<u>\$ 361,045.03</u>
Counsel for the Tobacco Producers’ Fee (inclusive of disbursements and HST)	\$3,138,314.49

PART II - FACTS

A. Overview of the Tobacco Actions

5. In the period from January 1, 1986 to December 31, 1996, the Tobacco Board was the exclusive supplier of Ontario flue-cured tobacco under supply management regulations. The Tobacco Producers sold their tobacco through auctions administered by the Tobacco Board, whose primary role was to regulate and control the production and marketing of Ontario-grown tobacco. The standard form of annual contracts for the purchase and sale of tobacco was called “Heads of Agreement”.¹

6. Under the Heads of Agreement, the Tobacco Companies purchased tobacco from the Tobacco Board for the cigarettes and other tobacco products manufactured in Canada for both the domestic market and also for the export markets that serviced the United States and elsewhere. In accordance with the Heads of Agreement, the Tobacco Companies paid a lesser price for tobacco intended for export than the guaranteed price of tobacco for domestic use. The Heads of Agreement called for an annual audit to ensure that the tobacco was used for the intended purpose and a “Make-Up” payment to account for the amount owing for tobacco that was purchased for export but was actually used for domestic cigarettes and other tobacco products.²

7. The Tobacco Producers’ Actions assert that each of Imperial, RBH and JTIM was involved in smuggling of their own cigarettes and other tobacco products back into Canada and that each of

¹ Affidavit of Harvey T. Strosberg KC sworn January 8, 2025 (“**Strosberg Affidavit**”), para. 4.

² Strosberg Affidavit, para. 5.

them was contractually obligated to pay the domestic price for the tobacco products that were smuggled back into Canada.³

B. Rothmans, Imperial and JTIM Pleaded Guilty to Smuggling

8. The Tobacco Companies manufactured cigarettes and other tobacco products in Canada to supply the export market. Those tobacco products, mostly cigarettes, were smuggled back into Canada for sale and consumption in the Canadian domestic market without payment of applicable duties and taxes and without paying the domestic price to the Tobacco Board for the tobacco used in those products.⁴

9. On July 31, 2008, RBH pleaded guilty to a charge that between January 1, 1989 and February 28, 1994, it aided persons to sell and be in possession of tobacco manufactured in Canada that was not packaged and stamped in conformity with the *Excise Act* and regulations, contrary to section 240(1)(a) of the *Excise Act*.⁵ Based on its admission, RBH was fined \$100 million and it agreed to compensate the Federal and Provincial Governments for lost duties and taxes in a civil settlement, referred to as the Comprehensive Agreement, dated July 31, 2008.⁶

10. On July 31, 2008, Imperial pleaded guilty and made similar admissions as RBH, for which it was fined \$200 million. Imperial also entered into a similar Comprehensive Agreement with the Federal and Provincial Governments to settle civil claims arising from its role in tobacco smuggling.⁷

³ Strosberg Affidavit, para. 6.

⁴ Strosberg Affidavit, para. 7.

⁵ Strosberg Affidavit, para. 8.

⁶ Strosberg Affidavit, para. 10.

⁷ Strosberg Affidavit, para. 11.

11. On April 13, 2010, JTIM pleaded guilty and made similar admissions as Imperial and RBH, for which it was fined \$150 million. JTIM also entered into a Comprehensive Agreement with the Federal and Provincial Governments to settle civil claims arising from its role in tobacco smuggling.⁸

C. The Tobacco Board's Retainer of Counsel for the Tobacco Producers

12. Following public disclosure of the guilty pleas and Comprehensive Agreements of RBH and Imperial, starting in about late November 2008, the Tobacco Board sought legal advice from Counsel for the Tobacco Producers about proposed actions against the Tobacco Companies for damages for breach of contract arising from the Tobacco Companies' involvement in smuggling their own tobacco into Canada.⁹

13. On February 10, 2009, the Tobacco Board passed a resolution authorizing the Tobacco Board to retain SS, enter into a contingency fee agreement with SS, and prosecute the Tobacco Producers' Actions.¹⁰

14. On February 11, 2009, the Tobacco Board signed a retainer and contingency fee agreement with SS ("**Contingency Fee Agreement**"). The Contingency Fee Agreement stated, *inter alia*, at para. 4:

4. In consideration for the legal services to be provided by SS, the Client agrees that the fee amount and manner of payment shall be as follows:

(a) If there is a recovery of money BEFORE the completion of examinations for discovery in the Action, SS shall be paid a fee of TWENTY-FIVE percent (25%) of any and all amounts recovered by the Client for damages, prejudgment interest, postjudgment interest and costs from any party, directly or indirectly, as a

⁸ Strosberg Affidavit, para. 12.

⁹ Strosberg Affidavit, para. 13.

¹⁰ Strosberg Affidavit, para. 16 and Exhibit "B" February 10, 2009 Resolution from Minutes of Tobacco Board Meeting.

result of negotiations with any party, or as a result of this retainer, but less recovered disbursements, plus GST; ...¹¹

15. SS also entered into similar retainer and contingency fee agreements with four individual Tobacco Producers (Brian Baswick, Arpad Dobrentey, Andy Jacko and Ronald Kichler) who agreed to act as proposed representative plaintiffs for proposed class proceedings on behalf of the Tobacco Producers.¹² However, as the Court of Appeal for Ontario stated in *Ontario v. Imperial Tobacco Canada Ltd.*, [2013 ONCA 481](#), the Tobacco Board has the sole authority to enforce the rights of the Tobacco Producers to recover payments owed by the Tobacco Companies under the annual Heads of Agreement.¹³

16. On March 6, 2009, the Tobacco Board passed a resolution confirming the retainer of SS to commence the Tobacco Producers' Actions with the Tobacco Board acting as a co-plaintiff with the individual Tobacco Producers. The Tobacco Board agreed to establish an indemnity fund to pay adverse costs of the individual Tobacco Producers should they be ordered by the court. This resolution was endorsed by the Farm Products Marketing Commission.¹⁴

D. The Tobacco Producers' Actions

17. 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, 2010.¹⁵ In each of the Tobacco Producers' Actions, the Tobacco Board pleaded breaches of contract arising from the admissions of RBH, Imperial and JTIM of involvement in smuggling their tobacco into the

¹¹ Strosberg Affidavit, paras. 17-18 and Exhibit "A" February 11, 2009 Contingency Fee Agreement at para. 4(a).

¹² Strosberg Affidavit, para. 19.

¹³ Strosberg Affidavit, para. 40.

¹⁴ Strosberg Affidavit, para. 20 and Exhibit "C" March 6, 2009 Tobacco Board Resolution.

¹⁵ Strosberg Affidavit, paras. 21-22 and Exhibit "D" November 5, 2009 Rothmans Statement of Claim, Exhibit "E" December 2, 2009 Imperial Statement of Claim and Exhibit "F" April 23, 2010 JTIM Statement of Claim.

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 described above.¹⁶

18. The nature of the claims in the Tobacco Producers' Actions (which were virtually identical) was summarized in the context of the Imperial action 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.¹⁷

E. The Effort to Recover the Tobacco Producers' Damages

19. From February 10, 2009 until these CCAA Proceedings commenced in March 2019, the Counsel for the Tobacco Producers prosecuted the Tobacco Producers' Actions over a period of about 10 years.¹⁸ Since the commencement of these CCAA Proceedings when a stay of the Tobacco Producers' Actions was directed under the Initial Orders as amended and extended,

¹⁶ Strosberg Affidavit, para. 22.

¹⁷ Strosberg Affidavit, para. 23 and *R. v. Imperial Tobacco Canada*, 2012 ONSC 6027 at [paras. 8](#) and [9](#).

¹⁸ Strosberg Affidavit, para. 24.

Counsel for the Tobacco Producers have continued to act for the Tobacco Producers under a separate agreement made with the Tobacco Board.¹⁹

20. In their statements of defence, the Tobacco Companies raised every conceivable defence in the Tobacco Producers' Actions, including fundamental assertions that:

- (a) each Comprehensive Agreement between the Tobacco Companies and the Province of Ontario (and others) released the claims of the Tobacco Board and the Tobacco Producers; and
- (b) the claims of the Tobacco Board and Tobacco Producers claims were statute-barred by the *Limitations Act* (1990) and/or the *Limitations Act, 2002*.²⁰

21. The Court adjudicated upon each of these defences prior to the commencement of these CCAA Proceedings. In each instance, the Tobacco Board and individual Tobacco Producers were successful in defeating the Tobacco Companies' motions and appeals to dispose of the Tobacco Producers' Actions, resulting in five reported judicial decisions:

- (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); and

¹⁹ Strosberg Affidavit, para. 25.

²⁰ Strosberg Affidavit, para. 26.

- (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).²¹

F. Costs Recovered from the Tobacco Companies

22. The Tobacco Board recovered \$219,034.82 of costs from the Tobacco Companies on the above-noted motions and appeals, consisting of the following:

- (a) \$7,000 for costs on the appeal of the stay of Ontario's application, pursuant to the Court of Appeal's July 20, 2011 order, received from Imperial on August 29, 2011;
- (b) \$41,772.06 for costs of the released claim motion (\$25,000) and the appeal at the Court of Appeal (\$15,000), including interest, received from Imperial and RBH on October 24, 2014; and
- (c) \$170,262.76 for costs of the summary judgment motions, including interest, received from the Tobacco Companies in December 2016.²²

23. From the \$219,034.82 recovered for costs, \$58,618.91 (inclusive of taxes) was applied towards the Tobacco Board's disbursements, and \$141,960.98 (plus HST of \$18,454.92) was applied towards fees, which will be deducted from the contingency fee claimed herein.²³

G. The CCAA Proceedings Fee Agreement

24. When the Tobacco Companies were granted CCAA protection, the Tobacco Board agreed to retain Counsel for the Tobacco Producers to continue to represent their collective interests.²⁴

25. By resolution dated April 4, 2019, the Tobacco Board retained Counsel for the Tobacco Producers and agreed to pay necessary disbursements and lawyers' time at discounted hourly rates for their work on the CCAA Proceedings (the "**CCAA Proceedings Fee Agreement**"). The hourly

²¹ Strosberg Affidavit, paras. 24-55.

²² Strosberg Affidavit, para. 56.

²³ Strosberg Affidavit, para. 57.

²⁴ Strosberg Affidavit, para. 58.

rates of the lawyers were well below usual hourly rates.²⁵ The CCAA Proceedings Fee Agreement provided that any fees paid to Counsel for the Tobacco Producers in respect of the CCAA Proceedings would be credited to the Tobacco Producers and deducted from any recovery under the Contingency Fee Agreement in the event of recovery.²⁶

26. The total fees paid by the Tobacco Board over a period of about 6 years under the CCAA Proceedings Fee Agreement, to be credited against the fee payable under the Contingency Fee Agreement is \$831,018.75 (plus HST).²⁷

H. The Amount Requested Under the Contingency Fee Agreement

27. Examinations for discovery in the Tobacco Producers' Actions did not take place. Therefore, in accordance with the Contingency Fee Agreement, Counsel for the Tobacco Producers are entitled to a gross fee of \$3,750,000 (25% of \$15,000,000). After deducting \$141,960.98 for fees recovered for costs in the Tobacco Producers' Actions, and \$831,018.75 paid by the Tobacco Board under the CCAA Proceedings Fee Agreement, plus \$249.19 for disbursements and \$361,045.03 for HST, the net amount requested is **\$3,138,314.49**.²⁸

28. As of December 22, 2024, Counsel for the Tobacco Producers incurred and were paid for disbursements in the amount \$66,444.15 (\$66,201.26 plus \$242.89 for HST). They have outstanding disbursements in the amount of \$249.19 (plus HST).²⁹

²⁵ Strosberg Affidavit, para. 59 and Exhibit "G" April 4, 2019 Tobacco Board Resolution – CCAA Retainer.

²⁶ Strosberg Affidavit, para. 60.

²⁷ Strosberg Affidavit, para. 62.

²⁸ Strosberg Affidavit, para. 63.

²⁹ Strosberg Affidavit, para. 64.

I. The Proposed Contingency Fee is Reasonable

29. On February 12, 2009, when Counsel for the Tobacco Producers entered into the Contingency Fee Agreement, they assumed the risk of recovery of a fee for time spent working on the Tobacco Producers' Actions and disbursements. Financial assistance was never sought or received from the (Ontario) Class Proceedings Fund or an independent third-party funder.³⁰

30. The Tobacco Producers' Actions were fought for over 10 years before the Tobacco Companies went into CCAA protection, leading to another 5 years and 9 months of proceedings, totaling more than 15 years of time spent by counsel pursuing the Tobacco Producers' claims.³¹

31. As of December 22, 2024, the value of all work that Counsel for the Tobacco Producers has done in the Tobacco Producers' Actions and CCAA Proceedings, based on over 4,100 billable hours of work and at usual hourly rates, exceeds **\$3 million**. This amount does not include the time spent by the firm's law clerks.³²

32. The fee requested herein is consistent with the terms of the Contingency Fee Agreement and the CCAA Proceedings Fee Agreement. The Tobacco Board by its Chair, Anthony DeCarolis, and its corporate lawyer, Geoffrey Spurr, are supporting the requested Counsel for Tobacco Producers' Fee sought herein.³³

³⁰ Strosberg Affidavit, para. 65.

³¹ Strosberg Affidavit, para. 66.

³² Strosberg Affidavit, para. 67.

³³ (1) Strosberg Affidavit, para. 69; (2) Affidavit of Anthony DeCarolis sworn January 13, 2025; and (3) Affidavit of Geoffrey Spurr sworn January 13, 2025.

PART III - ISSUES AND THE LAW

A. CCAA Plans – Payment of Costs

33. Article 14.9 (j) and Article 16 (at para. 8) of the CCAA Plans state that the retainer agreement(s) respecting fees and disbursements of Counsel for the Tobacco Producers in the Tobacco Producers’ Actions and the Tobacco Producers’ Fee to be paid from the Tobacco Producers’ Settlement Amount are subject to approval of this Court:

14.9 Payment of Costs

The professional fees, other fees, costs, disbursements, expenses, court costs and other expenditures, and all applicable Sales and Excise Taxes thereon (collectively, “Costs”), charged and incurred in relation to the settlement of the Tobacco Claims and the implementation and administration of the CCAA Plan shall be paid as follows:

(j) The Counsel for the Tobacco Producers’ Fee shall be paid out of and deducted from the Tobacco Producers Settlement Amount. The Counsel for the Tobacco Producers’ Fee and the retainer agreement respecting fees and disbursements between the Counsel for the Tobacco Producers and the representative plaintiffs in the Tobacco Producers’ Actions are subject to the approval of the CCAA Court;³⁴

34. Article 16. Claimant Allocation of the CCAA Plans at para. 8 states:

8. The Quebec Class Counsel Fee, Counsel for the Tobacco Producers’ Fee and Knight Class Counsel Fee are subject to approval by the CCAA Court. Subject to such approval, these fees will be paid in full at the time of plan implementation.³⁵

B. Court Approval of Contingency Fee Agreements under *Class Proceedings Act, 1992*

35. Section 32(2) of the *Class Proceedings Act, 1992* requires court approval of an agreement respecting fees and disbursements between a lawyer and a representative party in a class proceeding, on the motion of the lawyer.³⁶

³⁴ Article 14.9 (j) of CCAA Plans.

³⁵ Article 16. Claimant Allocation at para. 8 of CCAA Plans.

³⁶ Section 32(2), *Class Proceedings Act, 1992*, S.O. 1992, c.6.

C. The Test for Fee Approval

36. The test for approval of counsel fees in this context is whether they are fair and reasonable in all the circumstances.³⁷

i. The Retainer is Presumptively Valid

37. Ontario judges accept that the percentage set out in a contingency retainer agreement is presumptively valid and enforceable. In approving a one-third (33.3%) contingency fee of a \$28.2 million settlement in a tax shelter class action (a fee award of \$9.4 million) Justice Belobaba held that contingency fee arrangements that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable, and the presumption of a valid contingency fee should only be rebutted when: (i) there is a lack of full understanding or true acceptance on the part of the representative plaintiff, (ii) the agreed-to contingency amount is excessive, or (iii) when applying the presumptively valid one-third contingency fee leads to a legal fees award that is so large as to be unseemly or otherwise unreasonable.³⁸

38. Here, the requested fee (before offsetting fees recovered in the Tobacco Producers' Actions and paid in the CCAA Proceedings) is 25% of the Tobacco Producers' Settlement Amount. This is within the range of fees that courts have approved. The Tobacco Board and its counsel confirm the Contingency Fee Agreement and CCAA Proceedings Fee Agreement and support this fee request.³⁹ For these reasons, the retainer agreements are presumptively valid and enforceable and should be approved.

³⁷ *Pace Securities Corp. et al v. First Hamilton Holdings Inc. et al.*, [2021 ONSC 6956](#), para. 26,

³⁸ *Cannon v. Funds for Canada Foundation*, [2013 ONSC 7686](#), paras. 8-10.

³⁹ (1) Strosberg Affidavit, para. 69; (2) Affidavit of Anthony DeCarolis sworn January 13, 2025; and (3) Affidavit of Geoffrey Spurr sworn January 13, 2025.

39. Awarding fees based on a percentage of gross recovery is most appropriate because it encourages efficiency, rewards success and fairly reflects the considerable risks undertaken by counsel.”⁴⁰ As Justice Strathy stated: “If first-class lawyers cannot be assured that the Courts will support their reasonable fee requests, how can the Courts and the public expect them to take on risky and expensive litigation that can go for years before there is a resolution?”⁴¹

40. Fees in the range of 20% to 30% are “very common” in class proceedings and there have been many recent cases in which this court has approved fees that fall within that range.⁴²

<i>Baroch v. Canada Cartage</i> , 2021 ONSC 7376	30%
<i>C.S. v. Ontario</i> , 2021 ONSC 6851	27%
<i>Mancinelli v. Royal Bank of Canada</i> , 2021 ONSC 6306	21.9%
<i>Good v. Toronto Police Services Board</i> , 2020 ONSC 6332	28%
<i>Middlemiss v. Penn West Petroleum</i> , 2016 ONSC 3537	33%
<i>The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.</i> , 2018 ONSC 6447 ⁴³	22.95%

41. Some courts have used a multiplier as a cross-check on the percentage fee approach. In this case, the multiplier on the Counsel for Tobacco Producers’ Fee is about 0.8. Courts have repeatedly held that a multiplier of up to 4 times docketed time is presumptively fair. This Court recently held in a fee approval motion in *Pace Securities Corp. et al v. First Hamilton Holdings Inc. et al.*

⁴⁰ *Osmun v. Cadbury Adams Canada Inc.*, [2010 ONSC 2752](#), paras. 19-22.

⁴¹ *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, [2011 ONSC 7105](#), paras. 64-68. *Helm v. Toronto Hydro-Electric System Limited*, [2012 ONSC 2602](#), paras. 25-26.

⁴² *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 [2011 ONSC 7105](#) at [para. 63](#).

⁴³ *Baroch v. Canada Cartage*, [2021 ONSC 7376, para. 1](#); *C.S. v. Ontario*, [2021 ONSC 6851](#), paras. 57, 71; *Mancinelli v. Royal Bank of Canada*, [2021 ONSC 6306, para. 21](#); *Good v. Toronto Police Services Board*, [2020 ONSC 6332, para. 40](#); *Middlemiss v. Penn West Petroleum*, [2016 ONSC 3537, para. 19](#); *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, [2018 ONSC 6447, paras. 64, 77](#).

(“*Pace*”) that “a multiplier of 2.5 times is within the range accepted in the caselaw and may well be considered “low” in some circumstances.”⁴⁴

D. Relevant Factors in Determining the Counsel for Tobacco Producers’ Fee

41. While the percentage fee set out in a retainer is generally considered enforceable, there are other factors historically referenced by the courts when determining the fees of class counsel include:

- (a) the factual and legal complexities of the matters dealt with;
- (b) the risk undertaken;
- (c) the degree of responsibility assumed by counsel;
- (d) the monetary value of the matters in issue;
- (e) the importance of the matter to the class;
- (f) the degree of skill and competence demonstrated by class counsel;
- (g) the results achieved;
- (h) the ability of the class to pay;
- (i) the expectations of the class as to the amount of the fees; and,
- (j) the time expended by class counsel and the consequent opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

42. The factors found to be most relevant depended on the nature of the case, with the results achieved and risks undertaken usually being principally important. The factors that Counsel for the Tobacco Producers submit may apply here are addressed below, with the discussion of some factors being combined to avoid unnecessary duplication of submissions.

⁴⁴ *Pace Securities Corp. et al v. First Hamilton Holdings Inc. et al.*, [2021 ONSC 6956](#), [para. 28](#). *Fantl v. Transamerica Life Canada*, [2009 CanLII 55704](#) (Ont. S.C.J.), [para. 92](#).

i. The Degree of Risk

43. Counsel for the Tobacco Producers took on the major risk that there would be little or no recovery from the defendants with the means to satisfy a judgment, while having to commit an incredible amount of time, money and resources to the prosecution of Tobacco Producers' Actions.

44. As outlined above, the Tobacco Companies vigorously pursued motions and appeals to dispose of the Tobacco Producers' Actions, resulting in five reported judicial decisions. Had the Tobacco Companies been successful on any of those motions resulting in a dismissal of the Tobacco Producers' Actions, Counsel for the Tobacco Producers would have recovered nothing for its investment of time, professional skill and judgment.

45. Finally, like in *Pace*, the CCAA Proceedings necessitated further work, adding complexity and increasing risk of recovery in the Tobacco Producers' Actions. The costs incurred by Counsel for the Tobacco Producers reflect a material redirection of resources and an enhanced risk on the part of the firm relative to typical contingent fee cases. In taking on the Tobacco Producers' Actions, Counsel for the Tobacco Producers faced significant risks relative the usual "time and disbursements" approach to billing.

ii. The Results Achieved are Excellent

46. In the circumstances, it is submitted that the results achieved for the Tobacco Producers are excellent, following a decade of hard-fought, adversarial litigation and several more years of protracted negotiations in these CCAA Proceedings.

iii. The Complexity of the Proceedings

47. The Tobacco Producers' Actions and the CCAA Proceedings including negotiations that led to a resolution were long and complex. The matters gave rise to complex factual and legal issues involving an overlay of breach of contract claims, class action procedure and the CCAA. The mediation was long and complex and involved multiple layers of claimants amongst whom complex and contentious issues arose which made a resolution difficult to achieve.

iv. The Importance of the Matter to the Tobacco Producers

48. The Tobacco Producers' Actions were of significant importance to the Tobacco Producers as they concerned damages for historical breach of contract claims derived from their hard work and livelihood.

v. Competence of Counsel for the Tobacco Producers

49. Counsel for the Tobacco Producers are nationally recognized leaders in class and CCAA proceedings, and their expertise and experience were brought to bear in this novel and complex case. Counsel for the Tobacco Producers' efforts to drive the Tobacco Producers' Actions forward and their reputation as effective class action counsel assisted significantly in achieving a recovery.

vi. Expectation of the Tobacco Producers and Tobacco Board

50. The Tobacco Producers and Tobacco Board fully expected that, if this action succeeded, Counsel for the Tobacco Producers would be well-compensated for their work and taking on the real risks of this litigation. As noted above, the Tobacco Board and its counsel support the fee request.⁴⁵

⁴⁵ Affidavit of Anthony DeCarolis sworn January 13, 2025; Affidavit of Geoffrey Spurr sworn January 13, 2025.

vii. Opportunity Cost to Counsel for the Tobacco Producers

51. As noted above, Counsel for the Tobacco Producers incurred more than 4,100 hours of time amounting to more than \$3 million in prospective fees to bring this resolution before the Court. While Counsel for the Tobacco Producers recovered \$141,960.98 of fees recovered for costs in the Tobacco Producers' Actions and \$831,018.75 paid by the Tobacco Board under the CCAA Proceedings Fee Agreement, the value of unpaid time in the matters for which they have been waiting to be paid still exceeds \$2 million. Time and resources risked with this case represent time and resources that could not be invested in either conventional paying files or other class proceedings.

58. In light of these considerations, Counsel for the Tobacco Producers requests that this Honourable Court approve its Contingency Fee Agreement with the Tobacco Board and directing payment to Strosberg Wingfield Sasso LLP in Trust in the amount of \$3,138,314.49 from the Tobacco Producers' Settlement Amount for Counsel for the Tobacco Producers' Fee, disbursements and applicable taxes as set out above.

PART IV - ORDER REQUESTED

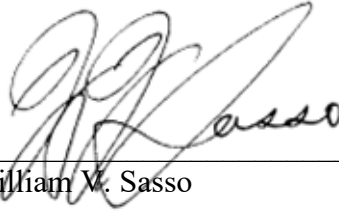
42. Counsel for the Tobacco Producers (Strosberg Wingfield Sasso LLP) requests that this Court make an order:

- (a) approving the fees and disbursements of Counsel for the Tobacco Producers in the amount of \$3,138,314.49 pursuant to the February 11, 2009 Contingency Fee Agreement (for the Tobacco Producers' Actions) and the April 4, 2019 CCAA Proceedings Fee Agreement with the Tobacco Board; and

- (b) that Counsel for the Tobacco Producers' Fee in the amount of \$3,138,314.49 be paid to Strosberg Wingfield Sasso LLP in Trust from the Tobacco Producers' Settlement Amount.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

January 22, 2025



William W. Sasso



David Robins

SCHEDULE "A" - LIST OF AUTHORITIES

1. *Pace Securities Corp. et al v. First Hamilton Holdings Inc. et al.*, [2021 ONSC 6956](#).
2. *Cannon v. Funds for Canada Foundation*, [2013 ONSC 7686](#).
3. *Osmun v. Cadbury Adams Canada Inc.*, [2010 ONSC 2752](#).
4. *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, [2011 ONSC 7105](#).
5. *Helm v. Toronto Hydro-Electric System Limited*, [2012 ONSC 2602](#).
6. *Baroch v. Canada Cartage*, [2021 ONSC 7376](#).
7. *C.S. v. Ontario*, [2021 ONSC 6851](#).
8. *Mancinelli v. Royal Bank of Canada*, [2021 ONSC 6306](#).
9. *Good v. Toronto Police Services Board*, [2020 ONSC 6332](#).
10. *Middlemiss v. Penn West Petroleum*, [2016 ONSC 3537](#).
11. *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, [2018 ONSC 6447](#).
12. *Fantl v. Transamerica Life Canada*, [2009 CanLII 55704](#) (Ont. S.C.J.).

SCHEDULE "B" - RELEVANT STATUTES

1. [*Companies' Creditors Arrangement Act \(R.S.C., 1985, c. C-36\)*](#)
2. [*Class Proceedings Act, 1992, S.O. 1992, c.6.*](#)

Fees and disbursements

32 (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

- (a) state the terms under which fees and disbursements shall be paid;
- (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
- (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

Court to approve agreements

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

Agreements for payment only in the event of success

33 (1) Despite the Solicitors Act and An Act Respecting Champerty, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.

Interpretation: success in a proceeding

(2) For the purpose of subsection (1), success in a class proceeding includes,

- (a) a judgment on common issues in favour of some or all class members; and
- (b) a settlement that benefits one or more class members.

Definitions

(3) For the purposes of subsections (4) to (7),

“base fee” means the result of multiplying the total number of hours worked by an hourly rate; (“honoraires de base”)

“multiplier” means a multiple to be applied to a base fee. (“multiplicateur”)

Agreements to increase fees by a multiplier

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.

Motion to increase fee by a multiplier

(5) A motion under subsection (4) shall be heard by a judge who has,

- (a) given judgment on common issues in favour of some or all class members; or
- (b) approved a settlement that benefits any class member.

Idem

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose. 1992, c. 6, s. 33 (6).

Idem

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

- (a) shall determine the amount of the solicitor's base fee;
- (b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and
- (c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement.

Idem

(8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee.

Idem

(9) In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding.

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
JTI-MACDONALD CORP.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
**IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO
COMPANY LIMITED**

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

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
PROCEEDINGS COMMENCED AT
TORONTO

FACTUM
**(Fee Approval Motion – Counsel for the Tobacco
Producers’ Fee)**

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