

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

MOTION RECORD
(Fee Approval Motion - Counsel for the Tobacco Producers' Fee)

January 13, 2025

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TO: **COMMON SERVICE LIST**

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Applicants

NOTICE OF MOTION

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

Strosberg Wingfield Sasso LLP, Counsel for the Tobacco Producers, will make a motion to the Honourable Chief Justice Morawetz of the Ontario Superior Court of Justice (Commercial List), to be heard at the end of the Sanction Hearing scheduled for January 29 to 31, 2025.

PROPOSED METHOD OF HEARING: The motion is to be heard by video conference.

THE MOTION IS FOR:

- (a) An Order approving the **Counsel for the Tobacco Producers' Fee** (as defined in the CCAA Plans);

- (b) An Order directing payment to Strosberg Wingfield Sasso LLP in Trust in the amount of \$3,138,314.49 from the Tobacco Producers' Settlement Amount or such other amount as this Court may deem just for Counsel for the Tobacco Producers' Fee; and
- (c) Such further and other relief as this Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. For consistency of reference, the definitions from the CCAA Plans are used throughout this notice of motion and are adopted for this Fee Approval Motion;
2. **"Counsel for the Tobacco Producers"** means the law practice of Strosberg Sasso Sutts LLP (now Strosberg Wingfield Sasso LLP and formerly Sutts Strosberg LLP ("**SS**"));
3. On February 10, 2009, the Ontario Flue-Cured Tobacco Growers' Marketing Board ("**Tobacco Board**") passed a resolution authorizing the Tobacco Board to retain SS, enter into a contingency fee agreement with SS, pursue the Tobacco Producers Claim and prosecute the Tobacco Producers' Actions (the "**Contingency Fee Agreement**");
4. The Contingency Fee Agreement signed by the Tobacco Board and SS on February 11 and 12, 2009, respectively, states:
 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 result of negotiations with any party, or as a result of this retainer, but less recovered disbursements, plus GST;

5. 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 along with the individual Tobacco Producers, which was subsequently endorsed by the Farm Products Marketing Commission;
6. The nature of the Tobacco Producers Claim 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.
7. When SS entered into the Contingency Fee Agreement, SS assumed the risk of recovery of a fee for time spent working on the Tobacco Producers' Actions and disbursements, and financial assistance was never sought or received from the (Ontario) Class Proceedings Fund or an independent third-party funder;
8. Over a period of about 10 years from February 2009 until March 2019 when these CCAA Proceedings were commenced, the members of SS prosecuted the Tobacco Producers' Actions, successfully defeating multiple motions and appeals to dispose of the Tobacco

Producers' Actions brought by the defendant Tobacco Companies, which resulted in five reported judicial decisions and the recovery of \$219,034.82 for costs;

9. From the \$219,034.82 recovered for costs in the Tobacco Producers' Actions, \$58,618.91 (inclusive of taxes) was applied towards disbursements and \$141,960.98 (plus HST of \$18,454.92) was applied towards fees in the Tobacco Producers' Actions, which will be deducted from the contingency fee claimed herein;
10. On April 4, 2019, following the granting of CCAA protection to the Tobacco Companies from their creditors and issuance of orders staying the Tobacco Producers' Actions, the Tobacco Board passed a resolution to retain Counsel for the Tobacco Producers to represent the Tobacco Producers' interests in the CCAA Proceedings in which the Tobacco Board agreed to pay necessary disbursements and reduced hourly rates of Counsel for the Tobacco Producers provided that the fees paid would be credited to the Tobacco Producers and deducted from any recovery under the Contingency Fee Agreement in the event there is a recovery in these CCAA Proceedings or thereafter;
11. The total fees paid to Counsel for the Tobacco Producers 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);
12. The last account sent by Counsel to the Tobacco Producers to the Tobacco Board in the CCAA Proceedings matter was dated November 5, 2024 and was for the billing period ending October 31, 2024;

13. The Tobacco Producers' litigation with the Tobacco Companies lasted for over 10 years before the Tobacco Companies went into CCAA protection in March 2019, leading to another 5 years and 9 months of proceedings, totaling more than 15 years of time spent by Counsel for the Tobacco Producers pursuing the Tobacco Producers' Actions;
14. 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 exceeds **\$2.2 million**;
15. Examinations for discovery were not completed in the Tobacco Producers' Actions, so a 25% contingency fee applies pursuant to the Contingency Fee Agreement which amounts to \$4,237,500 plus disbursements, being \$3,750,000 (25% of the \$15,000,000 Tobacco Producers' Settlement Amount) plus \$487,500 for HST;
16. The Tobacco Board has approved the compensation sought by Counsel for the Tobacco Producers for fees and disbursements in the amount of **\$3,138,314.49** to be paid to Strosberg Wingfield Sasso LLP as Counsel for the Tobacco Producers' Fee from the Tobacco Producers' Settlement Amount calculated as follows:

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

17. The provisions of the CCAA and the inherent and equitable jurisdiction of this Court;
18. Rules 1.04, 1.05, 2.03, 3.02, 16 and 37 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended; and
19. Such further and other grounds at the lawyers may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) The affidavit of Harvey T. Strosberg KC, sworn January 8, 2025 and exhibits thereto;
- (b) The affidavit of Anthony De Carolis, Chair of the Ontario-Flue Cured Tobacco Growers' Marketing Board, sworn January 13, 2025;
- (c) The affidavit of Geoffrey Spurr, sworn January 13, 2025; and
- (d) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

January 13, 2025

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Counsel for the Tobacco Producers

TO: THE COMMON SERVICE LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
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PROCEEDING COMMENCED AT
TORONTO

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

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Applicants

**AFFIDAVIT OF HARVEY T. STROSBERG, KC
(Sworn January 8, 2025 Remotely)**

I, **HARVEY T. STROSBERG, KC**, of the City of Windsor, in the County of Essex, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a member of the firm Strosberg Wingfield Sasso LLP, formerly Strosberg Sasso Sutts LLP and Sutts Strosberg LLP (collectively, “**SS**”), counsel for the Tobacco Producers throughout the conduct of the Tobacco Producers’ Actions) and was one of the lawyers for the Tobacco Producers, including the Ontario Flue-Cured Tobacco Growers Marketing Board (“**Tobacco Board**”) in these CCAA proceedings. As such, I have personal knowledge of the matters to which I hereinafter depose, except where I indicate that my information was obtained from other sources, in which case I state the source of my information and believe it to be true.

2. I swear this affidavit in support of a motion approving and fixing SS' compensation in the amount of **\$3,138,314.49** inclusive HST, pursuant to the February 11, 2009 Contingency Fee Agreement with the Tobacco Board (**Exhibit "A"**), calculated as follows:

\$3,750,000.00 (25% of \$15,000,000), less \$141,960.98 for fees recovered for costs, less \$831,018.75 for fees paid under the CCAA Proceedings Fee Agreement, plus \$249.19 for disbursements = \$2,777,269.46 plus \$361,045.03 for HST = \$3,138,314.49.

3. For consistency of reference, the definitions from the CCAA Plans are used throughout this affidavit.

OVERVIEW OF THE TOBACCO ACTIONS

4. 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**".

5. 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.

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

ROTHMANS, IMPERIAL AND JTIM PLEADED GUILTY TO SMUGGLING

7. 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 for the tobacco used in those products to the Tobacco Board.

8. On July 31, 2008, RBH pleaded guilty before the Honourable Mr. Justice R.G. Bigelow to a charge that between January 1, 1989 and February 28, 1994, RBH 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*.

9. The Agreed Statement of Facts in RBH’s guilty plea contained the following admissions:

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.

10. Based on its admission that from December 12, 1989 to June 9, 1993, RBH was involved in the avoidance of \$50 million in excise duties and taxes, RBH was fined \$100 million. RBH 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, with Her Majesty the Queen in Right of Canada and each of the Provinces, to settle claims arising from RBH's role in tobacco smuggling.

11. 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.

12. 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.

THE TOBACCO BOARD SOUGHT LEGAL ADVICE

13. On November 24, 2008, the Tobacco Board sought my advice about proposed actions against the Tobacco Companies for breach of contract for losses arising from the smuggling of tobacco into Canada because of the public disclosure of the July 31, 2008 guilty pleas and Comprehensive Agreements of RBH and Imperial.

14. On December 10, 2008, I met with the Tobacco Board and its counsel and on December 18, 2008, I sent to the Tobacco Board my privileged opinion.

15. On February 23, 2009, I attended a town hall meeting at Delhi and met with Tobacco Producers at which I recommended commencement of the Tobacco Producers' Actions.

CONTINGENCY FEE AGREEMENT

16. On February 10, 2009, the Tobacco Board passed a resolution (**Exhibit "B"**) authorizing the Tobacco Board to retain SS, enter into a contingency fee agreement with SS, and prosecute the Tobacco Producers' Actions.

17. On February 11, 2009, the Tobacco Board signed a retainer and contingency fee agreement with SS annexed as **Exhibit "A"** ("**Contingency Fee Agreement**").

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

19. On March 4, 2009, SS also entered into similar retainer and contingency fee agreements with the other Tobacco Producers (Brian Baswick, Arpad Dobrentey, Andy Jacko and Ronald Kichler) who had agreed to act as proposed representative plaintiffs for the proposed class proceedings on behalf of the Tobacco Producers.

20. On March 6, 2009, the Tobacco Board passed a resolution (**Exhibit “C”**) confirming the retainer of SS to commence the Tobacco Producers’ Actions with the Tobacco Board acting as a co-plaintiff with the other Tobacco Producers. The Tobacco Board also agreed to establish an indemnity fund to pay adverse costs of the other Tobacco Producers should they be ordered by the court. This resolution was subsequently endorsed by the Farm Products Marketing Commission.

THE TOBACCO PRODUCERS’ ACTIONS

21. The Tobacco Producers’ Actions were commenced against RBH on November 5, 2009, Imperial on December 2, 2009, and JTIM on April 23, 2010. The statements of claim are annexed as **Exhibits “D”, “E” and “F”** respectively.

22. In each of the Tobacco Producers’ Actions, the Tobacco Board pled breaches of contract arising from the admitted involvement of RBH, Imperial and JTIM in their involvement in smuggling tobacco into the domestic market and misrepresentations in their annual audit reports as to the actual use of the tobacco purchased and for failure to pay the Make-Up payments as required by the Heads of Agreement as described above.

23. 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.

THE 14 YEAR JOURNEY TO RECOVER THE TOBACCO PRODUCERS' DAMAGES

24. From February 10, 2009 until these CCAA Proceedings commenced, the members of SS including myself worked on the Tobacco Producers' Actions over a period of about 10 years.

25. Since the commencement of these CCAA Proceedings in March 2019 until December 31, 2024, and the stay of the Tobacco Producers' Actions directed under the Initial Orders in the Tobacco CCAA Proceedings as amended and extended, William Sasso, David Robins and I have continued to act for the Tobacco Producers under a separate agreement made with the Tobacco Board.

26. 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*.

27. The Court adjudicated upon each of these defences prior to the commencement of these CCAA Proceedings. In each instance, the Tobacco Board and the Other Plaintiffs were successful and the Tobacco Companies were unsuccessful.

28. Following is a summary of the motions brought by the Tobacco Companies that were determined by the Court.

The “Released Claim” Defence under the Comprehensive Agreements

29. The first ground of defence advanced by the Tobacco Companies, raised by Imperial, was that the Tobacco Board’s claim was released by the terms of the Imperial Comprehensive Agreement. RBH joined Imperial and supported this position.

30. However, the Tobacco Board, the Other Plaintiffs and the Tobacco Producers played no part in the negotiation of the terms of the Comprehensive Agreements and were not parties to and received no benefits under the terms of the Comprehensive Agreements.

31. On March 29, 2010, Imperial delivered notice to Ontario asserting that the claims by the Tobacco Board against Imperial arose out of and in connection with a “Released Claim” under the Comprehensive Agreement and that Imperial would pay up to \$50 million of the settlement funds due to Ontario under the Comprehensive Agreement into an escrow account, being the amount of damages claimed by the Tobacco Board in the Tobacco Action against Imperial.

32. On April 30, 2010, Ontario brought a court application, in which the Tobacco Board was made a party, for an order declaring that Imperial was obligated to pay Ontario under the Comprehensive Agreement.

33. On June 15, 2010, Imperial delivered a notice of arbitration asserting that the determination of whether the Tobacco Board's claim against Imperial "is a Released Claim by a Releasing Entity or Responsible Government as defined by the Agreement" was required to be determined by arbitration under the Comprehensive Agreement.

34. On June 16, 2010, Imperial brought a motion for a stay of Ontario's application on the basis that the matters raised in Ontario's application were subject to arbitration under the Comprehensive Agreement. Ontario and the Tobacco Board opposed the stay.

35. On July 26, 2010, the motion judge, Justice Richard C. Gates, granted Imperial's motion and ordered a stay of Ontario's application. On September 20, 2010, Justice Gates issued supplementary reasons, determining that it would be up to the arbitrator to decide who should have standing to participate and the issues to be determined between the contracting parties under the Comprehensive Agreement.

36. In effect, a determination that the Tobacco Board's claim was a Released Claim under the Comprehensive Agreement would have resulted in a non-suit of the Tobacco Board's claims in the Tobacco Producers' Actions, so it was fundamentally necessary for the Tobacco Board to be involved.

37. On July 20, 2011, Justice Gates' stay order was overturned by the Court of Appeal for Ontario (Goudge, Gillese JJ.A., and Juriansz, J.A. dissenting in part) in *Ontario v. Imperial Tobacco Canada Limited*, [2011 ONCA 525](#). Writing for the majority, Justice Goudge determined that because the Tobacco Board was not a party to the Comprehensive Agreement or its arbitration provisions, an arbitrator had no jurisdiction under the Comprehensive Agreement to determine the

Tobacco Board's rights. In the result, the Court of Appeal remitted the matter of the Released Claim defence to Justice Helen A. Rady, who was case managing the Tobacco Producers' Actions.

38. On September 19, 2012, Justice Rady heard Imperial's Released Claim application. RBH intervened and JTIM agreed to be bound by the result.

39. On January 2, 2013, Justice Rady delivered her reasons for decision in *R. v. Imperial Tobacco Canada*, [2012 ONSC 6027](#) in which she determined that the claims advanced by the Tobacco Board in the Tobacco Producers' Actions were not a Released Claim by a Releasing Entity under the Comprehensive Agreements.

40. On July 16, 2013, the Court of Appeal (Hoy A.C.J.O., Feldman and Simmons JJ.A.) dismissed Imperial's and RBH's appeal on the Released Claim defence in *Ontario v. Imperial Tobacco Canada Ltd.*, [2013 ONCA 481](#). In its reasons, the Court of Appeal recognized the Tobacco Board's statutory mandate and found that its primary role during the Period and at the time the Comprehensive Agreements were made was to regulate and control the production and marketing of Ontario-grown tobacco. The Court of Appeal found that the Tobacco Board had 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.

41. In summary, the Court of Appeal found that because the Tobacco Board was acting only as the agent for the Tobacco Producers to enforce the annual Heads of Agreement entered into by the Tobacco Board on their behalf and not as agent on behalf of the Crown or for the benefit of the Crown, the Tobacco Board was not asserting a Released Claim belonging beneficially to the Crown. The Tobacco Board was not a Releasing Entity within the meaning of the Comprehensive Agreements.

The Limitations Defence on the Contractual Claims by the Tobacco Board

42. The second significant ground of defence raised by the Tobacco Companies was a limitations defence.

43. On January 25, 2012, Justice Rady directed that the Tobacco Companies' limitation defence follow the determination of the Released Claim defence, if the Released Claim defence was determined in favour of the Tobacco Board.

44. At the Tobacco Board's request, Justice Rady directed that the Tobacco Companies deliver statements of defence in the Tobacco Producers' Actions.

45. On May 3, 2013, each of the Tobacco Companies served their statements of defence in which they each pleaded that the Tobacco Producers' Actions were barred by the *Limitations Act* (1990) or the *Limitations Act, 2002*. Each Tobacco Company denied any involvement in the smuggling of tobacco.

46. On May 23, 2013, each of the Tobacco Companies served a notice of motion for summary judgment based on their limitations defence.

47. On January 30 and 31, 2014, Justice Rady heard arguments on the summary judgment motions. The Tobacco Companies asserted that the Tobacco Board had to have known of the breach of contract claim for many years because the Tobacco Board knew that: (a) tobacco sold to the Tobacco Companies was being smuggled back into Canada, and (b) the Tobacco Companies did not pay the higher domestic price for that tobacco thereby establishing the Tobacco Producer's claim for losses.

48. In responding to the summary judgment motions, the Tobacco Board delivered extensive material to explain the respective roles of the parties in the tobacco industry, the structure and operations of the Canadian tobacco market, and the reasons for and the history of the Canadian contraband tobacco market. This information provided context for the contractual arrangements between the Tobacco Board and the Tobacco Companies at issue in the Tobacco Producers' Actions and was relied upon by the motion judge. The evidence of the Tobacco Board was unchallenged.

49. At the hearing, the Tobacco Board argued that it did not and could not reasonably have known of the Tobacco Companies' involvement in smuggling or responsibility for the breach of contract until the disclosures in the Comprehensive Agreements, guilty pleas under the *Excise Act* and related factual admissions were made in the Agreed Statement of Facts. The Tobacco Board emphasized how the Tobacco Companies consistently denied any involvement in smuggling activities which deprived the Tobacco Board of knowledge of the Tobacco Companies' identity as participants in smuggling which was an essential element of the breach of contract claim it was advancing in the Tobacco Producers' Actions.

50. On June 30, 2014, Justice Rady released her reasons dismissing the Tobacco Companies' motions for summary judgment in *The Ontario Flue-Cured Tobacco Growers' Marketing Board v. Rothmans, Benson & Hedges, Inc.*, [2014 ONSC 3469](#). She concluded that the Tobacco Board demonstrated that there was a genuine issue requiring a trial on the issue of discoverability and when the plaintiffs knew or ought to have known that they had a cause of action against the Tobacco Companies because:

- (a) there had been no documentary or oral discovery and there may have been evidence in the Tobacco Companies' control that was helpful to the Tobacco Board's position;

- (b) no representative of the Tobacco Companies swore an affidavit and no representative of the Tobacco Companies with personal knowledge of the facts or issues had presented any evidence to the Court;
- (c) Mr. Gilvesy and Mr. Neukamm [the Tobacco Board's affiants] were not cross-examined and their evidence was essentially unchallenged;
- (d) the Tobacco Companies continued to deny that they were involved in smuggling in their statements of defence;
- (e) the nexus of the loss sought in the Tobacco Producers' Actions and the Tobacco Companies from whom the loss is sought to be recovered was material to the doctrine of discoverability and this created a genuine issue requiring a trial. As Mr. Gilvesy pointed out, only the Tobacco Companies knew whether the tobacco they purchased was ultimately used for a different purpose than originally intended; and
- (f) there was a genuine issue requiring a trial about whether the Tobacco Companies' conduct might justify the suspension of the limitation period under s. 15(4) of the *Limitations Act, 2002*.

51. On April 23, 2015, the Tobacco Companies were granted leave to appeal the dismissal of their summary judgment motions to the Divisional Court. On April 21, 2016, the Divisional Court panel of Sachs, Horkins and Pattillo JJ. heard the appeal.

52. On July 4, 2016, the Divisional Court released its decision dismissing the Tobacco Companies' appeals in *Ontario Flue-Cured Tobacco Growers Marketing Board v Rothmans, Benson & Hedges, Inc.*, [2016 ONSC 3939](#).

53. Significantly, at para. 64 of the decision, Justice Sachs (writing for the Court) rejected the argument that the Tobacco Companies had not admitted complicity in tobacco smuggling, noting that the Agreed Statement of Facts on their guilty pleas spoke of their "knowing of and using the distribution channels that existed for the smuggling of contraband tobacco products into Canada and doing so with the intention of preserving their share of the Canadian tobacco market."

54. On November 4, 2016, the Court of Appeal for Ontario (Blair, Epstein and Huscroft, JJ.A.) dismissed the Tobacco Companies' motions for leave to appeal the Divisional Court's dismissal of their appeals.

55. Following is a list of the reported decisions on the above-noted defence motions in the Tobacco Producers' Actions in which our firm acted (successfully) for the Tobacco Board and the Tobacco Producers:

- (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
- (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).

COSTS RECOVERED FROM THE TOBACCO COMPANIES

56. The Tobacco Board recovered costs from the Tobacco Companies of \$219,034.82 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.

57. 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.

THE CCAA PROCEEDINGS FEE AGREEMENT

58. When the Tobacco Companies were granted CCAA protection from their creditors in March 2019 resulting in the issuance of orders staying the Tobacco Producers' Actions, the Tobacco Board agreed to retain SS to continue to represent their collective interests in the Tobacco CCAA proceedings by reason of both our familiarity with the Tobacco Producers' Actions and our experience in dealing with the CCAA and other restructuring proceedings including proceedings involving Olympia & York, Air Canada, Stelco, Eatons, Bramalea, Maple Leaf Sports/Ballard Estate, Global Television, St. Clair Paint/Colour Your World and many others.

59. By resolution dated April 4, 2019 (**Exhibit "G"**), the Tobacco Board retained SS to represent the Tobacco Producers' interests in the CCAA Proceedings and agreed to pay necessary disbursements and the hourly rates of William Sasso, David Robins and me at \$500 per hour for our work on the CCAA Proceedings (the "**CCAA Proceedings Fee Agreement**"). The hourly rates were well below my usual hourly rate (\$1,050) and the usual hourly rates of William Sasso (\$900) and David Robins (\$675) as they were in 2019, which increased each year during the period 2019 to 2024.

60. The hourly rates charged to the Tobacco Board under the CCAA Proceedings Fee Agreement were never increased, despite the fact that the agreement allowed for increases "from time to time in the usual and ordinary course of business". The CCAA Proceedings Fee Agreement provided that any fees paid to SS in respect of the Tobacco CCAA Proceedings would be credited

to the Tobacco Producers and deducted from any recovery under the Contingency Fee Agreement in the event that there was a recovery in the Tobacco CCAA Proceedings or thereafter.

61. On November 20, 2019, William Sasso sent an email to Geoff Spurr the Tobacco Board's corporate lawyer, Geoffrey P. Spurr of Wilson Spurr Law, further memorializing the CCAA Proceedings Fee Agreement, stating:

I confirm that our firm agrees with the request made on behalf of the Board that any legal costs paid under the Board's April 4, 2019 resolution to retain our firm in respect of the CCAA proceedings involving the tobacco manufacturers will be credited against any recovery under the Board's earlier February 10, 2009 resolution to retain our firm to investigate and prosecute the class actions against those same tobacco manufacturers. That was our understanding of the arrangements under which we have been acting, and it would have not occurred to us to have done otherwise. [emphasis added]

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

THE AMOUNT REQUESTED UNDER THE CONTINGENCY FEE AGREEMENT

63. Examinations for discovery in the Tobacco Producers' Actions did not take place. Therefore, in accordance with the Contingency Fee Agreement, SS is entitled to a fee of **\$3,138,314.83** calculated as: \$3,750,000 (25% of \$15,000,000), less \$141,960.98 for fees recovered for costs, less \$831,018.75 for fees paid under the CCAA Proceedings Fee Agreement, plus \$249.19 for disbursements = \$2,777,269.46 plus \$361,045.03 for HST = \$3,138,314.49.

64. As of December 22, 2024, SS incurred and was paid for disbursements in the amount \$66,444.15 (\$66,201.26 plus \$242.89 for HST). SS has outstanding disbursements in the amount of \$249.19 (plus HST).

THE PROPOSED CONTINGENCY FEE IS REASONABLE

65. On February 12, 2009, when SS entered into the Contingency Fee Agreement, SS 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.

66. The Tobacco Producers' litigation with the Tobacco Companies lasted for over 10 years before the Tobacco Companies went into CCAA protection in March 2019, leading to another 5 years and 9 months of proceedings, totaling more than 15 years of time spent by SS pursuing the Tobacco Producers' claims.

67. As of December 22, 2024, the value of all work that SS has done in the Tobacco Producers' Actions and CCAA Proceedings totals **\$2,202,431.85**, summarized as follows:

Value of SS Work in Tobacco Producers' Actions by Timekeeper			
Timekeeper	Total Hours	Hourly Rate Range	Amount
HTS	94.8	\$835 to \$1,075	\$85,947.50
WVS	690.7	760 to 950	563,261.50
DLR	666.2	400 to 750	319,652.00
WHK	585.6	470 to 500	281,475.00
Associates	292.3	225 to 535	84,164.50
Articling students	79.6	100 to 120	9,492.60
TOTAL	2,409.2		\$1,343,993.10

Value of SS Work in CCAA Proceedings by Timekeeper			
Timekeeper	Total Hours	Hourly Rate	Amount
HTS	463.7	\$500	\$231,850.00
WVS	1,103.6	500	551,800.00
DLR	120.2	500	60,100.00
Associates	72.4	187.50 to 225	14,501.25
Articling students	1.5	125	187.50
TOTAL	1,761.4		\$858,438.75

The amounts do not include the time spent by SS' clerks.

68. The last account to the Tobacco Board in the CCAA Proceedings matter was dated November 5, 2024, and was for the billing period ending October 31, 2024.

CONSENT OF TOBACCO BOARD AND ITS COUNSEL


69. I believe the fee requested herein is consistent with the terms of the Contingency Fee Retainer and the CCAA Proceedings Fee Retainer. I believe that the Tobacco Board on behalf of its Chair, Anthony DeCarolis, and Geoffrey Spurr of Wilson Spurr LLP Lawyers, the corporate lawyer for the Tobacco Board, will support SS' fee request pursuant to the terms of the Contingency Fee Agreement and the CCAA Proceedings Fee Agreement.

SWORN remotely by Harvey T. Strosberg, K.C., stated as being located at the City of Boca Raton, in the County of Palm Beach in the State of Florida, United States of America before me at the City of Windsor, in the County of Essex, Province of Ontario, on January 8, 2025, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



A Commissioner for taking affidavits




HARVEY T. STROSBERG, KC

This is **Exhibit “A”** referred to in the **Affidavit of Harvey T. Strosberg KC** sworn by Harvey T. Strosberg KC at the City of Boca Raton, in the County of Palm Beach in the State of Florida, United States of America, before me on **January 8, 2025**, at the City of Windsor, in the Province of Ontario, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, reading "David Robins". The signature is fluid and cursive, with a prominent loop at the end of the name.

Commissioner for Taking Affidavits (or as case may be)

David Robins
LSO No. 42332R

CONTINGENCY FEE RETAINER FOR LEGAL SERVICES

BETWEEN the Client and SS made as at December 1, 2008 at Windsor, Ontario

DEFINITIONS

1. For the purpose of this agreement, the following words have the following meanings:
 - (a) **“Action”** means an action for damages in the Court on behalf of the Client against any of Rothman’s Benson & Hedges Inc., Imperial Tobacco Canada Limited and JTI-MacDonald Corp. for breach of contract and/or such other causes of action arising from the conduct of Rothman’s Benson & Hedges Inc., Imperial Tobacco Canada Limited or JTI-MacDonald Corp. in the period January 1, 1988 to June 30, 1996 concerning the purchase of tobacco from the Client.
 - (b) **“Client”** means the Ontario Flue Cured Tobacco Growers’ Marketing Board;
 - (c) **“Court”** means the Ontario Superior Court of Justice; and
 - (d) **“SS”** means Sutts, Strosberg LLP.

PURPOSE AND SCOPE OF RETAINER

2. The Client hereby retains and employs SS in Windsor, Ontario, to investigate the facts, provide advice and to commence and prosecute the Action.
3. Prior to the commencement of the Action, the Client shall pass specific resolution(s) to confirm that SS has authority to commence and prosecute the Action.

CONTINGENCY FEE ARRANGEMENTS

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

(b) If there is a recovery of money AFTER the substantial completion of examinations for discovery (excluding undertakings) in the Action BUT BEFORE THE COMMENCEMENT OF A TRIAL OF THE ACTION, SS shall be paid a fee of THIRTY percent (30%) of any and all amounts recovered by the Client for damages, prejudgment interest, postjudgment interest and costs from any party, directly or indirectly, or as a result of the Action, or as a result of negotiations with any party, or as a result of this retainer, but less recovered disbursements, plus GST; and

(c) If there is a recovery of money AFTER the commencement of a trial of the Action, SS shall be paid a fee of THIRTY-THREE AND ONE THIRD percent (33.3%) of any and all amounts recovered by the Client for damages, prejudgment interest, postjudgment interest and costs, from any party, directly or indirectly, or as a result of the Action, or as a result of negotiations with any party, or as a result of this retainer, but less recovered disbursements, plus GST.

Examples illustrating the operation of this fee agreement are found at Schedule A which is attached to this agreement.

5. Notwithstanding the foregoing paragraphs 4(a), (b) and (c), if the Client, SS and the defendant(s) agree, the defendant(s) may pay a fee to SS for legal services rendered to the Client which SS may accept in full or partial satisfaction of its account.

6. SS agrees that it shall not charge the Client directly for legal fees if there is no recovery of money for damages, prejudgment and/or post-judgment interest whether by settlement, judgment, other Court order or otherwise, save and except as provided for in paragraph 5 above.

7. The Client hereby agrees and directs that all funds claimed by SS for legal fees, costs, taxes and disbursements shall be paid to SS in trust from any recovery of money for damages, prejudgment or post judgment interest and costs, whether by settlement, judgment or otherwise.

8. The Client or SS may apply to the Court to assess (review and approve) SS's bill within six months after the bill is rendered. The Client may ask the Court to determine whether the fee charged by SS is fair and reasonable. However, in the event that SS obtains the Court's prior approval of this agreement in accordance with paragraph 19 below, the Court would then only determine on an assessment whether the fee charged by SS is in accordance with this agreement.

DISBURSEMENTS AND COSTS

9. Subject to exceptions below, SS will pay all reasonable disbursements required for the prosecution of the Action and/or the recovery of money for damages, prejudgment and/or post-judgment interest whether by settlement or judgment.

10. The Client will pay for the costs of its staff who will be required to assist SS and for the costs of professionals and other individuals who have information such as Mr. Glen Momot of MacGillivray Partners LLP and Mr. George J. Gilvesy. The Client will also pay for the salaries, expenses, costs and/or fees of any fact witnesses.

11. The Client agrees that in addition to the amounts payable in accordance with paragraph 4 above, SS shall be reimbursed for all amounts paid as disbursements, including applicable taxes, by SS during the prosecution of the Action as a first charge on any recovery of money, prejudgment and/or post judgment interest or costs whether by settlement, judgment, other Court order or otherwise.

12. Unless otherwise ordered by a judge, the Client is entitled to receive any costs contribution or award, on a partial indemnity scale or substantial indemnity scale, if the Client is the party entitled to costs and those costs are separately specified.

13. If the Action is unsuccessful and/or if the Client is ordered to pay costs to the defendant(s), the Client shall pay any such cost orders. The Client will be responsible for paying any costs, contribution or award, on a partial indemnity scale or a substantial indemnity scale, if the Client is the party liable to pay costs.

OPTIONS OTHER THAN CONTINGENCY RETAINER

14. SS and the Client have discussed options other than the Client retaining SS by way of contingency retainer, including the Client paying SS on an hourly-rate retainer. To that end, SS has advised the Client that hourly rates vary among lawyers and that the Client may, at its option, speak to other lawyers to compare hourly rates.

15. The Client has advised SS that it has chosen to retain SS by way of a contingency fee retainer.

16. SS has advised the Client that all of the usual protections and controls on retainers between a lawyer and client, as defined by the Law Society of Upper Canada and the common law, apply to this contingency agreement.

CLIENT IS ADVISED TO OBTAIN INDEPENDENT LEGAL ADVICE

17. The Client acknowledges that SS has informed the Client that the Client has the right to consult with and retain another lawyer before signing this Agreement.

CLIENT'S RIGHT TO DECIDE ON SETTLEMENT

18. SS will advise the Client to settle the Action if it is possible to do so on reasonable terms but it is for the Client to decide whether to accept an offer to settle the Action and SS's consent is not required if the Client decides to discontinue or settle the Action.

COURT APPROVAL

19. The Client agrees that SS may apply to the Court for an order approving this agreement. The Client hereby consents to an order of the Court approving this agreement.

SS WILL PROVIDE PERIODIC UPDATES

20. From time to time at the request of the Client, SS will provide updated evaluations of the progress, merits and costs of the Action.

CLIENT'S RIGHT TO CHANGE LAWYERS AND CONSEQUENCES OF CHANGE OF LAWYERS

21. The Client may change lawyers or end its relationship with SS at any time. If the Client terminates the relationship without cause, the Client agrees to pay forthwith:

(a) all reasonable disbursements incurred by SS;

and, as SS may elect, either

(b) a fee in accordance with paragraph 4 above; or

(c) a fee as assessed under s. 24 of the *Solicitors Act*, R.S.O. 1990, c. S.15, as amended.

22. SS shall not withdraw from representation of the Client except for good cause. If SS withdraws from representation of the Client for good cause, the Client agrees to pay forthwith all reasonable disbursements incurred by SS and to also pay a fair and reasonable fee of SS in an amount as may be agreed upon at the time of termination, or, failing agreement, as an Ontario court may direct on an assessment in the ordinary manner under section 24 of the *Solicitors Act*, R.S.O. 1990, c.S.15, as amended.

23. For the purposes of the foregoing paragraphs 21 and 22, in the event that there is any disagreement between the Client and SS as to whether the termination or withdrawal of services has been for good cause, such issues shall be resolved by binding arbitration conducted in accordance with the *Ontario Arbitration Act, 1991*.

CLASS ACTION

24. The Client acknowledges and agrees that SS may act for tobacco growers and concurrently prosecute a class action on behalf of a class of tobacco growers who are the beneficiaries of agreements made between the Client and any of Rothman's Benson & Hedges Inc., Imperial Tobacco Canada Limited and JTI-MacDonald Corp. in the period January 1, 1989 to December 31, 1994 and who suffered damages. The Client agrees that in the event its relationship with SS is terminated, SS may act or continue to act for the above-mentioned class and may commence an action or may prosecute any action that was commenced on their behalf.

25. This Agreement may be executed in counterparts by facsimile with the same effect as if each party had signed the same document and all counterparts shall be construed together and will constitute one and the same Agreement. The Client acknowledges receipt of a duplicate copy of this Agreement, signed by SS and the Client and the Client shall retain a copy of this Agreement.

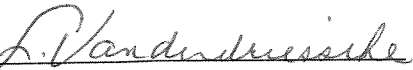
DATED AT WINDSOR THIS DAY OF FEBRUARY, 2009.

SUTTS, STROSBURG LLP

per: 

DATED: February 12, 2009

ONTARIO FLUE-CURED
TOBACCO GROWERS'
MARKETING BOARD

per: 

DATED: Feb 11 / 09

"I have authority to bind the Board"

SCHEDULE A
Example Calculations of SS's Disbursements and Contingency Fees

The following examples are intended to illustrate how the legal fees will be calculated under this agreement and is not intended as advice by SS on the settlement value or the expected recovery in the matter.

4.(a) Assuming that before the completion of examinations for discovery in the Action the Client recovers \$6,000,000 all inclusive of interest and costs, and SS incurred \$100,000 in disbursements (inclusive of GST), SS would be paid the following:

Fees 25% of \$6,000,000	\$1,500,000
GST thereon	75,000
Disbursements (inclusive of GST)	100,000
Total	\$1,675,000

The Client would receive the sum of \$4,325,000, being \$6,000,000 less \$1,675,000.

5.(b) Assuming that after the completion of examinations for discovery but before the commencement of a trial of the Action the Client recovers \$10,000,000 and is separately awarded \$200,000 of costs (for a total recovery \$10,200,000), and SS incurred \$100,000 in disbursements (plus GST), SS would be paid the following:

Fees 30% of \$10,200,000	\$3,060,000
GST thereon	153,000
Disbursements	100,000
GST on disbursements	5,000
Total	\$3,318,000

The Client would receive the sum of \$6,882,000, being \$10,200,000 less \$3,318,000.

This is **Exhibit “B”** referred to in the **Affidavit of Harvey T. Strosberg KC** sworn by Harvey T. Strosberg KC at the City of Boca Raton, in the County of Palm Beach in the State of Florida, United States of America, before me on **January 8, 2025**, at the City of Windsor, in the Province of Ontario, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink that reads "David Robins". The signature is fluid and cursive, with a horizontal line extending from the end of the name.

Commissioner for Taking Affidavits (or as case may be)

David Robins
LSO No. 42332R

(From the minutes of a Board Meeting held Tuesday, February 10, 2009.)

Moved by C. VanPaassen
Seconded by D. Gilvesy

RESOLVED that the firm Sutts, Strosberg LLP be retained as legal counsel for this Board to represent its interests as per the Contingency Fee Retainer presented.
Carried, 2 opposed.

This is **Exhibit “C”** referred to in the **Affidavit of Harvey T. Strosberg KC** sworn by Harvey T. Strosberg KC at the City of Boca Raton, in the County of Palm Beach in the State of Florida, United States of America, before me on **January 8, 2025**, at the City of Windsor, in the Province of Ontario, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, reading "David Robins". The signature is fluid and cursive, with a large, sweeping flourish at the end of the name.

Commissioner for Taking Affidavits (or as case may be)

David Robins
LSO No. 42332R

22. Moved by H. Chromczak
Seconded by C. VanPaassen

RESOLVED that the Board hereby confirms that Sutts, Strosberg LLP (SSLLP) is authorized and directed to commence the Class Action with the Board as co-plaintiff with some growers. SSLLP is directed to submit a draft statement of claim to the Board before it is issued;

AND FURTHER the Board agrees to indemnify and save harmless their co-plaintiffs in the Class Action, as well as their successors and assigns, from any and all costs awarded against them or any of them in the Class Action (the "Indemnity Agreement");

AND FURTHER the Chair of the Board is authorized to execute and deliver the Indemnity Agreement.
Carried.

23. F. Neukamm rejoined the meeting.
24. L. Vandendriessche reported on a meeting of the Tobacco Advisory Committee held March 2, 2009.
25. Board Members reviewed the draft 2009-2010 General Regulations.
26. Mr. Bryan Gilvesy, Chair of the Norfolk ALUS Pilot Project, joined the meeting to make a presentation to Board Members. Following questions and discussion, Mr. Gilvesy withdrew from the meeting.
27. Board Members discussed the upcoming meeting with the Ontario Farm Products Marketing Commission.
28. D. Gilvesy and M. Anseeuw reported on the Ontario Federation of Agriculture's "Agriculture Day" held March 3, 2009, in Toronto.
29. S. Symons and H. Chromczak reported on their visit to Queen's Park, Toronto, held March 4, 2009.
30. F. Neukamm reported on an Agricultural Round Table Meeting held March 4, 2009.

This is **Exhibit “D”** referred to in the **Affidavit of Harvey T. Strosberg KC** sworn by Harvey T. Strosberg KC at the City of Boca Raton, in the County of Palm Beach in the State of Florida, United States of America, before me on **January 8, 2025**, at the City of Windsor, in the Province of Ontario, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, reading "David Robins". The signature is fluid and cursive, with a prominent loop at the end of the name.

Commissioner for Taking Affidavits (or as case may be)

David Robins
LSO No. 42332R

Court File No.: 64402 CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

THE ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING BOARD,
ANDY J. JACKO, BRIAN BASWICK, RON KICHLER
and ARPAD DOBRENTEY

Plaintiffs

and

ROTHMANS, BENSON & HEDGES, INC.

Defendant

Proceeding Under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

November 5, 2009

Issued
by:


Local Registrar

Address of Court Office:
80 Dundas Street
London, ON N6A 6A5

TO:
ROTHMANS, BENSON & HEDGES INC.
1500 Don Mills Road
Toronto, ON M3B 3L1

CLAIM**DEFINITIONS**

1. The following terms used throughout this pleading have the meanings indicated:

- (a) “**Act**” means the *Farm Products Marketing Act*, R.S.O. 1990, c. F.9;
- (b) “**Agreements**” means the agreements made during the Class Period among the Board, Rothmans and other Canadian manufacturers of tobacco products under the Ontario Flue-Cured Tobacco Growers’ Marketing Plan, declared in force by the Farm Products Marketing Commission and set out in the chart at paragraph 17;
- (c) “**Baswick**” means Brian Baswick;
- (d) “**Board**” means the Ontario Flue-Cured Tobacco Growers’ Marketing Board;
- (e) “**Class Period**” means the period January 1, 1986 to December 31, 1996;
- (f) “**Class Members**” or “**Class**” means growers and producers in Ontario who sold tobacco through the Board pursuant to the terms of the Agreements during the Class Period;
- (g) “**CJA**” means the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (h) “**Dobrentey**” means Arpad Dobrentey;
- (i) “**Jacko**” means Andy J. Jacko;
- (j) “**Kichler**” means Ron Kichler;
- (k) “**Makeup Payment**” means the difference between the domestic price per pound of tobacco and the floor price per pound of tobacco; and
- (l) “**Rothmans**” means Rothmans, Benson & Hedges Inc.

RELIEF CLAIMED

2. The Board, Jacko, Baswick, Kichler and Dobrentey claim on their own behalf and on behalf of the Class:

- (a) an order pursuant to the *Act* certifying this action as a class proceeding and appointing them as the representatives of the Class;
- (b) \$50,000,000.00 for damages for breach of the Agreements;
- (c) an order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;
- (d) prejudgment and postjudgment interest pursuant to the *CJA* or at the internal rate of return earned on capital by Rothmans or its parent Rothmans Inc. or its affiliated corporations during the Class Period;
- (e) costs of this action on a full or substantial indemnity basis plus applicable taxes; and
- (f) such further and other relief as to this court deems just.

NATURE OF THIS ACTION

3. Pursuant to the *Act*, the Board made the Agreements with Rothmans and other Canadian manufacturers of tobacco products. The Agreements governed the purchase and sale of tobacco by the Class Members to Rothmans during the Class Period. The Board administered and processed the sale of tobacco by the Class Members to Rothmans pursuant to the Agreements, invoiced Rothmans, collected the proceeds of sale from Rothmans and, after deducting certain fees and charges, distributed the net proceeds of the sale to the Class Members.

4. Each of the Agreements provided that Rothmans would pay a guaranteed, minimum average price per pound for tobacco it intended to sell domestically and a lower floor price for tobacco it intended to sell for duty free and export purposes. In the result, Rothmans paid Class Members more for tobacco to be used for domestic purposes than for tobacco to be used for duty free and export purposes. Rothmans paid the Makeup Payments to the Board. The Board distributed the Makeup Payments to each Class Member, pro rata.

5. Rothmans was required to use the quantity of tobacco purchased and designated as being for duty free and export purposes only for such purposes.

6. The Agreements required Rothmans to accurately disclose to the Board's auditors the quantity of tobacco Rothmans delivered to the U.S. to be sold for duty free and export purposes. Rothmans breached the Agreements by failing to report to the Board's auditors the tobacco, designated as being for export and duty free purposes, which it knew or ought to have known would be smuggled into Canada.

7. In breach of the Agreements, Rothmans failed to pay to the Board the domestic price for the product ultimately smuggled into Canada. Rothmans failed to pay to the Board the Makeup Payments on these sales, which would have been distributed to the Class Members. As such, Rothmans caused the Class Members to suffer damages and loss.

THE PARTIES

8. The Board is a corporation without share capital established under the *Act* to control and regulate all aspects of the production and marketing of tobacco grown in Ontario. The Board's head office is located in Tillsonburg, Ontario.

9. Jacko is a farmer residing in Tillsonburg, Ontario. During the Class Period, Jacko grew tobacco in Ontario and sold it to Rothmans through the Board.

10. Baswick is a farmer residing in Delhi, Ontario. During the Class Period Baswick grew tobacco in Ontario and sold it to Rothmans through the Board.

11. Kichler is a retired farmer residing in Delhi, Ontario. During the Class Period, Kichler grew tobacco in Ontario and sold it to Rothmans through the Board.

12. Dobrentey is a farmer residing in Mount Brydges, Ontario. During the Class Period, Dobrentey grew tobacco in Ontario and sold it to Rothmans through the Board.

13. Each of the plaintiffs and each of the Class Members sold tobacco to Rothmans for both domestic and export purposes.

14. Rothmans is a Canadian corporation. It is a subsidiary of Rothmans Inc., a Canadian corporation. Rothmans' registered head office is at 1500 Don Mills Road,

Toronto, Ontario. At all material times, Rothmans carried on business in Canada and elsewhere as a manufacturer and distributor of tobacco products. During the Class Period, Rothmans purchased tobacco from the Class Members through the Board for domestic and export purposes.

THE AGREEMENTS

15. Pursuant to Ontario Regulation 435, the Farm Products Marketing Commission delegated supply management powers to the Board, including the power to establish a quota system, to license producers and buyers and to require all tobacco to be sold through the Board's auction exchanges.

16. The Agreements were the result of negotiations between the Board, Rothmans and other domestic cigarette manufacturers. The Agreements set the terms and conditions of the annual sale of tobacco, the pricing for tobacco and the quantities of tobacco to be produced and marketed.

17. The dates of the Agreements for each crop year are as follows:

Crop Year	Date of Agreement
1986	June 4, 1986
1987	April 22, 1987
1988	May 27, 1988
1989	May 31, 1989
1990	October 22, 1990
1991	September 3, 1991
1992	September 8, 1992
1993	April 29, 1993
1994	July 12, 1994
1995	April 12, 1995
1996	July 3, 1996

18. Each of the Agreements required Rothmans to pay to the Board a guaranteed average price per pound for tobacco for domestic use and floor prices for each pound of tobacco to be used for duty free or export purposes. Rothmans paid the Board for each purchase contract. The Board then deducted its applicable fees and paid the net amounts to the Class Members who sold the tobacco.

19. Each of the Agreements required Rothmans to deliver “proof of export” to the Board’s auditors, MacGillivray Partners LLP, accurately disclosing the quantity of tobacco Rothmans delivered to U.S. to be sold for duty free and export purposes.

20. The Agreements established a two-tier pricing system with the per pound price for duty-free and export tobacco being less than the per pound price of tobacco used for domestic purposes.

21. By way of example, for the 1986 crop, Rothmans agreed to pay a guaranteed average price of \$1.84 per pound for tobacco purchased for domestic purposes compared to the lower average floor price, which was calculated at the end of market for that year, at \$1.21 per pound for tobacco for duty free and export purposes.

22. In 1986, duty-free and export tobacco represented between 1% and 3% of all domestic tobacco sold through the Board.

23. Starting in 1987, taxes on tobacco products at the Canadian federal and provincial levels increased regularly and significantly until early 1994. During that same period, and largely as a result of the increased taxes, purchases in Canada of legal tobacco products for domestic use declined significantly.

24. In 1991, the Canadian government increased taxes and duties by 3 cents per cigarette (\$6 per carton). Applicable taxes and duties on other tobacco products were also increased. The provincial governments matched the federal tax increases with another \$6 per carton increase. The result was that applicable taxes and duties on cigarettes and tobacco increased by approximately 100%. In two years, the average price of a carton of cigarettes increased from \$26 to \$48 or higher. These tax increases were not applicable to export and duty free products.

25. During the Class Period, the amount of tobacco purchased by domestic manufacturers at the lower export or duty free price in comparison to the tobacco purchased for domestic account was as set out in the following chart:

CropYear	Ontario Duty Free and Export Poundage Purchased	Ontario Domestic Poundage Purchased	DFX/Domestic
1986	2,500,000	70,210,806	3.1%
1987	3,000,000	61,419,471	4.1%
1988	4,000,000	93,272,683	6.2%
1989	4,300,000	96,348,074	4.4%
1990	1,120,000	73,769,214	1.1%
1991	6,340,000	76,379,877	8.5%
1992	9,150,000	71,484,328	11.1%
1993	11,480,000	90,296,831	14.2%
1994	11,800,000	88,133,376	11.6%
1995	2,940,000	92,091,230	2.9%
1996	2,860,000	88,769,706	3.0%

26. During the Class Period, Rothmans designated tobacco as being for export and duty free purposes intending that it be smuggled into and sold in Canada. Rothmans did not package or stamp the cigarette packages and cartons to conform to the *Excise Act* so as to facilitate the smuggling of the cigarettes into Canada.

27. In the result, massive quantities of cigarettes and other tobacco products were smuggled back into Canada after Rothmans executed sham exports, leading to the distribution of these products throughout Canada on the black market.

28. On July 31, 2008, Rothmans pleaded guilty to violating section 241(1)(a) of the federal *Excise Act* by “aiding persons to sell or be in possession of tobacco products manufactured in Canada that were not packaged and were not stamped in conformity with the *Excise Act* and its amendments and the ministerial regulations”, thereby admitting publicly for the first time its involvement in smuggling operations.

29. In breach of the Agreements, Rothmans failed to report to the Board’s auditors the tobacco, designated as being for export and duty fee purposes, which it knew or ought to have known would be smuggled into Canada. It failed to pay the Makeup Payments on these sales to the Board, which would have been distributed to the Class Members, and thereby caused the Class Members to suffer damages and loss.

30. Rothmans did not pay the domestic price to the Board for the product ultimately smuggled to the domestic market as it was required to do under the Agreements.

31. Rothmans had the benefit of the Makeup Payments which it should have paid to the Board and used them for the purposes of its business and earned an average internal rate of return thereon which exceeded 10%.

32. The plaintiffs propose that this action be tried in the City of London.

November 5, 2009

SUTTS, STROSBURG LLP

Lawyers

600 - 251 Goyeau Street

Windsor, ON N9A 6V4

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LSUC# 126400

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Lawyers for the plaintiffs

THE ONTARIO FLUE-CURED TOBACCO
GROWERS' MARKETING BOARD et al.

vs. ROTHMANS, BENSON & HEDGES, INC.

Plaintiffs

Defendant

Court File No.

64402 CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDINGS COMMENCED AT LONDON

STATEMENT OF CLAIM

SUTTS, STROSBURG LLP

Lawyers
600 - 251 Goyeau Street
Windsor, ON N9A 6V4

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Fax: (519) 561-6203

Lawyers for the plaintiffs

FILE: 72.216.000

REF: HTS/df

This is **Exhibit “E”** referred to in the **Affidavit of Harvey T. Strosberg KC** sworn by Harvey T. Strosberg KC at the City of Boca Raton, in the County of Palm Beach in the State of Florida, United States of America, before me on **January 8, 2025**, at the City of Windsor, in the Province of Ontario, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "David Robins". The signature is fluid and cursive, with a large loop at the end of the last name.

Commissioner for Taking Affidavits (or as case may be)

David Robins
LSO No. 42332R

Court File No.:

64757

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN :

**THE ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING BOARD,
ANDY J. JACKO, BRIAN BASWICK, RON KICHLER
and ARPAD DOBRENTEY**

Plaintiffs

and

IMPERIAL TOBACCO CANADA LIMITED

Defendant

Proceeding Under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.


If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

December 2, 2009

Issued
by:


Local Registrar

Address of Court Office:
80 Dundas Street
London, ON N6A 6A5

TO:
IMPERIAL TOBACCO CANADA
LIMITED
3711 Saint-Antoine Street
Montréal, Québec
H4C 3P6

CLAIM

DEFINITIONS

1. The following terms used throughout this pleading have the meanings indicated:

- (a) “**Act**” means the *Farm Products Marketing Act*, R.S.O. 1990, c. F.9;
- (b) “**Agreements**” means the agreements made during the Class Period among the Board, Imperial and other Canadian manufacturers of tobacco products under the Ontario Flue-Cured Tobacco Growers’ Marketing Plan, declared in force by the Farm Products Marketing Commission and set out in the chart at paragraph 17;
- (c) “**Baswick**” means Brian Baswick;
- (d) “**Board**” means the Ontario Flue-Cured Tobacco Growers’ Marketing Board;
- (e) “**Class Period**” means the period January 1, 1986 to December 31, 1996;
- (f) “**Class Members**” or “**Class**” means growers and producers in Ontario who sold tobacco through the Board pursuant to the terms of the Agreements during the Class Period;
- (g) “**CJA**” means the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (h) “**Dobrentey**” means Arpad Dobrentey;
- (i) “**Imperial**” means Imperial Tobacco Canada Limited;
- (j) “**Jacko**” means Andy J. Jacko;
- (k) “**Kichler**” means Ron Kichler; and
- (l) “**Makeup Payment**” means the difference between the domestic price per pound of tobacco and the floor price per pound of tobacco.

RELIEF CLAIMED

2. The Board, Jacko, Baswick, Kichler and Dobrentey claim on their own behalf and on behalf of the Class:

- (a) an order pursuant to the *Act* certifying this action as a class proceeding and appointing them as the representatives of the Class;
- (b) \$50,000,000.00 for damages for breach of the Agreements;
- (c) an order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;
- (d) prejudgment and postjudgment interest pursuant to the *CJA* or at the internal rate of return earned on capital by Imperial or its parent Imperial Inc. or its affiliated corporations during the Class Period;
- (e) costs of this action on a full or substantial indemnity basis plus applicable taxes; and
- (f) such further and other relief as to this court deems just.

NATURE OF THIS ACTION

3. Pursuant to the *Act*, the Board made the Agreements with Imperial and other Canadian manufacturers of tobacco products. The Agreements governed the purchase and sale of tobacco by the Class Members to Imperial during the Class Period. The Board administered and processed the sale of tobacco by the Class Members to Imperial pursuant to the Agreements, invoiced Imperial, collected the proceeds of sale from Imperial and, after deducting certain fees and charges, distributed the net proceeds of the sale to the Class Members.

4. Each of the Agreements provided that Imperial would pay a guaranteed, minimum average price per pound for tobacco it intended to sell domestically and a lower floor price for tobacco it intended to sell for duty free and export purposes. In the result, Imperial paid Class Members more for tobacco to be used for domestic purposes than for tobacco to be used for duty free and export purposes. Imperial paid the Makeup Payments to the Board. The Board distributed the Makeup Payments to each Class Member, pro rata.

5. Imperial was required to use the quantity of tobacco purchased and designated as being for duty free and export purposes only for such purposes.

6. The Agreements required Imperial to accurately disclose to the Board's auditors the quantity of tobacco Imperial delivered to the U.S. to be sold for duty free and export purposes. Imperial breached the Agreements by failing to report to the Board's auditors the tobacco, designated as being for export and duty free purposes, which it knew or ought to have known would be smuggled into Canada.

7. In breach of the Agreements, Imperial failed to pay to the Board the domestic price for the product ultimately smuggled into Canada. Imperial failed to pay to the Board the Makeup Payments on these sales, which would have been distributed to the Class Members. As such, Imperial caused the Class Members to suffer damages and loss.

THE PARTIES

8. The Board is a corporation without share capital established under the *Act* to control and regulate all aspects of the production and marketing of tobacco grown in Ontario. The Board's head office is located in Tillsonburg, Ontario.

9. Jacko is a farmer residing in Tillsonburg, Ontario. During the Class Period, Jacko grew tobacco in Ontario and sold it to Imperial through the Board.

10. Baswick is a farmer residing in Delhi, Ontario. During the Class Period Baswick grew tobacco in Ontario and sold it to Imperial through the Board.

11. Kichler is a retired farmer residing in Delhi, Ontario. During the Class Period, Kichler grew tobacco in Ontario and sold it to Imperial through the Board.

12. Dobrentey is a farmer residing in Mount Brydges, Ontario. During the Class Period, Dobrentey grew tobacco in Ontario and sold it to Imperial through the Board.

13. Each of the plaintiffs and each of the Class Members sold tobacco to Imperial for both domestic and export purposes.

14. Imperial is a Canadian corporation. It is a wholly-owned indirect subsidiary of British American Tobacco PLC. Imperial's registered head office is at

3711 Saint-Antoine Street, Montréal, Québec. At all material times, Imperial carried on business in Canada and elsewhere as a manufacturer and distributor of tobacco products. During the Class Period, Imperial purchased tobacco from the Class Members through the Board for domestic and export purposes.

THE AGREEMENTS

15. Pursuant to Ontario Regulation 435, the Farm Products Marketing Commission delegated supply management powers to the Board, including the power to establish a quota system, to license producers and buyers and to require all tobacco to be sold through the Board's auction exchanges.

16. The Agreements were the result of negotiations between the Board, Imperial and other domestic cigarette manufacturers. The Agreements set the terms and conditions of the annual sale of tobacco, the pricing for tobacco and the quantities of tobacco to be produced and marketed.

17. The dates of the Agreements for each crop year are as follows:

Crop Year	Date of Agreement
1986	June 4, 1986
1987	April 22, 1987
1988	May 27, 1988
1989	May 31, 1989
1990	October 22, 1990
1991	September 3, 1991
1992	September 8, 1992
1993	April 29, 1993
1994	July 12, 1994
1995	April 12, 1995
1996	July 3, 1996

18. Each of the Agreements required Imperial to pay to the Board a guaranteed average price per pound for tobacco for domestic use and floor prices for each pound of tobacco to be used for duty free or export purposes. Imperial paid the Board for each purchase contract. The Board then deducted its applicable fees and paid the net amounts to the Class Members who sold the tobacco.

19. Each of the Agreements required Imperial to deliver “proof of export” to the Board’s auditors, MacGillivray Partners LLP, accurately disclosing the quantity of tobacco Imperial delivered to U.S. to be sold for duty free and export purposes.

20. The Agreements established a two-tier pricing system with the per pound price for duty-free and export tobacco being less than the per pound price of tobacco used for domestic purposes.

21. By way of example, for the 1986 crop, Imperial agreed to pay a guaranteed average price of \$1.84 per pound for tobacco purchased for domestic purposes compared to the lower average floor price, which was calculated at the end of market for that year, at \$1.26 per pound for tobacco for duty free and export purposes.

22. In 1986, duty-free and export tobacco represented between 1% and 3% of all domestic tobacco sold through the Board.

23. Starting in 1987, taxes on tobacco products at the Canadian federal and provincial levels increased regularly and significantly until early 1994. During that same period, and largely as a result of the increased taxes, purchases in Canada of legal tobacco products for domestic use declined significantly.

24. In 1991, the Canadian government increased taxes and duties by 3 cents per cigarette (\$6 per carton). Applicable taxes and duties on other tobacco products were also increased. The provincial governments matched the federal tax increases with another \$6 per carton increase. The result was that applicable taxes and duties on cigarettes and tobacco increased by approximately 100%. In two years, the average price of a carton of cigarettes increased from \$26 to \$48 or higher. These tax increases were not applicable to export and duty free products.

25. During the Class Period, the amount of tobacco purchased by domestic manufacturers at the lower export or duty free price in comparison to the tobacco purchased for domestic account was as set out in the following chart:

CropYear	Ontario Duty Free and Export Poundage Purchased	Ontario Domestic Poundage Purchased	DFX/Domestic
1986	2,500,000	70,210,806	3.1%
1987	3,000,000	61,419,471	4.1%
1988	4,000,000	93,272,683	6.2%
1989	4,300,000	96,348,074	4.4%
1990	1,120,000	73,769,214	1.1%
1991	6,340,000	76,379,877	8.5%
1992	9,150,000	71,484,328	11.1%
1993	11,480,000	90,296,831	14.2%
1994	11,800,000	88,133,376	11.6%
1995	2,940,000	92,091,230	2.9%
1996	2,860,000	88,769,706	3.0%

26. During the Class Period, Imperial designated tobacco as being for export and duty free purposes intending that it be smuggled into and sold in Canada. Imperial did not package or stamp the cigarette packages and cartons to conform to the *Excise Act* so as to facilitate the smuggling of the cigarettes into Canada.

27. In the result, massive quantities of cigarettes and other tobacco products were smuggled back into Canada after Imperial executed sham exports, leading to the distribution of these products throughout Canada on the black market.

28. On July 31, 2008, Imperial pleaded guilty to violating section 241(1)(a) of the federal *Excise Act* by “aiding persons to sell or be in possession of tobacco products manufactured in Canada that were not packaged and were not stamped in conformity with the *Excise Act* and its amendments and the ministerial regulations”, thereby admitting publicly for the first time its involvement in smuggling operations.

29. In breach of the Agreements, Imperial failed to report to the Board’s auditors the tobacco, designated as being for export and duty free purposes, which it knew or ought to have known would be smuggled into Canada. It failed to pay the Makeup Payments on these sales to the Board, which would have been distributed to the Class Members, and thereby caused the Class Members to suffer damages and loss.

30. Imperial did not pay the domestic price to the Board for the product ultimately smuggled to the domestic market as it was required to do under the Agreements.

31. Imperial had the benefit of the Makeup Payments which it should have paid to the Board and used them for the purposes of its business and earned an average internal rate of return thereon which exceeded 10%.

SERVICE OUTSIDE OF ONTARIO

32. This originating process may be served without court order outside Ontario because the claim is:

- (a) in respect of a contract made in Ontario (rule 17.02(f)(i));
- (b) in respect of a breach of contract that was committed in Ontario (rule 17.02(f)(iv));
- (c) in respect of damages sustained in Ontario arising from a breach of contract wherever committed (rule 17.02(h)); and
- (d) against a person carrying on business in Ontario (rule 17.02(p)).

PLACE OF TRIAL

33. The plaintiffs propose that this action be tried in the City of London.

December 2, 2009

SUTTS, STROSBURG LLP

Lawyers

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Windsor, ON N9A 6V4

HARVEY T. STROSBURG, Q.C.

LSUC# 126400

WILLIAM V. SASSO

LSUC# 121341

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Fax: (519) 561-6203

Lawyers for the plaintiffs

64757

THE ONTARIO FLUE-CURED TOBACCO
GROWERS' MARKETING BOARD et al.

vs. IMPERIAL TOBACCO CANADA LIMITED

Plaintiffs

Defendant

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDINGS COMMENCED AT LONDON

STATEMENT OF CLAIM

SUTTS, STROSBURG LLP
Lawyers
600 - 251 Goyeau Street
Windsor, ON N9A 6V4

HARVEY T. STROSBURG, Q.C.
LSUC# 126400
Tel: (519) 561-6228
Fax: (519) 561-6203

Lawyers for the plaintiffs

This is **Exhibit “F”** referred to in the **Affidavit of Harvey T. Strosberg KC** sworn by Harvey T. Strosberg KC at the City of Boca Raton, in the County of Palm Beach in the State of Florida, United States of America, before me on **January 8, 2025**, at the City of Windsor, in the Province of Ontario, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, reading "David Robins". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Commissioner for Taking Affidavits (or as case may be)

David Robins
LSO No. 42332R

Court File No.: 1056/10 CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

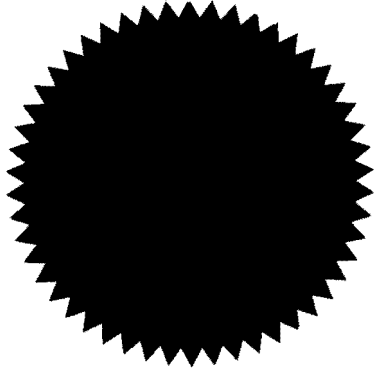
**THE ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING BOARD,
ANDY J. JACKO, BRIAN BASWICK, RON KICHLER
and ARPAD DOBRENTEY**

Plaintiffs

and

JTI-MACDONALD CORP.

Defendant



Proceeding Under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

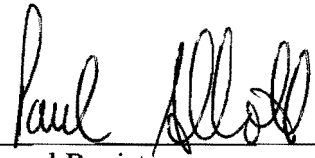
If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

April 23, 2010

Issued
by:


Local Registrar

Address of Court Office:
80 Dundas Street
London, ON N6A 6A5

TO:
JTI-MACDONALD CORP.
1 Robert Speck Parkway
Suite 1601
Mississauga, ON L4Z 0A2

CLAIM

DEFINITIONS

1. The following terms used throughout this pleading have the meanings indicated:

- (a) “**Act**” means the *Farm Products Marketing Act*, R.S.O. 1990, c. F.9;
- (b) “**Agreements**” means the agreements made during the Class Period among the Board, JTI and other Canadian manufacturers of tobacco products under the Ontario Flue-Cured Tobacco Growers’ Marketing Plan, declared in force by the Farm Products Marketing Commission and set out in the chart at paragraph 18 below;
- (c) “**Baswick**” means Brian Baswick;
- (d) “**Board**” means the Ontario Flue-Cured Tobacco Growers’ Marketing Board;
- (e) “**Class Members**” or “**Class**” means growers and producers in Ontario who sold tobacco through the Board pursuant to the terms of the Agreements during the Class Period;
- (f) “**Class Period**” means the period January 1, 1986 to December 31, 1996;
- (g) “**CJA**” means the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (h) “**Dobrentey**” means Arpad Dobrentey;
- (i) “**Jacko**” means Andy J. Jacko;
- (j) “**JTI**” means JTI – Macdonald Corp.; and
- (k) “**Kichler**” means Ron Kichler.

RELIEF CLAIMED

2. The Board, Jacko, Baswick, Kichler and Dobrentey claim on their own behalf and on behalf of the Class:
- (a) an order pursuant to the *Act* certifying this action as a class proceeding and appointing them as the representatives of the Class;
 - (b) \$50,000,000.00 for damages for breach of the Agreements;
 - (c) an order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;
 - (d) prejudgment and postjudgment interest pursuant to the *CJA* or at the internal rate of return earned on capital by JTI or its parent JTI Inc. or its affiliated corporations during the Class Period;
 - (e) costs of this action on a full or substantial indemnity basis plus applicable taxes; and
 - (f) such further and other relief as to this court deems just.

NATURE OF THIS ACTION

3. Pursuant to the *Act*, the Board made the Agreements with JTI and other Canadian manufacturers of tobacco products. The Agreements governed the purchase and sale of tobacco by the Class Members to JTI during the Class Period. The Board administered and processed the sale of tobacco by the Class Members to JTI pursuant to the Agreements, invoiced JTI, collected the proceeds of sale from JTI and, after deducting certain fees and charges, distributed the net proceeds of the sale to the Class Members.

4. Each of the Agreements provided that JTI would pay a guaranteed, minimum average price per pound for tobacco it intended to sell domestically and a lower price for tobacco it intended to sell for duty free and export purposes. In the result, JTI paid Class Members more for tobacco to be used for domestic purposes than for tobacco to be used for duty free and export purposes.

5. JTI was required to use the quantity of tobacco purchased and designated as being for duty free and export purposes only for such purposes.

6. The Agreements required JTI to accurately disclose to the Board's auditors the quantity of tobacco JTI delivered to the U.S. to be sold for duty free and export purposes. JTI breached the Agreements by failing to report to the Board's auditors that certain tobacco, designated as being for export and duty free purposes, would be smuggled into Canada and sold domestically.

7. In breach of the Agreements, JTI failed to pay to the Board for distribution to the class members the domestic price for the product ultimately smuggled into Canada. As such, JTI caused the Class Members to suffer damages and loss.

THE PARTIES

8. The Board is a corporation without share capital established under the *Act* to control and regulate all aspects of the production and marketing of tobacco grown in Ontario. The Board's head office is located in Tillsonburg, Ontario.

9. Jacko is a farmer residing in Tillsonburg, Ontario. During the Class Period, Jacko grew tobacco in Ontario and sold it to JTI through the Board.

10. Baswick is a farmer residing in Delhi, Ontario. During the Class Period, Baswick grew tobacco in Ontario and sold it to JTI through the Board.

11. Kichler is a retired farmer residing in Delhi, Ontario. During the Class Period, Kichler grew tobacco in Ontario and sold it to JTI through the Board.

12. Dobrentey is a farmer residing in Mount Brydges, Ontario. During the Class Period, Dobrentey grew tobacco in Ontario and sold it to JTI through the Board.

13. Each of the plaintiffs and each of the Class Members sold tobacco to JTI for both domestic and export purposes.

14. JTI is a Nova Scotia corporation. It is a wholly-owned indirect subsidiary of Japan Tobacco Inc. JTI's registered head office is at Suite 1600, George Street, Halifax, Nova Scotia. JTI's chief place of business is at 1 Robert Speck Parkway, Suite

1601, Mississauga, Ontario. At all material times, JTI carried on business in Canada and elsewhere as a manufacturer and distributor of tobacco products.

15. During the Class Period, JTI purchased tobacco from the Class Members through the Board for domestic and export purposes. Before its purchase by Japan Tobacco Inc., on or about May 11, 1999, it was named RJR-Macdonald Inc. and then RJR-Macdonald Corp.

THE AGREEMENTS

16. Pursuant to Ontario Regulation 435, the Farm Products Marketing Commission delegated supply management powers to the Board, including the power to establish a quota system, to license producers and buyers and to require all tobacco to be sold through the Board's auction exchanges.

17. The Agreements were the result of negotiations between the Board, JTI and other domestic cigarette manufacturers. The Agreements set the terms and conditions of the annual sale of tobacco, the pricing for tobacco and the quantities of tobacco to be produced and marketed.

18. The dates of the Agreements for each crop year are as follows:

Crop Year	Date of Agreement
1986	June 4, 1986
1987	April 22, 1987
1988	May 27, 1988
1989	May 31, 1989
1990	October 22, 1990
1991	September 3, 1991
1992	September 8, 1992
1993	April 29, 1993
1994	July 12, 1994
1995	April 12, 1995
1996	July 3, 1996

19. Each of the Agreements required JTI to pay to the Board a guaranteed average price per pound for tobacco for domestic use and floor prices for each pound of tobacco to be used for duty free or export purposes. JTI paid the Board for each purchase contract. The Board then deducted its applicable fees and paid the net amounts to the Class Members who sold the tobacco.

20. Each of the Agreements required JTI to deliver “proof of export” to the Board’s auditors, MacGillivray Partners LLP, accurately disclosing the quantity of tobacco JTI delivered to U.S. to be sold for duty free and export purposes.

21. The Agreements established a two-tier pricing system with the per pound price for duty-free and export tobacco being less than the per pound price of tobacco used for domestic purposes.

22. By way of example, for the 1986 crop, JTI agreed to pay a guaranteed average price of \$1.84 per pound for tobacco purchased for domestic purposes compared

to the lower average floor price, which was calculated at the end of market for that year, at \$1.11 per pound for tobacco for duty free and export purposes.

23. In 1986, duty-free and export tobacco represented between 1% and 3% of all domestic tobacco sold through the Board.

24. Starting in 1987, taxes on tobacco products at the Canadian federal and provincial levels increased regularly and significantly until early 1994. During that same period, and largely as a result of the increased taxes, purchases in Canada of legal tobacco products for domestic use declined significantly.

25. In 1991, the Canadian government increased taxes and duties by 3 cents per cigarette (\$6 per carton). Applicable taxes and duties on other tobacco products were also increased. The provincial governments matched the federal tax increases with another \$6 per carton increase. The result was that applicable taxes and duties on cigarettes and tobacco increased by approximately 100%. In two years, the average price of a carton of cigarettes increased from \$26 to \$48 or higher. These tax increases were not applicable to export and duty free products.

26. During the Class Period, the amount of tobacco purchased by domestic manufacturers at the lower export or duty free price in comparison to the tobacco purchased for domestic account was as set out in the following chart:

Crop Year	Ontario Duty Free and Export Poundage Purchased	Ontario Domestic Poundage Purchased	DFX/Domestic
1986	2,500,000	70,210,806	3.1%
1987	3,000,000	61,419,471	4.1%
1988	4,000,000	93,272,683	6.2%
1989	4,300,000	96,348,074	4.4%
1990	1,120,000	73,769,214	1.1%
1991	6,340,000	76,379,877	8.5%
1992	9,150,000	71,484,328	11.1%
1993	11,480,000	90,296,831	14.2%
1994	11,800,000	88,133,376	11.6%
1995	2,940,000	92,091,230	2.9%
1996	2,860,000	88,769,706	3.0%

27. During the Class Period, JTI designated certain of its tobacco purchases as being for export and duty free purposes intending that it be smuggled into and sold in Canada. JTI did not package or stamp the cigarette packages and cartons to conform to the *Excise Act* so as to facilitate the smuggling of the cigarettes into Canada.

28. In the result, massive quantities of cigarettes and other tobacco products were smuggled back into Canada after JTI executed sham exports, leading to the distribution of these products throughout Canada on the black market.

29. On April 13, 2010, JTI pleaded guilty to violating section 241(1)(a) of the federal *Excise Act* by “aiding persons to sell or be in possession of tobacco products manufactured in Canada that were not packaged and were not stamped in conformity

with the *Excise Act* and its amendments and the ministerial regulations”, thereby admitting publicly for the first time its involvement in smuggling operations.

30. In breach of the Agreements, JTI:
- (a) failed to report to the Board’s auditors the tobacco, designated as being for export and duty fee purposes, which it knew or ought to have known would be smuggled into Canada;
 - (b) failed to pay the domestic price for the purchases; and
 - (c) thereby caused the Class Members to suffer damages and loss.
31. JTI did not pay the domestic price to the Board for the product ultimately smuggled to the domestic market as it was required to do under the Agreements.
32. JTI had the benefit of the tobacco for which it paid the lower price and for which it should have paid to the Board the higher domestic price. The plaintiffs seek interest on this price differential or at the internal rate of return earned on capital by JTI or its parent JTI Inc. or its affiliated corporations during the Class Period.

PLACE OF TRIAL

33. The plaintiffs propose that this action be tried in the City of London.

April 23, 2010

SUTTS, STROSBURG LLP

Lawyers

600 - 251 Goyeau Street

Windsor, ON N9A 6V4

HARVEY T. STROSBURG, Q.C.

LSUC# 126400

WILLIAM V. SASSO

LSUC# 12134I

Tel: (519) 561-6228

Fax: (519) 561-6203

Lawyers for the plaintiffs

THE ONTARIO FLUE-CURED TOBACCO
GROWERS' MARKETING BOARD et al.

v. JTI-MACDONALD CORP.

Court File No.

1056/10 CP

Plaintiffs

Defendant

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDINGS COMMENCED AT LONDON

STATEMENT OF CLAIM

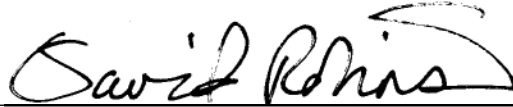
SUTTS, STROSBURG LLP
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HARVEY T. STROSBURG, Q.C.
LSUC# 126400
WILLIAM V. SASSO
LSUC# 121341
Tel: (519) 561-6228
Fax: (519) 561-6203

Lawyers for the plaintiffs

FILE: 72.216.003
REF: HTS/ig

This is **Exhibit “G”** referred to in the **Affidavit of Harvey T. Strosberg KC** sworn by Harvey T. Strosberg KC at the City of Boca Raton, in the County of Palm Beach in the State of Florida, United States of America, before me on **January 8, 2025**, at the City of Windsor, in the Province of Ontario, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read "David Robins". The signature is fluid and cursive, with a large loop at the end of the last name.

Commissioner for Taking Affidavits (or as case may be)

David Robins
LSO No. 42332R

**Resolution of the Ontario Flue-Cured Tobacco Growers' Marketing Board (the
"Board")**

**Re: *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended and in
the Plan of Compromise or Arrangement of JTI-MacDonald Corp.**

**Re: *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended and in
the Plan of Compromise or Arrangement of Imperial Tobacco Canada Limited
and Imperial Tobacco Company Limited**

RECITALS

Pursuant to former Ontario Regulation 435, established under the *Farm Products Marketing Act*, the Board may use any class of licence fees, service charges and other money payable to it for the purposes of paying the expenses of the Board, carrying out and enforcing the Act and the regulations and carrying out the purposes of the plan, and the Board may require the price or prices payable or owing to the producers for tobacco to be paid to or through the Board and to recover such price or prices by suit in a court of competent jurisdiction.

On July 31, 2008, Rothmans Benson & Hedges Inc. ("RBH") and Imperial Tobacco Canada Limited ("ITCL") each pleaded guilty to a single count of violating section 240(1)(a) of the federal *Excise Act* by "aiding persons to sell or be in possession of tobacco products manufactured in Canada that were not packaged and were not stamped in conformity with the *Excise Act* and its amendments and the Ministerial regulations."

On February 10, 2009, the Board passed a resolution to retain Strosberg Sasso Sutts LLP ("SSS LLP", previously known as Sutts, Strosberg LLP), to investigate and prosecute class actions on behalf of Ontario flue-cured tobacco growers and producers for compensation arising from the failure of RBH, ITCL and JTI to pay adjusted prices pursuant to agreements they made with the Board for tobacco they purchased for export at reduced prices that was imported into Canada for domestic sale (the "Class Actions")

and pursuant to this resolution, on February 11, 2009, the Board executed a contingency fee retainer agreement with SSS LLP.

On March 8, 2019, JTI sought and obtained protection under Initial Order pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") before the Ontario Superior Court of Justice ("Court"), court file number 19-CV-615862-00CL.

On March 12, 2019, ITCL and Imperial Tobacco Company Limited sought and obtained protection under Initial Order pursuant to the CCAA before the Court, court file no. 19-CV-616077-00CL.

It is expected that RBH will seek protection pursuant to the CCAA.

The Initial Orders stay the proceedings by the Board and Growers as well as all other pending actions in Canada against the Tobacco Manufacturers and enjoin creditors from starting or continuing any proceedings that affect the business or property of the Tobacco Manufacturers.

BE IT RESOLVED THAT:

1. The Board hereby retains, authorizes and directs SSS LLP to represent the Board's interests in connection with the JTI and ITCL CCAA proceedings.
2. The Board hereby retains, authorizes and directs SSS LLP to represent the Board's interests in connection with RBH in any CCAA proceedings.
3. The Board agrees to pay SSS LLP's reasonable fees for its services at the hourly rate of \$500 for services provided by Harvey Strosberg, William Sasso, David Robins, and that such fees may be increased from time to time in the usual and ordinary course of business, and necessary disbursements in relation to this retainer.

4. The Board agrees to pay SSS LLP's interim and final accounts both for fees and disbursements within 30 days of being rendered together with interest on overdue accounts at the rate charged by SSS LLP from time to time.

This resolution is hereby passed and consented to by the directors of the Board, as evidenced by the necessary signature hereto.

DATED to take effect as and from the 4th day of April, 2019


David Van DeVelde, Chair

#1665014

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

**AFFIDAVIT ANTHONY DECAROLIS
(Sworn January 13, 2025)**

I, **ANTHONY DECAROLIS**, of the Hamlet of Walsh, in Norfolk County, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Chair of the Ontario Flue-Cured Tobacco Growers' Marketing Board ("**Tobacco Board**"). As such, I have personal knowledge of the matters to which I hereinafter depose, except where I indicate that my information was obtained from other sources, in which case I state the source of my information and believe it to be true.
2. For consistency of reference, the definitions from the CCAA Plans are used throughout this affidavit.

3. The “**Tobacco Producers**” are defined in the CCAA Plans as collectively, the Tobacco Board, Andy J. Jacko, Brian Baswick, Ron Kichler, Arpad Dobrentey and all other tobacco growers and producers, including any successors or assigns, who sold their tobacco through the Board pursuant to the annual contracts (called “Heads of Agreement”) made with Imperial, RBH and JTIM from January 1, 1986 to December 31, 1996.

4. I became a director of the Tobacco Board in 2017. I was elected the Chair of the Tobacco Board as of March 2022. Prior to that time, I had little, if any, knowledge of the particulars concerning the Tobacco Board’s class action proceedings initiated on behalf of the Tobacco Producers. Accordingly, the matters I attest to in the paragraphs that follow have been based primarily on advice received from Counsel for the Tobacco Producers, my review of relevant documentation, advice from the Tobacco Board’s corporate counsel, Geoffrey Spurr of the law firm, Wilson, Spurr LLP, and the former Chair, David Van De Velde.

History of Chairs of the Tobacco Board

5. During the period of the Tobacco Producers’ Actions from November 2008 to date, there have been four (4) Chairs, namely, Linda Vandendriessche, Fred Neukamm, David Van DeVelde and myself.

6. In 2003, Fred Neukamm was elected Chair of the Tobacco Board. He held that position until October 2007. From October 2007 until June 2009, Mr. Neukamm was a director of the Tobacco Board. During April to October 2008, he also served as interim Vice-Chair of the Tobacco Board. From November 2008 to June 1, 2009, Linda Vandendriessche was Chair of the Tobacco Board.

7. On June 1, 2009 to December 31, 2017, Mr. Neukamm was Chair of the Tobacco Board appointed by the Farm Products Marketing Commission (“**Commission**”).

8. From about 2002 until October 2007, Mr. Neukamm was a Tobacco Advisory Committee (“**TAC**”) member representing the Tobacco Board and its tobacco growers. The TAC was a planning committee established in 1986 by the Commission to develop long-term plans for the production and marketing of flue-cured tobacco in Ontario. The TAC membership included representatives of the Ontario and Federal Governments, each of Imperial, RBH and JTIM, and the Tobacco Board. One of the stated objectives of the TAC was the elimination of contraband tobacco products in the Canadian domestic market.

9. From January 1, 2018 to March 2022, David Van DeVelde was Chair of the Tobacco Board.

10. Counsel for the Tobacco Producers reported and communicated throughout with all Chairs of the Tobacco Board during the period of the Tobacco Producers’ Actions and the Tobacco CCAA Proceedings and during the Tobacco CCAA Proceedings also corresponded with the Tobacco Board’s corporate lawyer, Geoffrey Spurr of the law firm of Wilson Spurr Lawyers LLP.

11. Following the commencement of the CCAA Proceedings in March 2019, Mr. Neukamm was retained by the Tobacco Board as a consultant to, among other things, assist the Tobacco Board and counsel for the Tobacco Producers in advising on the resolution of its claims against the Tobacco Companies. Mr. Neukamm continued to serve as adviser to the Tobacco Producers and has worked with Counsel for the Tobacco Producers during the Tobacco CCAA Proceedings.

Powers and Governance of the Tobacco Board

12. The Tobacco Board is a corporation without share capital established by regulation under the *Farm Products Marketing Act*, R.S.O. 1990, c. F.9 (the “**Act**”). Prior to the commencement of the Tobacco Producers’ Actions against Imperial, RBH and JTIM, the primary role of the Tobacco Board was to regulate and control the production and marketing of Ontario-grown tobacco using a quota system. The Tobacco Board was established for specific purposes relating to the marketing of tobacco, including the negotiation of agreements with Imperial, RBH and JTIM on behalf of the Tobacco Producers and the right to sue in its own name under those agreements.

13. At the times material to the Tobacco Producers’ Actions, the Tobacco Board had the power, among other things, to:

- (a) Licence all persons before they commence or continue to engage in the production or marketing of tobacco;
- (b) Prohibit persons from engaging in the production or marketing of tobacco except under the authority of a licence issued by the Tobacco Board;
- (c) Control and regulate the marketing of tobacco, including the times and places at which tobacco could be marketed;
- (d) Control and regulate agreements entered into by the Producers with persons engaged in marketing or processing tobacco;
- (e) Require Producers to only market their tobacco through the Tobacco Board;
- (f) Prohibit any person from processing, packing or packaging any tobacco that has not been sold by or through the Tobacco Board;
- (g) Make agreements relating to the marketing of tobacco through the Tobacco Board and prescribing the forms and the terms and conditions of such agreements; and
- (h) Do such acts, make such orders and issue such directions as are necessary to enforce the tobacco marketing regulations and plan.

14. The requirements for the election of the Tobacco Board's directors by the Tobacco Producers were established by Ontario regulations made pursuant to the Act. The Tobacco Board consisted of at least 10 elected directors, representing each of the tobacco growing districts in Ontario, plus an additional member appointed by the elected members. The Tobacco Board's Chair and Vice-Chair were elected annually by the directors.

15. The Commission is a statutory body. The Commission has broad powers to regulate virtually all aspects of the production and marketing of agricultural products in Ontario, as well as power to delegate many of its own powers, in whole or in part, to marketing boards such as the Tobacco Board.

16. Pursuant to Ontario regulations, the Commission delegated wide supply management powers to the Tobacco Board to enable the Tobacco Board to promote, regulate and control tobacco marketing and production. These included the powers noted above to establish a quota system, to licence Tobacco Producers and buyers, and to require all tobacco to be sold through the Tobacco Board's auctions.

17. The Tobacco Board had the sole authority to contract with Imperial, RBH and JTIM for the sale of tobacco, to enforce the agreements made, and to recover payments owed by Imperial, RBH and JTIM in respect to the tobacco sales that are the subject of the Tobacco Producers' Actions.

18. Section 8 of regulation 383 in respect of tobacco (1980) and its successor regulation 435 (1990) provided that the Commission authorizes the Tobacco Board "to require the price or prices payable or owing to the producers for tobacco to be paid to or through" the Tobacco Board and

authorizes the Tobacco Board “to recover such price or prices by suit in a court of competent jurisdiction.”

19. As Chair of the Tobacco Board, I have consulted and provided instructions with respect to the Tobacco Producers’ Actions and the Tobacco CCAA Proceedings to Counsel for the Tobacco Producers from the date I became the Chair. I have also consulted with, provided instructions and received advice from Geoffrey Spurr.

20. I understand that on February 11, 2009, the Tobacco Board signed a retainer and contingency fee agreement with Sutts Strosberg LLP in respect of the prosecution of the Tobacco Producers’ Actions (the “**Contingency Fee Agreement**”). I further understand that by resolution dated April 4, 2019, the Tobacco Board retained Strosberg Sasso Sutts LLP to represent the Tobacco Producers’ interests in the CCAA (the “**CCAA Proceedings Fee Agreement**”).

21. I have reviewed the affidavits of Harvey T. Strosberg, K.C. and Geoffrey Spurr filed. The Tobacco Board has approved the compensation sought by Strosberg Wingfield Sasso LLP for fees and disbursements as summarized below in the amount of \$3,138,314.49 to be paid to Strosberg Wingfield Sasso LLP out of the Tobacco Producers’ Settlement Amount.


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	<u>\$ 141,960.98</u>
<i>Less Credit</i> – Fees paid under the CCAA Proceedings Fee Agreement	<u>\$ 831,018.75</u>
Sub-total Fees	\$2,777,020.27
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

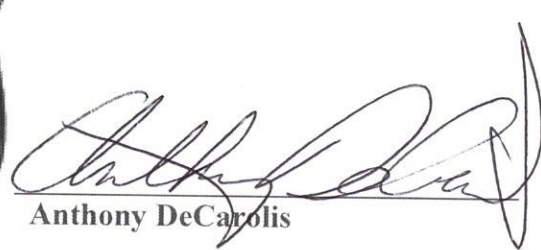
22. I believe the fee sought by Strosberg Wingfield Sasso LLP is consistent with the terms of the Contingency Fee Agreement made at the commencement of the Tobacco Producers' Actions and the further CCAA Proceedings Fee Agreement, and as Chair of the Tobacco Board, I approve payment of \$3,138,314.49 sought by Strosberg Wingfield Sasso LLP.

23. This affidavit is sworn in support of a motion for an Order:

- (a) approving the Counsel for the Tobacco Producers' Fee (as defined in the CCAA Plans); and
- (b) directing final payment from the Tobacco Producers' Settlement Amount to Strosberg Wingfield Sasso LLP in Trust in the amount of \$3,138,314.49, or such other amount as this Court may deem just for Counsel for the Tobacco Producers' Fee.

SWORN remotely by **Anthony DeCarolis**, stated as being located in the Hamlet of Walsh, Norfolk County, Province of Ontario, before me at the City of Windsor, in the County of Essex, Province of Ontario, on January 13, 2025, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.


A Commissioner for taking affidavits


Anthony DeCarolis

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

**AFFIDAVIT OF GEOFFREY SPURR
(Sworn January 13, 2025)**

I, **GEOFFREY SPURR**, of the City of St. Catharines, in the Regional Municipality of Niagara, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a lawyer for the Ontario Flue-Cured Tobacco Growers' Marketing Board ("**Tobacco Board**"). As such, I have personal knowledge of the matters to which I hereinafter depose, except where I indicate that my information was obtained from other sources, in which case I state the source of my information and believe it to be true.

2. For consistency of reference, the definitions from the CCAA Plans are used throughout this affidavit.

3. The “**Tobacco Producers**” are defined in the CCAA Plans as collectively, the Tobacco Board, Andy J. Jacko, Brian Baswick, Ron Kichler, Arpad Dobrentey and all other tobacco growers and producers, including any successors or assigns, who sold their tobacco through the Ontario Flue-Cured Tobacco Growers’ Marketing Board pursuant to the annual Heads of Agreement made with Imperial, RBH and JTIM from January 1, 1986 to December 31, 1996, and “Tobacco Producer” means any one of them.

4. I have consulted with the Chairs of the Tobacco Board, Fred Neukamm and Anthony DeCarolis, with respect to the Tobacco Producers’ Actions and these Tobacco CCAA Proceedings. I have provided legal advice during the period of these CCAA Proceedings to the Tobacco Board.

5. I have corresponded since the commencement of these Tobacco CCAA Proceedings with Counsel for the Tobacco Producers, primarily by letters, e-mails and phone calls with William V. Sasso. Mr. Sasso and I have had discussions with respect to the Tobacco Producers’ Actions and Tobacco CCAA Proceedings.

6. I have consulted with Mr. Sasso and the Tobacco Board in regard to protecting the claims of the Tobacco Producers during these Tobacco CCAA Proceedings and have advised the Tobacco Board on the terms of the legal retainer with Counsel for the Tobacco Producers following the stay of the Tobacco Producers’ Actions under the terms of the Initial Orders made in the Tobacco CCAA Proceedings.

7. In making this affidavit, I have also reviewed the affidavits of Harvey T. Strosberg, K.C. and Anthony DeCarolis, Chair of the Tobacco Board, and exhibits thereto and discussed with Anthony DeCarolis the appropriateness of the Tobacco Board consenting to an order for payment

of Counsel for the Tobacco Producers' Fee in the amount sought of \$3,138,314.49 to Strosberg Wingfield Sasso LLP out of the Tobacco Producers' Settlement Amount.

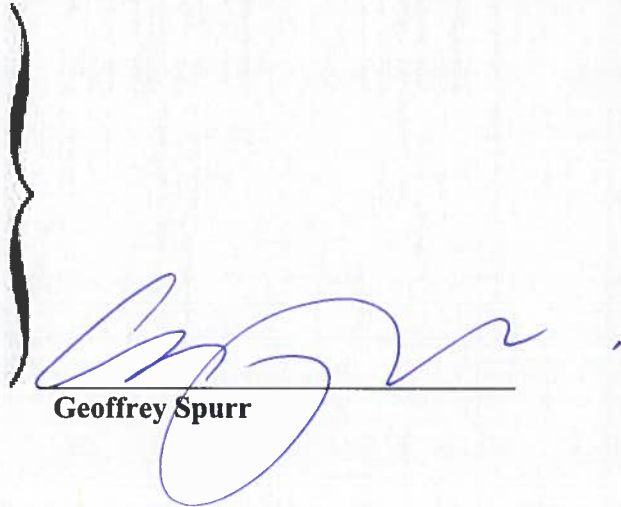
8. In that regard, I have advised the Tobacco Board that the Counsel for the Tobacco Producers' Fee sought accords and is consistent with the terms of both the Contingency Fee Retainer and the CCAA Proceedings Fee Retainer made between the Tobacco Board and Strosberg Wingfield Sasso LLP.

9. I make this affidavit in support of the fee approval motion by Counsel for the Tobacco Producers and for no improper purpose.

SWORN before me at the City of St. Catharines, in the Regional Municipality of Niagara, Province of Ontario, on January 13, 2025.



A Commissioner for taking affidavits



Geoffrey Spurr

#2052176

**Suzanna Elizabeth Segato,
Commissioner, etc., Province of
Ontario, for Wilson, Spurr LLP,
Barristers and Solicitors
Expires March 26, 2025.**

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**

THE HONOURABLE CHIEF) DAY, THE DAY OF
)
JUSTICE MORAWETZ) , 2025.

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

ORDER

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

THIS MOTION, made by Strosberg Wingfield Sasso LLP (formerly Strosberg Sasso Sutts LLP and Sutts Strosberg LLP), Counsel for the Tobacco Producers, for an Order approving the Counsel for the Tobacco Producers’ Fee, was heard this day by video conference.

ON READING the notice of motion, the affidavits of Harvey T. Strosberg, K.C., sworn January 8, 2025 and exhibits thereto, Anthony DeCarolis sworn January 13, 2025, and Geoffrey

Spurr sworn January 13, 2025, and on hearing the submissions of Counsel for the Tobacco Producers and those other parties present.

1. **THIS COURT ORDERS AND DECLARES** that the terms that appear in this Order shall have the meanings set out in the CCAA Plans.

2. **THIS COURT ORDERS** that the fees and disbursements including taxes, sought by Counsel for the Tobacco Producers 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 Ontario Flue-Cured Tobacco Growers' Marketing Board are fair and reasonable and are hereby approved.

3. **THIS COURT ORDERS AND DIRECTS** that 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, 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	\$ 141,960.98
<i>Less Credit</i> – Fees paid under the CCAA Proceedings Fee Agreement	\$ 831,018.75
Sub-total Fees	\$2,777,020.27
Disbursements	\$ 249.19
Total Fees & Disbursements	\$2,777,269.46
HST on Fees & Disbursements (13% on \$2,777,269.46 = \$361,045.03)	\$ 361,045.03
Counsel for the Tobacco Producers' Fee (inclusive of disbursements and HST)	\$3,138,314.49

Chief Justice Geoffrey B. Morawetz

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.

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

ORDER

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

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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

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

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ONTARIO
SUPERIOR COURT OF JUSTICE
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PROCEEDINGS COMMENCED AT
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MOTION RECORD
(Fee Approval Motion -
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