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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

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 IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

APPLICANTS

FACTUM OF THE APPLICANTS (REPLY FACTUM)

January 27, 2025

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TO: THE COMMON SERVICE LIST

FACTUM OF THE APPLICANTS

PART I - OVERVIEW

1. This factum is submitted on behalf of the Applicants, Imperial Tobacco Canada Limited ("**ITCAN**") and Imperial Tobacco Company Limited ("**ITCO**", and collectively with ITCAN, the "**Imperial Applicants**") in reply to the responding motion materials filed in response to the Monitors' motions filed on January 15, 2025, each seeking an Order (the "**Sanction Order**"), among other things, approving and sanctioning the First Amended and Restated Plan of Compromise and Arrangement dated December 5, 2024 in respect of each of the Tobacco Companies (the "**Plan**"). In particular, the within submissions respond to aspects of the responding motion materials and written submissions submitted on behalf of: (a) Rothmans Benson & Hedges Inc. ("**RBH**"); (b) the Canadian Cancer Society ("**CCS**"); and (c) the Heart and Stroke Foundation of Canada ("**HSF**").

2. As set out in the Imperial Applicants' Aide Memoire dated January 20, 2025, the Imperial Applicants are supportive of the Plan, as proposed by the Court-appointed Monitors, and consent to an order approving and sanctioning the Plan subject to the position set out herein regarding Article 5.2 thereof.

3. On its face, Article 5.2 of the Plan suggests that "[t]he issue of allocation of the Global Settlement Amount as between the Tobacco Companies in the three CCAA Proceedings remains unresolved". To be clear, however, the Imperial Applicants submit that – beyond the $750 million holdback (discussed below) – there is nothing further to "resolve" by virtue of the fact that the Plan constitutes a complete code with respect to the issue of "allocation".[1] More specifically, the respective contributions of the Imperial Applicants, RBH and JTI Macdonald Corp. ("**JTIM**", and collectively, the "**Tobacco Companies**") to the Global Settlement Amount are governed by two

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[1] The Imperial Applicants concede that the $750 million holdback contemplated by Article 5.4 of the Plan is not allocated as between the Tobacco Companies, and that this issue of allocation remains "unresolved".

payment mechanisms under the Plan: the Upfront Contributions and the Annual Contributions. In both cases, the Plan clearly and unambiguously prescribes the allocation as between the Tobacco Companies:

(a) Pursuant to Article 5.6, the Annual Contributions are to be calculated on the basis that each Tobacco Company is required to contribute an equal percentage (*i.e.*, 85% in the first 5 years, declining by 5% increments over the contribution period to a 70% threshold) of their respective Net After-Tax Income. These Annual Contributions will continue to be made by all three Tobacco Companies until the Global Settlement Amount is satisfied; and

(b) Pursuant to Article 5.4, the Upfront Contributions by the respective Tobacco Companies are to be calculated by reference to the "cash and cash equivalents generated from all sources by each Tobacco Company as at the month end prior to the Plan Implementation Date, plus the Cash Security Deposits, less the sum of $750 million which shall be deducted from the aggregate amount".

4. As a result of the operation of these two provisions, the only unresolved issue of allocation relates to the $750 million holdback (which the Imperial Applicants concede is not allocated by the Plan). Article 5.2 was included in the Plan at first instance because RBH – very late in the process – sought to backtrack from the terms of the negotiated deal which specifically include an internal and self-adjusting allocation formula.

5. In effect, RBH is attempting to reduce its own contribution obligations by now seeking to impose some manner of "re-allocation" of the contribution obligations (beyond the holdback) that are otherwise addressed by the Plan terms. Initially this attempt was grounded in the concept of assigning the Tobacco companies "deal shares". More recently, RBH has proposed a "re-distribution" mechanism whereby the Imperial Applicants and JTIM would effectively distribute their remaining profits to RBH. In either case, this notion of a broader "re-allocation" of profits is

contrary to the mediated negotiations to date, the principles of the CCAA and the framework of the existing Plan.

6. As set out more fully herein, the Imperial Applicants object to any such proposed "re-allocation" on the basis that it represents an attempt to fundamentally alter the nature of the deal that was negotiated among all stakeholders – over a five-year period, with the benefit of legal advice, the assistance of the Court-appointed Mediator and the oversight of the Monitors. The Plan is a product of a negotiated commercial resolution that is premised on each Tobacco Company's solvency and capacity to pay, as determined by evolving domestic industry profitability over the Contribution Period (as defined in the Plan). It has always been the parties' collective understanding and stated intention that contribution to any plan would be based on each Tobacco Company's ability to pay, such that any attempt to now re-allocate profits would be fundamentally at odds with the principles underlying the Plan.

7. For the first time – on January 24, 2025, in the context of its responding factum on this motion – RBH articulated a proposed re-allocation. RBH now contends that, based on various historical market data and findings in prior unrelated civil proceedings, the current contribution mechanisms under the Plan should be materially adjusted in their favour. This proposal – which RBH claims (erroneously) will not impact creditors – would effectively require the Imperial Applicants to pay 85% of their profits to the settlement fund, and then its remaining profits to RBH. Moreover, RBH requests an order prohibiting the Imperial Applicants from releasing any funds or paying any dividends to its affiliated entities until such time as RBH has received all of this "additional" funding, notwithstanding the fact that BAT will be supporting the Imperial Applicants through the provision of ongoing operational support.

8. This late-breaking claim of "unfairness" is entirely illusory. It is based on entirely extraneous and irrelevant considerations, and is grounded in a financial model that rests on a host of unprincipled and unfounded assumptions. Moreover, the claim that this re-distribution does not

adversely impact the creditors is not tenable. By effectively requiring the Imperial Applicants (and JTIM) to distribute the entirety of its profits for the foreseeable future, the re-allocation proposed by RBH creates heightened solvency risks which could materially impair the creditors' recoverability. Moreover, it puts RBH in a privileged position in a highly competitive marketplace. This fact alone creates risk for the creditors, insofar as RBH will be in a position to engage in strategic market activity that could adversely impact the other Tobacco Companies and, by extension, the timing and certainty of payment of the Global Settlement Amount.

9. More to the point, this self-serving re-allocation proposal from RBH would effectively force the Imperial Applicants and the BAT Group to carry on business in Canada as not-for-profit entities, without any prospect financial gain – at least until such time as RBH has extracted its pound of flesh from its market competitors. This proposal is anathema to the animating principles of the CCAA and is entirely contrary to the settlement framework that has been negotiated to date (by all parties). Among other things, this proposal would entail the distribution of assets to another CCAA Applicant – and not the creditors – with a view to preferring the financial position of one of the Tobacco Companies over the others, and allowing RBH to use this privileged position to manipulate the market to its own advantage (and to the detriment of the creditors). Conversely, the other Tobacco Companies' profitability incentives – which are essential to the framework of the Global Settlement – would be completely undermined.

10. Simply put, neither the Imperial Applicants nor the BAT Group can support a plan containing these punitive and inequitable redistribution mechanisms. The Imperial Applicants and BAT Group would never have agreed to the financial terms and related covenants prescribed by the Plan had there been a risk that their financial commitments could be materially changed in the future, through reallocation or otherwise. To the contrary, their collective willingness to agree to the financial commitments and covenants set out in the Plan has at all times been premised on the clear understanding that the Plan terms prescribed the full extent of their financial obligations.

11. If the prescribed contribution formula under the Plan is adjusted at this late stage, after the creditors have already voted unanimously in favour of the Plan, the economics of the Plan would be undermined. Moreover, the self–levelling nature of the payments under the Plan, which formed the foundation of the Plan from the outset of the negotiation process, would be materially compromised.

12. Ultimately, the Plan is a product of a complex and protracted multi-party negotiations, involving multiple stakeholders. The Plan terms are clear and unambiguous, and the framework of the Plan has been agreed to by all parties for years. Any attempt to now re-negotiate or restructure the Plan at the eleventh-hour would completely undermine all of the efforts to date and would be entirely inappropriate.

PART II - FACTS

13. The facts in support of this motion are set out in the Affidavit of Eric Thauvette.[2]

A. Response to RBH

14. The Plan terms speak for themselves. In particular, the Plan contains a prescribed allocation mechanism whereby the Tobacco Companies' contributions to the Global Settlement Amount are governed by two payment mechanisms: the Upfront Contributions and the Annual Contributions. These Plan terms have been unanimously approved by the creditors, and are neither ambiguous nor "unresolved" in any way.[3]

15. From the outset of the Mediation process, the proposals that were jointly submitted by the Tobacco Companies were expressly premised on an industry-wide, domestic resolution that contemplated payments over time based on the ability of each Tobacco Company to fund such

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[2] Affidavit of Eric Thauvette, sworn January 27, 2025 [**Thauvette Reply Affidavit**]. Capitalized terms not otherwise defined have the same meaning as in the Thauvette Reply Affidavit or in the Plan.

[3] Thauvette Reply Affidavit at para. 5.

payments. The Applicants were specifically directed – and agreed – to co-ordinate on a joint industry proposal.[4]

16. At no point were individual company offers contemplated or discussed, nor did the Tobacco Companies agree to any form of re-distribution or enter into any side-agreements that would commit the Imperial Applicants to anything other than what the terms of the Plan expressly contemplate.[5]

17. The Imperial Applicants will not support a plan that is subject to materially different financial terms than what has been agreed to. Moreover, the Imperial Applicants would never have consented to the financial terms prescribed by the Plan had there been a risk that their own financial commitments could be materially changed in the future, through reallocation or otherwise. To the contrary, the Imperial Applicants' willingness to agree to the financial commitments set out in the Plan has at all times been premised on the clear understanding that the Plan terms reflected the full extent of their financial obligations.[6]

18. The BAT Group will similarly not provide the support required by the Plan if the deal is re-allocated. In particular, if the Imperial Applicants' payment obligations under the Plan are altered or there is a risk of some future re-allocation, the BAT Group intends to take all steps necessary to discontinue such operational support once they are entitled to do so.[7]

19. The Imperial Applicants benefit from a wide range of manufacturing, financing and other services, licenses and rights provided by certain entities in the BAT Group. These service relationships, licenses and rights together with the manufacturing and financing services provided by the BAT Group are collectively vital for preserving the value of the underlying business of the

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4 Thauvette Reply Affidavit at para. 8.

5 Thauvette Reply Affidavit at para. 8.

6 Thauvette Reply Affidavit at para. 13.

7 Thauvette Reply Affidavit at para. 14 and Exhibit "A".

Imperial Applicants. This operational support from BAT – which is assured under the current terms of the Plan only by virtue of the BAT Group's voluntary covenant to provide continued services – is essential to the economic feasibility of the Plan and the Imperial Applicants' ability to generate the very profit that funds the Global Settlement Amount.[8]

B. Response to Other Parties

20. CCS has proposed various amendments to the Plan. The Imperial Applicants object to all of these proposed amendments, which represent material changes to the negotiated Plan structure.[9]

21. HSF has also proposed various amendments to the Plan relating to the use of the cy-près funds. The Imperial Applicants similarly object to any such amendments.[10]

PART III - ISSUES AND THE LAW

A. Issues

22. The central issue on these motions is whether the Plan, as proposed, should be sanctioned, or whether this Court can (and should) impose material amendments to the existing Plan terms to address requests from certain stakeholder groups.

B. The Proposed "Re-Allocation" Is Inappropriate and Unnecessary

23. The Plan terms are clear, and comprehensive. There is nothing "unresolved" (other than the holdback) or "unfair" insofar as allocation is concerned, and there is no basis to fundamentally restructure the Plan – or the economics thereof – at this late date.

24. The Annual Contributions are prescribed by Article 5.6 of the Plan, pursuant to which each Tobacco Company is required to contribute an equal percentage (*i.e.*, 85% in the first 5 years, declining by 5% increments over the contribution period to a 70% threshold) of their respective

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8 Thauvette Reply Affidavit at para. 14.

9 Thauvette Reply Affidavit at para. 23.

10 Thauvette Reply Affidavit at para. 24.

Net After-Tax Income. These Annual Contributions will continue to be made by all three Tobacco Companies until the Global Settlement Amount is satisfied.

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

26. If these contribution mechanisms are adjusted at this late stage, after the creditors have already voted unanimously in favour of the Plan, the economics of the Plan will be undermined and the self–levelling nature of the payments under the Plan will be materially compromised.[11]

27. Broadly speaking, the Plan provides that net after-tax income, calculated in accordance with the Metric, shall be used to determine the Annual Contributions – with each Tobacco Company contributing the same percentage of its calculated "Metric" every year until the Global Settlement is fully funded. This methodology provides for both equitable treatment of the Tobacco Companies and payment assurance for the creditors by assessing each Tobacco Company's Annual Contributions relative to their respective profits at the time of payment.[12]

28. RBH now asserts that the contribution obligations under the Plan should be tied to some form of notional "responsibility" based on various extraneous reference points, including the parties' market shares over a defined historical period or on the basis of the civil judgment that was rendered by the Quebec Superior Court in the context of a class action proceeding relating to

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[11] Thauvette Reply Affidavit at para. 15.

[12] Thauvette Reply Affidavit at para. 16.

certain tobacco-related injuries.[13] For the reasons outlined below, this "fault-based" re-allocation is entirely misplaced and unprincipled. More generally, any "re-allocation" of the Plan's funding mechanisms (*i.e.*, the Upfront Contributions or the Annual Contributions) would necessarily entail a material amendment to the Plan terms. No such amendment is necessary or appropriate, at this late stage or otherwise. The Plan is self-leveling, equitable, comprehensive and clear. It is the product of protracted negotiation, conducted under judicial supervision. In all of these circumstances, RBH's request for fundamental amendments to the financial aspects of the Plan should not be countenanced by this Court.

29. Admittedly, the aggregate $750 million holdback contemplated by Article 5.4 of the Plan is not allocated as between the Tobacco Companies under the current Plan. In this limited sense, the allocation of the Global Settlement Amount is "unresolved" insofar as it has not been determined how this aggregate holdback amount will be divided amongst the respective Tobacco Companies.[14] However, this discrete issue is not an impediment to Plan implementation, and can be resolved (through negotiation or otherwise) before the Effective Time. Any attempt by RBH to now argue that broader issues of Plan contribution – beyond the holdback – are also "unresolved" is belied by the Plan terms themselves.

30. Over and above the numerous principled grounds on which RBH's self-serving proposal should be wholly rejected, the proposed "re-allocation" raises serious practical concerns. Contrary to the suggestions by RBH that this is simply a matter of moving numbers around, any material re-allocation of financial obligations would require fundamental and wide-ranging Plan amendments. Among other things, the provisions permitting the Imperial Applicants to distribute its retained 15% of profits to its affiliates and permitting the BAT Group to suspend its operational support in the event that the Imperial Applicants become unprofitable would need to be

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[13] Thauvette Reply Affidavit at para. 17.

[14] Thauvette Reply Affidavit at para. 9.

renegotiated. Alternatively, the conditions permitting this suspension of BAT's operational support would be met on the Effective Date, such that all of the work of the past 6 years would be immediately undermined on day one. Contrary to the submissions of RBH, this proposed "re-allocation" in fact constitutes an entirely new settlement framework that cannot simply be layered onto the existing Plans. It would require all parties to engage in a fresh round of comprehensive commercial negotiations, as if the Mediation and the negotiations to date had never transpired.

C. RBH's Attempts to Import Concepts of "Responsibility" and Fault Are Misplaced

31. RBH's proposal rests on the fundamentally flawed premise that the contribution obligations under the Plan should be tied to some form of notional "responsibility" based on various extraneous reference points, including the parties' market shares over a defined historical period or on the basis of the civil judgment that was rendered by the Quebec Superior Court in the context of a class action proceeding relating to certain tobacco-related injuries. Again, neither of these reference points has formed any part of the CCAA negotiations to date, nor are these metrics in any way relevant to the Tobacco Companies' ability to pay the Global Settlement Amount over the Contribution Period.[15]

32. Notably, RBH's attempt to draw on other metrics to define allocations is grounded in a failure to recognize the fact that the Plan arises in the context of a CCAA proceeding, not a litigation settlement. There is a fundamental distinction between the two.

33. Where litigation claims are resolved within the context of CCAA proceedings, the judicial lens – and the applicable considerations – are entirely different from those that would be operative in the context of litigation settlement. The creditors, including plaintiffs, in effect "own" the value of the defendants in a CCAA context. The consideration of any proposed settlement from the plaintiff's perspective is no longer based on the proposed settlement as against anticipated recovery

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[15] Thauvette Reply Affidavit at para. 17.

in a lawsuit, but rather the only consideration is based on the value that can be recovered by liquidation or going concern sale versus the value of the proposed settlement. Accordingly, the historical conduct and causal connection of each defendant to the plaintiffs' damages suffered is no longer relevant.

34. The Canadian courts have long recognized this distinction. In *McCarthy v. Canadian Red Cross Society*,[16] for example, the court held as follows:

> … [A]lthough they are framed in similar language, the tests applied to determining the reasonableness of a Plan of Compromise and Arrangement in a CCAA proceeding and the approval of a settlement under the CPA are markedly different. In a CCAA proceeding, the court is concerned with the balancing of competing interests as between various stakeholders or creditors and with maintaining the company involved as a viable entity if possible. The objective of the CCAA is to enable the company subject to the proceeding to carry on its business in a manner which is designed to cause the least possible harm to itself, its creditors, its employees and former employees and the communities in which it carries on and carried on its business operations. (See *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.). This is evident from the reasons of Blair R.S.J. in approving the Plan. As he stated at paragraph 26 "I accept that the Plan equitably balances the various competing interests and the available resources of the Red Cross."

35. The CCAA framework is directed at restructuring insolvent companies with a view to providing a fresh start for those companies that are able to restructure their affairs. The RBH re-allocation proposal undermines this fundamental animating principle.

36. For these reasons, RBH's attempt to import (unsubstantiated) notions of "historical fault" into the allocation discussion are entirely misplaced.

37. Moreover, RBH's attempt to bootstrap its allocation arguments by reference to the Quebec Superior Court's trial decision in *Blais* is particularly misplaced.[17] That decision was rendered in the context of a civil class proceeding in Quebec, on the basis of defined allegations of wrongdoing as against a class of Quebec residents and corresponding claims for specific injuries rising from

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[16] 2001 CarswellOnt 509, 8 CPC (5th) 340 (ON SC) at para. 15.

[17] See para. 19 of the Trentadue Affidavit.

certain tobacco-related wrongs over a defined period of time. Whatever factual findings were made in the discrete context of that litigation bear no relevance to the current CCAA proceedings, and certainly do not inform how the Global Settlement Amount should be funded over the coming decades.

38. RBH's nebulous claims of economic unfairness are similarly misplaced. Among other things, the "calculations" proffered by RBH in Schedule "A" to the Trentadue Affidavit and in the schedules to its factum entirely discount the prospect of industry change over the multi-decade Contribution Period. All of the illustrative calculations proffered by RBH – tendered by a lay witness who has no ostensible financial expertise and has had no material involvement in the Mediation or these CCAA proceedings – are based on various assumptions which may or may not hold true over the expansive Contribution Period. The Tobacco Companies' market shares, profitability and relative financial positions may well change over this period.[18]

39. Recent changes in profitability and market shares illustrate this very point. For example, ITCAN's cash reserves have materially increased as compared to those of RBH since the CCAA filing, which suggests that ITCAN's profitability, which has increased over the last five years, has surpassed that of RBH. Accordingly, on a current-year metric, ITCAN will be making higher annual payments than RBH. Conversely, JTIM's market share has materially increased over the last 5 years while ITCAN's has declined over the same period. All of these metrics are obviously subject to change over time, such that it would be a fallacy to make any long-term predictions about the relative performance of the Tobacco Companies over the Contribution Period.[19]

40. More generally, the Tobacco Companies' profitability is driven primarily by product placement and pricing – not marketing – which decisions are entirely within the control of the

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[18] Thauvette Reply Affidavit at para. 18.

[19] Thauvette Reply Affidavit at para. 18.

respective Tobacco Companies. Accordingly, it is unreasonable to assume that their current relative profitability will simply remain completely static over the Contribution Period.[20]

41. The "financial modeling" now proffered by RBH's lay witness is grounded in the 5-year forecasts that were submitted by the respective Tobacco Companies, each of which is premised on a materially different set of assumptions. By way of example, the Imperial Applicants' forecast was based on an assumed market price adjustment in July 2024, as well as substantial price increases consistent with historic pricing levels in 2025 and beyond. However, the expected market price adjustment did not occur. For this reason (among others), the Imperial Applicants are substantially changing their projections.[21]

42. In effect, therefore, RBH's financial analysis is based on a speculative 5-year forecast, without regard for actualized past performance (such as the cash generated by the respective Tobacco Companies over the past 3 years) or reasonable changes in future performance.[22]

43. Notably, the "analysis" attached as Schedule "A" to the Trentadue Affidavit and the "financial modeling" embedded in the RBH factum is premised – at least in part – on a conclusory review of the Tobacco Companies' respective business models and profit structures. This type of analysis has never formed part of the CCAA negotiations to date, and falls well short of supporting RBH's late-breaking position on re-allocation. If such an analysis were to be properly undertaken – which the Imperial Applicants submit is neither necessary nor appropriate – it would represent a complete departure from the premise of negotiations to date, and could reasonably give rise to potential concerns related to Canadian competition law.[23]

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[20] Thauvette Reply Affidavit at para. 19.

[21] Thauvette Reply Affidavit at para. 20.

[22] Thauvette Reply Affidavit at para. 21.

[23] Thauvette Reply Affidavit at para. 22.

D. The Plan Cannot be Amended At this Late Juncture

44. Section 7 of the CCAA addresses the circumstances in which an alteration or modification of a plan is proposed during or after the creditor meeting. The implicit and default presumption underpinning this section is that, if a plan is amended during or after the creditor meeting, the meeting must be adjourned or that a further meeting will need to be held. While the Court has the discretion not to order a new or further meeting of a class of creditors, such discretion is bounded by the statutory requirement that the court must first come to the conclusion that the creditors will not be "adversely affected by the alteration or modification proposed".[24]

45. The Court's power to allow an amendment should be exercised extremely rarely, and in exceptional circumstances, even if the amendment is merely technical (which is not the case here). Moreover, the courts have held that post-meeting amendments cannot substantively alter the Plan, and proposed amendments of any materiality require a new vote.[25] In *Algoma Steel Corp. v. Royal Bank*, for example, the Ontario Court of Appeal held that it could not amend a plan post-sanction on the basis that it would "prejudice the interests of the company or the creditors."[26] Similarly, in *Sammi Atlas Inc., Re*, the court held that post-vote amendments should be exceptional.[27]

46. In *Kerr Interior Systems Ltd., Re*, the Court followed the reasoning adopted in the above-noted cases and concluded that while it has jurisdiction to make substantive amendments at the pre-vote stage, only technical, non-prejudicial amendments could be made at the sanction stage.[28]

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[24] CCAA, s. 7.

[25] In this context, a "substantive" plan amendment has been found to include (*inter alia*) amendments that would prejudice the interest of the company or creditors (see *Algoma*, *infra*), or amendments that would otherwise be significant to a party and could have affected their vote (see *Pine Valley Mining Corp., Re*, 2007 BCSC 926).

[26] 8 OR (3d) 449, 1992 CanLII 7413 (ON CA) [*Algoma*] [emphasis added].

[27] 3 CBR (4th) 171, 1998 CanLII 14900 (ON SC) at para. 6.

[28] 2011 ABQB 214 [*Kerr*] at para. 37 [emphasis added].

In so ruling, the Court noted as follows: "The court's jurisdiction does not extend to modifying plans of arrangement simply because a person is dissatisfied with the existing plan."[29]

47. The very same logic applies to the case before this Court. The proposed amendments – consisting of a "re-allocation" of the Tobacco Companies' financial obligations under the Plan – is manifestly prejudicial to "the interests of the company or the creditors". Insofar as the former is concerned, the Imperial Applicants would be asked to make a materially greater financial contribution than what was agreed to. Similarly, the BAT Group would be required to commit financial and other resources in furtherance of ongoing operational support in a context that materially differs from that which is contemplated by the current Plan terms. This is the very definition of prejudice.

48. Similarly, any material re-allocation of the underlying financial obligations of the Tobacco Companies will prejudice the interests of the creditors. Among other things, the re-allocation proposed by RBH effectively requires the Imperial Applicants to redistribute the limited profits that were preserved under the Plan to RBH. This not only puts RBH in a privileged and unique position – allowing it to engage in strategic behaviour that could materially disrupt a highly competitive marketplace – but it also puts the Imperial Applicants' solvency in jeopardy from the very Effective Date. The Imperial Applicants will be stripped of all profits, to the direct and material benefit of RBH, and will be at risk of being unable to continue to fund the Global Settlement Amount. For this reason alone, the RBH proposal puts the creditors at direct risk – contrary to the categorical statements otherwise contained in the RBH factum.[30]

49. Notably, the Plan itself recognizes that material or substantive amendments to the Plan terms cannot and should not be made after the fact. Among other things, Article 20.4 of the Plan expressly limits permissible amendments to matters which are "of an administrative nature

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[29] *Kerr* at paras. 36-37.

[30] Thauvette Reply Affidavit at para. 11.

required to better give effect to the implementation of the CCAA Plan" or are otherwise intended "to cure any errors, omissions or ambiguities, and in either case is not materially adverse to the financial or economic interests of the Affected Creditors or the Unaffected Creditors".

50. While Article 5.2 indicates that "the issue of allocation of the Global Settlement Amount" is "unresolved", the only outstanding issue related to allocation concerns the $750 million holdback amount contemplated by Article 5.4 of the Plan. The Imperial Applicants concede that the Plan, on its face, does not contemplate an allocation of this aggregate amount as between the Tobacco Companies. However, contrary to the recent position taken by RBH – suggesting a broader "re-allocation" of the Upfront Contributions and Annual Contributions – this holdback amount is the only "unresolved" allocation issue. All other aspects of the Global Settlement contributions are resolved by the operation of the Plan terms.[31] Any attempt to re-allocate the Upfront Contributions or the Annual Contributions would clearly constitute material and highly prejudicial amendments to the Plan.

51. Section 18.6 of the CCAA states that "any interested person in any proceedings under the CCAA" shall "act in good faith with respect to those proceedings."[32] Courts have previously found that a lack of good faith can arise where a creditor waits until the last minute to raise objections.[33]

52. In this case, the allegations of "unfairness" are not only factually unfounded, but they have been raised at the eleventh hour by a party who otherwise negotiated alongside the other Applicants in furtherance of the very joint industry resolution to which they now object. Indeed, the first time that the Imperial Applicants were made aware of the specifics of the RBH "proposal" was in the context of its factum on this very motion, delivered on January 24, 2025. Even if the complaints

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31 Thauvette Reply Affidavit at para. 9.

32 CCAA, s. 18.6.

33 *Mid-Bowline Group Corp*., Re, 2016 ONSC 669 at para. 59, which was decided in the context of an OBCA plan of arrangement.

of unfairness had any merit (which they do not), they have been raised latterly by RBH after negotiating for the very Plan structure that is now proposed.[34]

E. Re-Allocation Cannot be "Imposed" on the Applicants or their Affiliates

53. As noted above, neither the Imperial Applicants nor the BAT Group will continue to support the Plan if the contribution obligations are materially altered.

54. What RBH is now proposing – namely, a re-allocation of the Upfront Contributions and the Annual Contributions – constitutes a material departure from the Plan terms. The allocation of these amounts is not "unresolved", except insofar as the $750 million holdback contemplated by Article 5.4 is concerned. Accordingly, any proposed re-allocation beyond this holdback amount necessarily constitutes a material amendment which this Court cannot "impose" on the Imperial Applicants or its affiliates.

55. There is no authority supporting the notion that a CCAA court has the jurisdiction to impose a term on a plan sponsor which that sponsor does not support. Similarly, there is no authority specifically permitting the CCAA Court to require a plan sponsor or a related party to make economic contributions that it has not agreed to provide. If such authority existed, the CCAA Court could and would make such orders any time a plan seemed underfunded.

56. While there are various statutory mechanisms available under the CCAA to "drag along" unwilling parties in the interest of a compromise or restructuring (*e.g.*, the rights of a majority of creditors to bind the minority, the right of a creditor to propose a plan that may not be agreed to by the debtor, etc.) none of these mechanisms creates the statutory authority to compel a plan sponsor to fund or participate in a plan in the absence of their agreement.

57. More fundamentally in this case, there is no reasonable basis to compel the Imperial Applicants to agree to a "different deal" because they are fully supportive of the Plan that has been

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[34] Thauvette Reply Affidavit at paras. 6-9.

put forward by the Monitors and unanimously approved by the creditors. It is RBH – not the Imperial Applicants – that is seeking to change the terms of the negotiated deal. This behaviour should not be countenanced by this Court.

58. Further, it is not this Court's role to decide the business terms of the Plan; that is for the parties to negotiate. The allocation of the Global Settlement Amount is a business term which the parties negotiated over a protracted period, and which is clearly set out in the Plan.

F. CCS and HSF Proposed Amendments

59. All amendments proposed by CCS and HSF in their responding materials would also constitute material changes to the current Plan and therefore, cannot be introduced at this late stage, for the reasons set out above.[35]

60. In addition to being a material change, the proposed amendment by CCS which would require the provinces of Ontario and New Brunswick to submit to the Industry Documents Library at the University of California all documents obtained in the discovery process in the litigation advancing their respective Provincial HCCR Claims, is contrary to the principles of confidentiality which have been consistently recognized by Canadian courts:[36]

> It is essential for the efficient operation of the Court that there be a full and complete discovery. Information provided at discovery, such as that disclosed by Silver Wheaton, must be protected by the rule of confidentiality, otherwise nominees will be hesitant to disclose such information or, at a minimum, will be very careful about the information they disclose during discovery. As the Supreme Court of Canada noted, such a disincentive to disclose documents or answer certain questions candidly is contrary to the proper administration of justice and the objective of full disclosure of evidence.

61. Notably, the documents produced in the Ontario and New Brunswick proceedings are subject to confidentiality orders issued by the case management judges in each of those proceedings. These orders expressly limit the disclosure and use of the productions in both of the

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35 Thauvette Reply Affidavit at paras. 23-24.

36 *Silver Wheaton Corp. v. The Queen*, 2019 TCC 170 at para. 71.

Ontario and New Brunswick proceedings, and specifically direct the respective Provinces to return or destroy the records upon the conclusion of the proceedings. Accordingly, any transmission of these records to the US repository would be in clear violation of these orders.[37]

62. Moreover, the requests relating to "legislative" amendments with respect to marketing practices fall well beyond the purview of this Court, and cannot reasonably form the basis of any relief within this CCAA proceeding. In effect, the CCS is asking this Court to legislate, which would clearly constitute a policy-based decision that falls outside the jurisdiction of this Court.

63. More generally, none of the relief that is now sought by the CCS has been the subject of negotiations to date. The Imperial Applicants have never agreed to any of the undertakings or commitments proposed by the CCS, and cannot reasonably be bound by these newly-articulated obligations at this late date.

64. For all of the foregoing reasons, the Imperial Applicants submit that the amendments proposed by CCS and HSF cannot be accepted by this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of January, 2025.

Osler, Hoskin & Harcourt LLP

[37] Thauvette Reply Affidavit at para. 23(b); Exhibit "B" to the Thauvette Reply Affidavit, Confidentiality Order dated December 12, 2017 in *Her Majesty the Queen in Right of Ontario v. Rothmans Inc. et al.*, Court File No.: CV-09-387984; Exhibit "C" to the Thauvette Reply Affidavit, Confidentiality Order dated October 9, 2012 in *Her Majesty the Queen in Right of the Province of New Brunswick v. Rothmans Inc. et al.*, Court File No.: F/C/88/08.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Algoma Steel Corp. v. Royal Bank of Canada*, 8 OR (3d) 449, 1992 CanLII 7413 (ON CA)

2. *Kerr Interior Systems Ltd. (Re)*, 2011 ABQB 214

3. *McCarthy v. Canadian Red Cross Society*, 2001 CarswellOnt 509, 8 CPC (5th) 340 (ON SC)

4. *Mid-Bowline Group Corp*., Re, 2016 ONSC 669

5. *Pine Valley Mining Corp., Re*, 2007 BCSC 926

6. *Sammi Atlas Inc., Re*, 3 CBR (4th) 171, 1998 CanLII 14900 (ON SC)

7. *Silver Wheaton Corp. v. The Queen*, 2019 TCC 170

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

Court may give directions

7 Where an alteration or a modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, the meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and those directions may be given after as well as before adjournment of any meeting or meetings, and the court may in its discretion direct that it is not necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and any compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

[…]

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

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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 IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

APPLICANTS

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

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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