

Competition Tribunal



Tribunal de la Concurrence

CT-99/01

IN THE MATTER OF an application by the Commissioner of Competition pursuant to sections 92, 104 and 105 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF the merger of British American Tobacco p.l.c. and Rothmans International B.V. whereby British American Tobacco p.l.c. will acquire, *inter alia*, indirect control of Rothmans Inc. and thereby the controlling interest of Rothmans Inc. in Rothmans, Benson & Hedges Inc.

B E T W E E N:



The Commissioner of Competition

Applicant

- and -

British American Tobacco p.l.c.

Respondent

CONSENT INTERIM ORDER

Date of Hearing by Conference Call:

May 14, 1999

Presiding Member:

The Honourable Madame Justice Sandra J. Simpson

Counsel for the Applicant:

The Commissioner of Competition

D. Martin Low, Q.C.
Elsbeth Gullen

Counsel for the Respondent:

Lawson A.W. Hunter, Q.C.
Katherine L. Kay

COMPETITION TRIBUNAL
CONSENT INTERIM ORDER

The Commissioner of Competition

v.

British American Tobacco p.l.c.

FURTHER TO the application of the Commissioner of Competition (the "Commissioner") pursuant to sections 92 and 105 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act") for a consent order directing the divestiture of the Rothmans Canadian interest encompassed by the merger (all as defined herein) and certain other remedies;

AND ON CONSIDERING the notices of application dated May 13, 1999, the statement of grounds and material facts, the consent order impact statement, the affidavits of Gerry Birks dated May 13, 1999, and his supplementary affidavits dated May 14 and 19, 1999, the Commissioner's memorandum of argument, the draft consent interim order, the draft consent order and the consent of the parties, filed herein;

AND ON CONSIDERING that the Commissioner and the respondent are in agreement with respect to the terms of this interim order;

AND IT BEING UNDERSTOOD by the parties that the Commissioner has alleged certain material facts, and the respondent does not agree with all the facts alleged but does not contest the statement of grounds and material facts and consent order impact statement for the purposes of these applications and any proceeding initiated by the Commissioner relating to this consent order, including an application to vary or rescind;

AND UPON BEING ADVISED that the respondent consensually attorns to the jurisdiction of the Competition Tribunal solely for the purpose of these applications;

AND UPON DETERMINING that the service and notice requirements for this application may be dispensed with as the parties requested;

AND UPON HEARING counsel for the parties in respect of this application by teleconference on Friday, May 14, 1999;

AND UPON CONSIDERATION of the supplementary affidavits of Gerry Birks dated May 14 and 19, 1999 dealing with the prospects for divestiture;

AND UPON DETERMINING that this is an appropriate case for the issuance of an interim order pursuant to section 104 of the Act;

THE TRIBUNAL ORDERS THAT:

Definitions

1. For the purposes of this order the following definitions shall apply:

(a) "affiliate" means affiliate defined in accordance with section 2(2) of the Act but for the purposes of this order with respect to BAT, does not include Rothmans or RBH following closing of the merger;

(b) "BAT" means British American Tobacco p.l.c.;

(c) "business" means the tobacco product operations of RBH;

(d) "confidential information" means competitively sensitive or proprietary information relating to the business not independently known to BAT or its affiliates or Imasco, and shall include, but not be limited to, customer lists, price lists, marketing methods and plans and product changes, or other trade secrets;

(e) "Commissioner" means the Commissioner of Competition appointed pursuant to section 7 of the Act ;

(f) "divestiture" means the sale, transfer, assignment, redemption, or any other disposition of all or part of the Rothmans Canadian interest, including without limitation, an indirect sale or transfer effected through the disposition of all or part of the shares of a company owning directly or indirectly the Rothmans Canadian interest;

(g) "final divestiture" means the divestiture which results in the circumstances described in paragraph 4 of the draft consent order;

(h) "Imasco" means Imasco Limited and its affiliates;

(i) "merger" means the merger between BAT and Rothmans International B.V. whereby BAT will acquire, *inter alia*, indirect control of Rothmans and thereby the controlling interest of Rothmans in RBH;

(j) "RBH" means Rothmans, Benson & Hedges Inc.;

(k) "Rothmans" means Rothmans Inc.; and

(l) "Rothmans Canadian interest" means the entire interest, direct or indirect, of Rothmans International B.V. and its affiliates in the shares of RBH.

Maintain Current Ownership

2. BAT shall not procure or cause any change in the share structure, capitalization or ownership of RBH or any change in BAT's direct or indirect ownership of Rothmans except:

(a) with the consent of the Commissioner;

(b) for the purpose of effecting the divestiture ; or

(c) a change that, with respect to Rothmans, results in the shares of Rothmans now held by Rothmans International B.V. or its affiliates being held directly or indirectly by BAT through one or more wholly-owned subsidiaries.

3. BAT shall not, without the consent of the Commissioner or pursuant to this order, take any action or cause any affiliate, Rothmans or RBH to take any action that will inhibit or delay the divestiture on the terms contemplated by the draft consent order.

Management

4. BAT shall not directly or indirectly alter or cause to be altered the board of directors, the officers or the management of Rothmans and RBH, except:

(a) to elect directors at shareholders' meetings or to replace directors whose term has expired, who have voluntarily resigned, died or become disabled or whose position has been eliminated or terminated for cause;

(b) with the consent of the Commissioner; or

(c) as may be necessary to comply with the terms of this order.

5. No director, officer, or employee of BAT or its affiliates or Imasco may also hold a position of director, officer or employee of Rothmans or RBH except with the consent of the Commissioner. BAT shall advise any director nominated by it to the board of directors of Rothmans or RBH that he or she is being appointed as an independent director and therefore shall not have regard to or be influenced by the indirect interest of BAT in Imasco.

Maintain Independent Viability of Business

6. BAT and its affiliates shall not knowingly take any action as indirect shareholders of RBH that adversely affects the competitiveness, assets, operations or financial position of RBH, except with the approval of the Commissioner. Without limiting the generality of the foregoing, BAT shall not cause RBH, except with the approval of the Commissioner, to:

(a) divest or license any of its assets to any person;

- (b) reduce any aspect of its level of service to customers;
- (c) make any material changes to its financial arrangements;
- (d) curtail marketing, sales, promotional or other activities in connection with the solicitation of its existing or prospective customers; and
- (e) except as contemplated in paragraphs 4 and 5 of this order, terminate or alter any current employment, salary or benefits agreements for any of the executive, managerial, sales or marketing personnel of the business.

Maintain Separate Businesses

7. BAT and its affiliates shall not, except in accordance with this order, take any steps inconsistent with keeping RBH as a business that is independent and separate and apart from BAT, its affiliates and Imasco.

Confidential Information

8. Except in accordance with this order, BAT and its affiliates and their directors, officers and employees shall not receive, have access to or use any confidential information.

9. The employees of BAT or its affiliates named in Appendix "A" to this order (the “named persons”) may receive, have access to or use confidential information in connection with any reviews of RBH and Rothmans required for the purposes of the divestiture. Named persons may be added or replaced by BAT with the consent of the Commissioner. In the event of any such additions or deletions the Commissioner will file a revised version of Appendix "A" with the Competition Tribunal. The named persons shall use confidential information only in connection with the divestiture and shall not disclose confidential information to BAT or any other person except as reasonably required for the purposes of the divestiture.

10. Prior to the final divestiture and for a period of one year thereafter, no named person who has received confidential information shall, without the consent of the Commissioner, become an employee, director or officer of the tobacco product operations of Imasco, or become involved with the tobacco product operations of Imasco in any way that would be likely to have the effect of communicating any confidential information to Imasco.

11. A breach of paragraphs 8, 9 or 10 by any of the named persons shall also be deemed to be a breach of this order by BAT.

Monitor

12. Upon seven days notice to BAT, the Commissioner may appoint a monitor (the “monitor”) who shall be responsible for monitoring the compliance by BAT with this order. In the event that BAT objects to the Commissioner’s appointment, BAT may apply to the Competition Tribunal for appropriate relief on five days notice to the Commissioner setting out the grounds for the objection.

13. In the event that the monitor is unable to perform monitoring duties under the terms of this order because of death, disability, termination for cause or any other reason, the Commissioner shall appoint a new monitor within 15 days and paragraph 12 shall apply to such appointment.

14. For the purposes of monitoring the compliance by BAT with this order, subject to any legally recognized privilege, BAT shall give the monitor access to:

- (a) the directors, officers and employees of BAT and its affiliates, including any named persons listed in Appendix "A" hereto;
- (b) the directors of Rothmans or RBH who have been nominated by BAT;
- (c) the financial information and records of BAT regarding the Rothmans Canadian interest and the business; and
- (d) such excerpts of the minutes of meetings of the board of directors of BAT as relate to the Rothmans Canadian interest.

15. For the purposes of monitoring the compliance by BAT with this order, subject to any legally recognized privilege, the monitor may request access to:

- (a) the premises of Rothmans and the business;

- (b) any information relating to the financial records, operations and assets of Rothmans and the business; and

- (c) meetings of the management of Rothmans and the business.

16. Where such request is made, BAT shall, if necessary, take all reasonable steps to promote compliance with the request. If Rothmans objects, BAT shall notify the Commissioner and the monitor and the Commissioner may apply to the Competition Tribunal, on notice to BAT and Rothmans, for appropriate relief.

17. BAT shall not, nor shall BAT cause any affiliate or Rothmans or RBH to, exert or attempt to exert any influence, direction or control over the monitor which may adversely affect the discharge of the monitor's duties under the terms of this order.

18. If the monitor considers that BAT is in default of any of the terms of this order, the monitor shall immediately notify the Commissioner of such breach, who shall give notice to BAT setting out the particulars of such default.

19. The monitor shall provide to the Commissioner, upon request, a written report in affidavit form relating to compliance with the terms of this order.

20. The monitor shall not be subject to personal liability for any act or omission pursuant to the terms of this order.

21. The monitor shall not communicate any information acquired in the performance of his or her duties to any person except to the extent required by this order.

General

22. If the monitor advises the Commissioner, or if the Commissioner believes, that BAT is in default of any of the terms of this order, then for the purpose of determining or securing compliance with this order, subject to any legally recognized privilege, and upon written request on reasonable notice to BAT, BAT shall permit any duly authorized representative of the Competition Bureau:

- (a) access during office hours to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under control of BAT and its affiliates; and

(b) upon five days notice to BAT and without restraint or interference from it, to interview directors, officers or employees of BAT and its affiliates, including any named persons listed in Appendix "A" hereto, who may have counsel present.

23. BAT shall provide a copy of this order to its directors, Rothmans, RBH, Imasco and any affiliate of BAT which has a direct or indirect ownership interest in the Rothmans Canadian interest and their respective directors, officers and managers. As well, BAT shall provide a copy of this order to any named persons listed in Appendix "A" hereto. BAT shall also advise the board of directors, officers and managers of Rothmans, RBH and Imasco of the obligations of BAT and its affiliates to operate and manage in accordance with this order and BAT shall take all measures open to it to have BAT and its affiliates operate and manage in accordance with this order.

24. Notices, reports or other communications required or permitted by this order shall be in writing and shall be given by personal delivery to the party to whom such notice is given or by registered mail or by facsimile to the address or facsimile number below:

For the Commissioner:

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25. Jurisdiction shall be retained by the Tribunal for the purpose of any application by the Commissioner or BAT to rescind or vary any of the provisions of this order in the event of a change of circumstances or otherwise.

26. In the event of a dispute as to the interpretation or application of this order including any decision by the Commissioner pursuant to this order or breach of this order by BAT, the Commissioner or BAT shall be at liberty to apply to the Competition Tribunal for a further order.

Term of Interim Order

27. This order shall come into force on the date of the closing of the merger and shall remain in effect until final divestiture or further order of the Competition Tribunal which deals with the application or terms of this order.

DATED at Vancouver, this 19th day of May, 1999.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Sandra J. Simpson
Sandra J. Simpson

Appendix "A"

The Named Persons

1. Andrew Cripps, Director of Corporate Finance, Rothmans International