



CT-99/01

IN THE MATTER OF an application by the Commissioner of Competition for a consent order pursuant to sections 92 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 ORDER

Dates of Hearing:

August 4, 1999

Members:

Simpson J. (presiding)
Christine Lloyd
Lawrence P. Schwartz

Counsel for the Applicant:

The Commissioner of Competition

D. Martin Low, Q.C.
Elspeth A. Gullen

Counsel for the Respondent:

British American Tobacco p.l.c.

Lawson A.W. Hunter, Q.C.
Katherine L. Kay
Nicholas P. McHaffie

COMPETITION TRIBUNAL

CONSENT ORDER

The Commissioner of Competition

v.

British American Tobacco p.l.c.

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

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 of May 14 and 19, 1999, the Consent Interim Order dated May 19, 1999, the draft consent order and the consent of the parties, filed herein;

AND ON CONSIDERING THAT by the Consent Interim Order dated May 19, 1999, British American Tobacco p.l.c. is required, pending the final divestiture of the Rothmans Canadian interest or further order of the Competition Tribunal, *inter alia*, to conduct itself pursuant to the Consent Interim Order, and, in particular, to hold separate and not knowingly to take any action as an indirect shareholder of Rothmans, Benson & Hedges Inc. to adversely affect the competitiveness, assets, operations or financial position of Rothmans, Benson & Hedges Inc.;

AND ON CONSIDERING THAT the Commissioner declares himself satisfied that, on the basis of the considerations outlined in the consent order impact statement, the remedies provided herein, if ordered, will be sufficient to eliminate the likelihood of a substantial lessening or prevention of competition in the Canadian manufactured cigarette market and the fine cut tobacco market as described in the application;

AND ON CONSIDERING THAT the Commissioner and the respondent are in agreement with respect to the terms of this consent 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 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 ON HEARING counsel for the parties in respect of this application in Toronto on August 4, 1999;

AND UPON BEING SATISFIED that this is an appropriate case for the issuance of this order;

THE TRIBUNAL ORDERS THAT:

Definitions

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

(a) “Act” means the *Competition Act*, R.S.C. 1985, c. C-34;

(b) “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;

(c) “BAT” means British American Tobacco p.l.c.;

(d) “business” means the tobacco product operations of RBH;

(e) “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, or other trade secrets;

- (f) “Commissioner” means the Commissioner of Competition appointed pursuant to section 7 of the Act;
- (g) “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;
- (h) “divestiture period” means the period of time commencing on June 7, 1999 and ending on the date of final divestiture by either BAT or the trustee;
- (i) “final divestiture” means the divestiture which results in the circumstances described in paragraph 4 of this order;
- (j) “Imasco” means Imasco Limited and its affiliates;
- (k) “merger” means the merger between BAT and Rothmans International B.V., whereby BAT has acquired, *inter alia*, indirect control of Rothmans and thereby the controlling interest of Rothmans in RBH;
- (l) “offering” means a public offering or a private placement for which there are more than 10 buyers of the securities being sold with no single buyer (other than a qualified institutional investor) acquiring 10 percent or more of the securities of any

class (including securities of that class held by the buyer prior to the public offering or private placement) of the entity whose securities are being offered, provided that an underwriter purchasing for resale shall not be considered as a buyer for the purposes of this clause, but the buyers of securities from such underwriter shall be considered as buyers for the purpose of fulfilling BAT's obligations pursuant to this order, and provided further that two or more buyers that are affiliates of each other shall be considered as being a single buyer;

(m) "private placement" means a distribution of securities that is exempt under applicable securities legislation from the requirement to obtain a receipt for a prospectus or a comparable disclosure document;

(n) "public offering" means a distribution of securities other than a private placement;

(o) "purchaser" means the person or entity or group of persons or entities who purchases the Rothmans Canadian interest, other than through an offering;

(p) "qualified institutional investor" means a bank, insurance company, pension fund, mutual fund or similar entity, provided that such entity does not hold shares of any class of Imasco in excess of 10 percent of the outstanding shares of that class;

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

- (r) "Rothmans" means Rothmans Inc.;
- (s) "Rothmans Canadian interest", means the entire interest, as direct or indirect shareholders, of Rothmans International B.V. and/or its affiliates in the shares of RBH, as described in Schedule "A" hereto.
- (t) "technical services agreement" means a services agreement between Rothmans International Services Limited and Rothmans relating to the provision of certain specialized services by Rothmans International Services Limited to Rothmans; and
- (u) "trustee" means the trustee appointed pursuant to the provisions of paragraph 13 of this order.

Continuation of Consent Interim Order

2. Paragraphs 2 to 24 and Appendix "A" of the Consent Interim Order dated May 19, 1999, are attached hereto as Schedule "B" and are hereby incorporated into and made a part of this order and expressions not defined therein shall have the meanings set out in paragraph 1 of this order. References to "this order" in such incorporated paragraphs of the Consent Interim Order shall be read as references to the present order, except in relation to paragraph references, which references shall be to the numbers of the incorporated paragraphs, in Schedule "B". The Consent Interim Order is hereby rescinded as of the date of the signing of this order.

Divestiture

3. BAT shall divest itself of all the right, title and interest of whatever character in the Rothmans Canadian interest, subject to and in accordance with this order. BAT shall promptly commence its efforts to divest and shall use its best efforts, in the exercise of its business judgment, to complete the final divestiture on reasonable commercial terms as soon as possible, but in any event by no later than one year from June 7, 1999, in accordance with the procedure for divestiture set out herein. Notwithstanding anything to the contrary herein, if BAT and the purchaser enter into a legally binding agreement within 60 days prior to the end of the one year period described in this paragraph, BAT shall be granted an additional 60 days following the one year period, within which to complete the final divestiture. If the final divestiture has not been completed within the time specified in this paragraph, paragraph 13 of this order will apply.

4. Upon the completion of the final divestiture by BAT or the trustee, BAT shall not have any interest, whether direct or indirect (including, without limiting the generality of the foregoing, through shareholding in RBH or Rothmans or any other corporation), in the business or in any of the assets of the business in Canada (including without limitation rights associated with brands in Canada), except for any rights and obligations which may continue pursuant to the technical services agreement and intellectual property and supply agreements and arrangements in favour of RBH to which affiliates of BAT will be a party after the merger. For greater certainty, nothing in this order shall prevent BAT and its affiliates from enforcing the intellectual property rights in Canada that they continue to own after the final divestiture.

5. BAT shall not, without the consent of the Commissioner, provide financing for all or any part of any divestiture under this order which would permit BAT to influence or control directly or indirectly the Rothmans Canadian interest after the divestiture.

Procedure for Divestiture other than by Means of an Offering

6. A divestiture, other than a divestiture pursuant to an offering, shall be:

(b) by way of a procedure conducted in such a manner as will allow an opportunity for one or more *bona fide* prospective purchasers to receive notice of the proposed divestiture and to make an offer to acquire the Rothmans Canadian interest; and

(c) on usual commercial terms for transactions of the size and nature of that contemplated in this order and in the circumstances contemplated by this order.

7. Any person making a *bona fide* inquiry of BAT or its agent for the purposes of the divestiture regarding the possible purchase of the Rothmans Canadian interest by that person or that person's principal shall be notified that the divestiture is being made pursuant to this order and shall be provided with a copy of this order.

8. In the case of a divestiture other than by an offering, BAT shall, upon the written request of the Commissioner, advise the Commissioner in writing, of the progress of its efforts to accomplish the divestiture, including a description, with all reasonable detail, of contacts or negotiations with prospective purchasers.

Procedure for Divestiture by Means of an Offering

9. BAT may effect a divestiture by means of an offering or series of offerings provided that:

(a) a copy of this order shall be appended to any prospectus or offering memorandum or comparable document prepared in connection with applicable securities laws to effect or facilitate such offering; and

(b) the offering shall be on usual commercial terms for offerings of the size and nature of that contemplated in this order and in the circumstances contemplated by this order.

10. BAT shall not close a public offering or private placement that is not a final divestiture, the terms of which make impracticable any further divestiture or the final divestiture.

11. BAT shall advise the Commissioner by written notice of its intention to proceed with any public offering or private placement. The notice shall describe:

(a) the securities proposed to be sold and the relationship of the entity whose securities are being sold to the Rothmans Canadian interest;

(b) whether the public offering or private placement is a final divestiture; and

(c) if the public offering or private placement is not a final divestiture, the nature of the Rothmans Canadian interest that will remain to be divested and the plans of BAT for the final divestiture.

1. Where BAT has given notice pursuant to paragraph 11, BAT shall provide such information and documents relating to the public offering or private placement as the Commissioner may request in writing. In the case of a private placement, BAT shall, upon written request by the Commissioner, advise the Commissioner as to the identity of buyers and the extent of their holdings as that information becomes known to BAT.

Trustee Sale

13. If the final divestiture has not been completed within the time set out in paragraph 3 of this order, the Competition Tribunal, on the application of the Commissioner and after affording BAT a reasonable opportunity to be heard with respect to the identity thereof, may appoint a person (the “trustee”) nominated by the Commissioner to effect the divestiture (the “trustee sale”) on the following terms:

(a) after the appointment of the trustee becomes effective, the trustee shall have the sole right to effect the trustee sale on the terms of this order;

(b) the trustee shall have the full power and authority to effect the trustee sale and shall use all reasonable efforts to do so;

(c) the Rothmans Canadian interest shall be divested by the trustee at the price and on the terms and conditions most favourable to BAT then reasonably available, in the opinion of the trustee;

(d) the trustee shall use its reasonable efforts to effect the trustee sale within six months of the trustee's appointment;

(e) BAT shall use its reasonable commercial efforts to assist the trustee in effecting the trustee sale and shall execute such documents and do such other acts or things as may be reasonably requested by the trustee in connection therewith;

(f) after appointment, the trustee shall, every 30 days, file reports with the Commissioner and BAT setting forth the trustee's efforts to effect the trustee sale;

(g) the trustee shall promptly notify BAT and the Commissioner of any negotiations with a prospective purchaser that, in the opinion of the trustee, may lead to a trustee sale;

(h) all expenses reasonably and properly incurred by the trustee in the course of the trustee sale shall be paid by BAT and the trustee's compensation shall provide an incentive for the trustee's sale to be effected in accordance with paragraph 13 of this Order as soon as possible ;

(i) the trustee sale shall be effected in accordance with paragraphs 3 to 9 of this order;

(j) the net proceeds of the trustee sale shall be paid to BAT or as BAT may direct;
and

(k) the trustee shall have such other powers as the Competition Tribunal may grant to the trustee upon the request of the Commissioner or BAT.

14. BAT shall not object to a trustee sale on any grounds other than the trustee's malfeasance, gross misconduct or breach of this order.

15. If the trustee has not effected the trustee sale within six months of its appointment, the trustee shall thereupon promptly file with the Competition Tribunal, on a confidential basis, a report setting forth: (i) the trustee's efforts to effect the trustee sale; (ii) the reasons, in the trustee's judgment, why the trustee sale has not been effected; and (iii) the trustee's recommendations. The trustee shall at the same time furnish such report to the Commissioner and BAT, who shall have the right to be heard by, and to make additional recommendations to, the Competition Tribunal consistent with the purpose of the trustee sale. The Competition Tribunal may thereafter make such orders as it deems appropriate in order to effect the trustee sale.

Approval of the Divestiture

16. Paragraphs 17 to 22 of this Order do not apply to any divestiture effected by means of an offering.

17. The divestiture is subject to the approval of the Commissioner, who shall, *inter alia*, take into account the competitive impact of the acquisition by the proposed purchaser, and which shall be obtained in accordance with the procedure set out in paragraphs 18 to 22 of this order.

18. BAT or the trustee (whichever is then responsible for effecting the divestiture or trustee sale required herein) shall give a written notice (the “divestiture notice”) to the Commissioner (and, in the case of a trustee sale, also to BAT) of any binding agreement (subject to the Commissioner’s approval) reached for the divestiture or trustee sale. The divestiture notice shall set forth the details of the proposed divestiture or trustee sale.

19. Within 15 days after receipt of the divestiture notice, the Commissioner may request additional information concerning the proposed divestiture. BAT or the trustee shall furnish the additional information within 15 days of the receipt of the request unless the Commissioner agrees in writing to extend the time.

20. Within 15 days after receipt of the divestiture notice or, if additional information is requested by the Commissioner or BAT within the time specified in paragraph 19, within 15 days after receipt of the additional information, the Commissioner shall notify BAT, and, in the case of a trustee sale, the Commissioner or BAT shall notify the trustee, in writing, of any objections they may have to the proposed divestiture or trustee sale, on the ground that it does not conform to the terms of this order, and shall give detailed reasons therefor.

21. If the Commissioner or BAT does not object within the period specified in paragraph 20, the divestiture other than by means of an offering or trustee sale may be completed.

22. Where the Commissioner or BAT objects to the proposed divestiture or trustee sale pursuant to paragraph 20, the proposed divestiture shall not be completed without the approval of the Competition Tribunal.

General

23. 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.

24. 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 Consent Order

25. This order shall remain in effect until the Tribunal receives notice in writing from the Commissioner that final divestiture has occurred or until further order of the Competition Tribunal.

DATED at Toronto, this 6th day of August, 1999.

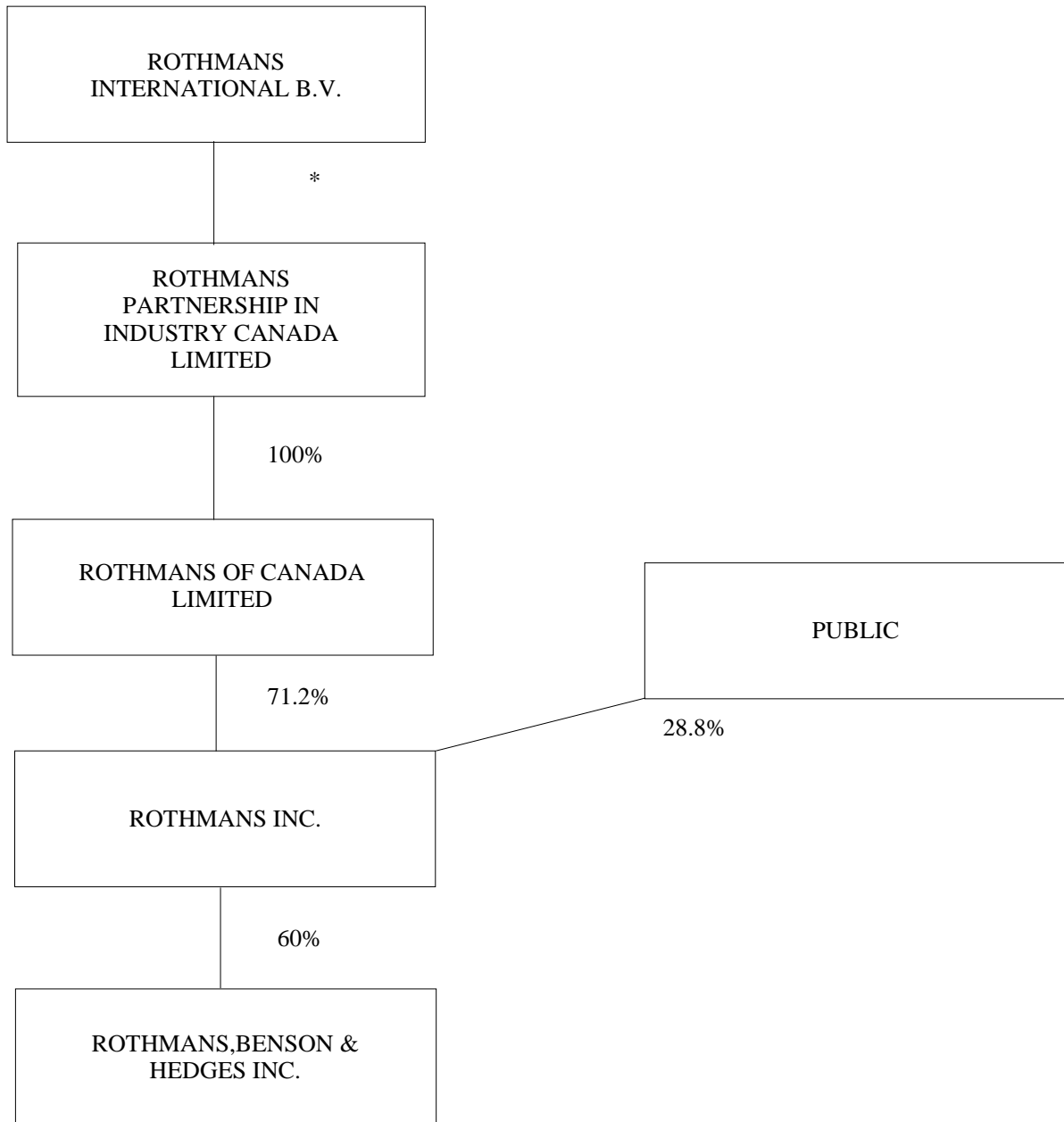
SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Sandra J. Simpson
Sandra J. Simpson

SCHEDULE "A" to the Consent Order dated August 6, 1999.

SCHEDULE "A"

Rothmans Canadian Outline Structure Chart as at April 30, 1999



*intermediate wholly-owned Dutch interests

SCHEDULE "B" to the Consent Order dated August 6, 1999.

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:

1. 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

2. 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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Appendix "A"

The Named Persons

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