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

AMENDED MOTION RECORD OF THE MOVING PARTY, THE ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING BOARD (Motion for Declarations)

~~March 26~~June 17, 2021

STROSBERG SASSO SUTTS LLP
Lawyers
1561 Ouellette Avenue
Windsor, Ontario N8X 1K5

WILLIAM V. SASSO (LSO# 12134I)
Tel: 519.561.6222
Email: wvs@strosbergco.com

DAVID ROBINS (LSO# 42332R)
Tel: 519.561.6215
Fax: 866.316.5308
Email: drobins@strosbergco.com

Lawyers for The Ontario Flue-Cured Tobacco Growers' Marketing Board, Moving Party/Claimant

TO: COMMON SERVICE LIST

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AMENDED NOTICE OF MOTION

The Ontario Flue-Cured Tobacco Growers' Marketing Board ("**Tobacco Board**") will make a motion before Justice Thomas J. McEwen, the presiding judge in these proceedings in re Rothmans, Benson & Hedges Inc. ("**Rothmans**") and related proceedings in Court File No. 19-CV-616077-00CL in re Imperial Tobacco Canada Limited ("**Itcan**") and Court File No. 19-CV-615862-00CL in re JTI-Macdonald Corp. ("**JTIM**") (collectively, the "**Tobacco CCAA Proceedings**"), on a date and time to be set, by judicial conference via Zoom at Toronto, Ontario due to the COVID-19 emergency. The Protocol for Motion by Zoom Video Conference to be provided once a date and time is set.

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

THE MOTION IS FOR declarations on the following questions:

~~(a) Whether the Tobacco Board has a "**Tobacco Claim**" within the meaning of that term under the Initial Order, as amended and restated, in these Tobacco CCAA proceedings?~~

~~(b)~~(a) Whether the Tobacco Board's claim is a debt or liability arising out of fraud, or a debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation that under *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("**CCAA")** subsections 19(2)(c) and (d) cannot be compromised without the consent of the Tobacco Board?

~~(c)~~(b) Whether the Tobacco Board's claim includes a debt for interest owed in relation to the amounts referred to in CCAA section 19(2)(c) and (d) that under CCAA subsection 19(2)(e) cannot be compromised without the consent of the Tobacco Board?

~~(d) Whether the Tobacco Board's claim is placed properly in a separate class of creditors from the Tobacco Claimants under CCAA section 22 for the purpose of meetings to be held in respect of a plan of compromise or arrangement?~~

THE GROUNDS FOR THE MOTION ARE

Directions Required to Move Process Forward Toward Resolution of Tobacco Board's Claims

1. The Tobacco Board seeks declarations from the Court on the Tobacco Board's entitlement to be treated in the same manner as the other pre- and post- Initial Order suppliers of goods or services and distinct from the class of creditors with Tobacco Claims.

2. The Tobacco Board is the only pre- or post-Initial Order supplier of goods and services to Rothmans, Itcan and/or JTIM (collectively, the "**Tobacco Manufacturers**") – that has not been paid for goods or services provided to the Tobacco Manufacturers.

3. The Court has been advised by the Tobacco Manufacturers' Monitors that any issues concerning other pre- and post-Initial Order suppliers than the Tobacco Board are being resolved directly by the Tobacco Manufacturers with the suppliers, with the Monitors' approval, under the Court's "business as usual" mandate.

4. All other Claimants in these Tobacco CCAA Proceedings are Tobacco Claimants. The Provinces and Territories claim the costs of health care services provided to those with tobacco-related diseases caused or contributed to by exposure to a tobacco product ("**HCCR Claims"**). The Quebec class action plaintiffs ("**QCAP**") and the remaining Claimants with unsettled Claims seek damages for individuals with tobacco-related diseases ("**TRW Claims"**). The HCCR Claims and the TRW Claims are collectively defined in the Initial Orders as amended and restated as a **Tobacco Claims**.

5. The Tobacco Board seeks the Court's declarations on these issues because there is no reasonable prospect of resolution of the Tobacco Board's claims in the Court-directed Mediation process in the Tobacco CCAA Proceedings or otherwise unless these questions are determined.

Tobacco Board's Claim Based on Tobacco Manufacturers' Intentional Breaches and Misrepresentations

6. The Tobacco Board's claims, set out in 2009 and 2010 actions - *The Ontario Flue-Cured Tobacco Growers' Marketing Board et al v. Rothmans, Benson & Hedges, Inc.*, Court File No. 64462CP; *The Ontario Flue-Cured Tobacco Growers' Marketing Board et al v. Imperial Tobacco Canada Limited*, Court File No. 64757; and *The Ontario Flue-Cured Tobacco Growers' Marketing Board et al v. JTI-MacDonald Corp.*, Court File No. 1056/10 CP ("**Actions**") brought for the benefit of Ontario flue-cured tobacco growers and producers ("**Producers**") are based upon the Tobacco Manufacturers':

   (a) Breaches of annual contracts ("**Heads of Agreement**") for the purchase of tobacco from the Tobacco Board during the period January 1, 1986 to December 31, 1996; and

   (b) Misrepresentations in the annual audit statements concerning the use of the duty-free and export ("**DFX**") tobacco purchased from the Tobacco Board.

7. When the Tobacco Manufacturers made these misrepresentations to the Tobacco Board, they knew that the cigarettes and other tobacco products manufactured with the DFX

tobacco, purchased at discounted DFX prices from the Tobacco Board, were intended to be smuggled back into Canada and sold illegally in the domestic market.

8. The Tobacco Manufacturers made these misrepresentations to the Tobacco Board to cover up their involvement in illegal smuggling operations to which they later admitted their involvement.

9. On July 31, 2008, Rothmans first disclosed its involvement in the smuggling of cigarettes and other tobacco products back into Canada, following years of vigorous denial. Rothmans made its disclosure by admitting its guilt to charges brought against it under the *Excise Act*, RSC 1985 c. E-14 as amended.

10. On July 31, 2008, Rothmans pleaded guilty to a charge that, contrary to section 240(1)(a) of the *Excise Act*, R.S.C. 1985, c. E-14, as amended, between January 1, 1989 and February 28, 1994, Rothmans did aid persons to sell and be in possession of tobacco manufactured in Canada that was not packaged and was not stamped in conformity with the *Excise Act* and its amendments and ministerial regulations.

11. The reason that Rothmans did not package and stamp its products in conformity with the *Excise Act* is admitted in the Agreed Statement of Facts on its guilty plea. As Rothmans admits:

> 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 purpose of maintaining Rothmans, Benson & Hedges' share of the Canadian tobacco market.

12. Rothmans was fined $100,000,000 for its admitted criminal activity. The fine was based on Rothmans' admission that it was involved in the avoidance of $50,000,000 in excise duties from December 12, 1989 to June 9, 1993, and excise duties and excise taxes from June 10, 1993 until February 28, 1994.

13. In order to compensate the Governments for lost duties and taxes during the periods relating to the *Excise Act* charges, Rothmans agreed earlier with Her Majesty the Queen in right of Canada and each of the Provinces to a civil settlement, referred to as the Comprehensive Agreement, to take effect upon the Court's acceptance of Rothmans' guilty plea. The Comprehensive Agreement required Rothmans to pay $450,000,000 to the Federal and Provincial Governments to settle claims arising from Rothmans' role in tobacco smuggling.

14. Similar pleas, admissions and comprehensive agreements were made by Itcan and JTIM, the other Tobacco Manufacturers.

15. The Tobacco Board's actions and the Tobacco Manufacturers' defences thereto have been commented upon at length by the Court in pre-Initial Order decisions, including:

    (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);

(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); and

(f) The application for leave to appeal the Divisional Court decision 2016 ONSC 3939 was dismissed by the Court of Appeal (Blair, Epstein and Huscroft JJ.A.) on November 4, 2016.

Business as Usual Directions to Tobacco Manufacturers by CCAA Court

16. On March 8, 2019, the Court granted the first of three CCAA Initial Orders that month in the Tobacco CCAA Proceedings that stayed all existing civil actions against Rothmans, Itcan and JTIM and enjoined the exercise of any creditors' rights or remedies, including those of the Tobacco Board.

17. The Initial Orders, among other things, permitted the Tobacco Manufacturers and related companies to continue carrying on business as usual.

Tobacco Claim Excludes Tobacco Board's Claim

18. The definition of **Tobacco Claim** is identical in form other than the names of the Applicants in each of the Initial Orders (Rothmans Second Amended and Restated Initial Order, para. 4(f), Itcan Second Amended and Restated Initial Order, para. 4(k), and JTIM Second Amended and Restated Initial Order, para. 4(e), each dated April 25, 2019).

19. Paragraph 4(f) of the Rothmans Second Amended and Restated Initial Order provides:

> (e) "**Tobacco Claim**" means any right or claim (including, without limitation, a claim for contribution or indemnity) of any Person against or in respect of the Applicant or any member of the PMI Group that has been advanced (including without limitation, in the Pending Litigation), that could have been advanced or that

could be advanced, and whether such right or claim is on such Person's own account, on behalf of another Person, as a dependent of another Person or on behalf of a certified or proposed class or made or advanced as a government body or agency, insurer, employer or otherwise, under or in connection with:

(i) applicable law, to recover damages in respect of the development, manufacture, production, marketing, advertising, distribution, purchase or sale of Tobacco Products, the use of or exposure to Tobacco Products or any representation in respect of Tobacco Products, in Canada or, in the case of the Applicant, anywhere else in the world; or

(ii) the HCCR Legislation (as defined in the Luongo Affidavit),

excluding any right or claim of a supplier relating to goods or services supplied to, or the use of leased or licensed property by, the Applicant or any member of the PMI Group.

20. The Tobacco Board, the exclusive supplier of Ontario flue-cured tobacco to the Tobacco Manufacturers under supply management rules and regulations in effect during the period January 1, 1986 to December 31, 1996 makes a "claim of a supplier relating to goods or services supplied to" the Tobacco Manufacturers and is expressly excluded from the definitions of Tobacco Claim and Tobacco Claimant.

Tobacco Board is a CCAA Section 19(2) Creditor

21. The Tobacco Board is a CCAA section 19(2)(c), (d) and (e) creditor. CCAA section 19(2) provides that certain types of claims cannot be compromised without the consent of that creditor. The subsections read in part:

> (2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:…

> (c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;
>
> (d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or
>
> (e) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).

22. Under CCAA subsections 19(2)(c), (d) and (e), a compromise or arrangement may not deal with any claim that relates to debts or liabilities resulting from obtaining property or services by false pretenses or fraudulent misrepresentation or that arises out of fraud or embezzlement unless that creditor agrees to the compromise of its claim.

23. The Tobacco Board seeks the declaration of the Court that under section CCAA 19(2), the Tobacco Board's claim cannot be compromised without the Tobacco Board's consent.

Payment to Other Trade Creditors under Initial Orders

24. The other trade creditors of Rothmans, Itcan and JTIM have been paid or their disputes were allowed to be settled separately as a matter of course under the "business as usual" directions of the Court. As an example only, the Fifth Report of Rothmans' Monitor dated February 13, 2020 advises:

> The Monitor understands the Applicant [Rothmans], with the consent of the Monitor, has paid in the ordinary course the pre-filing claims of third-party trade creditors. The Applicant considers such payments to be necessary and desirable for the ongoing operations. The Monitor believes this course of action will preserve the Applicant's operations while it seeks to address the claims asserted against it in the Quebec Class Actions and Other Pending Litigation.

Classes of Tobacco Manufacturers' Creditors

25. The Tobacco Board's claim as an unpaid supplier of goods to the Tobacco Manufacturers during the period January 1, 1986 to December 31, 1996 does not have "commonality of interest" within the meaning of that term in CCAA section 22 with the tort-based and statute-based Tobacco Claimants, whether TRW Claimants or HCCR Claimants, and is properly entitled to a separate class under CCAA subsection 22(1) from the Tobacco Claimants.

Mediation Directed Only to Resolution of Tobacco Claims

26. Paragraph 39 of the April 25, 2019 second amended and restated Initial Order for Rothmans appointed the Honourable Warren K. Winkler as an officer of the Court and neutral third party (the "Court-Appointed Mediator") with the mandate "to mediate a global settlement of the Tobacco Claims."

27. The amended and restated Initial Order provides no mandate to the Court-Appointed Mediator to mediate settlement of the Tobacco Board's claim or the claims of other suppliers of goods or services to Rothmans, Itcan and JTIM, and there is, in any event, no unresolved suppliers' claims other than the Tobacco Board's claim.

28. Rothmans, Itcan and JTIM, as well as their Monitors, have each advised the Court that the purpose of the stay of proceedings and its extensions is to permit them to work toward the singular objective of developing a plan of compromise or arrangement for a Pan-Canadian global settlement of the Tobacco Claims.

29. The resolution of the Tobacco Board's claims as a trade supplier will not materially affect the prospects for global resolution of the Tobacco Claims.

30. The Tobacco Board does not make a Tobacco Claim and has no proper role in the stated mandate of the Court-Appointed Mediator or the efforts of the Tobacco Manufacturers and their Monitors to develop a plan of compromise or arrangement for a Pan-Canadian global settlement of the Tobacco Claims.

31. The CCAA including sectons 11 and 19 ~~and 22~~ and this Court's inherent equitable jurisdiction.

32. Rules 1.04, 1.05, 2.01, 2.03, 3.02, 14.05(2), 16, 37, 38 and 39 of the *Rules of Civil Procedure (Ont.)*.

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

(a) The affidavit of Fred Neukamm, sworn March 17, 2021 and exhibits thereto;

(b) The affidavit of Andy Jacko sworn March 17, 2021;

(c) The affidavit of Harvey T. Strosberg, Q.C. sworn March 16, 2021 and exhibits thereto;

(d) Relevant parts of the application and motion records, court orders, and Monitor's reports in the Tobacco CCAA Proceedings; and

(e) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

~~March 26~~June 16, 2021

STROSBERG SASSO SUTTS LLP
Lawyers
1561 Ouellette Avenue
Windsor, Ontario N8X 1K5

WILLIAM V. SASSO (LSO# 12134I)
Tel: 519.561.6222
Email: wvs@strosbergco.com

DAVID ROBINS (LSO# 42332R)
Tel: 519.561.6215
Fax: 866.316.5308
Email: drobins@strosbergco.com

Lawyers for The Ontario Flue-Cured Tobacco Growers' Marketing Board, Moving Party/Claimant

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Applicant

AFFIDAVIT OF FRED NEUKAMM
(Sworn March 17, 2021)

I, FRED NEUKAMM, of the Township of Malahide, in the County of Elgin, in the Province of Ontario, MAKE OATH AND SAY:

1. I was the former Chair of the Ontario Flue-Cured Tobacco Growers' Marketing Board ("**Tobacco Board**") at the time of commencement of the Tobacco Board's actions against Rothmans, Benson & Hedges Inc. ("**Rothmans**") and the other tobacco product manufacturers. I am at present a consultant to the Tobacco Board in respect of these *Companies' Creditors Arrangement Act* ("**CCAA**") proceedings (the "**Tobacco 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 the information and believe it to be true.

2. On August 30, 2011, I swore affidavits in each of three actions brought respectively against Rothmans, Imperial Tobacco Canada Limited ("**Itcan**") and JTI-Macdonald Corp. ("**JTIM**") (collectively, the "**Tobacco Manufacturers**") in which the

Tobacco Board acts as a representative plaintiff and in support of motions for orders certifying the actions as class proceedings.

3. On November 21, 2013, I swore an affidavit in response to the motion by Rothmans and the other Tobacco Manufacturers for summary judgment dismissing the class proceedings, which motions were unsuccessful before Justice Rady (2014 ONSC 3469), on appeal to the Divisional Court (2016 ONSC 3939), and on leave to appeal to the Ontario Court of Appeal.

4. I was not cross-examined on my affidavits. I affirm the truth of the statements made in my prior affidavits sworn in the class proceedings.

5. I restate in this affidavit certain parts of prior affidavits that deal with (i) supply management powers and governance of the Tobacco Board, (ii) the Tobacco Advisory Committee ("**TAC**"), and (iii) the agreements made between the Tobacco Board and the Tobacco Manufacturers in the late 1980s and early 1990s that are the subject of the class proceedings. I am informed by the Tobacco Board's lawyers and believe these restated parts may be relevant to this motion for the Court's advice and directions.

MY INVOLVEMENT WITH THE TOBACCO BOARD

6. From 1992 to 2008 inclusive, I was registered with the Tobacco Board as a local tobacco grower. In 2002, I was elected as a director of the Tobacco Board for my district. In 2003, I was elected Chair of the Tobacco Board and I held that position until October 2007.

7. From October 2007 until June 2009, I was a director of the Tobacco Board. During April to October 2008, I also served as interim Vice-Chair of the Tobacco Board.

8. On June 1, 2009, I was again appointed as Chair of the Tobacco Board by the Farm Products Marketing Commission ("**Commission**") and I held that position until December 31, 2017.

9. From my election as a director of the Tobacco Board in 2002 until October 2007, I was a 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.

10. The TAC membership included representatives of the Ontario and Federal Governments, each of the Tobacco Manufacturers, and the Tobacco Board. One of the stated objectives of the TAC was the elimination of contraband tobacco products in the Canadian domestic market.

11. Following the March, 2019 Tobacco CCAA Proceedings, I was retained by the Tobacco Board as a consultant to, among other things, assist the Tobacco Board and its lawyers in advising on the resolution of its claims against the Tobacco Manufacturers.

POWERS & 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 proceedings against the Tobacco Manufacturers, the primary role

of the Tobacco Board was to regulate and control the production and marketing of Ontario-grown tobacco using a quota system.

13. The Tobacco Board was established for specific purposes relating to the marketing of tobacco, including the negotiation of agreements with the Tobacco Manufacturers on behalf of the Ontario flue-cured tobacco growers and producers ("**Producers**") and the right to sue in its own name under those agreements.

14. At the times material to the proceedings against the Tobacco Manufacturers, 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.

15. The requirements for the election of the Tobacco Board's directors by the 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.

16. 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.

17. 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 Producers and buyers, and to require all tobacco to be sold through the Tobacco Board's auctions.

18. Both during the Class Period and up to the time of the commencement of the class proceedings, the Tobacco Board had the sole authority to contract with the Tobacco Manufacturers for the sale of tobacco, to enforce the agreements made, and to recover payments owed by the Tobacco Manufacturers.

19. 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."

THE ANNUAL HEADS OF AGREEMENT

20. The Tobacco Board made annual agreements with Rothmans – as well as other tobacco purchasers – regarding the sale of tobacco by growers at the Tobacco Board's auctions during the Class Period. These agreements are titled "Heads of Agreement". The Heads of Agreement set the terms and conditions of the annual sale of tobacco, the pricing paid for tobacco, and the quantities of tobacco to be produced and marketed.

21. The Tobacco Board administered the sale of tobacco by the Producers pursuant to the Heads of Agreements, received payment from the purchasers, and, after deducting certain fees and charges, distributed the net proceeds of sale to the Producers.

22. The Heads of Agreements were the result of negotiations between the Tobacco Board, Rothmans, Itcan and JTIM made at the TAC by the members appointed by the Tobacco Board and the members appointed by Rothmans and the other Tobacco Manufacturers to the Negotiating Committee for Tobacco, as stated in the Heads of Agreement – 1993 Crop, a copy of which is attached as Exhibit "A" to this affidavit.

23. The tobacco that was purchased by Rothmans, Itcan and JTIM for duty free and export sales ("**DFX tobacco**") was sold at floor prices determined at auctions administered by the Tobacco Board for each lot of tobacco sold by Producers.

24. Unlike tobacco purchased for products to be consumed domestically, DFX tobacco was purchased without the requirement to pay a higher guaranteed minimum average price under the applicable Heads of Agreement. The higher price was paid later by way of a so-called "Domestic Make-up" payment from Rothmans, representing the difference

between the guaranteed minimum average price agreed to by Rothmans under the Heads of Agreement and the floor price per pound of DFX tobacco Rothmans had purchased during the year.

25. 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.

26. 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 applicable taxes and duties on cigarettes and tobacco increased by approximately 100%. In two years, the average price of a domestic carton of cigarettes increased from $26 to $48 or higher.

27. These tax increases were not applicable to DFX cigarettes and other DFX tobacco products.

PROOF OF EXPORT

28. The annual Heads of Agreement made between Rothmans and the Tobacco Board established “accounts” that represented volumes of tobacco purchased by the Tobacco Manufacturers for different purposes. It was necessary to monitor volumes of tobacco purchased and used in each of these accounts because the price paid by Rothmans depended on the purpose for which the tobacco was used.

29. After the account for DFX tobacco was established pursuant to the annual Heads of Agreement, Rothmans agreed to provide proof of export to the Tobacco Board's auditor, MacGillivray Partners, to monitor the purchases and exports of DFX tobacco for each year. As an example, Clauses B.7 a) and c) of the Heads of Agreement – 1993 Crop requires Rothmans with respect to the 1993 crop to provide an audited certification of proof of export of manufactured product and use of Ontario tobacco for the manufacture of DFX product.

30. In the result, the proof of export audit process was dependent on Rothmans' self-reporting to monitor the volumes of DFX tobacco that they purchased and used for that purpose.

THE GUILTY PLEAS AND COMPREHENSIVE AGREEMENTS

31. On July 31, 2008, I was Vice-Chair of the Tobacco Board and present at a Tobacco Board meeting when the media announced the agreements reached by Rothmans and Itcan with the Government of Canada and Provincial Governments to resolve the RCMP's investigation concerning the sale of tobacco products exported from Canada in the period 1989 to 1996. During the Tobacco Board meeting, Linda Vandendriessche, who was the Chair of the Tobacco Board at the time, informed the Tobacco Board of these announcements.

32. The Tobacco Board's executive and recording secretary, Christine Jacob, recorded notes at the July 31, 2008 Tobacco Board meeting and at a later Tobacco Board meeting held on August 1, 2008. I have reviewed Ms. Jacob's notes, a copy of which is attached

as Exhibit “B” to this affidavit, to refresh my recollection of these meetings. I believe Ms. Jacob’s notes accurately record my comments made at those meetings.

33. After Ms. Vandendrissche had read the media releases to the Tobacco Board on July 31, 2008, I stated that some analysis was warranted regarding the Tobacco Manufacturers’ proofs of export during the 1989 to 1996 period that was the subject of the convictions.

34. On August 1, 2008, the Tobacco Board met again. At that meeting, I stated that the Tobacco Board should investigate the marketing agreements for the period that was the subject of the convictions and get advice if what the companies (Rothmans and Itcan) did was “out of bounds”.

35. The investigations and legal advice received by the Tobacco Board led to the proceedings brought by the Tobacco Board and certain tobacco growers against the Tobacco Manufacturers.

DEMOGRAPHICS OF CLASS TOBACCO GROWERS AND PRODUCERS

36. According to the Tobacco Board’s own records there were 3930 Producers whose tobacco was sold as DFX tobacco through the Tobacco Board during the Class Period and who would have been entitled to benefit from the Make-up Payments required under the Heads of Agreements.

37. As time moves on, it becomes more difficult for the Tobacco Board to provide meaningful financial benefits through judgments or settlements for those entitled to receive the Make-up Payments under the Heads of Agreement some thirty years ago.

Many of the Producers have died and many others have discontinued growing tobacco and moved away from the tobacco growing districts.

38. In my case, as stated above, I was registered with the Tobacco Board as a local tobacco grower during the Class Period growing tobacco on our family farm succeeding my parents. I was a share grower for my parents from 1992 to 1997. In 1997, my wife Nancy and I purchased the quota farm land and farm corporation shares from my parents. A resolution of the Tobacco Board's claim would certainly be welcome to us.

39. My father, Emil, who is now deceased, and my mother, Frieda, who is 85 years old, were also registered as local tobacco growers with the Tobacco Board and entitled to the benefit of a successful resolution of the claim made on our behalf by the Tobacco Board. I would very much like to see the Tobacco Board's claim resolved for the benefit of my mother and so many other aging neighbours. My mother, common with other senior citizens, is on a fixed income and resolution of the Tobacco Board's claim and potential award would certainly be welcomed by her.

40. With the end of Ontario tobacco supply management in 2009, it becomes more and more difficult for the Tobacco Board to identify – for those who have died or moved away from the tobacco growing regions – the whereabouts of the former Producers, their families, heirs, successors and assigns and to provide to them the benefits to which they are entitled.

41. The Tobacco Manufacturers continue to be supplied with Ontario tobacco grown from some of the very same farms operated by the Producers who sold their tobacco through the Tobacco Board. Many of the licences to grow Ontario tobacco are now owned

by the Producers' offspring (children and grandchildren) and many of the Producers still assist in the production of Ontario tobacco currently supplied to the Tobacco Manufacturers.

42. With the end of Ontario tobacco supply management in 2009, the Tobacco Board's most significant function at present may well be the pursuit of the resolution of the proceedings against Rothmans and the other Tobacco Manufacturers by settlements or judgments which have now been stayed under the terms of the Initial Orders, as extended and amended.

43. As I understand the CCAA process on advice from the Tobacco Board's lawyers, the Tobacco Board's claim as well as the claims of the representative Producers have been stayed while Rothmans and the other Applicants operate under court protection to seek the Pan-Canadian resolution of the defined Tobacco Claims in the Initial Order.

44. As a consultant to the Tobacco Board in the Tobacco CCAA Proceedings, I have participated in the Court-directed Mediation process. I have attended personally as the representative of the Tobacco Board at the Mediation Sessions on January 15 and 16, 2020 in Toronto at the office of Ernst & Young, Rothman's Monitor. I have been consulted by the Tobacco Board and its lawyers in the Tobacco CCAA Proceedings in respect of the Mediation process. I understand that all statements, discussions, offers made and documents produced by any of the parties in the course of the Mediation Process are strictly confidential and shall not be subject to disclosure.

45. I am also aware that the Court has appointed the Mediator with the mandate to mediate a global settlement of the Tobacco Claims in the Tobacco CCAA Proceedings.

The Tobacco Board does not advance a Tobacco Claim and has no involvement whatsoever in the conduct of the Tobacco Claims.

46. As a consultant to the Tobacco Board, I am aware that the Tobacco Board's position throughout the Mediation is that it does not make a Tobacco Claim, and cannot properly comment on the positions of the Tobacco Claimants and Tobacco Manufacturers regarding a plan for or settlement of the Tobacco Claims, and has a claim that is distinct from the Tobacco Claims.

47. The Tobacco Board has sought from the outset to obtain an offer from Rothmans and/or the other Tobacco Manufacturers for the benefit of the Producers. I am extremely disappointed that no offer has been made to date by Rothmans, Itcan or JTIM to non-Tobacco Claimants. Without such an offer being made to non-Tobacco Claimants, I do not believe that there is any prospect of resolving the Tobacco Board's Claim on behalf of the Producers in the Tobacco CCAA Proceedings.

48. I am also not aware of any non-Tobacco Claimant in the Tobacco CCAA Proceedings other than the Tobacco Board and the Producers that it represents. As I read and understand the Rothmans' Monitors' reports all other suppliers relating to goods or services supplied to Rothmans or any member of the PMI Group has been and continues to be paid for goods and services provided.

49. Distinct from the defined "Tobacco Claimants" who seek damages against those involved in the tobacco industry relating to the sale, use of or exposure to tobacco products, the Tobacco Board and the Producers that the Tobacco Board represents were

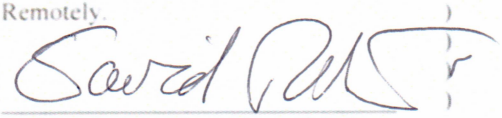
essential parts of the legitimate tobacco industry in Canada supplying the essential ingredient for tobacco products.

50. I believe that the Tobacco Board and the Producers that it represents share no common ground with the Tobacco Claimants, namely those who advance damage claims for tobacco-related diseases ("**TRW Claims**"), or to recover public costs for health care services provided to those with tobacco-related diseases ("**HCCR Claims**").

51. This affidavit is filed in support of a motion by the Tobacco Board for declarations as set out in the notice of motion and for no other or improper purpose. The declarations are sought on issues that I believe must be determined before there can be any meaningful negotiations toward the resolution of the Tobacco Board's claims against Rothmans, Itcan or JTIM.

SWORN remotely by Fred Neukamm, stated as being located at the Town of Malahide, in the County of Elgin, Province of Ontario, before me at the City of Windsor, County of Essex, Province of Ontario, on March 17, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

FRED NEUKAMM



A Commissioner for taking affidavits
David Robins, LSO #42332R

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_____
FRED NEUKAMM

_____
A Commissioner for taking affidavits
David Robins, LSO #42332R

#1800675

This is **Exhibit "A"** of the **Affidavit of Fred Neukamm** sworn March 17, 2021.

A Commissioner for taking Affidavits
David Robins (LSO #42332R)

FOR THE AGREEMENT FOR MARKETING THE 1993, 1994, 1995, 1996 AND 1997 CROPS OF FLUE-CURED TOBACCO UNDER THE ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING PLAN.

BETWEEN:

A. Bouw	
G. Gilvesy	A. Pechloff
A. Lindsay	G. Demaiter
G. Rapai	T. Raytrowsky
L. Decarolis	G. Fulop
J. Csubak	C. Szucs

being all of the Members appointed to the Negotiating Committee for Tobacco under the Plan by the Ontario Flue-Cured Tobacco Growers' Marketing Board.

AND:

T. Lee	Imperial Tobacco Limited
H. Goode	Imperial Tobacco Limited
W. Abbott	RJR-Macdonald Inc.
L. Graham-Didone	RJR-Macdonald Inc.
L. Bowen	Rothmans, Benson & Hedges Inc.
G. Ayres	Rothmans, Benson & Hedges Inc.

being all of the members appointed to the Negotiating Committee for Tobacco under the Plan by the domestic manufacturers hereinbefore listed.

WHEREAS under the Farm Products Marketing Act, R.S.O. 1990, Chapter F.9. and the regulations thereunder and subject to the limitations thereof, the Negotiating Committee for Tobacco is empowered to adopt or settle by Agreement:

(a) minimum prices for tobacco;
(b) terms and conditions relating to the marketing of tobacco; and
(c) any charges relating to the marketing of tobacco;

AND WHEREAS under the said Farm Products Marketing Act, R.S.O. 1990, Chapter F.9. the Farm Products Marketing Commission may declare an Agreement to come into force and such Agreement shall remain in force for one year or for such period as is provided in the Agreement.

AND WHEREAS the above noted members of the Negotiating Committee for Tobacco have concluded a five year agreement for the marketing of the 1993, 1994, 1995, 1996 and 1997 crops of flue-cured tobacco to be sold through the Ontario Flue-Cured Tobacco Growers' Marketing Board auctions on a three year firm plus two years rolling basis as follows:

a) 1993 Crop - as set out in Part I of this agreement,

b) 1994 & 1995 Crops - as set out in Part II E and G of this agreement,

c) 1996 & 1997 Crops - as set out in Part II F and G of this agreement.

NOW THEREFORE the members of the Negotiating Committee for Tobacco hereby agree to the terms of the Agreement herein set forth and recommend that the same be declared to come into force by the Farm Products Marketing Commission as of the date of filing with the Commission.

A. DEFINITIONS

A. 1. "Act" means the Farm Products Marketing Act, R.S.O. 1990; Chapter F.9.

A. 2. "Board Members" means all of the members of the local board listed above.

A. 3. "Company Members" means the representatives of the domestic manufacturers listed above.

A. 4. "Crop" with respect to Part I of this agreement, means the 1993 crop of tobacco to be marketed through the local board's auction exchange pursuant to this agreement and, with respect to part II of this agreement means the 1994 through 1997 crops of tobacco to be marketed through the local board's auction exchanges pursuant to a negotiated agreement under the Act.

A. 5. "Domestic Account(s)" means the account(s) consisting of all tobacco purchased for domestic use.

A. 6. "Manufactured product for Duty Free & Export account(s)" means the account(s) consisting of all tobacco purchased for the manufacture of tobacco products for sale to Duty Free outlets and export markets in North America.

A. 7. "Manufactured product for export account(s) outside the North American continent" means the account(s) consisting of all tobacco purchased for the manufacture of tobacco products for sale to export markets excluding the North American continent.

A. 8. "Domestic Make-Up" means amount to be paid to the local board pursuant to Clause D.1.(c).

A. 9. "Domestic manufacturers" means Imperial Tobacco Limited, RJR-Macdonald Inc., and Rothmans, Benson & Hedges Inc.

A. 10. "Domestic poundage" means the pounds of tobacco in the domestic account(s).

A. 11. "Manufactured product for Duty Free & Export account(s) poundage" means the pounds of tobacco in the Manufactured product for Duty Free & Export account(s).

A. 12. "Manufactured product for export account(s) outside the North American continent poundage" means the pounds of tobacco in the manufactured product for export account(s) outside the North American continent.

A. 13. "Export accounts" means the tobacco that is marketed through the local board's auction exchanges and that is not Domestic Account(s), Manufactured product for Duty Free & Export account(s), and manufactured product for export account(s), outside the North American continent.

A. 14. "Export leaf dealers" means the following members of the Leaf Tobacco Exporters Association of Canada; Delta Leaf Tobacco Company Ltd., Dibrell Brothers of Canada Ltd., Imperial Tobacco Limited, RJR-Macdonald Inc., Standard Commercial Tobacco Company of Canada Ltd., Simcoe Leaf Tobacco Company Ltd., and such other export leaf dealers as may be licensed by the local board and become members of the Leaf Tobacco Exporters Association of Canada in the future.

A. 15. "Export poundage" means the pounds of tobacco in the export account(s).

A. 16. "Floor price" means the actual bid price accepted by the producer for tobacco of the grade as set out in Schedule I to this agreement sold through the local board's auction exchanges.

A. 17. "Local board" means the Ontario Flue-Cured Tobacco Growers' Marketing Board.

A. 18. "Marketed" includes tobacco sold or otherwise disposed of through the auction exchanges operated by the local board.

A. 19. "Minimum Grade Price(s)" means the price(s) for the grade(s) set out in Schedule I hereto.

A. 20. "No-Bid" means tobacco that has been offered for sale and has not been bid upon:

(a) at or above the minimum grade price as set out in Schedule I, for "A" grades;
(b) at any price for all other tobaccos.

A. 21. "Sold" means marketed through the auction exchanges operated by the local board and bought for domestic account(s), manufactured product for Duty Free & Export account(s), manufactured product for export account(s) outside the North American continent, and export account(s), but does not include no-bid tobacco.

A. 22. "Tobacco" means unmanufactured Flue-Cured tobacco produced in Ontario, including Flue-Cured tobacco purchased or otherwise acquired by and readied for storage and sale by the local board.

A. 23. "Tobacco Advisory Committee" is a committee made up of the following persons or their successors, as appointed from time to time by their respective organizations:

Present Members

O.M.A.F.	Mr. R. Duckworth Mr. J. Sandever
Federal Dept. of Agriculture	Mr. K. Trudel Mr. W. Parlee
O.F.C.T.G.M.B.	Mr. A. Bouw Mr. G. Gilvesy Mr. D. Lindsay Mr. R. Vancso
Imperial Tobacco Limited	Mr. T. Lee Mr. H. Goode
RJR-Macdonald Inc.	Mr. W. Abbott Ms. L. Graham-Didone
Rothmans, Benson & Hedges Inc.	Mr. L. Bowen Mr. G. Ayres
Leaf Tobacco Exporters Association	Mr. C. Cline Mr. R. Muckle

A. 24. "Market Clearing Program Tobacco" means no-bid "A" grades of tobacco removed from the market under the terms of the "Market Clearing Program".

A. 25. "Market Clearing Program" is a program attached to the Heads of Agreement.

A. 26. "Buyer" means a buyer licensed as such by the local board.

PART I

B. The domestic manufacturers agree as follows with respect to the 1993 crop:

B.1. To purchase for domestic account(s) not less than 77,520,000 pounds of graded tobacco offered for sale through the local board's auction exchanges and to guarantee for tobacco sold to domestic account(s) an average price of $2.6281 per pound green weight for all such tobacco purchased. The guarantee as to average price and pounds excludes N.D. and Special Factored Tobaccos. The 77,520,000 pounds for domestic account(s) consists of:

		%
Imperial Tobacco Limited	48,610,000 pounds	62.71
RJR-Macdonald Inc.	12,926,000 pounds	16.67
Rothmans, Benson & Hedges Inc.	15,984,000 pounds	20.62
Total	77,520,000 pounds	100.00

B. 2. To purchase for manufactured product for Duty Free & Export account(s) 11,480,000 pounds of graded tobacco, excluding N.D. and Special Factored Tobaccos, offered for sale through the local board's auction exchanges at floor prices as referred to in Clause D. 1.(a). The 11,480,000 pounds for these account(s) consists of:

		%
Imperial Tobacco Limited	3,390,000 pounds	29.53
RJR-Macdonald Inc.	4,074,000 pounds	35.49
Rothmans, Benson & Hedges Inc.	4,016,000 pounds	34.98
Total	11,480,000 pounds	100.00

B. 3. To purchase for manufactured product for export account(s) outside the North American continent 6,750,000 pounds of tobacco, including N.D. and Special Factored Tobaccos, offered for sale through the local board's auction exchanges at floor prices.

The 6,750,000 pounds in these account(s) consists of:

		%
RJR-Macdonald Inc.	4,219,000 pounds	62.50
Imperial Tobacco Limited	2,531,000 pounds	37.50
Total	6,750,000 pounds	100.00

B. 4. That N.D. and Special Factored Tobaccos shall not be subject to Minimum Grade Price(s) and shall not be included in the calculations when determining the average price paid under Clauses B.1. and B.2.

B. 5. That tobacco grades shall be established by an independent grader(s) under the Farm Products Grades and Sales Act of Ontario and regulations thereunder and the grader or his or her designate shall place the grade of the sample bale on the tobacco pallet.

B. 6. That the prices set out in the grading system specified in the schedules hereto form part of the Heads of Agreement and that if tobacco referred to herein does not receive a bid under the terms in Definition A. 20, that tobacco shall be categorized as no-bid tobacco.

B. 7. To provide proof of export of manufactured product and use of Ontario tobacco for the manufacture thereof to MacGillivray Partners:

a) Duty Free and Export account(s);

Proof of export shall consist of an audited certification by MacGillivray Partners in accordance with paragraph c) hereof.

b) Export account(s) outside the North American continent:

Proof of export shall consist of an audited certification by MacGillivray Partners in accordance with paragraph c) hereof.

1) that the destination(s) of the manufactured product(s) is outside the North American continent,

2) of the quantities of Ontario tobacco used for the manufacture of these products, or still being held for the manufacture of these products.

3) Due to the lower priced tobaccos required to compete in world markets, RJR-Macdonald Inc., and Imperial Tobacco Limited agree that the average floor price paid by them for purchase of tobaccos for manufactured product for export account(s) outside the North American Continent, will under no circumstances, due to timing and to the grade mix purchased, be more than the average price paid for their purchases for domestic account(s) and for manufactured product for Duty Free and Export account(s) combined.

c) For the purposes of the above, an audited certification shall be pursuant to the terms and requirements for such audits agreed to by all TAC Subcommittee members.

d) Tobacco used for the manufacture of the products for Duty Free and Export accounts and Export accounts outside of North America shall be calculated using the following conversion factors, except in the case of Export Accounts outside of North America where other conversion factors may apply if they are adequately documented;

Cigarettes - 1.95 farm weight pounds per thousand cigarettes,

Fine-Cut & Rag - 2.28 farm weight pounds per kilogram of manufactured Fine-Cut or Rag.

C. The local board agrees as follows with respect to the 1993 Crop:

C. 1. To fix and allot 1993 quotas for producers in such a manner as to provide for the marketing of 167,500,000 pounds from the Crop.

C. 2. To meet with the domestic manufacturers and Export leaf dealers no later than during the second round of sales to determine whether additional quota should be fixed and allotted in such a manner as to provide for the marketing of up to 7,500,000 pounds in excess of 167,500,000 pounds. Should an exceptional growing season result in a crop larger than 175.0 million pounds, the Board will work with the Export leaf dealers and domestic manufacturers to determine whether more tobacco may be marketed. The determination to fix and allot additional quota shall require reasonable assurances from the Export leaf dealers that reasonably satisfy the local board that the additional pounds will sell and an orderly market will be maintained. Additional quota allotted under this clause shall not exceed, in aggregate, more than the total additional amount indicated by the Export leaf dealers. Of any additional quota allotted, not more than 3,750,000 pounds shall be allotted for marketing no later than the fourth round (when approximately 40% of the crop has been offered for sale), if conditions for the additional volume are met, and any additional amounts above 3,750,000 pounds shall be allotted for marketing no later than after the completion of the fourth round.

C. 3. The Minimum Grade Price(s) in Definition A.19. as set out in Schedule I will apply to the 1993 crop only. In the application of those grade prices, on "A" grade tobacco the clock will be stopped when it reaches the Minimum Grade Price for that tobacco. On "B" grade tobacco the clock will be allowed to continue until the tobacco is sold or until the clock reaches such price below the Minimum Grade Price as may be considered reasonable by the local board, after consultation with Export leaf dealers, subject, however, to the provisions of Clauses D.1.(a) and D.1.(b).

C. 4. That it will not use any powers vested in it to distort or tamper with the normal mixture of grades of tobacco available for purchase at an auction operated by it unless agreed otherwise by the parties hereto.

C. 5. To pay the domestic make-up to producers in a manner that rewards producers for the production of high quality, mature tobacco as set out in a letter from the local board to the Domestic manufacturers prior to the signing of this Agreement.

D. It is mutually agreed with respect to the 1993 Crop:

D. 1.(a) In respect of domestic poundage and manufactured product for Duty Free & Export account(s) poundage, the local board shall invoice each domestic manufacturer daily for:

(i) the floor price for each unit of sale for all "A" type tobaccos and all "B" type tobaccos that are sold at or above the Minimum Grade Price for the applicable grade as set out in Schedule I, or the Minimum Grade Price as set out in Schedule I for each unit of sale of "B" type tobacco that receives a floor price less than the Minimum Grade Price for that particular grade;

(ii) N.D. and Special Factored Tobaccos at floor price paid.

Each domestic manufacturer (or its representative) shall on the following day pay to the local board the required amount.

(b) The local board shall also forward daily to the domestic manufacturers (or their representative):

i) daily and to-date statements of the pounds sold to these accounts on an individual domestic manufacturer basis and in total and the average amounts paid on an individual domestic manufacturer basis and in total (exclusive of N.D. and Special Factored Tobaccos);

ii) a to-date statement of the make-up paid by individual domestic manufacturers and in total for domestic poundage purchased;

iii) an invoice for the make-up to be paid by individual domestic manufacturers and in total for domestic poundage purchased, being in total the difference between such to-date price paid for the domestic poundage and any amounts previously paid pursuant to this Clause and the guaranteed average price of $2.6281 per pound purchased for domestic accounts (exclusive of N.D. and Special Factored Tobaccos). The portion to be paid by individual domestic manufacturers shall be determined as set out in Schedule II. An example of the calculations is shown in Schedule II.

(c) The domestic manufacturers (or their representative) shall on the following day, pay to the local board their portion of the domestic make-up, being the difference between such to-date amounts paid as provided in D.1.(a) and the amounts required as provided in D.1.(b).

D. 2. In respect to manufactured product for export account(s) outside the North American continent poundage, the local board shall invoice the appropriate domestic manufacturer daily for the floor price paid for each unit of sale.

Each domestic manufacturer (or its representative) shall on the following day pay to the local board the required amounts.

D. 3. In respect of domestic poundage, manufactured product for Duty Free & Export account(s) poundage and manufactured product for export account(s) outside the North American continent poundage, as soon as possible after the local board's marketing of the crop closes, the local board shall forward to the domestic manufacturers duly audited statements of each domestic manufacturers purchases for these accounts, the total purchases of all domestic manufacturers for these accounts, the total funds received from auction sales, plus the domestic make-up received from each domestic manufacturer and the total make-up received from all domestic manufacturers pursuant to Clause D.1.(b) and D.1.(c).

D. 4. The local board shall retain in a separate account, under the Market Clearing Program, an amount equivalent to one-third cent (1/3¢) per pound for all domestic pounds and manufactured product for Duty Free & Export account(s) pounds which shall be the domestic manufacturers share of the funding for the Market Clearing Program.

D. 5. In respect to the manufactured product for export account(s) outside the North American continent poundage, the local board shall invoice the appropriate domestic manufacturers in the amount of one-third cent (1/3¢) per pound and retain these funds in the separate account referred to in Clause D.4. for funding of the Market Clearing Program.

D. 6. That "A" type tobacco as defined in Schedule I that is No-Bid as defined in Definition A. 20. shall, starting with the seventh round, be purchased under the terms and subject to the limitations of the "Market Clearing Program" attached to the Heads of Agreement.

D. 7. In order to assure the integrity of Domestic Account(s) as defined in Clause A.5, the local board;

(a) shall obtain and file with MacGillivray Partners.

i) complete information on all sales of tobaccos sold to export account(s) on the auction floors from the 1993 crop as well as from the 1990, 1991, and 1992 crops and,

ii) satisfactory proof of export for all tobacco exported directly by the local board as provided in B.7.c).

(b) shall obtain the written undertaking from each export leaf dealer to which the local board intends to sell tobaccos for export that such export leaf dealer shall file with MacGillivray Partners satisfactory proof of the export of any such tobaccos as provided in B.7.c).

D. 8. That the domestic manufacturers shall have a period of two years from the completion of the 1993 crop market to utilize tobaccos purchased for manufactured product for export account(s) outside the North American continent. The local board agrees that any such tobaccos not documented as having been exported in accordance with Clause B.7. b) within that two year period may be at the option of the domestic manufacturer in whole or in part either;

(a) exported with proof of export as required under Clause D. 7 or,

(b) used for domestic manufacture upon payment to the local board of all applicable domestic make-up as provided for by Clause D. 1(b).

D. 9. That tobacco purchased for export accounts may be transferred to manufactured product for export account(s) outside North American continent and such tobacco is then subject to conditions specified in clause D. 8.

D.10. That any buyers making application to purchase tobacco from the 1993 crop shall be governed by the terms and conditions in the Ontario Flue-Cured Tobacco Growers' Marketing Board Policy Statement No. 3, Terms & Conditions for Buyers, dated April 22, 1993, under the authority of Regulation 383 amended under the Farm Products Marketing Act.

PART II

E. It is mutually agreed with respect to the 1994 through 1995 crops:

E. 1. That the guaranteed average price base for purchases for domestic accounts be the previous crop year guaranteed average price for domestic accounts. Increases in the guaranteed average price for domestic accounts shall be a maximum of:

1994 - 70 percent of the 1993 increase in CPI.
1995 - 60 percent of the 1994 increase in CPI.

F. With respect to the 1996 and 1997 crops, there is a strong indication that this method of price determination will be continued. The final decision to continue will be made for the 1996 crop during the 1994 crop negotiations and for the 1997 crop during the 1995 crop negotiations. If a decision to continue is made, the basis for increases in the guaranteed average price for domestic accounts for the 1996 crop would be the previous year's guaranteed average prices for domestic accounts as a base and maximum increase of;

1996 - 60 percent of the 1995 increase in CPI

The percentage of CPI increase for the 1997 crop domestic price to be determined during the 1994 crop negotiations.

The CPI increase in all cases shall be the annual average shown in the Table 3 of the Statistics Canada Catalogue 62-001 for December of the previous year.

G. It is mutually agreed with respect to the 1994 through 1997 crops;

G. 1. The domestic manufacturers will supply to the local board throughout the term of this agreement, on an annual basis, no later than February 1st, in each year the domestic manufacturers' aggregate estimate of their projected tobacco product sales for the ensuing five years.

G. 2. The domestic manufacturers will supply to the local board throughout the term of this agreement, on an annual basis, no later than February 1st, in each year the domestic manufacturers' aggregate estimate of their projected Ontario tobacco crop requirements for the ensuing three years expressed in terms of green weight of tobacco.

G. 3. The domestic manufacturers will no later than the 15th day of February, of each year for the years 1994 through 1997, advise the local board of their firm aggregate Ontario tobacco crop requirements for that year which shall be derived from the estimate earlier provided under Clauses G.1. and G.2., subject only to such revision as may be required owing to any unforeseen circumstances. That quantity shall be the basis for agreement on quantities to be purchased by the domestic manufacturers in each of those years pursuant to a negotiated agreement under the Act.

G. 4. As at the time of execution of this agreement the domestic manufacturers' estimate of their aggregate Ontario tobacco crop requirements are:

		Manufactured Product	
	Domestic Mfd Product (Defn. A.5)	Duty Free & Export in North America (Defn. A.6)	Export Outside North America (Defn. A.7)
1994	74,400,000	7,600,000	10,000,000
1995	71,700,000	7,800,000	10,000,000
1996	69,000,000	8,000,000	11,000,000
1997	68,000,000	8,000,000	11,000,000

G. 5. The local board will exercise its best efforts, in cooperation with the domestic manufacturers to obtain from the Export leaf dealers on an annual basis, the Export leaf dealers' estimate of their projected tobacco requirements for the ensuing three years and will supply such information to the domestic manufacturers.

G. 6. The local board shall establish quotas for 1994 through 1997 crops, so as to reflect the total requirements for export accounts subject to an acceptable export price indication based on export demand profiles and the total aggregate requirements of the domestic manufacturers. The domestic manufacturers tobacco requirements for accounts A.6 and A.7 shall be included in the aggregate requirements, subject to the terms and conditions set out in Part I of this agreement.

G. 7. As the beneficial aspects of flexibility in the poundage of tobacco to be marketed is recognized by all members of the industry, it is agreed that the determination of the allotment of any additional quota in any of the years 1994 through 1997 shall be decided by the local board, Export leaf dealers and the domestic manufacturers.

G. 8. That Minimum Grade Prices be based on the previous four years floor prices with the highest year removed and the remaining three years averaged. This price is applied to a weighted four-year grade mix to arrive at an overall average. The resulting prices will be inflated by three to five percent as determined by the TAC Subcommittee to establish Minimum Grade Prices. The TAC Subcommittee may intervene where necessary to revise the resulting prices.

G. 9. To maintain the independent grading system and the grade standards so that the grade standards are uniformly applied, grading consistency is achieved such that the independent grading system is the recognized system of measurement within the Ontario tobacco industry.

It is agreed that Part I of the Heads of Agreement remain in force until the later of the 31st day of March, 1994, or the actual completion date of the 1993 market and that the remainder of this Heads of Agreement, except to the extent that it may later be amended or replaced by the parties remains in force until the 30th day of June, 1998.

It is agreed that the domestic manufacturers and the local board shall retain the terms of this Heads of Agreement in confidence and shall not disclose such terms to any third party, except for required disclosure to professional advisors, governmental agencies or regulatory authorities of Ontario or Canada and that disclosure to producers shall be in the form, and to the extent, and on such terms as the local board deems necessary.

The Heads of Agreement approved by the Farm Products Marketing Commission by order dated the 8th day of September, 1992 is hereby revoked.

Witness the signature of the members of the Negotiating Committee for Tobacco this 29 day of April, 1993.

For the domestic manufacturers:

Imperial Tobacco Limited

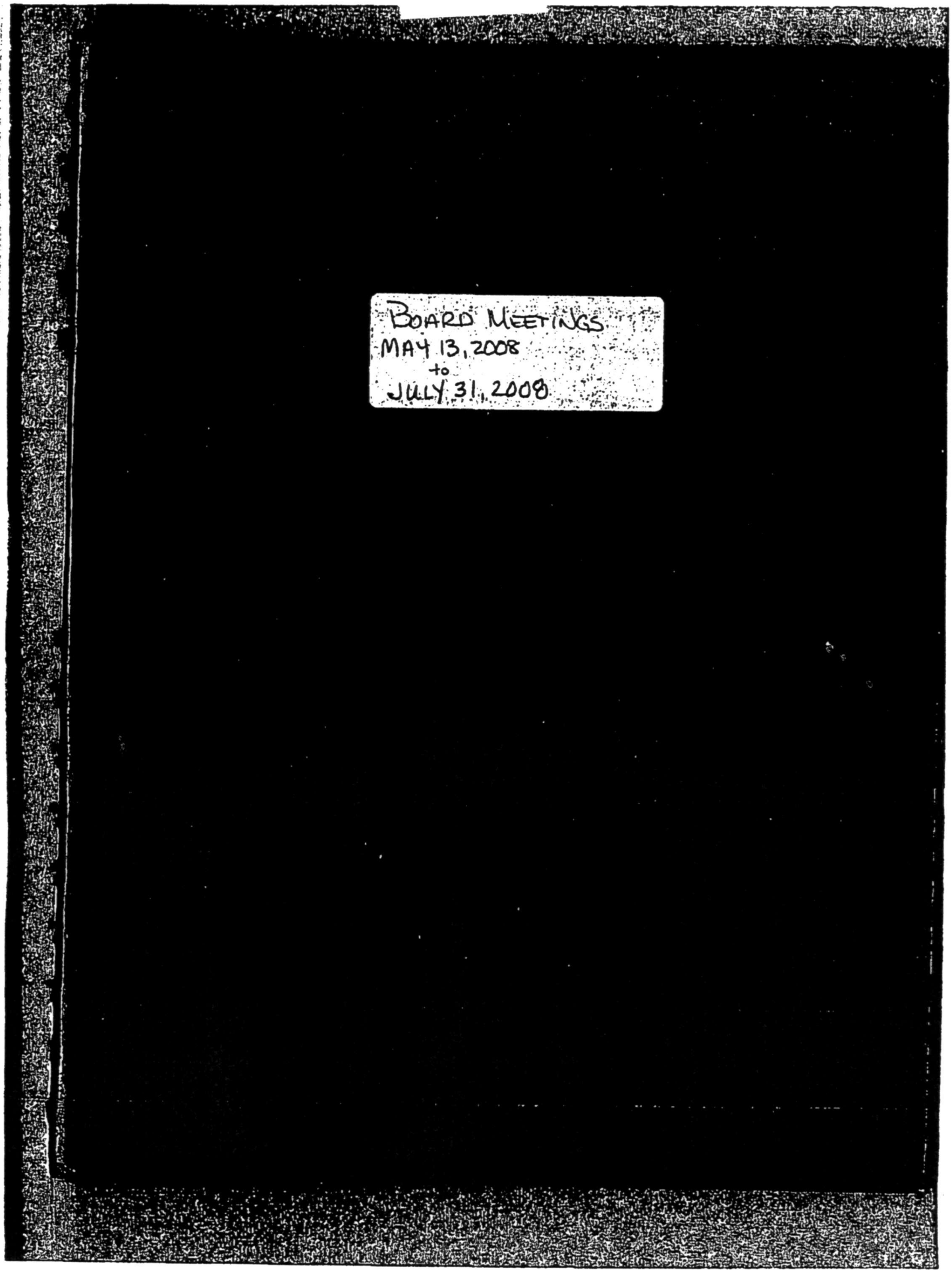
RJR-Macdonald Inc.

Rothmans, Benson & Hedges Inc.

For the local board:

This is **Exhibit "B"** of the **Affidavit of Fred Neukamm** sworn March 17, 2021.

A Commissioner for taking Affidavits
David Robins (LSO #42332R)


BOARD MEETINGS
MAY 13, 2008
to
JULY 31, 2008

Date July 31.

Board Meeting Thurs. July 31/08 @ 9 am

LV FN VM LL CJ
JD MA SS TM HV DG RUM. CVP.

1) Called to order at 9:40 am.
- F.N. Chaired.

2) Approval of Agenda
- status of TAC. (SS)
- North Shore (SS) + (HH)
- Lawsuit - (DG)
- Agricorp Audit (DG).

M - MA
S - DG
Carried as amended

3) Moratorium
M - MA
S - HV
Carried for 30 days . . .

4) General ~~Regulation~~ Business
Reg 2-2008 - Whole BPQ
M - HV
S - DG
Carried

Reg 4-2008 - Part BPQ.
M - MA
S - SS
Carried

Date July 31

* L.V. joined the meeting and assumed the Chair

* Meeting w Scott Brison & Eric Hoskins - LV

LV Brison is co-chair with Bob Rae of Lib Committee - close w Wayne Easter - very informed & supportive of our issue

HV - Concern - Libs saying the right things but it's not in the "Book" - still homework to do with Dion.

*RUM joined the meeting.

DG spoke to Lib Whip Carrie Redmond - also very well informed by Wayne Easter - She may be in the area for a "Corn Roast" with Martha Dennis.

*CVP joined the meeting

TM. Lloyd St Amand - Wayne Easter will be done Sept 4 out west

DG Bob Rae said point blank Yes, the Libs would implement a levy to fund a program

Brison / Hoskins

CVP - spoke to both.

Date July 31

Staff Reports

VH. Survey - @ 10,000 acres
damage - hail in Dumbo, Walsingham, Cultus, Aylmer
- a lot of calls re 'leaf drop'

Inspections
- expect to be done tomorrow
- @ 80% entered = - 8356 acres
- c/o = 2.4 m lbs
- @ 23/24 mm crop + c/o of 2.4.

⇒ Check c/o numbers (was 2.7 - some have destroyed c/o)

LV. - Weight/yields will be an issue with all the rain etc.

Advance Payments
- slow
- 280 apps to date
  $ 3,481,420. - int free
  $ 32.191. - int bearing

Conference Call rates
- to reduce costs.
- $80 up to 1 hr.
- $50 every hr. thereafter
- max $188.

CVP - s/b just 1/2 per diem for Conf Call up to 2 hrs.

Date July 31.

Dunarski joined.
M - CUP
S - RUM)

Conf Call = 1/2 per diem ~~[illegible]~~.
~~top to 8hrs = more than~~
~~8hrs = full per diem~~
Carried.

{ cleaned up motion from last meeting.
— ~~Received letter~~ f

F.P.M.C. - Restructuring
- letter distributed and read + discussed
LV - will check with lawyrs re what we still can do to eliminate 11th member
- will do what letter asked re: realignment in timely fashion
FN feel we should re-look at 7 district model for 2009
LV they do feel there should be 10 - they refer to Deloitte which says 10
SS they contradict themselves in the letter
LV We will now have the opportunity to tell
* those who stand for election in Oct. that it might be for a one year term
Still feel we do not require 11th member

Date July 31/08.

CVP Should stay focused on model for 7 districts - have it ready to implement for 2009.

RVM Imperative that we have 3rd party involvement with this exercise.

DG What about the 2¢ fee?
LV Still merit?
FN Yes!
RVM Yes - to cover costs
DG Feel we should re-visit this since not everyone can vote
JD agree with Deb - produce will end up paying
CVP This should be part of the discussion of the draft budget due ~~to~~ Aug 8th
HV Board works for all quota holders All who are being represented should help "carry the freight"
→ I would not have supported the motion re voting but I do support the 2¢

→ SS - discuss as part of budget process)

VM Stetler Update
- made proposal
- Stetler does not want to settle
∴ on to appeal

Date July 31/08

North Shore

UM - Rec'd app for buyers' licence - but info missing - so far they are refusing to provide it → letter sent from BB by registered mail.

UM - 1-2 mm lbs of export wanted by another buyer - being handled by Momot.

ACC

UM - will not give financing until there is a crop agreement - have extended deadline

Crop Insurance

UM Working on interim payment structure

UM Cannot get rest of Advance Payment until crop agreement in place

DO - They do it for other commodities! ie.- beef + pork!

LV. Andy still following-up - we haven't given up.

Private Insurance

LL - indications that they have come up with plan - re rate of payout if a loss

preliminary plan
- $2.21 for tobacco lost w/in the 7% growth
- $1.60 for tobacco for which rentals are intended
- Cannot sell farmers this yet - likely next week

Date July 31 08

UM Carryover Update
= No discrepancies

6. Harvest Wage Rates
HV- has been very contentious
- tried to move all harvesting to hourly rate -> very slow & reluctant.
- discussion on meaning of "status quo"
- them -> $87.50
- us -> $85.80.
- SC has endorsed the $87.50 (x10 factor)
- have taken this as far as we can for 2008.
- The 10 hr methodology is our ~~methods~~ enemy
- tobacco farmers vs farmers who grow tobacco.
- this info for letter to producers
- stronger letter to go to governments
- effect on locals of going away from the "10 hr equivalent - savings for govt though.
- Low Skill Program may start to take hold - esp. as a recourse to Mexico & its problems - also problem re illegals
- Mennonites starting to move west.

Date July 31/08

TM Important to get to government with the proper information. No other group is paying piecework
- should be optional to farmer to pay either hourly or piecework.

SS H.N. & Service Canada are discriminating against some of their workers – hrly pd striproom vs piecework in kiln.
- problem in bunkhouse –

TM Can't give up – get BB involved

DG Have lawyer draft letter back to SC.
HV Need to work for the 10 hrs!
DG Unfair for us to send the message to our farmers - if you are mechanized (you) get 10 hrs of work for $87.50

FN We will not be a party to the discrimination your rules are creating . . .
& we will advise them to pay all by the hour.
no longer a rationale for 10 hrs. (and equivalent varieties cult. practices since 60's when the 10 hr. was set)
CVP Danger of job classifications
Job has evolved so much
TM → Do survey – how many stat have to
- o/s empty the kiln
- no emptying with bcrs.

Date July 31/08

i) letter to producers
ii) letter to gov't - our objection & our expectations
- check with legal people re the discrimination issue.

8. Water Response Team Mtg - July 23
CVP - level 1 response cancelled because of weather
DG Otter was very low & it makes no sense - can't get any answers Golf Course ??
CVP Have sent CA to find those answers
MA. More retention areas on streams?
LV Need to stay on top of this
DG. OFA presentation next week

9. Outside Riders Teleconference - July 24.
CVP - seat belt legislation
- private members bill now in Committee to prohibit riding in back of pick-up or cube van
- Exemptions for Agriculture for farm to farm purpose
- still in consultation process.

#LV. read news report re. ties to Big Tobacco (good for us?)
also PM looking to take over Rothmans entirely

Date July 31 08

FN: response to CVP.
re news of fines to companies
- some analysis warranted re proof
of export etc. . . .

* Rum withdrew

13. ~~Adjournment~~ Correspondence

1. ACC Farmers Financial A.M.
M - HV
S - MA) Treasurer
Carried

2 Runciman Fundraiser Aug 16.
- No action

Other Business
1. Notice from Norfolk re Ag Advisory Bd.
(CVP intends to apply)

2. Request from Alan Emerson re transfers

LV- Call from Minister Finley
- Warehouse tomorrow for announcement
- open to farmers to attend
- 10 am announcement
- beat Erich at 930

Date July 31

Leon Passmore meeting - July 30

LV – Imperial would be sticking to their figures
- He is willing to come back to the table

North Shore

LV supposedly willing to pay levy on ~~pack~~ carton of cigarettes

LL Jason + Mark are aware of it.

Agricorp Audit

DG – overpayments being overlooked
– lack of security etc.

≠ LV – We will be responding to this

≠ DG – I have points → go over with Judy

MA Very corrupt.

DG FCC – becoming aggressive with farmers – 90% of their tobacco accounts in arrears.

VM Allan Emerson request?
OK in @ 2 weeks.

Geo Morris
– no action

Date July 31

Mark Resnick joined the meeting

MR- announcement in Delhi tomorrow
- Conservatives "show"
- Finley to call LV tonight re some more details
- don't have a lot of info on the program re timing + mechanics
- think it is still work in progress
- announcement re smuggling = $ = us
- bottom line → there is going to be a buyout
- will still be a lot of work to do
- primary concern now is to get the Prov. to come up with their 40% share → can't turn this into partisan spat.
- preparing statements for LV for tomorrow can't back them into a corner - must give them some [redacted] room to [redacted] move
- will give directors some bullet points for when talking to farmers. → critical → it is a bittersweet moment for tobacco farmers - tone of message

8:30 at Exchange. → all meet
- govt wants to see farmers there → tell them to be there at 10 - funding announcement announcement at 1030.

M- RVM
Adjourn at 2:45pm.

Date Aug 1/08

Friday August 1st @ 9am
Delhi Auction Exchange

- ~~J~~ Vandenbreessche, F. Neukamm
MA RDM SS CVP TM JD DG HV.
JMaxwell Uhlfeldm Lbeteau Cgacot
Mark Resnick
- ~~Mark Resnick~~
- Mark reviewed agenda for the morning
- suggested speaking points
- remarks re province
- how does this affect negotiations with the Trade?
- Board to meet after ~~lunch~~ the press conference
LV - Will eventually need mass meeting
LL - Suggest a couple of farmers with positive comments to media
- ~~Bruce~~ Emurch,

Reconvene after Announcement
- discussed reaction to announcement
mixed emotion
- Trans -> 15 million
DG Our dollars before Community $
Bulk of $ before end of year
4-6 wks for apps to be out
- if you take the $, you don't grow again

Date Aug 1/08

MR – Board will have to help the Prov with this.

TBs ① Will have to work on strategy with Prov starting next week

② Need to see Shenstone next week re Program Admin

LV Need to now get Richard Mahoney back re province

LL. Leona still talking Devy on the product

DG. Defined period of time?

LV Wrap up by end of 09?

MR. We will get the cheque to the Board up front + we administer it

LV – Next steps -> call banks + tell them to hold off

VM – Wording in redux re not taking everything from a farmer.

LV If you choose to continue to grow, you lose the right to $1.05.

- By 2009 -> just a licencing system for those who choose to remain

- Board Meeting -> Thursday

Finance - Tues @ 2pm re: Insurance.

FN Should investigate marketing agreements for the period of the convictions - get advice if what the Co's did was out of bounds - after we secure the prov. dollars.

Court File No. 19-CV-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 **ROTHMANS, BENSON & HEDGES INC.**

Applicant

AFFIDAVIT OF ANDY JACKO
(Sworn March 17, 2021)

I, ANDY JACKO, of the Township of Norwich, in the County of Oxford, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a named plaintiff along with the Ontario Flue-Cured Tobacco Growers' Marketing Board ("Tobacco Board") in three proposed class actions commenced against Rothmans, Benson & Hedges Inc. ("Rothmans"), Imperial Tobacco Canada Limited ("Itcan") and JTI-Macdonald Corp. ("JTIM"). In this affidavit, I shall refer to Rothmans, Itcan and JTI collectively as the Tobacco Manufacturers. I have knowledge of the matters to which I hereinafter depose.

2. On August 29, 2011, I swore affidavits in each of the three actions brought respectively against Rothmans, Itcan and JTIM in support of motions for orders certifying the actions as class proceedings. I affirm the truth of the statements made in my prior affidavits sworn in the class proceedings. I was not cross-examined on my affidavits.

3. The actions were brought on behalf of Ontario flue-cured tobacco growers and producers ("Producers") who sold their tobacco through the Tobacco Board pursuant to the annual Heads of Agreement made by the Tobacco Board with the Tobacco Manufacturers from January 1, 1986 to December 31, 1996 (the "Agreements").

4. I am a farmer residing in the County of Oxford, Ontario. During the 1986 to 1996 period, I grew tobacco in Ontario and sold it to the Tobacco Manufacturers through the Tobacco Board's auction exchanges on terms stipulated by the Agreements.

5. The actions seek to recover damages from the Tobacco Manufacturers for breach of the Agreements arising from their failure to pay the contracted price for the tobacco that I grew and sold, along with other Producers, through the Tobacco Board.

6. I understand that the actions have been stayed by an initial order of this Court made on March 22, 2019 as extended and amended in CCAA proceedings.

7. I recently turned 65 years old. Most of the Producers are between the ages of 60 and 70. One of my fellow Producers, Brian Baswick, who is also a named plaintiff in the actions, Brian Baswick died on March 3, 2021 at the age of 65.

8. I am frustrated by stay of the actions. I would very much like to see the Producers' claims, as advanced by the Tobacco Board in the actions, resolved for the benefit of myself and my aging former fellow Producers, because we are retired, aging and could use the money.

9. I swear this affidavit in support of a motion by the Tobacco Board for declarations and for no other or improper purpose.

SWORN by Andy Jacko. of the Township of Norwich, in the County of Oxford, Province of Ontario, before me at the City of Windsor, County of Essex, Province of Ontario, on March 17, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

ANDY JACKO

A Commissioner for taking affidavits
David Robins, LSO #42332R

#1805776

Court File No. 19-CV-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 **ROTHMANS, BENSON & HEDGES INC.**

Applicant

AFFIDAVIT HARVEY T. STROSBERG, Q.C.
(Sworn March 16, 2021)

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

1. The capitalized terms used in this Affidavit have the following meanings:

   (a) "**Actions**" means The Ontario Flue-Cured Tobacco Growers' Marketing Board et al v. Rothmans, Benson & Hedges, Inc., Court File No. 64462CP; The Ontario Flue-Cured Tobacco Growers' Marketing Board et al v. Imperial Tobacco Canada Limited, Court File No. 64757; and The Ontario Flue-Cured Tobacco Growers' Marketing Board et al v. JTI-MacDonald Corp., Court File No. 1056/10 CP;

   (b) "**CCAA**" means *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;

   (c) "**Comprehensive Agreement**" means the agreement made as of July 31, 2008 between Rothmans and Her Majesty the Queen in Right of Canada and the Provinces, and "**Comprehensive Agreements**" means the Rothmans and Itcan agreements made as of July 31, 2008 and the JTIM agreement made as of April 30, 2010;

   (d) **"DFX**" means duty free and export;

   (e) "***Excise Act***" means *Excise Act*, R.S.C. 1985, c. E-14, as amended;

(f) "**HCCR Claim**" means a health care costs recovery claim by the Provinces and Territories for its costs, including the future costs, of health care services provided to those with tobacco-related diseases in each of the Provinces and Territories caused or contributed to by exposure to a tobacco product;

(g) **"Itcan**" means Imperial Tobacco Canada Limited;

(h) "**JTIM**" means JTI-Macdonald Corp.;

(i) "***Limitations Act* 1990**" means the *Limitations Act*, R.S.O. 1990, c. L.15;

(j) "***Limitations Act* 2002**" means the *Limitations Act, 2002*, S.O. 2002, c. 24;

(k) "**Producers**" means Ontario flue-cured tobacco growers and producers;

(l) "**Released Claims**" under the Comprehensive Agreement include, *inter alia*, "all civil claims that may be allowed to the **Releasing Entities** relating to or arising out of the smuggling of tobacco or any failure on the part of **Itcan** to pay taxes, duties, excise, customs or excise taxes or duties or amounts payable on account of smuggled or imported tobacco.";

(m) "**Releasing Entities**" under the Comprehensive Agreement means Her Majesty the Queen in Right of Canada and in Right of the Provinces and includes for greater certainty the Canadian Revenue Agency and the Canadian Border Service Agency;

(n) "**Rothmans**" means Rothmans, Benson & Hedges, Inc.;

(o) ""**TAC**" means the Tobacco Advisory Committee;

(p) "**Tobacco Board**" means The Ontario Flue-Cured Tobacco Growers' Marketing Board;

(q) "**Tobacco Claim**" means a **HCCR Claim** and/or a **TRW Claim**;

(r) "**Tobacco CCAA Proceedings**" means the **CCAA** proceedings involving **Rothmans**, **Itcan** and **JTIM**;

(s) "**Tobacco Manufacturers**" means **Itcan**, **JTIM** and **Rothmans** collectively; and

(t) "**TRW Claim**" means an action for tobacco related wrongs relating to the use and/or exposure to tobacco.

2. I am a senior partner at Strosberg Sasso Sutts LLP. I am one of the counsel for the Tobacco Board in the Actions and in the Tobacco 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.

3. I swear this affidavit in support of the Tobacco Board's motion for declarations. The purpose of this affidavit is to provide an overview of the Tobacco Board's Actions against the Tobacco Manufacturers that pre-dated the CCAA Initial Orders for JTIM on March 8, 2019, Itcan on March 12, 2019, and Rothmans on March 22, 2019. Attached as Exhibit "A," "B" and "C" are the pleadings in the Actions against Rothmans, Itcan and JTIM respectively.

4. In the Actions, the Tobacco Board and other Producers as proposed representative plaintiffs pleaded contracts with each of the Tobacco Manufacturers for the supply of tobacco.

5. Before the March 2019 CCAA Initial Orders, the Tobacco Manufacturers raised defences in the Actions such as: (i) a contract interpretation alleging that payment of the domestic price (as opposed to the discounted price in the contract for export) was not required to be paid as damages; (ii) each Comprehensive Agreement bars the claims by the Tobacco Board and the Producers; and (iii) the Tobacco Board's claims and the Producers' claims were statute-barred by the *Limitations Act* 1990 and/or *Limitations Act* 2002. The Court adjudicated upon each of these defences prior to the Initial Orders. In each instance, the Tobacco Board and the Producers were successful and the Tobacco Manufacturers were unsuccessful.

6. The Tobacco Board asserts that its claims are a "right or claim of a supplier relating to goods or services supplied to," the Tobacco Manufacturers which are expressly excluded from the definition of Tobacco Claim in the Initial Orders as extended and amended.

7. In the late 1980s and 1990s, the Tobacco Board was the exclusive supplier to Rothmans of Ontario flue-cured tobacco under supply management regulations. The Tobacco Board asserts that these regulations were an integral part of the tobacco industry at that time. The Tobacco Board also asserts that it has a common interest in the Tobacco CCAA Proceedings with the other suppliers of goods or services to Rothmans, Itcan and JTIM rather than a common interest with the Tobacco Claimants.

8. In the Tobacco CCAA Proceedings, all other claimants, except the Tobacco Board, are Tobacco Claimants.

9. Under the "business as usual" directions mandated by the Court throughout the Tobacco CCAA Proceedings, the Tobacco Board is the only pre- and post-Initial Order supplier of goods or services to the Tobacco Manufacturers that has not been paid or is not being paid in full for goods or services while the Tobacco Manufacturers continue to operate under the Court's protection.

10. On this motion, the Tobacco Board seeks declarations that:

(a) the Tobacco Board is not a "Tobacco Claimant;"

(b) the Tobacco Board's claims against Rothmans, Itcan and JTIM are debts or liabilities arising out of fraud or a debt or liability resulting from obtaining property or services by false pretenses or fraudulent misrepresentation that, under CCAA section 19(2), cannot be compromised without the consent of the Tobacco Board; and

(c) The Tobacco Board does not have commonality of interest under CCAA section 22(2) with the Tobacco Claimants.

11. In the absence of the Court's declarations, I believe there is no reasonable prospect of resolving the Tobacco Board's claims because the value of the Tobacco Board's claims compared to the value of the Tobacco Claims is "small potatoes." The Tobacco Board and the Producers appear to have no importance to the Tobacco Manufacturers which continued to operate under the Court's protection for the past two years.

Overview of the Actions

12. The Actions were commenced against Rothmans on November 5, 2009, Itcan on December 2, 2009, and JTIM on April 23, 2010. The Plaintiffs in the Actions were the Tobacco Board and individual Producers who, in the period January 1, 1986 to December 31, 1996, sold their tobacco to the Tobacco Manufacturers pursuant to the annual standard form of contract called the Heads of Agreement.

13. There was a different/lesser price for DFX tobacco under the Heads of Agreement. The Tobacco Manufacturers paid less for tobacco for export, DFX, than the price of tobacco for domestic use.

14. Individually, Rothmans, Itcan and JTIM were involved in smuggling tobacco products caused by the increase in taxes and duties imposed on tobacco products by the Federal and Provincial Governments in the late 1980s and early 1990s and the desire to mandate market share of the domestic cigarette market. Why did they smuggle? The answer was that each of Rothmans, Itcan and JTIM desperately wished to maintain market share of the domestic sales of cigarettes.

15. The Federal and Provincial taxes and duties did not apply to exported tobacco products. Tobacco products exported for sale outside of Canada on a 'tax exempt' basis under a Heads of Agreement category called DFX were not affected by these increases in Federal and Provincial taxes and duties.

16. The Tobacco Board and the other plaintiffs asserted that each of the Manufacturers were involved in smuggling. Each Manufacturer should have paid the domestic price not the lesser export price for DFX.

Rothmans' Admission in 2008-2009 of Aiding Smuggling

17. Rothmans manufactured tobacco products in Canada to supply the DFX market. Those tobacco products were smuggled back into Canada for sale and consumption in the Canadian domestic market without payment of applicable duties and taxes.

18. On July 31, 2008, Rothmans pleaded guilty before the Honourable Mr. Justice R.G. Bigelow to a charge that, contrary to section 240(1)(a) of the *Excise Act*, between January 1, 1989 and February 28, 1994, Rothmans did aid persons to sell and be in possession of tobacco manufactured in Canada that was not packaged and was not stamped in conformity with the *Excise Act* and its amendments and ministerial regulations.

19. The reason that Rothmans, Itcan and JTIM did not package and stamp their products in conformity with the *Excise Act* and otherwise aided persons engaged in smuggling activities is identified in Rothmans' Agreed Statement of Facts on its guilty plea. The Rothmans' Agreed Statement of Facts in its guilty plea include the following:

> 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. [Emphasis added].

20. Rothmans was fined $100,000,000 for its admitted criminal activity. The fine was based on Rothmans' admission that it was involved in the avoidance of $50,000,000 in excise duties from December 12, 1989 to June 9, 1993, and excise duties and excise taxes from June 10, 1993 until February 28, 1994.

21. In order to compensate the Governments for lost duties and taxes during the periods relating to the *Excise Act* charges, Rothmans agreed earlier with Her Majesty the Queen in right of Canada and each of the Provinces to a civil settlement, referred to as the Comprehensive Agreement.

22. The Comprehensive Agreement required Rothmans to pay $450,000,000 to the Federal and Provincial Governments to settle claims arising from Rothmans' role in tobacco smuggling.

23. The Comprehensive Agreement was executed prior to Rothmans' guilty plea, was placed in escrow to come into force upon acceptance of Rothman's guilty plea and the joint proposal of the Crown and Rothmans as to penalty, and thereafter to be released for public access.

24. Similar Comprehensive Agreements and admissions were made by Itcan and JTIM, on the one hand, and the Federal and Provincial Governments, on the other, in respect of Itcan's and JTIM's involvement in the use of tobacco designated for DFX that was smuggled back into Canada and sold in the domestic market.

25. The public disclosure of the Comprehensive Agreements, the Tobacco Manufacturers' guilty pleas, and related Agreed Statements of Facts caused the Tobacco Board to seek advice on whether the Tobacco Manufacturers had breached the terms of the Heads of Agreement and, if so advised, to bring legal proceedings to recover damages arising from the breach(es). The Tobacco Board then sought advice from me on whether the Tobacco Manufacturers had breached the terms of the Heads of Agreement and, if a claim could be made, to bring legal proceedings to recover damages for the Producers arising from the breaches of the Heads of Agreement.

26. As set out in further detail in the statement of claim against Rothmans attached at Exhibit "A" to my affidavit, under the Heads of Agreement Rothmans purchased tobacco through the Tobacco Board for the cigarettes and other tobacco products manufactured in Canada for the domestic market and also for the DFX markets that serves Canada's snowbirds and travelers to the United States who purchase cigarettes and other tobacco products at duty free outlets.

27. In each of the annual Heads of Agreement the domestic price of tobacco was higher than the DFX price. The Heads of Agreement called for an annual audit and "Make-up" payment at year-end to increase the price paid by the Tobacco Manufacturers at the Board's auctions during the year to the higher domestic price guaranteed under the Heads of Agreement for that year.

28. The Tobacco Manufacturers also represented to the Tobacco Board their annual estimates of the size of each of the legitimate domestic and DFX markets and further verified at year-end that the tobacco purchased through the Tobacco Board for each of these markets was used by the Tobacco Manufacturers in the manufacture of products sold into the legitimate domestic and DFX markets.

The "Released Claim" Defence under the Comprehensive Agreements

29. The first ground of defence put forward by the Tobacco Manufacturers, raised by Itcan, was that the Tobacco Board's claim had been released by the terms of the Itcan Comprehensive Agreement. This position was supported by Rothmans.

30. Under its Comprehensive Agreement, Itcan agreed to pay $350 million to the Governments over 15 years in exchange for a release from future actions.

31. To the knowledge of the Tobacco Manufacturers, the Tobacco Board played no part in the prosecution of the *Excise Act* charges. The Tobacco Board and the Producers played no part in the negotiation of the terms of the Comprehensive Agreements and were not parties to the Comprehensive Agreements. Moreover, the Tobacco Board and the

Producers that it represents received no benefits under the terms of the Comprehensive Agreements.

32. Notwithstanding the Tobacco Manufacturers' knowledge of the above facts, on March 29, 2010 Itcan delivered notice to Ontario alleging that the claims by the Tobacco Board in the class action against Itcan arose out of and in connection with a "Released Claim" and that the Tobacco Board and Commission are "Responsible Governments" – as those terms are defined in the Comprehensive Agreement – and that Itcan would pay the funds due to Ontario under the Comprehensive Agreement into an escrow account up to the amount of $50 million, being the amount of damages claimed by the Tobacco Board in the Action against Itcan.

33. Ontario brought a court application on April 30, 2010 – the Tobacco Board was made a party to the application – for an order declaring that Itcan was obligated to pay Ontario under the Comprehensive Agreement.

34. That was countered by Itcan's notice of arbitration dated June 15, 2010 asserting that the determination of whether the Tobacco Board's claim in the Action against Itcan "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.

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

36. On July 26, 2010, the motion judge, Justice Richard C. Gates, granted Itcan's motion for a stay of Ontario's application.

37. 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 as well as to determine the issues between the contracting parties under the Comprehensive Agreement.

38. The determination that the Tobacco Board's claim was a Released Claim under the Comprehensive Agreement would result in a non-suit of the Tobacco Board's claim in the Actions.

39. Section 15 of the Itcan Comprehensive Agreement (section 16 in the Rothmans Comprehensive Agreement) provides that the Releasing Entities absolutely and unconditionally fully release and forever discharge the Released Entities from the Released Claims.

40. Section 16 of Rothmans' Comprehensive Agreement also provides that, if a Releasing Entity does bring a Released Claim against a Released Entity, the release may be pleaded as a complete defence and may be relied upon as a complete estoppel to dismiss the claim. The release in the Comprehensive Agreements in favour of the Tobacco Manufacturers is worded as follows:

> The Releasing Entities hereby, without any further action on the part of such Releasing Entities, absolutely and unconditionally fully release and forever discharge, the Released Entities from the Released Claims. Without in any way limiting the generality of the foregoing, the Releasing Entities further agree that:

> (a) in the event that a proceeding, claim, action, suit or complaint with respect to a Released Claim is brought by Releasing Entity against a Released Entity, this release may be pleaded as a complete defence and reply, and may be relied upon in such a proceeding as a complete estoppel to dismiss the said proceeding; and
>
> (b) in the event of (a), the Releasing Entity that initiated the proceeding shall be liable for all reasonable costs, legal fees, disbursements and expenses incurred by the Released Entity as a result of such proceeding.[Emphasis added]

41. On July 20, 2011, the above decision by Justice Gates to arbitrate the Tobacco Board's claim was overturned by the Court of Appeal for Ontario (Goudge, Gillese JJ.A., and Juriansz, J.A. dissenting in part) on appeal by Ontario and the Tobacco Board.

42. Writing for the majority, Justice Goudge determined that, because the Tobacco Board is not a party to the Comprehensive Agreement or its arbitration provisions, an arbitrator under the Comprehensive Agreement has no jurisdiction to determine the Tobacco Board's rights. In Justice Goudge's words "I need deal with no more than the challenge to the arbitrator's jurisdiction raised by both Ontario and the Tobacco Board, that the Tobacco Board is not a party to the Agreement or its arbitration provisions." A copy of July 20, 2011 decision *Ontario v. Imperial Tobacco Canada Limited*, 2011 ONCA 525 is attached as Exhibit "D" to my affidavit.

43. Justice Goudge observed that the Board has a vital interest in the question raised by the application. Indeed, because of the language of section 15 of the Itcan Comprehensive Agreement (Rothmans section 16) quoted above, "The answer could provide ITCAN with a complete defence to the action, or could eliminate that possibility. The application directly implicates the Tobacco Board's rights, not just those of Ontario and ITCAN."

44. In the result, the Court of Appeal determined that the question asked of the Court on the application must, for the purposes of s. 15 of the Itcan Comprehensive Agreement (Rothmans section 16), be determined in a forum in which the Tobacco Board has the right to participate.

45. The matter of the Released Claim defence was remitted to the judge having carriage of the Actions, Justice Helen A. Rady. The specific order of the Court of Appeal dated July 20, 2011 states that the stay of the application is lifted to allow the application to proceed "to seek a declaration that the claim of the Tobacco Board … is not a Released Claim for the purposes of s. 15 of the Comprehensive Agreement dated July 31, 2008."

46. The Released Claim application was heard by Justice Rady on September 19, 2012, with the decision reserved at the conclusion of submissions. Rothmans intervened and JTIM agreed to be bound by the result of the application.

47. On January 2, 2013, Justice Rady delivered her reasons for decision. She determined that the claims advanced by the Tobacco Board in the Action were not a Released Claim by a Releasing Entity under the Comprehensive Agreements The January 2, 2013 decision of Rady J. in *R. v. Imperial Tobacco Canada*, 2012 ONSC 6027 is attached as Exhibit "E" to my affidavit.

48. The learned motion judge succinctly described the substance of the Board's claim as follows: "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 ITCAN 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." [para. 50, 2012 ONSC 6027]

49. Justice Rady concluded that the proposed class action against Itcan is not a Released Claim by a Releasing Entity, for reasons that are summarized in the following paragraphs.

50. First, the claims of the Governments that were being settled under the Comprehensive Agreement were for the non-payment of taxes and related charges on the allegedly smuggled tobacco products. The opening recital of the Comprehensive Agreement stipulates that the parties agree to "address [their] shared objective of combating the manufacture, sale, distribution, transport and storage of illicit and contraband tobacco products in Canada." [para. 30, 2012 ONSC 6027]

51. Second, while the definition of Released Claim is very broadly and comprehensively drafted and includes damages however arising, known and unknown, it clearly relates, arises from, or is in connection to smuggling activities and any resulting "failure by the Released Entities to pay taxes, duties, excise, customs or excise taxes or duties or other amounts payable on account of smuggled ... tobacco products." [para. 33, 2012 ONSC 6027]

52. Third, the definition of Released Claim goes on to exclude from the operation of the release claims related to the recovery of alleged health care costs and two specifically identified existing proceedings. The Tobacco Board's claim against Itcan is not mentioned because it had not yet been commenced and there is no evidence that it was in

the contemplation of the parties to the Comprehensive Agreement. [para. 34, 2012 ONSC 6027]

53. Fourth, Releasing Entities are defined as including the Canada Revenue Agency and the Canada Border Services Agency, the two entities which would have been impacted by the failure to remit "taxes, duties, excise, customs or excise taxes or duties...." [para. 35, 2012 ONSC 6027]. This was found to demonstrate that what the parties contemplated was a release of claims arising from or related to the failure to pay taxes to the contracting Governments.

54. Fifth, any damages that may be awarded under the Board's Actions would not benefit Ontario. If successful, the claims are not allowable to Ontario but would be allowable to the Tobacco Board for the benefit of Producers. Even if the Tobacco Board is considered a Crown agency, the Tobacco Board is not acting as an agent of the Crown or for the benefit of the Crown in pursuing the Actions. It is acting as an agent for the Producers as it was obligated to do by statute and regulation. [para. 39, 2012 ONSC 6027]

55. On July 16, 2013, the Court of Appeal (Hoy A.C.J.O., Feldman and Simmons JJ.A.) dismissed Itcan's and Rothmans' appeal on the Released Claim defence. A copy of the July 16, 2013 decision *Ontario v. Imperial Tobacco Canada Ltd.*, 2013 ONCA 481 is attached as Exhibit "F" to this affidavit.

56. As noted in the Court of Appeal's reasons, the Comprehensive Agreement dated July 31, 2008 was entered into between Itcan, on the one hand, and Her Majesty the Queen in Right of Canada, Her Majesty the Queen in Right of Ontario and the nine other provinces, on the other hand, to settle claims arising out of a course of conduct by Itcan

between 1985 and 1996 whereby Itcan smuggled tobacco out of Canada then back in without paying required duties and taxes. A number of other tobacco companies, including the intervener, Rothmans, entered into similar agreements to settle similar claims with the same Governments.

57. In its reasons, the Court of Appeal focused on the role of the Tobacco Board and its statutory mandate. It noted that the Tobacco Board's primary role during the 1980-90s period and at the time of the 2008 Comprehensive Agreement was to regulate and control the production and marketing of Ontario-grown tobacco.

58. The court observed that the Tobacco Board operated autonomously. Its Board of Directors consisted of Directors elected by the Producers, namely the tobacco producers representing each of the tobacco growing districts in Ontario, plus an additional member appointed by the elected members.

59. Among other things, the Tobacco Board had the power to, and required the Producers to, only market their tobacco through the Tobacco Board. The Tobacco Board entered into annual contracts with the Tobacco Manufacturers on behalf of the Producers for the sale of the Producers' tobacco, including those annual contracts at issue in the Actions.

60. The Tobacco Board had the sole authority to enforce the rights of the Producers to recover payments owed by tobacco companies under the annual contracts. Significantly, while the Producers were the beneficiaries of those annual contracts, they were not parties to the contracts. Itcan's counsel and counsel for Rothmans advised the Court of Appeal

that they did not concede that the Producers can bring actions like the current one without the involvement of the Tobacco Board.

61. In bringing the class actions, the Court of Appeal observed, the Tobacco Board is only acting as agent for the Producers to enforce the annual agreements entered into by the Board on the Producers' behalf and not as agent for the Crown or for the benefit of the Crown.

62. Accordingly, the Court of Appeal determined that, although the Actions may come within the definition of "Released Claims", the Tobacco Manufacturers "are only released under s. 15 of the 2008 Agreement [Comprehensive Agreement] if they are released by a Releasing Entity. In this way, the 2008 Agreement ensures that only claims within the definition of Released Claims that belong to a Releasing Entity are released." [para. 17, 2013 ONCA 481]

63. In summary, because the Tobacco Board is acting only as the agent for the 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 is not asserting a Released Claim belonging beneficially to the Crown and is not acting as a Releasing Entity within the meaning of the Comprehensive Agreement.

The Limitations Defence on the Contractual Claims by the Tobacco Board

64. The second significant ground of defence raised by the Tobacco Manufacturers is the limitations defence. On January 25, 2012, Justice Rady had earlier directed that the

Tobacco Manufacturers' limitation defence should follow the determination of the Released Claim defence, if the Released Claim defence was determined in favour of the Tobacco Board.

65. At the Tobacco Board's request, Justice Rady directed that the Tobacco Manufacturers deliver statements of defence in the Actions. On May 3, 2013, each of the Tobacco Manufacturers served their statements of defence. A copy of Rothmans' statement of defence delivered on May 3, 2013 is attached at Exhibit "A" to this affidavit.

66. Each of the Tobacco Manufacturers pleaded in their statements of defence that the Actions are barred by the provisions of the *Limitations Act* 1990 or alternatively the *Limitations Act* 2002 Sch. B. Each of them also denied any involvement in the smuggling of tobacco products.

67. On May 23, 2013, each of the Tobacco Manufacturers served a notice of motion for summary judgment based on their limitations defences. On January 30 and 31, 2014, Justice Rady heard arguments on these summary judgment motions from all parties and reserved her decision at the conclusion of argument.

68. On June 30, 2014, Justice Rady released her reasons on the summary judgment motions. She dismissed the Tobacco Manufacturers' motions for summary judgment seeking dismissal of the plaintiffs' action as statute barred. A copy of the June 30, 2014 Summary Judgment Endorsement of the Honourable H.A. Rady - *The Ontario Flue-Cured Tobacco Growers' Marketing Board v. Rothmans, Benson & Hedges, Inc.*, 2014 ONSC 3469 is attached as Exhibit "G" to this affidavit.

69. The Tobacco Manufacturers asserted on the summary judgment motions that: (a) the Tobacco Board knew that tobacco sold to the Tobacco Manufacturers was being smuggled back into Canada, and (b) the Tobacco Manufacturers did not pay the higher domestic price for that tobacco, and, as a result, the plaintiffs suffered a loss. The Tobacco Manufacturers submitted that the constituent elements of the breach of contract claim were therefore known to the Tobacco Board.

70. The Tobacco Manufacturers further submitted that their own involvement in smuggling was not a material fact necessary to the Tobacco Board's breach of contract claim. Nevertheless, the Tobacco Manufacturers pointed to volumes of media reports and other documentation that demonstrate speculation, if not the conclusion, that the Tobacco Manufacturers were complicit in smuggling activities. The Tobacco Manufacturers asserted that their involvement in smuggling activities was open and notorious (while at the same time denying in their defences any involvement at all).

71. In response, the Tobacco Board asserted that it did not know and could not reasonably have known of the Tobacco Manufacturers' 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 made in association with their pleas in the Agreed Statement of Facts.

72. The Tobacco Board pointed out to the Court that the Tobacco Manufacturers had consistently denied any involvement in smuggling activities. Most critically, the Tobacco Board asserted that knowledge of the Tobacco Manufacturers' identity as participants in

smuggling is an essential element of the breach of contract claim it was advancing in the Actions.

73. 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.

74. This information provided context for the contractual arrangements between the Tobacco Board and the Tobacco Manufacturers at issue in the Actions and was relied upon by the learned motion judge.

75. The evidence of the Tobacco Board was unchallenged on the summary judgment motions.

76. Justice Rady concluded that the Tobacco Board demonstrated that there is 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 Manufacturers for the following reasons:

> (a) There has been no documentary or oral discovery and there may be evidence in the Tobacco Manufacturers' control that is helpful to the Tobacco Board's position;
>
> (b) No representative of the Tobacco Manufacturers swore an affidavit and no representative of the Tobacco Manufacturers with personal knowledge of the facts or issues have presented any evidence to the Court;
>
> (c) Mr. Gilvesy and Mr. Neukamm [the Tobacco Board affiants] were not cross-examined and their evidence is essentially unchallenged;
>
> (d) The Tobacco Manufacturers continue to deny that they were involved in smuggling in their statements of defence;

(e) The nexus of the loss sought in the Actions and the Tobacco Manufacturers from whom the loss is sought to be recovered is material to the doctrine of discoverability and this is a genuine issue requiring a trial. As Mr. Gilvesy points out, only the Tobacco Manufacturers knew whether the tobacco they purchased was ultimately used for a different purpose than originally intended; and

(f) There is a genuine issue requiring a trial about whether the Tobacco Manufacturers conduct might justify the suspension of the limitation period under s. 15(4) of the *Limitations Act* 2002.

77. Pursuant to leave granted, the limitations defence decision was appealed to the Divisional Court. The Divisional Court panel of Sachs, Horkins and Pattillo JJ. heard the appeal on April 21, 2016 and reserved their decision at the conclusion of argument.

78. The Divisional Court dismissed the Tobacco Manufacturers' appeal for reasons delivered on July 4, 2016. A copy of the July 4, 2016 Divisional Court Reasons for Judgment of H. Sachs, C.J. Horkins and L.A. Pattillo JJ.– *Ontario Flue-Cured Tobacco Growers Marketing Board v Rothmans, Benson & Hedges, Inc.*, 2016 ONSC 3939 is attached as Exhibit "H" to this affidavit.

79. In the comprehensive reasons written for the Divisional Court by Justice Sachs, she noted, among other things, the contract interpretation issue – raised by the Tobacco Manufacturers – as to whether, in order to establish their cause of action, the plaintiffs must establish that the Tobacco Manufacturers actually participated in the smuggling of DFX products back into Canada to be consumed domestically.

80. It was the position of the Tobacco Board that this is an essential element of the contract claim and that the Tobacco Board could not reasonably have known of the Tobacco Manufacturers' involvement in smuggling until the Tobacco Board was made

aware of certain settlement agreements and guilty pleas in relation to a breach of the *Excise Act* in 2008 and 2010.

81. In the factual background, the Divisional Court noted the role of the TAC where plans for the production and marketing of tobacco in Ontario were developed and that the Heads of Agreement provided for different pricing arrangements for products that the Tobacco Manufacturers intended to sell domestically and tobacco products they intended to sell for DFX purposes. The Heads of Agreement further required the Tobacco Manufacturers to account for export or DFX tobacco that was ultimately returned and sold in Canada and to pay the make-up payments owing with respect to that tobacco. [para. 16, 2016 ONSC 3939]

82. In dismissing the appeal, the Divisional Court dealt first with the Tobacco Manufacturers' argument that their alleged involvement in smuggling was not an essential element of the breach of contract claims. The Tobacco Manufacturers argued that it was known that DFX tobacco that they were paying lower prices for was going to be smuggled back into Canada and, in spite of this knowledge, the Tobacco Manufacturers did not pay the higher domestic price for that tobacco. The knowledge of smuggling *per se* of DFX tobacco was, of course, open and notorious.

83. The Tobacco Manufacturers also submitted that if their involvement in smuggling was a material fact necessary to establish breach of contract then there were volumes of media reports alleging that the Tobacco Manufacturers were complicit in smuggling activities.

84. On this important issue of contract interpretation, both the motion judge and the Divisional Court accepted the Tobacco Board's interpretation that the Heads of Agreement did not obligate the Tobacco Manufacturers to pay a make-up in the event that tobacco products that they sold to legitimate buyers in the United States were brought back into Canada by someone else without the Tobacco Manufacturers' knowledge or help.

85. The Divisional Court noted that the statements of claims in the Actions assert that the Tobacco Manufacturers "facilitated" the smuggling of cigarettes into Canada. For example, at paragraphs 26 and 27 of the statement of claim against Itcan reads:

> 26. During the Class Period, [Itcan] designated tobacco as being for export and duty free purposes intending that it be smuggled into and sold in Canada. [Itcan] 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 [Itcan] executed sham exports leading to the distribution of these products throughout Canada on the black market.

86. The Divisional Court next examined whether the motion judge erred in finding that there was a genuine issue for trial as to whether the Tobacco Manufacturers' involvement in smuggling was discoverable before the limitation period expired.

87. The issue turned on the interpretation of s. 5.1(b) of the *Limitations Act* 2002, which provides that a claim is discovered on the earlier of … "the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a)."

88. Section 5.1(b) of the *Limitations Act* 2002, contains the objective component of the discoverability test. It requires the consideration of the abilities and circumstances of the person with the claim, i.e. the Tobacco Board, and then to decide whether that person ought to have known of the matters giving rise to that claim.

89. The reasons given by Mr. Gilvesy and Mr. Neukamm as to their belief that the Tobacco Manufacturers were not complicit in smuggling – and by extension the Tobacco Board's belief –are highly relevant not only to establish their subjective belief but also highly relevant to the objective part of the discoverability analysis. Such reasons address directly the reasonableness of the Tobacco Board's belief being an assessment that requires understanding the circumstances of the person making the claim before deciding whether that person ought to have known of the matters giving rise to the claim.

The Guilty Pleas and Settlement Agreements

90. The Divisional Court also dealt expressly with – and rejected – the Tobacco Manufacturers' argument that the *Excise Act* charges, the Comprehensive Agreements, Agreed Statements of Fact and pleas added nothing to the Board's knowledge of the Tobacco Manufacturers' involvement in smuggling [paras. 58-61, Reasons]. According to the Tobacco Manufacturers their pleas amounted to nothing more than that they were guilty of strict liability "labelling" offences.

91. As Justice Sachs noted, the Agreed Statement of Facts speaks of the Tobacco Manufacturers "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." [para. 64, 2016 ONSC 3939] In the result, the Divisional Court dismissed the appeal with costs.

92. The Tobacco Manufacturers applied for leave to appeal the Divisional Court decision to the Court of Appeal for Ontario. The application was dismissed by the Court of Appeal on November 4, 2016 (Blair, Epstein and Huscroft, JJ.A.).

93. As expressly provided in the definition of Tobacco Claim in the Rothmans Initial Order as Amended and Restated, the claim by the Tobacco Board on behalf of the Producers is excluded expressly under the language "excluding any right or claim of a supplier relating to goods or services supplied to ...the Applicant [Rothmans] or any member of the PMI Group".

94. In the Tobacco CCAA Proceedings, the Tobacco Board asserts that it is not a Tobacco Claimant but it was a supplier to Rothmans and the other Tobacco Manufacturers. The Tobacco Board is distinct from every Tobacco Claimant.

SWORN remotely by Harvey T. Strosberg, Q.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 March 16, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A Commissioner for taking affidavits
David Robins, LSO #42332R

Harvey T. Strosberg

HARVEY T. STROSBERG, Q.C.

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A Commissioner for taking affidavits
David Robins, LSO #42332R

HARVEY T. STROSBERG, Q.C.

#1803174

This is **Exhibit "A"** of the **Affidavit of Harvey T. Strosberg, Q.C.**, sworn March 16, 2021.

A Commissioner for taking Affidavits
David Robins (LSO #42332R)

Court File No.: 64462 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: Kendra Tracy
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 if 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, STROSBERG LLP
Lawyers
600 - 251 Goyeau Street
Windsor, ON N9A 6V4

HARVEY T. STROSBERG, Q.C.
LSUC# 12640O
WILLIAM V. SASSO
LSUC# 12134I
Tel: (519) 561-6228
Fax: (519) 561-6203

Lawyers for the plaintiffs

673036

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

Plaintiffs

vs. ROTHMANS, BENSON & HEDGES, INC.

Defendant

Court File No. 64402 CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDINGS COMMENCED AT LONDON

STATEMENT OF CLAIM

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

HARVEY T. STROSBERG, Q.C.
LSUC# 12640O
WILLIAM V. SASSO
LSUC# 12134I
Tel: (519) 561-6228
Fax: (519) 561-6203

Lawyers for the plaintiffs

FILE: 72.216.000
REF: HTS/df

Court File No. 64462CP

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 DEFENCE

1. The defendant (hereinafter referred to as "Rothmans") admits the allegations contained in paragraphs 8, 15, 16, 17, and 19 of the statement of claim.

2. Save as is hereinafter expressly admitted, Rothmans denies all other allegations contained in the statement of claim.

THE FACTS

3. Rothmans is incorporated in Canada and has its head office at Toronto, Ontario. It carries on business as a manufacturer of tobacco products.

4. Rothmans admits that, during the period from January 1, 1986 to December 31, 1996, it purchased tobacco leaf grown in Ontario under a marketing plan administered by the Ontario Flue-Cured Tobacco Growers' Marketing Board (the "Board"). All purchases were made through auctions conducted by the Board and were settled with the Board.

5. Rothmans had no dealings with growers individually (including those growers who are named as plaintiffs) respecting its purchases of tobacco leaf.

6. The purchases made by Rothmans from the Board were governed by written agreements entered into between the Board and Canadian manufacturers of tobacco products (the "manufacturers"). For each crop year, a separate agreement was entered into. The annual agreements are hereinafter collectively referred to as the "Agreements".

7. The Agreements required the manufacturers to purchase tobacco leaf for use in products to be sold in Canada ("Domestic Accounts") in stipulated quantities and at the price determined by auction but at not less than a guaranteed minimum average price per pound. The Agreements also permitted the manufacturers to purchase tobacco leaf for use in products to be sold outside Canada ("Duty Free & Export Accounts" or "DFX Accounts") at the price determined by auction, subject to a minimum price.

8. By at least 1990, it was general knowledge in Canada, and it was known to the Board and to every individual grower, or they ought to have known, that substantial increases by the federal and some provincial governments in the rates of taxation applicable to tobacco products had resulted in significant volumes of contraband tobacco products being sold in Canada, including exported Canadian-manufactured products which had been smuggled back into Canada. The Agreements, including the pricing and volume of tobacco, were negotiated in that context.

9. The Board was, at all material times, fully aware of the actual volumes of sales made by Rothmans to DFX Accounts. The Agreements provided for verification by audit of such sales. They required the manufacturers to provide proof of export to MacGillivray Partners, a firm of chartered accountants, which reported to the Tobacco Advisory Committee, a group that included representatives of the Board, federal and provincial government ministries, manufacturers, and leaf exporters. Rothmans duly disclosed to MacGillivray Partners its export sales, by category, and provided the auditors with full access to sales invoices and other records disclosing customers, shipment destinations, and quantities of shipments.

10. The Board understood and accepted that Rothmans would continue to sell to DFX Accounts notwithstanding that a proportion of the sales was likely to be smuggled back into Canada.

NO BREACH OF CONTRACT

11. Rothmans fully complied with the terms of the Agreements. Accordingly, it denies the plaintiffs' allegations of breach of contract.

12. At all material times, Rothmans believed that its export sales complied with all applicable law. At no time was Rothmans involved in smuggling operations nor has it ever admitted having been so.

13. Whether or not the plaintiffs ever had a claim for breach of contract (which is denied), that claim was subsumed in the agreements made between the Board and the manufacturers, beginning in 1990, to limit the quantities of tobacco leaf that could be allocated to DFX Accounts to levels that were substantially below the manufacturers' actual sales to such Accounts. The Board negotiated and accepted the prices for domestic tobacco knowing that Rothmans would continue to sell to DFX Accounts notwithstanding that a proportion of the sales was likely to be smuggled back into Canada.

THE CLAIM HAS BEEN RELEASED

14. Rothmans is a party to an agreement (the "Comprehensive Agreement") made as of July 31, 2008 with Canada and each of the provinces. Pursuant to the terms of the Comprehensive Agreement, Her Majesty the Queen in Right of Ontario granted a release to Rothmans from all manner of causes of action in any way relating to smuggling, or any conduct in any way relating to smuggling, contraband tobacco products, or the exportation, re-importation, transhipment or shipment of tobacco products manufactured, distributed or sold by Rothmans that were otherwise contraband. The release applies to the period between January 1, 1985 and December 31, 1996.

15. The release contained in the Comprehensive Agreement applies, by operation of law, to claims by Ontario and its Crown agents, and so to the Board and, by operation of law, to all of the individual growers.

16. The Board, as a part of the Ontario government, is bound by the Comprehensive Agreement. In addition or in the alternative, the Board was at all material times a Crown

agent and bound by the terms of the Comprehensive Settlement and its release. The Plaintiff's claim is captured by this release.

17. Rothmans therefore pleads and relies on the release as a complete defence and estoppel to this claim.

THE CLAIM IS STATUTE BARRED

18. Rothmans pleads that this action is barred by the provisions of the *Limitations Act*, R.S.O. 1990, c. L.15 and alternatively by the provisions of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.

DAMAGES ARE DENIED

19. Rothmans denies that the plaintiffs have sustained the damages alleged, and pleads that the damages claimed are excessive and too remote, and that the plaintiffs have failed to mitigate their damages.

RELIEF REQUESTED

20. Rothmans respectfully requests that this action be dismissed, with costs on a substantial indemnity basis.

May 3, 2013

Greenspan Humphrey Lavine
15 Bedford Road
Toronto ON M5R 2J7

Brian H. Greenspan LSUC# 14268J
Naomi M. Lutes LSUC # 60192Q

Tel: (416) 868-1755
Fax: (416) 868-1990

Lawyers for the defendant

TO: **Sutts, Strosberg LLP**
600 – 251 Goyeau Street
Windsor ON N9A 6V4

William V. Sasso LSUC # 12134I
Tel: 519 561-6227
Fax: 519 561-6203

Lawyers for the plaintiffs

THE ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING BOARD et al. Plaintiffs	and	ROTHMANS, BENSON & HEDGES INC. Defendant	Court File No: 64462CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at London

STATEMENT OF DEFENCE

Greenspan Humphrey Lavine
15 Bedford Road
Toronto ON M5R 2J7

Brian H. Greenspan LSUC#: 14268J
Naomi M. Lutes LSUC# 60192Q

Tel: 416 868-1755
Fax: 416 868-1990

Lawyers for the Defendant

1087149

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Court File No. 64462CP

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*

REPLY

1. Except as expressly admitted in the statement of claim or herein, the plaintiffs deny all allegations contained the statement of defence.

THE RELEASED CLAIM DEFENCE

2. The plaintiffs in this class action commenced two other class actions that involve similar issues against Imperial Tobacco Canada Limited ("ITCAN") in court file no. 64757CP (the "ITCAN action") and JTI-Macdonald Corp. in court file no. 1056/10CP (the "JTI action").

3. Following the commencement of this action, on April 30, 2010 Her Majesty the Queen in Right of Ontario ("Ontario") made an application in court file no. CV-10-14709 for an order declaring that the claim of the Ontario Flue-Cured Tobacco Growers' Market Board (the

"Board") in the ITCAN action is not a "Released Claim" for the purposes of section 15 of the Comprehensive Agreement dated July 31, 2008 made between ITCAN and Her Majesty the Queen in Right of Canada and in Right of the Provinces (the "Application").

4. The defendant, Rothmans, Benson & Hedges, Inc. ("Rothmans"), participated as an Intervener in the Application agreeing to be bound by the result.

5. By order dated July 20, 2011, the Court of Appeal for Ontario ordered the Application to proceed "to seek a declaration that the claim of the Tobacco Board in Court file no. 64757CP is not a Released Claim for the purposes of s.15 of the Comprehensive Agreement dated July 31, 2008."

6. On October 17, 2011, the Regional Senior Judge for the Southwest Region of Ontario designated the Honourable Justice Rady to hear all matters in the three related class actions (this action, the ITCAN action and the JTI action) and the Application.

7. By judgment dated January 2, 2013, the Honourable Justice Rady granted the Application and declared that the Board's claim in the ITCAN action is not a Released Claim for the purposes of section 15 of the Comprehensive Agreement dated July 31, 2008.

8. Rothmans is therefore bound in the result of the Application as it relates to the Comprehensive Agreement dated July 31, 2008 made between Rothmans and Her Majesty the Queen in Right of Canada and in Right of the Provinces.

9. Rothmans' defence that the release in the Comprehensive Agreement is complete defence and estoppel to this claim is a collateral attack on the January 2, 2013 judgment of the Honourable Justice Rady because the issue has been finally determined by the Court. The

plaintiffs plead and rely upon the related doctrines of *res judicata*, issue estoppel and abuse of process.

THE LIMITATIONS ACT DEFENCE

10. At all times prior to July 31, 2008, when 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*", Rothmans publicly denied that it had any involvement in the smuggling of tobacco products back into Canada during the Class Period.

11. Notwithstanding Rothmans' July 31, 2008 guilty plea on the *Excise Tax* offence, Rothmans continues to deny in its statement of defence that it was involved or that it ever admitted having been involved in smuggling operations.

12. In the circumstances of Rothmans' repeated and continued denials, the plaintiffs did not know the material facts underlying their claim that, according to Rothmans, never existed.

13. The plaintiffs relied on Rothmans' representations that it had no involvement in the smuggling of tobacco products back into Canada.

14. The plaintiffs therefore deny that the action is statute barred.

May 17, 2013

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

HARVEY T. STROSBERG, Q.C.
LSUC# 12640O

WILLIAM V. SASSO
LSUC# 12134I
Tel: 519.561.6222
Fax: 519.561.6203

Lawyers for the Plaintiffs

TO:

GREENSPAN HUMPHREY LAVINE
Lawyers
15 Bedford Road
Toronto, ON M5R 2J7

BRIAN H. GREENSPAN
LSUC# 14268J

NAOMI M. LUTES
LSUC# 60192Q
Tel: 416.868.1755
Fax: 416.868.1990

Lawyers for the Defendant

#1087697

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

-and-

ROTHMANS, BENSON & HEDGES, INC.

Defendant

Court File No. 64462CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
LONDON

REPLY

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

HARVEY T. STROSBERG, Q.C.
LSUC# 12640O
Tel: 519.561.6228

WILLIAM V. SASSO
LSUC# 12134I
Tel: 519.561.6222
Fax: 519.561.6203

Lawyers for the Plaintiffs

File number: 72.216.001

FILED
MAY 28 2013

This is **Exhibit "B"** of the **Affidavit of Harvey T. Strosberg, Q.C.**, sworn March 16, 2021.

A Commissioner for taking Affidavits
David Robins (LSO #42332R)

Court File No.: 04757

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

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 if 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 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. 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, STROSBERG LLP
Lawyers
600 - 251 Goyeau Street
Windsor, ON N9A 6V4

HARVEY T. STROSBERG, Q.C.
LSUC# 12640O
WILLIAM V. SASSO
LSUC# 12134I
Tel: (519) 561-6228
Fax: (519) 561-6203

Lawyers for the plaintiffs

755688

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

vs. IMPERIAL TOBACCO CANADA LIMITED

64757

Plaintiffs

Defendant

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDINGS COMMENCED AT LONDON

STATEMENT OF CLAIM

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

HARVEY T. STROSBERG, Q.C.
LSUC# 12640O
Tel: (519) 561-6228
Fax: (519) 561-6203

Lawyers for the plaintiffs

Court File No. 64757

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 -

IMPERIAL TOBACCO CANADA LIMITED

Defendant

Proceeding Under the *Class Proceedings Act, 1992*

STATEMENT OF DEFENCE

1. Except as expressly admitted herein, Imperial Tobacco Canada Limited (**ITCAN**) denies all of the allegations contained in the Statement of Claim.

2. ITCAN is or has been an importer and manufacturer of tobacco products. Its head office is located in Montreal, Quebec.

The purchase and sale of Ontario-grown tobacco

3. Between January 1, 1986 and December 31, 1996, ITCAN purchased Ontario-grown tobacco under a marketing plan administered by The Ontario Flue-Cured Tobacco Growers' Marketing Board (the **Board**). The Board is a farm marketing board established and overseen by the Ontario government through the Farm Products Marketing Commission (the **Commission**). The Board's mandate and powers are set by the Commission and subject to the Commission's sole and absolute discretion.

4. The purchase and sale of tobacco was governed by contracts or "Heads of Agreement" (the **Agreements**). The parties entered into a new Agreement each crop year following negotiations among various participants, including the Ontario Ministry of Food and Agriculture. The parties to the Agreements were the tobacco manufacturers and the Board. Individual

tobacco farmers were not parties to the Agreements. Tobacco farmers dealt with the Board, and the Board in turn transacted with the manufacturers. ITCAN had no dealings and no contractual relationship with tobacco farmers in relation to the purchase and sale of tobacco.

5. The negotiated Agreements specified two prices: (i) a guaranteed minimum price for tobacco purchased for the manufacture of tobacco products to be sold outside of Canada (duty-free & export tobacco or **DFX tobacco**), and (ii) a higher minimum guaranteed price for tobacco purchased for the manufacture of tobacco products to be sold domestically in Canada (**domestic tobacco**). Further, the Agreements specified the volume of DFX tobacco to be purchased by ITCAN and other tobacco manufacturers for each year.

6. Tobacco was purchased via auction. Each bale of tobacco would be graded by licensed graders hired by the Board and verified by government graders. A bale of tobacco would then be put up for sale. If a bale did not receive a bid higher than the minimum guaranteed price, the tobacco would become subject to a market clearing program.

7. Audit reports relating to the purchase and sale of tobacco administered by the Board were prepared annually by the accounting firm MacGillivray Partners (**MacGillivray**). MacGillivray reported to the Tobacco Advisory Committee, which included government representatives and representatives of manufacturers and tobacco exporters.

Increase in taxes on tobacco products and the creation of market for contraband tobacco

8. Starting in 1987, the federal government and some provincial governments began to increase taxes and duties on tobacco products sold in Canada which significantly increased the retail price for domestic tobacco products. However, these taxes and duties were not imposed on exported tobacco products.

9. The resulting increasing difference in price between domestic and exported tobacco products stimulated a growth in the market for contraband tobacco products. In particular, growth occurred in the market for tobacco products that had been exported from Canada to the United States and re-imported illegally back into Canada. These contraband products (**Contraband DFX Products**), which (by virtue of the illegal re-importation) could be sold in Ontario for less than domestic tobacco products, contained Ontario-grown tobacco sold at the DFX tobacco price.

Plaintiffs' knowledge of Contraband DFX Products

10. By at least 1990 the widespread existence of Contraband DFX Products had become common knowledge to the Canadian public. By that time, and likely much earlier, governments, the Board, tobacco farmers and MacGillivray knew or ought to have known that:

(a) Contraband DFX Products made using tobacco sold to manufacturers (including specifically ITCAN) at DFX prices were being illegally re-imported into Canada and sold within Canada; and

(b) Contraband DFX Products were widespread and a significant portion of the tobacco bought at DFX prices was being consumed in Canada.

Each and every year that the Agreements were entered into, all parties were aware of these facts.

11. The Agreements, including the pricing and volume of tobacco, were negotiated in the context of a known and increasing market for Contraband DFX Products containing DFX tobacco.

12. Under the Agreements, the Board, negotiating on behalf of the tobacco farmers, made an informed decision to sell increasing volumes of DFX tobacco to ITCAN and the other manufacturers, knowing that a significant portion of DFX tobacco was being used in Contraband DFX Products that were being illegally re-imported into Canada and sold within Canada.

No breach of contract

13. ITCAN denies that it is liable to the Plaintiffs for breach of contract, as claimed or at all.

14. ITCAN complied with all of its contractual obligations under the Agreements. It paid the Board the amounts stipulated under the Agreements for domestic tobacco and DFX tobacco. The fact that some DFX tobacco was being sold in Canada through the market for Contraband DFX Products was expressly considered and factored into the Agreements through negotiations on price and volume.

15. ITCAN also made required disclosure to MacGillivray. The Agreements required ITCAN and the other manufacturers to provide proof of export to MacGillivray. ITCAN disclosed to

MacGillivray its export sales and provided them with full access to sales records disclosing customers, shipment destinations and shipment quantities.

16. Contrary to the allegations in the Statement of Claim, ITCAN had no contractual obligation to advise MacGillivray of the existence of Contraband DFX Products, which in any event was widely known to the public, to governments and to the Board and was or should have been known to MacGillivray.

17. ITCAN denies that it had any "involvement in the smuggling operations" as alleged in the Statement of Claim and denies admitting any such conduct. In 2008, ITCAN pleaded guilty to a single regulatory offence under s. 240(1)(a) of the *Excise Act*. At no time has ITCAN ever been charged with an offence related to smuggling under the *Criminal Code*.

18. The Plaintiffs are estopped from asserting a claim for breach of contract, as a result of the Board's conduct. By agreeing to and accepting the prices for domestic tobacco and DFX tobacco while having knowledge of the existence of Contraband DFX Products, the Board represented to ITCAN that it was satisfied that tobacco farmers were adequately compensated notwithstanding the existence of Contraband DFX Products. ITCAN relied on that representation.

19. Even if ITCAN did breach the Agreements (which is denied), the Board ratified such breach(es) by its conduct. The Board negotiated and accepted the prices for domestic tobacco and DFX tobacco with the knowledge that DFX tobacco was used in Contraband DFX Products.

No damages

20. ITCAN denies that the Plaintiffs have suffered any damages, as claimed or at all.

21. But for the Contraband DFX Products, Ontario-grown tobacco would have lost market share to products manufactured using foreign-grown tobacco.

The claim has been released

22. On July 31, 2008, ITCAN and the federal and provincial governments executed a comprehensive settlement agreement that resolved any liability ITCAN may have had in relation to Contraband DFX Products (the **Comprehensive Agreement**).

23. The Comprehensive Agreement contains a release provision that releases ITCAN from any and all claims related to Contraband DFX Products for the period of 1985 to 1996 (the **Release**).

24. The Board, as a part of the Ontario government, is bound by the Comprehensive Agreement and the Release.

25. In addition or in the alternative, the Board is an agent of the Crown and bound by the Comprehensive Agreement and the Release.

26. The Plaintiffs' claim is captured by the Release. ITCAN pleads and relies upon the Release as a complete defence and reply to the Plaintiffs' claim and as an estoppel to dismiss the claim.

The claim is time-barred

27. This action is barred by the *Limitations Act*, R.S.O. 1990, c. L.15 and/or the *Limitations Act, 2002*, S.O. 2002, c.24, Sched. B. The Plaintiffs knew, and/or a reasonable person with the abilities and in the circumstances of the Plaintiffs ought to have known:

(a) that tobacco sold to manufacturers at DFX prices was being used in Contraband DFX Products;

(b) that the Board negotiated the price (and quantum) of DFX tobacco knowing that a significant portion of same would be and was used in Contraband DFX Products;

(c) that ITCAN and the other manufacturers knew of the existence of Contraband DFX Products; and

(d) the extent of disclosure by ITCAN and the other tobacco manufacturers to MacGillivray in respect of Contraband DFX Products,

at a time that caused their claim to become statute-barred well before the commencement of this action.

28. ITCAN requests that this action be dismissed, with costs.

May 3, 2013

NORTON ROSE CANADA LLP
TD Waterhouse Tower, Suite 2300
Toronto-Dominion Centre
79 Wellington Street West
Toronto, Ontario M5K 1H1

Orestes Pasparakis LSUC#: 36851T
Rahool P. Agarwal LSUC# : 54528I
Tel: 416-216-4000
Fax: 416-360-8277

Lawyers for the Defendant

TO: **SUTTS, STROSBERG LLP**
600-251 Goyeau Street
Windsor, Ontario N9A 6V4
CANADA

William 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. Plaintiffs	and	IMPERIAL TOBACCO CANADA LIMITED Defendant	Court File No: 64757

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at London

STATEMENT OF DEFENCE

NORTON ROSE CANADA LLP
TD Waterhouse Tower, Suite 2300
Toronto-Dominion Centre
79 Wellington Street West
Toronto, Ontario M5K 1H1

Orestes Pasparakis LSUC#: 36851T
Rahool P. Agarwal LSUC# : 54528I
Tel: 416-216-4000
Fax: 416-360-8277

Lawyers for the Defendant

3/May/2013 1:21:29 PM Norton Rose Canada 416-360-8277 9/9

Court File No. 64757CP

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

IMPERIAL TOBACCO CANADA LIMITED

Defendant

Proceeding Under the *Class Proceedings Act, 1992*

REPLY

1. Except as expressly admitted in the statement of claim or herein, the plaintiffs deny all allegations contained the statement of defence.

THE RELEASED CLAIM DEFENCE

2. The plaintiffs in this class action commenced two other class actions that involve similar issues against Rothmans, Benson & Hedges, Inc. in court file no. 64462CP (the "Rothmans action") and JTI-Macdonald Corp. in court file no. 1056/10CP (the "JTI action").

3. Following the commencement of this action, Her Majesty the Queen in Right of Ontario ("Ontario") made an application in court file no. CV-10-14709 for an order declaring that the claim of the Ontario Flue-Cured Tobacco Growers' Market Board (the "Board") in this action is

not a "Released Claim" for the purposes of section 15 of the Comprehensive Agreement dated July 31, 2008 made between Imperial Tobacco Canada Limited ("ITCAN") and Her Majesty the Queen in Right of Canada and in Right of the Provinces (the "Application").

4. By order dated July 20, 2011, the Court of Appeal for Ontario ordered the Application to proceed "to seek a declaration that the claim of the Tobacco Board in Court file no. 64757CP is not a Released Claim for the purposes of s.15 of the Comprehensive Agreement dated July 31, 2008."

5. On October 17, 2011, the Regional Senior Judge for the Southwest Region of Ontario designated the Honourable Justice Rady to hear all matters in the three related class actions (this action, the Rothmans action and the JTI action) and the Application.

6. By judgment dated January 2, 2013, the Honourable Justice Rady granted the Application and declared that the Board's claim in this action is not a Released Claim for the purposes of section 15 of the Comprehensive Agreement dated July 31, 2008.

7. ITCAN's defence that the release in the Comprehensive Agreement is complete defence and estoppel to this claim is a collateral attack on the January 2, 2013 judgment of the Honourable Justice Rady because the issue has been finally determined by the Court. The plaintiffs plead and rely upon the related doctrines of *res judicata*, issue estoppel and abuse of process.

THE *LIMITATIONS ACT* DEFENCE

8. At all times prior to July 31, 2008, when ITCAN 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*", ITCAN publicly denied that it had any involvement in the smuggling of tobacco products back into Canada during the Class Period.

9. Notwithstanding ITCAN's July 31, 2008 guilty plea on the *Excise Tax* offence, ITCAN continues to deny in its statement of defence that it was involved or that it ever admitted having been involved in smuggling operations.

10. In the circumstances of ITCAN's repeated and continued denials, the plaintiffs did not know the material facts underlying their claim that, according to ITCAN, never existed.

11. The plaintiffs relied on ITCAN's representations that it had no involvement in the smuggling of tobacco products back into Canada.

12. The plaintiffs therefore deny that the action is statute barred.

May 17, 2013

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

HARVEY T. STROSBERG, Q.C.
LSUC# 12640O
Tel: 519.561.6228

WILLIAM V. SASSO
LSUC# 12134I
Tel: 519.561.6222
Fax: 519.561.6203

Lawyers for the Plaintiffs

TO:

NORTON ROSE CANADA LLP
TD Waterhouse Tower, Suite 2300
Toronto-Dominion Centre
79 Wellington Street West
Toronto, ON M5K 1H1

ORESTES PASPARAKIS
LSUC# 36851T

RAHOOL P. AGARWAL
LSUC# 545281
Tel: 416.216.4000
Fax: 416.360.8277

Lawyers for the Defendant

#1087708

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

-and-

IMPERIAL TOBACCO CANADA LIMITED

Defendant

Court File No. 64757

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
LONDON

REPLY

FILED

MAY 28 2013

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

HARVEY T. STROSBERG, Q.C.
LSUC# 12640O
Tel: 519.561.6228

WILLIAM V. SASSO
LSUC# 12134I
Tel: 519.561.6222
Fax: 519.561.6203

Lawyers for the Plaintiffs

File number: 72.216.002

This is **Exhibit "C"** of the **Affidavit of Harvey T. Strosberg, Q.C.**, sworn March 16, 2021.

A Commissioner for taking Affidavits
David Robins (LSO #42332R)

Court File No.: 1056/10 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

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: Paul Elliott
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:

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%

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

HARVEY T. STROSBERG, Q.C.
LSUC# 12640O
WILLIAM V. SASSO
LSUC# 12134I
Tel: (519) 561-6228
Fax: (519) 561-6203

Lawyers for the plaintiffs

801717 v.3

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

HARVEY T. STROSBERG, Q.C.
LSUC# 12640O
WILLIAM V. SASSO
LSUC# 12134I
Tel: (519) 561-6228
Fax: (519) 561-6203

Lawyers for the plaintiffs

FILE: 72.216.003
REF: HTS/lg

Court File No. 1056/10 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 –

JTI-MACDONALD CORP.

Defendant

STATEMENT OF DEFENCE

1. The defendant JTI-MacDonald Corp. ("JTIM") admits the allegations contained in paragraph 8, 14, the second sentence of paragraph 15 and paragraph 16 (subject to supplementary agreements dated December 16, 1990, and February 6, 1991, and an addendum to the 1992 agreement dated November 9, 1992) of the statement of claim.

2. JTIM denies all other allegations in the statement of claim except as may be expressly admitted in this statement of defence and puts the plaintiffs to the strict proof thereof.

3. JTIM specifically denies that the plaintiffs are entitled to any of the relief claimed in paragraph 2 of the statement of claim.

The Parties

4. JTIM is incorporated under the laws of Canada with its head office in Mississauga, Ontario. At times material to the action, JTIM operated as RJR Macdonald Inc. and was primarily in the business of the manufacture, marketing, distribution and sale of Canadian-blend cigarettes and other tobacco products.

5. The plaintiff Ontario Flue-Cured Tobacco Growers' Marketing Board (the "Board") is a local board within the meaning of the *Farm Products Marketing Act* , R.S.O. 1990, c. F-9. At the relevant time it was responsible for the control and regulation of the production and marketing of tobacco within Ontario.

6. The remaining plaintiffs are individuals with whom JTIM had no contractual relationship as set out below.

The Agreements

7. During the period January 1, 1986 to December 31, 1996, JTIM and other Canadian manufacturers of tobacco products agreed to purchase tobacco grown in Ontario under annual written agreements with the Board for each crop year (collectively the "Agreements").

8. The Agreements were between JTIM, other Canadian manufacturers and the Board, and not any individual grower, as the plaintiffs have admitted in paragraph 3 of the statement of claim.

9. The Agreements stipulated the minimum quantity and price of tobacco leaf purchased for use in products sold by JTIM and other manufacturers in Canada ("Domestic Accounts"). The Agreements also provided that JTIM and the other manufacturers would purchase specified quantities of tobacco for use in products sold outside of Canada for duty free and export ("Domestic Export Accounts" or "DFX Accounts") at or above stipulated minimum prices.

No Breach of the Agreements

10. JTIM denies the plaintiffs' allegations that it breached the Agreements. At all times material to the action, JTIM paid to the Board the amounts properly owing under the Agreements for the tobacco purchased under the Agreements, according to their terms.

11. JTIM also made the required disclosure to MacGillivray, contrary to the plaintiffs' allegations. JTIM duly disclosed to MacGillivray Partners its export sales, by category, and provided the auditors with full access to sales invoices and other records disclosing customers, shipment destinations, and quantities of shipments.

12. JTIM therefore denies any liability for the alleged breach of the Agreements, or at all.

Tobacco Taxes Create Contraband Market

13. Beginning in 1987, the Canadian Federal and Provincial governments substantially increased taxes and duties on domestic tobacco products only. Those taxes and duties were not imposed on tobacco products for export. This created a significant difference in prices, which in turn resulted in tobacco products that had been exported from Canada being re-imported illegally and sold for less than the domestic tobacco products.

14. By 1990, the widespread availability of contraband tobacco products had become common knowledge in the Canadian public. The Board, the other plaintiffs, tobacco farmers and MacGillivray knew that DFX tobacco products were being illegally re-imported and sold in Canada.

15. The Agreements, including the pricing and volume of tobacco, were negotiated in the context of a known and increasing market for contraband DFX products containing DFX tobacco.

16. Under the Agreements, the Board sold increasing volumes of DFX tobacco to JTIM and the other manufacturers, knowing that a significant portion of DFX tobacco was being illegally re-imported into Canada and sold in Canada. The fact that some DFX tobacco was being sold in Canada through the market for contraband DFX tobacco products was considered and factored into the Agreements.

17. Despite actual knowledge of the smuggling, neither the Board, nor the other plaintiffs, made any complaint to JTIM alleging that the Board was entitled to be paid any additional amounts in respect of the tobacco sold to the DFX Accounts. On the contrary, the Board continued to sell increasing volumes of tobacco to JTIM for the DFX Accounts knowing that increasing volumes of that tobacco was being smuggled back into Canada for resale.

18. Each year, the Board negotiated and accepted the prices in the Agreements for domestic and DFX tobacco, with knowledge that DFX tobacco was used in contraband tobacco products. In doing so, it ratified the alleged breach of the Agreements, which breach is in any event denied.

19. The plaintiffs wrongly suggest that they are entitled to effectively change the price now, for quantities of DFX tobacco purchased decades ago on the basis of the price in the Agreement. On the contrary, the plaintiffs cannot retroactively change the price, yet allege that the annually negotiated prices and quantities would have remained the same. Had the Board complained at the relevant time that it was entitled to receive a higher price for the tobacco sold to the DFX accounts, JTIM would have negotiated a commensurately lower price for the tobacco sold to Domestic Accounts, or chosen to purchase less tobacco.

20. Thus, even if the Board had a claim for breach of contract, which is denied, by its conduct it waived the claim, a waiver on which JTIM detrimentally relied. Further, as a result of the Board's conduct, the plaintiffs are estopped from now pursuing this claim.

No Damages

21. JTIM denies the plaintiffs have suffered any of the damages alleged in the statement of claim and puts them to the strict proof thereof. Further, to the extent the plaintiffs have suffered any damage, which is denied, such damages are excessive, remote and not foreseeable, and are not recoverable at law.

Claim is Statute Barred

22. The plaintiffs' knew or ought to have known of the claim by at least some 20 years before the claim was initiated, and likely much earlier. The action is therefore barred by the provisions of the *Limitations Act,* R.S.O. 1990, c. L.15, or alternatively, the provisions of the *Limitations Act,2002,* S.O. 1990, c. 24.

Claim is Released

23. By agreement dated April 12, 2010, JTIM entered into a Comprehensive Settlement Agreement with Her Majesty the Queen in right of Canada and certain provinces and territories, including Ontario and Her Majesty the Queen in right of Ontario. The Comprehensive Settlement Agreement resolved any liability the JTIM may have in relation to the illegal contraband tobacco products at issue in this action.

24. The Comprehensive Settlement includes a release of JTIM by Ontario and its Crown Agents for any and all claims in any way relating to contraband tobacco products, or any conduct relating to smuggling, exportation, transshipment, importation or re-importation of tobacco to and from Canada during the period January 1, 1985 to December 31, 1999. The plaintiffs' claim is captured by the release.

25. The Board, as a part of the Ontario government, is bound by the Comprehensive Settlement Agreement. In addition or in the alternative, the Board was at all material times an agent of the Crown and bound by the Comprehensive Settlement Agreement and its release.

26. JTIM therefore pleads and relies on the release as a complete defence to this claim and an estoppel to this claim.

27. Pursuant to its agreement with the Board, by pleading and relying on the release, JTIM does not waive its rights to require arbitration of any other issues under the Comprehensive Settlement Agreement.

Not a Proper Class Action

28. JTIM denies that the claim is properly a class action. If the action is certified, however, JTIM reserves the right to amend its statement of defence to address the class claims.

Action Should be Dismissed

29. JTIM asks that this action be dismissed, with substantial indemnity costs plus H.S.T. payable to JTIM.

May 3, 2013

Torys LLP
Suite 3000
79 Wellington St. W.
Box 270, TD Centre
Toronto, Ontario
M5K 1N2 Canada

Wendy Matheson LSUC#: 28548T
Tel: 416-865-8133

Patrick D. Flaherty LSUC#: 34661L
Tel: 416-865-8113

Fax: 416-865-7380
Lawyers for the Defendant

TO: SUTTS, STROSBERG LLP
Lawyers
600 - 251 Goyeau Street
Windsor, ON N9A 6V4

HARVEY T. STROSBERG, Q.C.
LSUC#: 126400O
WILLIAM V. SASSO
LSUC# 121341
Tel: 519.561.6228
Fax: 519.561.6203

Lawyers for the Plaintiffs

THE ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING BOARD et al	- and -	JTI-MACDONALD CORP.
Plaintiffs		Defendants

Court File No: 1056/10 CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at LONDON

STATEMENT OF DEFENCE

Torys LLP
Suite 3000
79 Wellington St. W.
Box 270, TD Centre
Toronto, Ontario
M5K 1N2 Canada

Wendy Matheson LSUC#: 28548T
Tel: 416-865-8133

Patrick D. Flaherty LSUC#: 34661L
Tel: 416-865-8113
Fax: 416.865.7380

Lawyers for the Defendant

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Court File No. 1056/10CP

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

JTI-MACDONALD CORP.

Defendant

Proceeding Under the *Class Proceedings Act, 1992*

REPLY

1. Except as expressly admitted in the statement of claim or herein, the plaintiffs deny all allegations contained the statement of defence.

THE RELEASED CLAIM DEFENCE

2. The plaintiffs in this class action commenced two other class actions that involve similar issues against Imperial Tobacco Canada Limited ("ITCAN") in court file no. 64757CP (the "ITCAN action") and Rothmans, Benson & Hedges, Inc. ("Rothmans") in court file no. 64462CP (the "Rothmans action").

3. Following the commencement of this action, on April 30, 2010 Her Majesty the Queen in Right of Ontario ("Ontario") made an application in court file no. CV-10-14709 for an order

declaring that the claim of the Ontario Flue-Cured Tobacco Growers' Market Board (the "Board") in the ITCAN action is not a "Released Claim" for the purposes of section 15 of the Comprehensive Agreement dated July 31, 2008 made between ITCAN and Her Majesty the Queen in Right of Canada and in Right of the Provinces (the "Application").

4. The defendant, JTI-Macdonald Corp. ("JTI"), agreed to be bound in the result of the Application.

5. By order dated July 20, 2011, the Court of Appeal for Ontario ordered the Application to proceed "to seek a declaration that the claim of the Tobacco Board in Court file no. 64757CP is not a Released Claim for the purposes of s.15 of the Comprehensive Agreement dated July 31, 2008."

6. On October 17, 2011, the Regional Senior Judge for the Southwest Region of Ontario designated the Honourable Justice Rady to hear all matters in the three related class actions (this action, the ITCAN action and the Rothmans action) and the Application.

7. By judgment dated January 2, 2013, the Honourable Justice Rady granted the Application and declared that the Board's claim in the ITCAN action is not a Released Claim for the purposes of section 15 of the Comprehensive Agreement dated July 31, 2008.

8. JTI is therefore bound in this result as it relates to the Comprehensive Agreement dated April 12, 2010 made between JTI and Her Majesty the Queen in Right of Canada and in Right of the Provinces.

9. JTI's defence that the release in the April 12, 2010 Comprehensive Agreement is a complete defence and estoppel to this claim is a collateral attack on the January 2, 2013

judgment of the Honourable Justice Rady because the issue has been finally determined by the Court. The plaintiffs plead and rely upon the related doctrines of *res judicata*, issue estoppel and abuse of process.

THE *LIMITATIONS ACT* DEFENCE

10. At all times prior to April 13, 2010, when 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*", JTI publicly denied that it had any involvement in the smuggling of tobacco products back into Canada during the Class Period.

11. In the circumstances of JTI's repeated denial that it had any involvement in the smuggling of tobacco products back into Canada during the Class Period, the plaintiffs did not know the material facts underlying their claim.

12. The plaintiffs relied on JTI's representations that it had no involvement in the smuggling of tobacco products back into Canada.

13. The plaintiffs therefore deny that the action is statute barred.

May 17, 2013

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

HARVEY T. STROSBERG, Q.C.
LSUC# 12640O
Tel: 519.561.6228

WILLIAM V. SASSO
LSUC# 12134I
Tel: 519.561.6222
Fax: 519.561.6203

Lawyers for the Plaintiffs

TO: **TORYS LLP**
Suite 3000
79 Wellington St. W.
Box 270, TD Centre
Toronto, ON M5K 1N2

WENDY MATHESON
LSUC# 28548T
Tel: 416.865.8133

PATRICK D. FLAHERTY
LSUC# 34661L
Tel: 416.865.8113
Fax: 416.865.7380

Lawyers for the Defendant

#1087710

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

-and-

JTI-MACDONALD CORP.

Defendant

Court File No. 1056/10 CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
LONDON

REPLY

FILED
MAY 28 2013

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

HARVEY T. STROSBERG, Q.C.
LSUC# 12640O
Tel: 519.561.6228
WILLIAM V. SASSO
LSUC# 12134I
Tel: 519.561.6222
Fax: 519.561.6203

Lawyers for the Plaintiffs

File number: 72.216.006

This is **Exhibit "D"** of the **Affidavit of Harvey T. Strosberg, Q.C.**, sworn March 16, 2021.

A Commissioner for taking Affidavits
David Robins (LSO #42332R)

CITATION: Ontario v. Imperial Tobacco Canada Limited, 2011 ONCA 525
DATE: 20110720
DOCKET: C52576

COURT OF APPEAL FOR ONTARIO

2011 ONCA 525 (CanLII)

Goudge, Gillese and Juriansz JJ.A.

BETWEEN

Her Majesty the Queen in Right of Ontario

Appellant

and

Imperial Tobacco Canada Limited and The Ontario Flue-Cured Tobacco Growers' Marketing Board

Respondents

John Kelly and Lise G. Favreau, for the appellant

Alan Mark and Orestes Pasparakis, for Imperial Tobacco Canada Limited

William V. Sasso, for The Ontario Flue-Cured Tobacco Growers' Marketing Board

Ronald G. Slaght, Q.C. and Peter J. Osborne, for the intervener Her Majesty the Queen in Right of Canada

Heard: February 17, 2011

On appeal from the judgment of Justice R.C. Gates of the Superior Court of Justice dated July 26, 2010.

Juriansz J.A. (Dissenting in part):

OVERVIEW

[1] The issue in this appeal is whether the motion judge erred by staying the application brought by Her Majesty the Queen in Right of Ontario in the Superior Court because he concluded an arbitration process should be followed. The appeal raises again the scope of the exceptions to the general rule stated in *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 that "in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator."

[2] The application brought by Ontario in the Superior Court has to do with a settlement of litigation between Imperial Tobacco Canada Limited ("ITCAN") on one side and the governments of Canada and the provinces on the other. The governments had brought an action against ITCAN and its subsidiaries for their role in the smuggling of tobacco across the Canada-U.S. border between January 1, 1985 and December 31, 1996. The parties entered into a Comprehensive Settlement Agreement (the "Agreement") dated July 31, 2008. Under the Agreement, ITCAN agreed to pay up to $350 million to the governments in annual payments over 15 years in exchange for a release from future actions, the terms of which I will discuss in detail later in these reasons.

[3] Subsequently, on December 2, 2009, the Ontario Flue-Cured Tobacco Growers' Marketing Board (the "Tobacco Board") and four tobacco farmers commenced a $50 million class action against ITCAN on behalf of growers and producers who were required to sell tobacco through the Tobacco Board between 1986 and 1996. The

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Tobacco Board claims on its own behalf and on behalf of growers and producers the difference between the lower export price paid by ITCAN to the Tobacco Board for tobacco exported from Canada and the higher price that should have been paid for tobacco for domestic use, in respect of tobacco which was first exported from Canada and then smuggled back into Canada.

[4] Claiming to rely on provisions of the Agreement, ITCAN gave notice on March 29, 2010 that, commencing April 30, 2010, it would pay the settlement funds due to Ontario under the Agreement into an escrow account pending the resolution of the class action. Ontario brought an application for declarations that ITCAN was not entitled to withhold annual payments to Ontario, which the motion judge dismissed so that the arbitration process in the Agreement could be followed.

[5] Ontario has appealed the motion judge's decision to this court, arguing that the dispute between Ontario and ITCAN does not fall within the arbitration clause, or in the alternative, that this court should determine its application in any event to avoid a multiplicity of proceedings and the possibility of inconsistent results.

[6] I would dismiss the appeal and uphold the motion judge's stay of Ontario's application and confirm his referral of the parties to the arbitrator so that the arbitration process set out in the Agreement may be followed.

FACTUAL CONTEXT

The Release in the Comprehensive Agreement

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[7] The Agreement is central to the resolution of the issues. The Agreement is made between Canada and the provinces on one side and ITCAN and its Affiliates on the other.

[8] Section 15 of the Agreement deals with the release. The terms "Releasing Entities", "Released Entities" and "Released Claims" are important to understanding s. 15. The Agreement defines those terms as follows:

> (a) "Releasing Entities" means: "Her Majesty in Right of Canada and in Right of the Provinces and includes for greater certainty the Canada Revenue Agency and the Canada Border Services Agency."
>
> (b) "Released Claims" include, *inter alia*, "all civil claims that may be allowable to the Releasing Entities" relating to or arising out of the smuggling of tobacco or any failure on the part of ITCAN to pay taxes, duties, excise, customs or excise taxes or duties or amounts payable on account of smuggled or imported tobacco.
>
> (c) "Released Entities" include ITCAN and related companies.

[9] Section 15 provides that the Releasing Entities absolutely and unconditionally fully release and forever discharge the Released Entities from the Released Claims. Section 15 does not stop there, however. It goes on to provide that if a Releasing Entity does bring a Released Claim against a Released Entity, the release may be pleaded as a complete defence and may be relied upon as a complete estoppel to dismiss the claim.

[10] Because of its importance, I set out s. 15 in full:

> RELEASE
>
> 15. The Releasing Entities hereby, without any further action on the part of such Releasing Entities, absolutely and unconditionally fully release and forever discharge, the

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> Released Entities from the Released Claims. Without in any way limiting the generality of the foregoing, the Releasing Entities further agree that:
>
> (a) in the event that a proceeding, claim, action, suit or complaint with respect to a Released Claim is brought by Releasing Entity against a Released Entity, this release may be pleaded as a complete defence and reply, and may be relied upon in such a proceeding as a complete estoppel to dismiss the said proceeding; and
>
> (b) in the event of (a), the Releasing Entity that initiated the proceeding shall be liable for all reasonable costs, legal fees, disbursements and expenses incurred by the Released Entity as a result of such proceeding.

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The Right to Escrow Payments in Section 7 of the Agreement

[11] Section 7 of the Agreement gives ITCAN additional rights in the event that it incurs monetary liabilities "in any way relating to, arising out of or in connection with any Released Claims or Claims Over". If ITCAN does incur such monetary liabilities, it has the right to reduce the amount of the payments it must make to the government concerned under the Agreement. In addition, upon ITCAN learning of the existence of any claim that might give rise to such liabilities, it has the right, after giving 30 days' notice, to begin paying any funds due to a government under the Agreement into an escrow account.

[12] In my view, as this case turns on contrasting the rights of ITCAN under s. 7 with its rights under s. 15, I examine those rights carefully. Section 7 provides:

> Without prejudice to any other rights or remedies as provided in paragraphs 15, 16, 17, 18 and 19 of this Agreement, in the event that monetary liabilities (including all fees, expenses and disbursements on a full indemnity scale) are incurred by Released Entities in any way relating to, arising out of or in

> connection with any Released Claims or Claims Over made by a Releasing Entity or an Entity claiming through or on behalf of a Releasing Entity (and for the avoidance of doubt including such Government's crown-controlled corporations or crown agencies) (a "Responsible Government"), the amount of the Payment due in the fiscal year in which the monetary liabilities are incurred, and Payments due in subsequent fiscal years, shall be reduced by such amounts incurred. Upon learning of the existence of any claim, action, suit, or proceeding that could give rise to such liabilities, ITCAN may, upon giving 30 days' notice to the Responsible Government, begin paying any funds which are then or thereafter due into an interest-bearing escrow account, up to the amount claimed in such claim, action, suit, or proceeding pending its resolution. The amount by which the Payments shall be so reduced or escrowed shall not exceed the then-remaining Responsible Government's share of the Payments (as set out in Schedule "C" hereto).

[13] Certain features of s. 7 must be noted. First, while s. 15 provides ITCAN the right to assert a defence to certain claims, s. 7 provides ITCAN the right to reduce or escrow the payments it must make under the Agreement if faced with certain claims. Second, s. 7 applies to a broader range of claims than does s. 15. While both sections apply to claims brought by a "Releasing Entity", s. 7 also applies to claims made by "an Entity claiming through or on behalf of a Releasing Entity", a term which includes a government's crown-controlled corporations and crown agencies. Third, s. 7 applies to give ITCAN the right to reduce or escrow payments regardless of whether it has or asserts a defence to the claim under s. 15. This is clear because s. 7 applies when ITCAN actually incurs monetary liabilities, a situation that could not arise if it had a defence under s. 15.

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[14] Additionally, s. 7 introduces the term "Responsible Government". It provides ITCAN with the right to set off against the annual payments it makes under the agreement monetary liabilities:

> [I]n any way relating to, arising out of or in connection with any Released Claims or Claims Over made by a Releasing Entity or an Entity claiming through or on behalf of a Releasing Entity (and for the avoidance of doubt including such Government's crown controlled corporations or crown agencies) (a 'Responsible Government').

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[15] The parties seem to take this phrase as defining "an Entity claiming through or on behalf of a Releasing Entity" to be a Responsible Government. They therefore identify the question disputed as whether the Tobacco Board is a Responsible Government. I digress to explain why I am uncomfortable with the short form terminology used by the parties. I think it is preferable to state the question as whether the Tobacco Board is "an Entity claiming through or on behalf of a Releasing Entity", and not whether it is a Responsible Government.

[16] I say so because additional references to Responsible Government in s. 7 cast doubt on the parties' characterization of the dispute. Section 7 goes on to provide for ITCAN giving 30 days' notice to the Responsible Government of its intention to set off its monetary liabilities. Section 7 also provides that the amount of money that ITCAN places in escrow "shall not exceed the then-remaining Responsible Government's share of the payments (as set out in Schedule "C" hereto)." The Entity claiming through or on behalf of a Releasing Entity does not have a share of the payments and does not get

notice that such payments are being placed in escrow. The payments under Schedule "C" are made to Canada and the provinces.

[17] These additional references to Responsible Government lead me to think that the term Responsible Government may refer to the government responsible for the "Entity claiming through or on behalf of a Releasing Entity" and not the Entity itself. That is why I prefer to articulate the question as whether the Tobacco Board is an Entity claiming through or on behalf of a Releasing Entity, and not whether the Tobacco Board is itself a Responsible Government. However, in my review of the parties' documents, I need quote their language referring to the Tobacco Board as potentially a Responsible Government.

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Actions Taken by the Parties

[18] Relying on s. 7 of the Agreement, ITCAN served notice on March 29, 2010, alleging that the claims by the Tobacco Board arise out of and are in connection with the "Released Claims", and that the Tobacco Board and the Farm Products Marketing Commission are "Responsible Governments", and that commencing with the annual payment due on April 30, 2010, ITCAN would pay the funds due to Ontario into an escrow account up to the amount of $50 million, which is the amount claimed in the class action brought by the Tobacco Board.

[19] On April 30, 2010, Ontario commenced an application pursuant to Rules 14.05(3)(d) and (h) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 for declarations that:

> (a) the claim in the class action commenced by the Tobacco Board, on its own behalf and on behalf of growers and producers who sold tobacco through the Tobacco Board for the years 1986 to 1996 against ITCAN, is not a "Released Claim" by a "Responsible Government" for purposes of the Agreement;
>
> (b) the Notice served by ITCAN on March 29, 2010, under s. 7 of the Agreement, is therefore invalid, and ITCAN is not entitled to withhold payments owing to Ontario pursuant to the Agreement; and
>
> (c) ITCAN is required to pay to Ontario any payment due to Ontario on April 30, 2010, and annually thereafter, together with interest on any overdue payments at the interest rate prescribed under Part XLIII of Regulations of the *Income Tax Act*, R.S.C. 1985, c. 1.

[20] ITCAN responded to Ontario's application on June 16, 2010, by bringing a motion to dismiss or, alternatively, permanently stay Ontario's application on the basis that the matters raised in the application are subject to arbitration under the Agreement. The arbitration process is dealt with in ss. 32 to 36 of the Agreement.

The Arbitration and Dispute Resolution Provisions

[21] Section 32 of the Agreement provides that "[i]t is the intention of the Parties to settle consensually, by negotiation or agreement, any disputes with respect to performance, procedure and management arising out of this Agreement."

[22] Section 33 provides for the delivery of a notice of dispute by ITCAN or Canada only. It reads:

> Any notice of dispute shall be delivered by ITCAN or Canada (as the case may be) to the other in writing and shall be dealt with in the first instance for Canada by the Director General,

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> Excise and GST/HST Rulings Directorate, Legislative Policy and Regulatory Affairs Branch, Canada Revenue Agency and for ITCAN by the Vice President of Law, or equivalent, who shall promptly discuss and attempt to resolve the dispute.

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[23] The Agreement does not contain any provision for the giving of notice by or to Ontario or any of the provinces or by or to any of ITCAN's Affiliates or other Released Entities.

[24] Section 34 is the heart of the arbitration provisions. It provides that a dispute that remains unresolved 90 days after the date of the notice of dispute may be referred to arbitration. Section 34 provides:

> Any dispute between the Parties to this Agreement arising out of or relating to this Agreement or any breach, clarification, or enforcement of any provision of this Agreement or any conduct contemplated herein, that remains unresolved 90 days after the date of the notice of dispute, may be referred to arbitration in accordance with the *Commercial Arbitration Code* (the "Code"), being a schedule to the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.). Arbitrations shall be with a sole arbitrator. The Parties will select a mutually agreeable arbitrator within 30 days of the delivery of the notice of dispute who shall serve as arbitrator in respect of any disputes hereunder, unless and until he or she becomes unable or unfit to act as arbitrator (in which case the Parties shall immediately appoint a successor arbitrator within 30 days). If the Parties are unable to agree on the arbitrator, he or she shall be appointed, upon the request of a Party, by the court or other authority specified in article 6 of the Code.

[25] I emphasize that s. 34 refers to any dispute "between the Parties to this Agreement" that arises out of or in relation to the Agreement, "or any breach, clarification, or enforcement of any provision of this Agreement or any conduct contemplated herein".

[26] Section 35 gives the arbitrator under the Agreement all the jurisdiction of a Superior Court judge of a province to grant both legal and equitable remedies.

[27] Section 36 requires that arbitration proceedings remain confidential and prohibits the parties from disclosing the nature and scope of the proceedings to any third party. No amicus curiae or "friend of the court" briefs may be filed in the arbitration proceedings. The arbitrator shall provide the rules of the proceeding. The arbitrator's award shall be exclusively enforceable in the Federal Court, and any action to compel arbitration shall be commenced in the Federal Court.

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Notice of Arbitration

[28] ITCAN served a Notice of Arbitration (the "Notice") dated June 15, 2010 on Canada under s. 34 of the Agreement. The Notice refers to the class action commenced by the Tobacco Board, and sets out ITCAN's position that the class action falls within the application of s. 7 of the Agreement and Ontario's position that it does not. The relief the Notice seeks from the arbitrator are declarations that:

> (a) the Tobacco Board's action is a Released Claim by a Releasing Entity or a Responsible Government, as defined by the Agreement;
>
> (b) ITCAN may, starting April 30, 2010, pay fines owing to Canada under the Agreement, up to $50,000,000, into an interest-bearing escrow account pending resolution of the Tobacco Board's action, in accordance with s. 7 of the Agreement; and
>
> (c) the amount of funds owing to Canada, starting on April 30, 2010, shall be reduced by the amount of monetary liabilities incurred by ITCAN in any way relating to, arising

> out of or in connection with the Board Action, in accordance with s. 7 of the Agreement.

[29] The Notice also states that it constitutes a "notice of dispute" for the purposes of the arbitration clause. Neither ITCAN nor Canada nor Ontario has delivered a separate notice of dispute under s. 33 of the Agreement.

[30] As noted, ITCAN's response to Ontario's court application was to move for a stay.

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Decision of the Motion Judge

[31] On July 26, 2010, the motion judge granted an interim stay of Ontario's application pending the conclusion of the arbitration. He issued supplementary reasons dated September 20, 2010, stating that it would be up to the arbitrator "to control his/her own process including the issue of who should have standing to participate as well as to rule on the issues between the parties."

ISSUES

[32] The issue in this appeal is whether the motion judge erred by staying Ontario's application so that the arbitration process in the Agreement could be followed. This will require a consideration of the following two questions:

> (1) Whether the case falls within the exceptions to the general rule of systematic referral to an arbitrator; that is, whether Ontario's challenge to the arbitrator's jurisdiction is based "solely on a question of law" or on a question of "mixed law and fact" where the "questions of fact require only superficial consideration of the documentary evidence in the record"; and

> (2) Whether referring the parties to arbitration gives rise to a multiplicity of proceedings and a risk of inconsistent findings, and if so whether the court has a residual discretion to decline ordering a stay.

ANALYSIS

The General Rule and the Exceptions

[33] The arbitration statute that applies in this case, as stipulated by the Agreement, is the *Commercial Arbitration Code* (the "Code"). The Code is a schedule to the federal *Commercial Arbitration Act*, R.S.C. 1985, c. 17. The Code is based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985 (the "Model Law"). The Code simply restates the Model Law and any additions or substitutions to the Model law are in italics. References to "Canada", "Parliament", and to the "Code" are italicized. Except for these adaptations to customize it for Canada, the Code replicates the Model Law.

[34] The Model Law itself was modeled after the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 U.N.T.S. 3, Can. T.S. 1986 No. 43 (entered into force June 1959) (the "New York Convention").

[35] In the discussion that follows, I will refer to the Code as the Model Law. Doing so emphasizes that international jurisprudence is helpful in the interpretation and application of the statute. In *Dell Computer*, Deschamps J. reviewed the international law and paid considerable attention to the international consensus in rejecting the interventionist approach and adopting the general rule of systematic referral to arbitration.

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[36] The rule of systematic referral to arbitration rests on art. 8(1) of the Model Law, which requires courts to refer any matter subject to an arbitration agreement to arbitration subject to limited exceptions. The article provides:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. [Emphasis added.]

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[37] Article 8(1) operates in conjunction with art. 16(1), which provides in part: "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."

[38] Pursuant to arts. 8(1) and 16(1), a court should not itself rule on the scope of an arbitration agreement, but should leave the issue to the arbitrator. Deschamps J. laid down the general rule in *Dell Computer* "that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator".

[39] Deschamps J. did, however, carve out two exceptions to the rule of systematic referral to the arbitrator: A court may depart from the rule of systematic referral to arbitration if the challenge to the arbitrator's jurisdiction is based solely on a question of law, or on a question of mixed law and fact where the question of fact requires only superficial consideration of the documentary evidence in the record.

[40] These exceptions must be carefully applied. Deschamps J. immediately added that "even when considering one of the exceptions, the court might decide that to allow the

arbitrator to rule first on his or her competence would be best for the arbitration process." Before applying an exception, the court "must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding."

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[41] More recently, in *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, the Supreme Court confirmed the application of the *Dell Computer* framework in cases in which the arbitration statute reflects the provisions of the New York Convention and the Model Law. Binnie J., writing for the majority, said at para. 29:

> [A]bsent legislated exception, any challenge to an arbitrator's jurisdiction over Ms. Seidel's dispute with TELUS should first be determined by the arbitrator, unless the challenge involves a pure question of law, or one of mixed fact and law that requires for its disposition "only superficial consideration of the documentary evidence in the record".

[42] Thus, it is necessary to begin the analysis by characterizing Ontario's challenges to the jurisdiction of the arbitrator. Do Ontario's challenges involve pure questions of law, or questions of mixed fact and law that require only superficial consideration of the documentary evidence in the record for their disposition?

Ontario's first challenge: that it is not a party to the arbitration agreement

[43] Ontario bears the burden of establishing that its challenge to the arbitrator's jurisdiction is based solely on a question of law, or on a question of mixed law and fact where the question of fact requires only superficial consideration of the documentary evidence in the record.

[44] Ontario first argues that the arbitration provisions of the Agreement apply only to disputes between ITCAN and Canada, and not to disputes between ITCAN and Ontario. Ontario advances this argument, not as an exception to the systematic rule of referral, but submits that the court can and should decide whether the dispute between Ontario and ITCAN is arbitrable before deciding whether to grant a stay.

[45] I do not agree. The argument that a party is not subject to the arbitration agreement is simply one species of challenge to the arbitrator's jurisdiction. The general rule of systematic referral applies, unless on only superficial consideration of the documentary evidence in the record or on a pure question of law, the applicant establishes it is not a party to the arbitration agreement.

[46] Ontario points out that s. 33 of the Agreement provides for the delivery of a notice of dispute only by ITCAN or Canada. Ontario also argues that when the arbitration and dispute resolution provisions are read in the context of the entire Agreement, it is clear that the parties to the Agreement did not intend to authorize Canada to act as agent for and on behalf of the provinces in resolving disputes between ITCAN and one of the provinces.

[47] Ontario submits that this demonstrates that none of the other parties to the Agreement have the right to have a dispute dealt with under s. 33. It follows, Ontario submits, that none of the other parties to the Agreement are able to refer an unresolved dispute to arbitration under s. 34. Therefore, Ontario would have the court conclude that s. 34's arbitration provision does not apply to Ontario.

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[48] Canada, as intervener, supports Ontario's position. Canada and Ontario both submit that Canada has no interest in the dispute between ITCAN and Ontario, as Canada will receive all of its settlement funds due to it under the Agreement. Therefore, Canada has no reason to engage in arbitration with ITCAN.

[49] On the other hand, there is much to support the argument that the arbitration provision does apply to Ontario. The provision is broadly worded and states quite plainly that "[a]ny dispute between the Parties to this agreement…may be referred to arbitration." Section 1 of the Agreement defines "Parties" as ITCAN and the Governments. "Governments" is defined to mean Canada and the provinces. The title of the Agreement states that it is made between ITCAN and the Queen in right of Canada and "The Province listed on the signature pages attached hereto". The Agreement was executed by the Attorney General of Ontario immediately below the sentence that reads "[t]his Agreement constitutes a valid and binding agreement of the Province of Ontario and is enforceable in accordance with its terms". Section 28 of the Agreement provides that it is "binding upon the Parties". In s. 3 of the Agreement, each government warrants that it has obtained all approvals and authorizations to execute the Agreement and make it binding upon it. Each government further warrants that the Agreement constitutes a legally binding obligation of the government and is enforceable against it in accordance with its terms. There is no doubt that Ontario is a party to the Agreement.

[50] While Ontario is a party, it cannot give any notice under the Agreement. Nor can any of the other provinces. Nor can any of ITCAN's Affiliates or any of the other

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Released Entities. The Agreement has a detailed definition of "Affiliate" and its definition of "Released Entity" includes the 48 tobacco corporations listed in Schedule B.

[51] Despite the involvement of all these entities, s. 38 provides that "All notices under this Agreement" (emphasis added) shall be made to ITCAN or to Canada at specified addresses. Nowhere in the Agreement does it provide for the provinces to directly receive notice from ITCAN or any of the Affiliates on any matter. Nor does it make any provision for any Affiliate to give or receive notice.

[52] The central role of Canada in the administration of the Agreement is made apparent by several provisions. For example, s. 39 provides "[a]ll payments shall be made to Canada". Section 5 is more specific. It provides that "ITCAN shall pay to Canada, for Canada, and on behalf of and as agent for the Provinces…" the settlement funds provided for in the Agreement. Sections 10 and 11 provide that ITCAN shall provide certain certificates "to Canada for Canada, and as agent for and on behalf of the Provinces" each year.

[53] In short, ITCAN can point to many features of the Agreement to support its submission that it is structured so that the two corresponding parties are ITCAN and Canada, thus avoiding the need for any entity to deal with a multiplicity of parties. Certainly, the fact that Canada receives and distributes the settlement funds and various documentation as agent for the provinces can be taken to suggest that Canada administers the Agreement, including the arbitration provisions, on their behalf.

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[54] Ontario, relying on *Bell Canada v. The Plan Group* (2009), 252 O.A.C. 71 (C.A.), submits that the interpretation of the Agreement is a pure question of law, and the court should determine that it is not a party to the arbitration clause. In my view, Ontario misreads *Bell Canada*.

[55] In *Bell Canada*, Blair J.A. noted at para. 20 that "[t]he historical view is that the interpretation of a contract is a question of law, and reviewable on the standard of correctness. However, the standard of appellate review in matters of contractual interpretation is not as straightforward as it once appeared to be…" He generally approved of the comments of Steel J.A. at para. 36 of *Prairie Petroleum Products Ltd. v. Husky Oil Ltd.* (2008), 295 D.L.R. (4th) 146 (Man. C.A.):

> The proper interpretation and application of the principles of contractual interpretation is a question of law. A trial judge's determination of the factual matrix, consideration of extrinsic evidence and consideration of the evidence as a whole is a question of fact. Finally, the application of the legal principles to the language of the contract in the context of the relevant facts, or a question involving an intertwining of fact and law, is a question of mixed fact and law.

[56] It must be remembered that the issue Blair J.A. discussed in *Bell Canada* was the standard of review to be applied on an appeal of a trial judge's interpretation of a contract and not whether the interpretation of the contract itself involved a question of mixed fact and law per se. That perspective led him to comment that Feldman J.A.'s conclusion in *Casurina Limited Partnership v. Rio Algom Ltd.* (2004), 181 O.A.C. 19 (C.A.), at para. 34, that "[t]he construction of a written instrument is a question of mixed fact and law" did not mean that a deferential standard of appellate review must always be applied to the

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interpretation of a contract. The view Blair J.A. expressed in *Bell Canada* is that contractual interpretation is an exercise that "generally falls much more towards the error of law end of the *Housen* spectrum" once the issues relating to the factual matrix of the contract have been resolved or are not in dispute.

[57] In my view, the interpretation of a contract, especially where the determination of the surrounding factual matrix is significant to its meaning, should be regarded as a question of mixed fact and law for the purposes of the general rule of systematic referral to arbitration. The very purpose of art. 8 (1) of the Model Law is to give the arbitrator the jurisdiction to determine disputes about the existence and scope of the arbitration agreement. This seems to be the view that Sharpe J.A. adopted in *Dancap Productions Inc. v. Key Brand Entertainment, Inc.* (2009), 246 O.A.C. 226 (C.A.).

[58] In this case, as the above review of the Agreement makes plain, what the parties intended by the language of the Agreement, viewed objectively, in the circumstances in which the Agreement was made can only be assessed after a careful review of the surrounding factual matrix. The comments of Sharpe J.A. in *Dancap* at para. 40 about the arbitration clause in that case could equally be made about the Agreement in this case:

> The determination of the scope of [the agreement] and the arbitration clause will require a thorough review of the parties' complex contractual discussions, understandings, expectations and arrangements, an inquiry that clearly calls for much more than a "superficial consideration of the documentary evidence in the record." I conclude, therefore, that on this record, the motion judge erred in refusing to stay Dancap's action on account of the arbitration clause.

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[59] Returning to this case, it is worth repeating that the arbitration provision applies to any dispute "between the Parties to this Agreement" that arises out of or in relation to the Agreement "or any breach, clarification, or enforcement of any provision of this Agreement or any conduct contemplated herein". Ontario's application in the Superior Court is replete with questions about the Agreement. It seeks declarations about what is or is not a Released Claim by a Responsible Government "for the purposes of the Comprehensive Agreement"; it seeks a declaration that ITCAN is not entitled to withhold payments "pursuant to the Comprehensive Agreement"; and it seeks a declaration that ITCAN is required to make the payments "under the Comprehensive Agreement".

[60] While the ultimate determination of Ontario's challenge that it is not a party to the arbitration clause will be up to the arbitrator, this language must be considered in the context of this court's conclusion in *Canadian National Railway Company v. Lovat Tunnel Equipment Inc.* (1999), 174 D.L.R. (4th) 385, at para. 20, approving of Blair J.'s statement in *Onex Corp. v. Ball Corp*. (1994), 12 B.L.R. (2d) 151 (Ont. Gen. Div.), at p. 160 that "where the language of the arbitration clause is capable of bearing two interpretations, and one of those interpretations fairly provides for arbitration, the courts should lean towards honouring that option".

[61] I conclude that whether Ontario is subject to the arbitration provisions involves a question of mixed fact and law. I also conclude that Ontario has not established that that question can be determined on only a superficial consideration of the documentary evidence in the record. Very much to the contrary, a superficial consideration of the

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documentary evidence in the record indicates that it is arguable that the arbitration provision applies to Ontario. It is for the arbitrator, in deciding on his or her own jurisdiction, to determine the matter conclusively.

Ontario's second challenge: that ss. 7 and 15 of the Agreement are not subject to the arbitration clause

[62] Ontario argues that disputes about the application of ss. 7 and 15 of the Agreement could not have been intended to be arbitrable for two main reasons: (1) s. 15 requires that the question about whether the Tobacco Board's class action is a "Released Claim" is to be determined by a court with jurisdiction over the action; and (2) since s. 7 also requires a determination of whether the claim is a "Released Claim", any determination in relation to the validity of a notice provided by ITCAN under s. 7 must also be made by the Superior Court.

[63] It is not necessary to evaluate these contentions and their tacit premises because my reasoning regarding Ontario's first challenge applies to this challenge as well. These questions, assuming that the dispute raises them, are not questions of law alone. The scope of the arbitration clause and whether it applies to ss. 7 and 15 of the Agreement requires a careful review of the factual matrix surrounding the making of the Agreement. It is important to understand the process of negotiation of the Agreement, the respective roles of Canada and each of the provinces, the reasons for the Agreement's unique structure, the process by which Canada acts as agent for the provinces and the context surrounding the Releasing Provisions.

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[64] It is the arbitrator's function to consider and determine the questions Ontario raises, on a complete record.

Conclusion

[65] I conclude that Ontario's challenges to the arbitrator's jurisdiction do not involve pure questions of law or questions of mixed law and fact that can only be decided on a superficial review of the evidence in the record. As such, the exceptions to the general rule of systematic referral to arbitration do not apply. Ontario, however, advances another argument.

Will a stay order in favour of arbitration lead to a multiplicity of proceedings and risk of inconsistent results?

[66] Ontario advances the additional argument that the court possesses a residual discretion to decline to refer parties to arbitration in order to avoid a multiplicity of proceedings and a risk of inconsistent results and that this court should exercise that discretion in this case. First I explain why I conclude that the court does not possess such discretion under the Model Law. Second, if I am incorrect, I explain why, in this case, there is no appreciable risk of multiple proceedings and inconsistent results that would warrant exercising such residual discretion.

[67] Ontario cites a number of decisions1 that do indeed state that the court has the discretion to decline to refer a matter to arbitration in order to avoid a multiplicity of

1 *Penn-Co Construction Canada (2003) Ltd. v. Constance Lake First Nation*, [2007] O.J. No. 3940 (Sup. Ct.), aff'd [2008] O.J. No. 4523 (C.A.); *Frambordeaux Developments Inc. v. Romandale Farms Ltd.*,

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proceedings and risk of inconsistent results. These cases say that it is preferable, where there are claims subject to the arbitration agreement as well as claims against other parties that are plainly not subject to the arbitration agreement, to have all claims determined under the umbrella of a single proceeding before the court.

[68] The wrinkle is that all the cases Ontario cites are cases decided under Ontario's domestic *Arbitration Act, 1991*, S.O. 1991, c. 17. Section 7 of that Act gives the court considerable latitude to refuse a stay of proceedings in favour of arbitration. Section 7 expressly addresses the situation in which the arbitration agreement deals with only some of the matters in respect of which the court proceeding was commenced.

[69] By contrast, the Model Law, which is adopted by both Ontario's *International Commercial Arbitration Act*, R.S.O. 1990, c. I-9 and the federal *Commercial Arbitration Code* that applies in this case, does not have an equivalent provision. The lack of an equivalent provision is perhaps understandable in the context of international arbitration. International arbitration may well raise issues not found in domestic arbitration cases. For example, in international arbitration, the likelihood of multiple proceedings and inconsistent results could arise if the courts of different states adopt an interventionist approach and take jurisdiction. I pause to note that this case involves the federal government and all ten provinces, and many of the Released Entities in Schedule B of the Agreement are foreign companies. If the courts of the jurisdictions where some parties are located adopt an interventionist approach, it seems to me that there would be an

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[2007] O.J. No. 4917 (Sup. Ct.); *Radewych v. Brookfield Homes (Ontario) Ltd.*, [2007] O.J. No. 2483 (Sup. Ct.), aff'd [2007] O.J. No. 4012 (C.A.).

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elevated risk of inconsistent results. The Model Law on international arbitration was designed to avoid this very prospect.

[70] The question of the existence and scope of a court's discretion to decline to refer parties to arbitration under the Model Law to avoid the possibility of multiple proceedings has been considered by the courts of appeal in Alberta and British Columbia. Before turning to those cases, it is worth recalling that art. 8(1) of the Model Law provides that a court "shall…refer the parties to arbitration…unless it finds that the agreement is null and void, inoperative or incapable of being performed".

[71] In *Kaverit Steel and Crane Ltd. v. Kone Corp.* (1992), 85 Alta. L.R. (2d) 287 (C.A.), a distributor brought an action against a licensor and others. The agreement the distributor had with the licensor contained an arbitration clause. The licensor sought a stay of the action on the ground that the dispute should be referred to arbitration. The trial judge refused to stay the court proceedings for the reason that the action added parties that were not part of the arbitration agreement and part of the claim alleged liability outside the contract. The Alberta Court of Appeal allowed the licensor's appeal and directed the distributor and licensor to arbitration while allowing the action to proceed against the other defendants. Kerans J.A., writing for the unanimous court said:

> [47] The power to grant or withhold a reference under the International Commercial Arbitration Act is very limited…For the purpose of argument, I accept the possibility (albeit I suspect very slim) of two suits at the same time, and even contradictory findings. Nevertheless, that is the method chosen by the parties. The Act directs me to hold them to their bargain. Section 2(1) of the International Commercial Arbitration Act makes the Convention part of the law of

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> Alberta. It says that the Convention "applies in the Province." The Convention Article II s. 3 provides that:
>
> > 3. The court of a Contracting State … shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. [Emphasis in original.]
>
> [48] The learned chambers judge relied upon the qualifying words. He held that an inconvenient reference was an "inoperative" one. I do not agree. It may not operate conveniently, but it cannot be said to be inoperative. The view taken by the learned chambers judge adds a gloss to the word that it cannot, in all the circumstances, reasonably bear.
>
> …
>
> [51] In modern commercial disputes, it is almost inevitable that many parties will be involved and very unlikely that all parties will have an identical submission. The problem of multiple parties, which drove the decision of the chambers judge here, will exist in almost every case. There is no question that proliferation of litigation is a possibility…In any event, the [Model Law] cannot reasonably be taken as having abandoned any attempt at arbitration when this problem arises.

[72] The British Columbia Court of Appeal dealt with a similar issue in *Prince George (City) v. McElhanney Engineering Services Ltd.*, [1995] B.C.J. No. 1474 (C.A.), leave to appeal refused, [1995] S.C.C.A. No. 467. The City of Prince George had brought an action against a construction company for delay in construction, breach of contract and negligent work. The City's contract with the construction company had an arbitration clause. The City also sued the engineering consultant on the project for damages in the design and supervision of construction of the work done by the defendant construction company. The City had no arbitration agreement with the engineering consultant.

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[73] The construction company brought a motion to stay the City's action against it so that the dispute between it and the City could be arbitrated. The motion judge refused the application on the basis that: (1) the arbitration clause was inoperative or incapable of being performed because the City's action raised broader issues against the engineering consultant that were interrelated with the arbitrable issues between the City and the construction company; and (2) there was a risk of multiple proceedings and inconsistent results.

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[74] The construction company's appeal was allowed by the British Columbia Court of Appeal, which directed a stay of the proceedings against the construction company in favour of arbitration. The City's action against the engineering consultant could proceed. Cumming J.A., writing for the court, canvassed international and Canadian decisions as well as the literature, before concluding at para. 37 that:

> These authorities establish that, as a general principle, the mere fact that there are multiple parties and multiple issues which are inter-related and some, but not all, defendants are bound by an arbitration clause is not a bar to the right of the defendants who are parties to the arbitration agreement to invoke the clause.

[75] The authors cited by the court included M.J. Mustill & S.C. Boyd, *The Law and Practice of Commercial Arbitration in England*, 2d ed. (London: Butterworths, 1989), who state at 464-65 that "…the fact that issues in the arbitration overlap issues in proceedings between parties who are not bound by the arbitration agreement does not make the agreement 'inoperative'", and J.B. Casey, *International and Domestic Commercial Arbitration* (Carswell, 1993) who states at 4-14 that "[i]t is not sufficient to

say that because the court action raises issues outside the scope of the arbitration agreement per se, or because the action involves some parties that are not parties to the arbitration agreement, that the agreement should be considered 'inoperative'."

[76] While the question has not been decided by the Court of Appeal for Ontario, it was considered by Campbell J. of the Ontario High Court in *Boart Sweden A.B. v. N.Y.A. Stromnes A.B.* (1988), 41 B.L.R. 295 (Ont. H.C.). Campbell J. allowed an application for a stay of proceedings pending arbitration where there were multiple issues and multiple parties, not all subject to the arbitration agreement. Campbell J. said at 302-303:

> Public policy carries me to the consideration which I conclude is paramount having regard to the facts of this case, and that is the very strong public policy of this jurisdiction that where parties have agreed by contract that they will have the arbitrators decide their claims, instead of resorting to the Courts, the parties should be held to their contract.
>
> …
>
> To deal with all these matters in a single proceeding in Ontario instead of deferring to the arbitral process in respect of part of the action and temporarily staying the other parts of the action, would violate that strong public policy.
>
> It would also fail to give effect to the change in the law of international arbitration which, with the advent of art. 8 of the Model Law and the removal of the earlier wide ambit of discretion, gives the Courts a clear direction to defer to the arbitrators even more than under the previous law of international arbitration.
>
> …
>
> I conclude that nothing in the nullity provisions of art. 8 prevents this Court from giving effect to the clear policy of deference set out in the article.

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> *To conclude otherwise would drive a hole through the article by encouraging litigants to bring actions on matters related to but not embraced by the arbitration and then say that everything had to be consolidated in Court, thus defeating the policy of deference to the arbitrators.* [Emphasis in original.]

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[77] These Canadian decisions are consistent with international jurisprudence under the Model Law. For example, Cumming J.A. in *Prince George* cited *Lonrho Ltd. (U.K.) v. Shell Petroleum Co. (U.K.)* (1978) 4 Y.B. Comm. Arb. 320 (New York Convention). Two other decisions that have noted and stressed the different extent of curial intervention the courts can exercise under the Model Law or New York Convention rather than under domestic arbitration statutes when faced with applications to stay court proceedings in the face of an arbitration agreement are *Car & Cars Pty. Ltd. v. Volkswagen AG (Germany)* (2009), 34 Y.B. Comm. Arb. 783 (SIAC) and *ABI Group Contractors Pty. Ltd. v. Transfield Pty. Ltd.* (1999), 24 Y.B. Comm. Arb. 591 (New York Convention).

[78] This jurisprudence interpreting the Model Law prompts me to conclude that the court possesses no residual discretion outside the parameters of art. 8(1) of the Model Law to decline to stay court proceedings in the face of an arbitration agreement involving the Model Law to avoid multiple proceedings. Rather, the parties to the arbitration agreement must be held to their bargain.

[79] In any event, I am satisfied that in this case there is no appreciable possibility of a multiplicity of proceedings. I reach that conclusion on a cursory review of the Agreement and the documents in the record. I stress that it is not the court's function to interpret the

Agreement and these documents. That is a matter for the arbitrator. However, in order to assess Ontario's argument it is necessary to take a preliminary view of these matters. The preliminary view leads me to conclude that Ontario has not established any real prospect of a multiplicity of proceedings or a risk of inconsistent results.

[80] Ontario argues that the question whether the Tobacco Board is a Releasing Entity will arise before both the arbitrator in the arbitration and the court in the class action, and the question could be answered differently. In my view, the question will not arise in both venues, and if it did, there is no appreciable risk it would be answered differently.

[81] First, on my preliminary reading of the Agreement, the Tobacco Board does not fit within the definition of a Releasing Entity. The Tobacco Board is not Her Majesty the Queen in Right of Ontario. No other part of the definition could conceivably apply. I consider it extremely unlikely that the Tobacco Board would be found to be a Releasing Entity by the arbitrator or by the court (assuming the court could be and was called upon to address the issue).

[82] Second, the dispute between Ontario and ITCAN has to do with the application of s. 7 of the Agreement and not s. 15. It is s. 15 that provides ITCAN with a defence to a claim brought by a Releasing Entity. Section 7 recognizes that entities may still bring claims against ITCAN that result in actual monetary liabilities, but allows ITCAN to set those liabilities off against the payments it must make under the Agreement. Both Ontario and ITCAN, in their documents that I review below, characterize their dispute

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not as whether the Tobacco Board is a Releasing Entity, but rather whether it is a Responsible Government.

[83] As I explained earlier, I prefer to characterize the question as whether the Tobacco Board is an Entity claiming through or on behalf of a Releasing Entity, but in reviewing the parties' documents, I need quote their language.

[84] In the notice dated March 29, 2010 that ITCAN served on Canada under s. 7 of the Agreement, I see no claim that the Tobacco Board is a Releasing Entity or that s. 15 applies. The notice refers to the class action commenced by the Tobacco Board, sets out that the regulations made under the *Farm Products Marketing Act*, R.S.O. 1990, c. F-9 required that the Tobacco Board obtain the prior written consent of the Farm Products Marketing Commission before commencing any civil proceeding, and then claims that "[b]oth the Commission and the Board are Responsible Governments within the meaning of section 7 of the Comprehensive Agreement" (emphasis added).

[85] Similarly, ITCAN's Notice of Arbitration dated June 15, 2010 does not mention s. 15 of the Agreement at all. Rather, as set out above, ITCAN claims in the Notice the right to start setting off payments to Canada on behalf of Ontario because "[t]he amount of funds owing to Canada, starting on April 30, 2010, shall be reduced by the amount of monetary liabilities incurred by ITCAN in any way relating to, arising out of or in connection with the Board Action, in accordance with s. 7 of the Agreement." This language specifically contemplates that ITCAN may incur monetary liabilities as a result of the Tobacco Board's action, which will proceed regardless.

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[86] I recognize that the Notice of Arbitration does say that "the Board Action is a Released Claim made by a Releasing Entity or a Responsible Government". I do not take this to be a claim that the Tobacco Board is a Releasing Entity. When the Notice is read as a whole, it is clear to me that ITCAN, while it uses the composite term found in s. 7, is asserting its position that the Board's action is made by a "Responsible Government", (i.e. an Entity claiming through or on behalf of a Releasing Entity).

[87] Ontario seems to have understood full well that ITCAN's position is that the Tobacco Board is a Responsible Government, because its application in the Superior Court seeks a declaration that the Tobacco Board's class action "is not a 'Released Claim by a Responsible Government' for purposes of the Comprehensive Agreement…" (emphasis added).

[88] Thus, it seems to me that the question in dispute between Ontario and ITCAN is whether the Tobacco Board is an "Entity claiming through or on behalf of a Releasing Entity", not whether it is a Releasing Entity itself.

[89] That question is for the arbitrator to decide, not the court. I do observe, however, that the Tobacco Board has not a whit of interest in whether or not it is found to be an "Entity claiming through or on behalf of a Releasing Entity". The Tobacco Board's interest is in obtaining the damages it claims in the class action it has brought on behalf of itself and the growers and producers. The Tobacco Board's right to damages would be unaffected by a finding that it is an "Entity claiming through or on behalf of a Releasing Entity". Whether or not it is such an Entity, the Tobacco Board can still press ahead with

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its class action, and if successful, can enforce any judgment it obtains against ITCAN. The only consequence of the Tobacco Board being such an Entity is that ITCAN can set off the money it pays to the Tobacco Board as damages against the annual payments it makes to Canada on behalf of Ontario.

[90] Thus, as I see it, there is no likelihood of multiple proceedings and a risk of inconsistent results. The Tobacco Board's class action will proceed and be determined in the Superior Court. The Superior Court will determine whether ITCAN has incurred monetary liabilities to the Tobacco Board. The arbitrator will determine whether ITCAN can set off those monetary liabilities against the payments it makes to Canada on behalf of Ontario under the Agreement. The arbitrator will also decide whether ITCAN is entitled to begin paying the monies it may set off into an interest-bearing escrow account until the Superior Court has determined the class action.

[91] On my reading of the documents, the issue whether the Tobacco Board is a Releasing Entity is not part of the dispute. If that issue is raised, the question of where and by whom it is decided may have to be addressed. Wherever it is addressed, I see scant likelihood that the Tobacco Board would be found to be a Releasing Entity.

[92] For these reasons, I conclude that no possibility of a multiplicity of proceedings or a risk of contradictory findings exists in this case.

Additional Considerations

[93] Ontario alleges that ITCAN did not properly comply with the arbitration and dispute resolution provisions and that as a result, the Notice of Arbitration is invalid. As

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such, Ontario argues that there was no arbitration process to which the dispute could be referred by the motion judge.

[94] Whether ITCAN complied with the arbitration and dispute resolution provisions is not a question that this court needs to decide. This argument is part and parcel of Ontario's overall challenge to the arbitrator's jurisdiction. If necessary, the arbitrator can address this issue, as well as the many procedural questions that Ontario raised on this appeal.

[95] I have read the reasons of my colleague Goudge J.A. but I am not dissuaded from the result I would reach or the reasoning supporting it. I agree with him that the arbitrator cannot determine the rights of the Tobacco Board. If my colleague is correct that whether the Tobacco Board is a Releasing Entity is a live issue before the arbitrator, the arbitrator's ruling will not be binding on the Tobacco Board in the class proceeding. ITCAN has not pleaded the Release as a defence in the class action, i.e. that the Tobacco Board is a Releasing Entity. If it does eventually raise that defence in the class action, the merits of that defence will ultimately be determined by the Superior Court hearing the class action.

[96] A decision by the arbitrator as to whether the Tobacco Board is a Releasing Entity, would be binding on Ontario and ITCAN, but not on the Tobacco Board. Such a decision would resolve the current dispute between Ontario and ITCAN, namely whether ITCAN can begin to pay the annual payments due to Ontario into an escrow account. As well, such a decision may affect disputes that might arise in the future between Ontario and

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ITCAN, such as what eventually happens to the escrowed funds. Such a decision, though, would not be binding on the Tobacco Board in the class action.

[97] The Tobacco Board does have an interest in whether the Release of ITCAN by Ontario applies to its class action. However, no one puts forward that the Tobacco Board is a party to the arbitration agreement and must arbitrate, and so I don't see Sharpe J.A.'s comment in *Dancap*, on which Goudge J.A. relies, as applying. The Tobacco Board did not bring the application stayed by the motion judge, Ontario did. The Tobacco Board's class action will proceed and its rights will be determined by the court in that class action whether Ontario's application is stayed or whether the arbitrator proceeds. Consequently, the Tobacco Board does not require that Ontario's application proceed in order to have the court decide its interests. The extraordinary step of declining to stay Ontario's action is not necessary to protect the Tobacco Board's rights.

[98] The fact that a preliminary view of the issue, on a cursory review of the record, makes it doubtful the arbitrator could find the Tobacco Board to be a Releasing Entity lends additional reason for staying Ontario's application.

[99] I add a couple of further observations. First, declining to stay Ontario's application does not necessarily lead to greater efficiency. Because the Agreement, as Goudge J.A. agrees, must be interpreted in the light of the factual matrix in which it was negotiated, the court hearing Ontario's application will have to admit evidence of that factual matrix. Since allowing Ontario's application to proceed does not prevent the arbitration from proceeding, the parties may have to call evidence about the factual matrix in two separate

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proceedings. As I see it, it would be more efficient to stay Ontario's application, recognizing that the issues between Ontario and ITCAN will be resolved by arbitration as they agreed, and awaiting the determination of the Tobacco Board's rights in the class action.

[100] Second, I note that the parties provided that the federal *Commercial Arbitration Act* applies to arbitrations under their Agreement, and chose the Federal Court as the forum in which applications to name an arbitrator must be brought. The approach my colleague takes opens the door to any of the courts in the home jurisdiction of any of the many parties to the Agreement to assert the right to make binding interpretations of the Agreement.

[101] Finally, I express my view that permitting parties to bring applications such as Ontario's to court would not be best for the arbitration system. As Kerans J.A. observed in *Kaverit Steel* and as is manifest in the international jurisprudence, modern commercial disputes involve many parties. Allowing parties to resort to the court system in the face of an arbitration agreement simply by including in the proceeding non-parties to the agreement will provide encouragement for others who seek to evade their arbitration agreement. Such an approach will not only diminish the competence-competence principle but will result in added cost, complexity and delay to the arbitration process.

CONCLUSION

[102] It is arguable that the dispute between ITCAN and Ontario is a dispute that falls within the arbitration agreement and that Ontario is a party to that agreement. According

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to the general rule, this matter should be referred to arbitration unless there are exceptions to justify the court retaining jurisdiction over the matter. No such exceptions exist in this case. The challenge to the arbitrator's jurisdiction is based on a question of mixed law and fact. The question of fact cannot be determined based solely on a superficial review of the evidence in the record.

[103] Furthermore, there are no real concerns about a multiplicity of proceedings or a risk of inconsistent findings in this case. While Ontario named the Tobacco Board as a party to its application, the application is not necessary to determine the Tobacco Board's rights.

[104] For these reasons, I would conclude that the motion judge did not err in ordering a stay of Ontario's application in favour of arbitration. Accordingly, I would dismiss the appeal and refer the matter to the arbitrator to rule on his or her own jurisdiction.

"R.G. Juriansz J.A."

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Goudge J.A.:

[105] I have had the benefit of reading the clear and comprehensive reasons for judgment of my colleague Juriansz J.A., and I agree with much of what he writes. However, I part company with him on several important issues. As a result, I reach a different conclusion. For the reasons that follow I would allow the appeal in part.

[106] I begin with a brief review of the chronology, using the same short form references as my colleague.

[107] On December 2, 2009, the Tobacco Board commenced its class action against ITCAN. The Tobacco Board is a corporation without share capital established by regulation under the *Farm Products Marketing Act*, R.S.O. 1990, c. F.79. It entered into annual agreements with tobacco manufacturers including ITCAN which, among other things, set the prices paid by ITCAN to tobacco growers for the tobacco they sold to ITCAN. The Tobacco Board's class action is brought on behalf of tobacco growers against ITCAN claiming $50,000,000 damages because ITCAN paid less than contract prices to the growers for their tobacco. Ontario is not a party to the class action and will not receive any of the amounts claimed therein if the action is successful.

[108] On March 29, 2010, ITCAN gave notice to Canada in accordance with s. 7 of the Agreement that, commencing April 30, 2010, it would pay into escrow the funds then or thereafter due to Ontario under the Agreement, up to $50,000,000, pending resolution of the class action. The notice sets out ITCAN's position that the claim in the class action is a Released Claim and the Tobacco Board is a Responsible Government.

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[109] On April 30, 2010, Ontario commenced an application, to which ITCAN and the Tobacco Board are parties, seeking a declaration that the claim in the class action "...is not a 'Released Claim' by a 'Responsible Government' for the purposes of the Agreement" [emphasis added].

[110] The application also seeks relief consequent upon the declaration, namely that ITCAN is not entitled to withhold payments to Ontario owing under the Agreement, and that ITCAN is required to make those payments.

[111] On June 15, 2010, ITCAN served a Notice of Arbitration on Canada under s. 34 of the Agreement seeking a declaration in almost identical terms to that in the Application, namely that the claim in the class action "is a Released Claim by a Releasing Entity or Responsible Government as defined by the Agreement". Similarly it also seeks relief consequent upon the declaration, namely that ITCAN may pay up to $50,000,000 into escrow pending resolution of the class action, and that what it owes under the Agreement is reduced correspondingly.

[112] On June 16, 2010, ITCAN brought a motion to stay the application brought by Ontario on the basis that the matters raised in the application are subject to arbitration.

[113] Both Ontario and the Tobacco Board opposed the stay. They sought to have the application proceed, arguing that the arbitrator's jurisdiction under the Agreement does not extend to the question placed before the court by the application.

[114] On July 26, 2010, the motion judge granted the stay of the application, saying that the arbitration process should be followed.

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[115] This is the appeal from that order.

[116] To reiterate the language in the declaration sought in the application, the question is whether the Tobacco Board's claim in the class action is a Released Claim by a Responsible Government for the purposes of the Agreement. Because of the definition of "Released Claim" in the Agreement, this requires scrutiny of whether the claim in the class action is a civil claim allowable to a Releasing Entity, namely the Tobacco Board. It also requires scrutiny of whether the Tobacco Board is a Responsible Government. And both analyses must be done for the purposes of the entire Agreement.

[117] I therefore do not agree with my colleague that the question before the court that ITCAN says is subject to arbitration can be confined to whether the Tobacco Board is an Entity claiming through or on behalf of a Releasing Entity. Nor do I agree that it can be confined to the purposes of s. 7 of the Agreement.

[118] That said, this is clearly a case that engages the principles in *Dell*. ITCAN says the question raised for the court in the application is subject to arbitration. Both Ontario and the Tobacco Board challenge the arbitrator's jurisdiction to deal with that question. This engages the rule of systemic referral to arbitration referred to in *Dell*, requiring the arbitrator to be the one to resolve these challenges, unless the *Dell* analysis permits an exception allowing the court to do so.

[119] My colleague has ably set out the principles applicable in the *Dell* analysis. In describing this legal framework I would only add the following from para. 32 of *Dancap*

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Productions Inc. v. Key Brand Entertainment Inc., (2009) 246 O.A.C. 226 (C.A.). It was decided by this court after *Dell* and in light of the principles *Dell* sets out:

> It is now well-established in Ontario that the court should grant a stay under art. 8(1) of the Model Law where it is "arguable" that the dispute falls within the terms of an arbitration agreement. In *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (C.A.), at para. 21, Charron J.A. adopted the following passage by Hinkson J.A. in *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (B.C.C.A.), at paras. 39-40, as "the proper approach" to art. 8(1):
>
> > it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement because those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.
> >
> > Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal. [Emphasis added.]

[120] I agree with my colleague that in this case, the *Dell* analysis turns on a careful examination of the distinctions between s. 7 and s. 15 of the Agreement.

[121] I begin with s. 7. It is useful to reproduce it here for ease of reference:

> Without prejudice to any other rights or remedies as provided in paragraphs 15, 16, 17, 18 and 19 of this Agreement, in the

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> event that monetary liabilities (including all fees, expenses and disbursements on a full indemnity scale) are incurred by Released Entities in any way relating to, arising out of or in connection with any Released Claims or Claims Over made by a Releasing Entity or an Entity claiming through or on behalf of a Releasing Entity (and for the avoidance of doubt including such Government's crown-controlled corporations or crown agencies) (a "Responsible Government"), the amount of the Payment due in the fiscal year in which the monetary liabilities are incurred, and Payments due in subsequent fiscal years, shall be reduced by such amounts incurred. Upon learning of the existence of any claim, action, suit, or proceeding that could give rise to such liabilities, ITCAN may, upon giving 30 days notice to the Responsible Government, begin paying any funds which are then or thereafter due into an interest-bearing escrow account, up to the amount claimed in such claim, action, suit, or proceeding pending its resolution. The amount by which the Payments shall be so reduced or escrowed shall not exceed the then-remaining Responsible Government's share of the Payments (as set out in Schedule "C" hereto).

[122] This section provides ITCAN with two separate rights. The first arises where ITCAN learns of an action that could give rise to its monetary liability that is "in any way relating to, arising out of, or in connection with any Released Claims or Claims Over made by a Releasing Entity or an Entity claiming through or on behalf of Releasing Entity". If that precondition is met, ITCAN has the right, on notice, to begin to escrow the Payments then or thereafter due to the Responsible Government up to the amount claimed in the action, pending the resolution of that action.

[123] As applied to the present circumstances, if the Tobacco Board's action against ITCAN meets the precondition, ITCAN's right to escrow arises. It would be entitled to begin to pay into escrow the Payments then and thereafter due to the credit of Ontario up to the maximum of $50,000,000. Those funds would remain in escrow until the Tobacco

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Board's action is resolved. However, if the circumstances permit ITCAN to exercise this s. 7 escrow right, that can have no impact whatsoever on the Tobacco Board, on the presentation of its class action, or its right to fully recover from ITCAN if its action succeeds.

[124] The second right s. 7 gives to ITCAN arises if and when an action against ITCAN succeeds in monetary liability against it that meets the precondition, (that is, being "in any way relating to, arising out of, or in connection with a Released Claim or Claim Over by a Releasing Entity or an Entity claiming through or on behalf of a Releasing Entity"), ITCAN then has the right to reduce its present and future Payments required under the Agreement, by the amount of the monetary liability.

[125] As applied to the present circumstances, if the Tobacco Board's action succeeds against ITCAN, thus imposing a $50,000,000 liability on it, and if the precondition is met, ITCAN can reduce its present and future Payments due to the credit of Ontario by $50,000,000. ITCAN's escrowed funds would be returned to it. If the Tobacco Board's action failed or if it succeeded but the monetary liability thereby imposed on ITCAN did not meet the precondition, ITCAN's escrowed funds would be paid out to the credit of Ontario. However, like ITCAN's escrow right, any exercise by ITCAN of its s. 7 right to reduce Payments can have no impact whatsoever on the Tobacco Board or the prosecution its class action or its right fully to recover from ITCAN if its action succeeds.

[126] In summary, the answer to the question raised in the application has the consequence, for the purposes of s. 7, of determining whether, in the circumstances,

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ITCAN has a right to pay into escrow or a right to reduce its payments. Ontario has a significant stake in both questions. The Tobacco Board has none.

[127] On the other hand, s. 15 is quite different. It is also helpful to reproduce it:

> The Releasing Entities hereby, without any further action on the part of such Releasing Entities, absolutely and unconditionally fully release and forever discharge, the Released Entities from the Released Claims. Without in any way limiting the generality of the foregoing, the Releasing Entities further agree that:
>
> > (a) in the event that a proceeding, claim, action, suit or complaint with respect to a Released Claim is brought by Releasing Entity against a Released Entity, this release may be pleaded as a complete defence and reply, and may be relied upon in such a proceeding as a complete estoppel to dismiss the said proceeding.

[128] This section gives Released Entities an absolute and unconditional release by the Releasing Entities from the Released Claims. It also gives the Released Entities the right to rely on that release as a complete defence to any action that meets the condition of being an action brought by a Releasing Entity with respect to a Released Claim.

[129] As applied to the present circumstances, if the Tobacco Board's action is found to meet the precondition, ITCAN has a complete defence to it.

[130] In summary, the answer to the question raised in the application has the consequence, for the purposes of s. 15, of determining whether, in the circumstances, ITCAN has a complete defence to the Tobacco Board's action. The Tobacco Board has a significant stake in that question.

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[131] I now turn to the challenges to the arbitrator's jurisdiction raised by Ontario and the Tobacco Board in response to ITCAN's motion to stay the application because the question raised for the court is subject to arbitration.

[132] My colleague deals first with Ontario's challenge that the arbitration provisions of the Agreement apply only to disputes between ITCAN and Canada. Ontario says these provisions do not apply at all to disputes between ITCAN and Ontario. It argues that the arbitrator therefore has no jurisdiction to decide the question raised by the application.

[133] For the reasons given by my colleague, I agree that this argument fails. I agree with him that the argument that a party is not subject to the arbitration provisions of the Agreement is simply one species of challenge to the arbitrator's jurisdiction. In this case, the argument raises a question of mixed fact and law, namely whether in light of the factual matrix in which the arbitration provisions of the Agreement were negotiated, these provisions extend to disputes between Ontario and ITCAN. Determining the necessary facts cannot be done on the basis only of a superficial consideration of the documentary evidence in the record. This challenge to the jurisdiction of the arbitrator must be addressed first by the arbitrator.

[134] Ontario also challenges the jurisdiction of the arbitrator to decide the question posed to the court because it says the dispute set out in the application does not fall within the arbitration provisions of the Agreement. Ontario argues that the Agreement requires that the question in the application, posed for s. 7 purposes, be answered by the

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same forum as is required when it is posed in the s. 15 context, namely the court rather than arbitration.

[135] Finally, Ontario challenges the arbitrator's jurisdiction because it says two parties to the legal proceeding, namely Ontario and the Tobacco Board, are not parties to the arbitration provisions of the Agreement. The Tobacco Board joins in this challenge on the basis that it is a party to the legal proceeding, has a vital interest in the question before the court, but is not a party to the Agreement or its arbitration provisions.

[136] In my view, these remaining challenges must be analysed separately, first in the context of s. 7 of the Agreement and then in the context of s. 15, to determine if the challenges must be dealt with first by the arbitrator or whether the application can proceed.

[137] First section 7. Ontario's challenge based on the nature of the dispute is that the Agreement requires that the question of whether the claim in the class action is a Released Claim by a Responsible Government must be answered for s. 7 purposes in the same forum as for s. 15 purposes. That is clearly a question of mixed fact and law. A determination of the factual matrix in which the Agreement was negotiated is clearly required. A superficial consideration of the documentary evidence is not enough.

[138] Turning to the challenge based on not being parties to the arbitration provisions, the question raised in the application, when posed in the s. 7 context, affects only Ontario and ITCAN. Whether the Tobacco Board is a party to the arbitration provisions in the Agreement is irrelevant to the arbitrator's jurisdiction over the question posed in the s. 7

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context. In addition, as I have indicated, whether Ontario is a party to the arbitration provisions of the Agreement is an issue that must be dealt with first by the arbitrator. This is so just as much so for the question raised in the application for s. 7 purposes as it is for the question of whether Ontario is a party to the arbitration provisions at all.

[139] In summary, I would conclude that, for the purposes of s. 7, the challenges to the arbitrator's jurisdiction to resolve the question raised in the application must fail. To that extent the application was properly stayed.

[140] However, I reach a different conclusion when the context is changed to s. 15. I need deal with no more than the challenge to the arbitrator's jurisdiction raised by both Ontario and the Tobacco Board, that the Tobacco Board is not a party to the Agreement or its arbitration provisions.

[141] As was said in *Dancap*, where it is clear that a party to the legal proceedings is not a party to the arbitration agreement, the court can reach a final determination rather than require that the arbitrator first determine a jurisdictional challenge brought on that basis. In the language of *Dell*, when no more than a superficial examination of the documentary evidence is required to determine this challenge, the court can do so rather than require the arbitrator to do so first.

[142] Here, no one contends that the Tobacco Board is a party to the Agreement and its arbitration provisions. A superficial review of the record is enough to reach that conclusion. There is equally no doubt that the Tobacco Board is a party to the legal proceedings that ITCAN seeks to stay in favour in arbitration. Nor is there any doubt that

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the Tobacco Board has a vital interest in the question raised by the application, for the purposes of s. 15. The answer could provide ITCAN with a complete defence to its action, or could eliminate that possibility. The application directly implicates the Tobacco Board's rights, not just those of Ontario and ITCAN. The arbitrator cannot resolve that question posed by the application because the Tobacco Board is not a party to the Agreement or its arbitration provisions. The arbitrator has no jurisdiction to determine the Tobacco Board's rights. The question asked of the court must, for the purposes of s. 15, be determined in a forum in which the Tobacco Board has the right to participate. Hence the application should not be stayed in preference to arbitration so far as the question is posed for the purposes of s. 15.

[143] I would therefore dismiss the appeal so far as the application seeks the declaration for the purposes of s. 7. I would allow the appeal and lift the stay so far as the declaration sought is for the purposes of s. 15.

[144] Ontario has been only partially successful on appeal. The Tobacco Board succeeded in its main argument. I would therefore award Ontario significantly less in costs than it sought, and the Tobacco Board most of what it sought. Both are awarded costs on a partial indemnity basis fixed at $7,000 each, inclusive of disbursements and applicable taxes.

RELEASED: JUL 20 2011 ("S.T.G.")

"S.T. Goudge J.A."
"I agree. E.E. Gillese J.A."

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This is **Exhibit "E"** of the **Affidavit of Harvey T. Strosberg, Q.C.**, sworn March 16, 2021.

A Commissioner for taking Affidavits
David Robins (LSO #42332R)

CITATION: R. v. Imperial Tobacco Canada, 2012 ONSC 6027
COURT FILE NO.: CV 10 14709
DATE: 2013/01/02

SUPERIOR COURT OF JUSTICE – ONTARIO

2012 ONSC 6027 (CanLII)

RE: Her Majesty the Queen in Right of Ontario (Applicant)

-and-

Imperial Tobacco Canada Limited and The Ontario Flu-Cured Tobacco Growers' Marketing Board (Respondents)

BEFORE: JUSTICE H. A. RADY

COUNSEL: John Kelly, Lise Favreau & Kristin Smith, for the Applicant

Alan Mark, Orestes Pasparakis & Rahool Agarwal, for Imperial Tobacco Canada Limited

William Sasso for Ontario Flu-Cured Tobacco Growers' Marketing Board

Harry Underwood for Rothmans, Benson & Hedges, Inc.

Ronald Slaght for Her Majesty the Queen in Right of Canada

HEARD: **September 19, 2012**

ENDORSEMENT

Introduction

[1] The applicant seeks a declaration that a proposed class action commenced by the Ontario Flu-Cured Tobacco Growers' Marketing Board on its own behalf and on behalf of growers and producers of tobacco sold through the Tobacco Board is not a released claim by a releasing entity within the meaning of a settlement agreement made between the Imperial Tobacco Limited and Her Majesty the Queen in Right of Canada and Her Majesty the Queen in Right of the Provinces, including Ontario.

[2] Rothman, Benson & Hedges Inc. is an intervener in this application, it having entered into the same form of settlement agreement. JTI-MacDonald Corp., which also executed a virtually identical agreement, has agreed to be bound by the result in this application. Her Majesty the Queen in Right of Canada is maintaining a watching brief.

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The Parties and Interested Entities

(1) Her Majesty the Queen in Right of Ontario (Ontario)

(2) Her Majesty the Queen in Right of Canada (Canada)

(3) The Ontario Flu-Cured Tobacco Growers' Marketing Board (the Tobacco Board)

(4) Imperial Tobacco Canada Ltd. (ITCAN)

(5) Rothmans, Benson & Hedges Inc. (RBH)

(6) JTI-MacDonald Corp. (JTI)

Background

[3] On July 31, 2008, ITCAN entered into a comprehensive agreement with Canada and the provinces including Ontario, to settle claims arising from ITCAN's alleged role in tobacco smuggling between January 1, 1985 and December 31, 1996. Nearly identical agreements were executed with RBH and JTI as well. The allegation was that tobacco designated for export was smuggled back into Canada and sold on the domestic market. As a result, it was alleged that ITCAN avoided payment of taxes, duties, excise or customs taxes.

[4] As part of the comprehensive agreement, ITCAN agreed to pay up to $350 million over 15 years, payable in annual instalments, based on a percentage of ITCAN's sales revenues. Ontario's share of the annual payments is 14.267% of the total annual payment.

[5] The comprehensive agreement provides for a release of ITCAN, as well as a number of defined terms, which are set out below. ITCAN also agrees to a form of release of Canada and the provinces.

[6] The Release in favour of ITCAN is worded as follows:

> s. 15 The Releasing Entities hereby, without any further action on the part of such Releasing Entities, absolutely and unconditionally fully release and forever discharge, the Released Entities from the Released Claims. Without in any way limiting the generality of the foregoing, the Releasing Entities further agree that:
>
> > (a) in the event that a proceeding, claim, action, suit or complaint with respect to a Released Claim is brought by Releasing Entity against a Released Entity, this release may be pleaded as a complete defence and reply, and may be relied upon in such a proceeding as a complete estoppel to dismiss the said proceeding; and
> >
> > (b) in the event of (a), the Releasing Entity that initiated the proceeding shall be liable for all reasonable costs, legal fees, disbursements and expenses incurred by the Released Entity as a result of such proceeding.

[7] Section 1 of the comprehensive agreement contains the following pertinent definitions:

> "**Releasing Entities"** means Her Majesty in Right of Canada and in Right of the Provinces and includes for greater certainty the Canada Revenue Agency and the Canada Border Services Agency.
>
> "**Released Entities"** means ITCAN, British American Tobacco p.l.c., the Entities listed on Scheduled "B", Philip Morris, and each of their current and former Affiliates and each and any of their respective divisions, predecessors, successors and assigns and direct and indirect subsidiaries, as well as each and all of their respective current and former officers, directors, agents, servants and employees, including external legal counsel, and all of their respective heirs, executors and assigns. For avoidance of doubt, "Released Entities" shall not include Japan Tobacco Inc., R.J. Reynolds Tobacco Holdings, Inc., JTI Macdonald Corp. or any of their respective Affiliates (with the exception of Lane Limited and then only to the extent and during the period in which Lane Limited was an Affiliate of Rothmans, Benson and Hedges Inc. and for greater certainty this exception shall not apply during any period in which Lane Limited was or is an Affiliate of, or related in any way to, R.J. Reynolds Tobacco Holdings, Inc., or any of its Affiliates), or any of the current parties to the Actions or the CTMC.
>
> **"Released Claims**" means (excepting only the obligations under this Agreement); all manner of civil, administrative and regulatory proceedings, actions, causes of action, suits, duties, debts, dues, accounts, bond, covenants, contracts, complaints, claims, charges, and demands of whatsoever nature for damages, liabilities, monies, losses, indemnity, restitution, disgorgement, forfeiture, punitive damages, penalties, fines, interest, taxes, assessments, duties, remittances, costs, legal fees and disbursements,

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expenses, interest in loss, or injuries howsoever arising, known or unknown, including without limitation any claims arising at common law or in equity, by any federal or provincial statute or regulation and including all civil claims that may be allowable to the Releasing Entities within criminal or other proceedings in the form of restitution, disgorgement, forfeiture, punitive damages, penalties, fines or interest or otherwise, which hereto may have been or may hereafter arise in any way relating to, arising out of or in connection with:

(a) any exportation transhipment or shipment out of Canada, smuggling, reimportation or transhipment into Canada or any of the provinces thereof of tobacco product...manufactured, distributed or sold by the Released Entities (including aiding or participating in such activities), smuggling or any conduct in any way relating to smuggling, contraband tobacco product, the exportation, reimportation, transhipment or shipment of tobacco products manufactured, distributed or sold by Released Entities that were otherwise contraband, during the Relevant Period;

(b) any failure by the Released Entities to pay taxes, duties, excise, customs or excise taxes or duties or other amounts payable on account of smuggled and/or reimported and/or transhipped (including inter-provincial transhipments) and/or otherwise contraband tobacco products manufactured, distributed, sold by the Released Entities and/or sold, delivered or consumed in Canada, or any expenditures relating to enforcing or recovering any such tax, duty, excise or other amounts alleged to be payable, or any failure to file a return, form, account or any other required documentation in respect of such amounts (including aiding or participating in such activities) in relation to the Relevant Period; and

(c) any after-the-fact conduct including any oral or written statements, representations or omissions related to the matters referred to in (a) and/or (b) whether during the Relevant Period or afterward or during the negotiation of this Agreement.

(d) for avoidance of doubt, Released Claims shall not include any claims

(1) whether already commenced or that may be commenced, related to the recovery of alleged health care costs, unless such claims arise from (a), (b) or (c) above. This paragraph is not intended to limit the ability of a Releasing Entity to claim, in any health care cost recovery litigation, damages on an aggregated basis based on the actual incidence of smoking. For greater certainty, this Agreement does not limit the Releasing Entities' ability to introduce and rely on evidence of smoking incidence, even if such incidence may arise out of or is related to (a), (b) or (c) above, and a Released Entity shall not raise as a defence or lead any evidence that the actual incidence of smoking or the health care costs caused or contributed to by smoking should be reduced by reason of (a), (b) or (c) above;

(2) in proceedings bearing Court File Nos. 04-CL-5530 and O3-CV-253858 CMI, in the Ontario Superior Court of Justice (the "Actions"). For the avoidance of doubt, this exclusion shall not include any claims made against the Released Entities; or

(3) against the CTMC.

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[8] On December 2, 2009, the Tobacco Board and four individual tobacco farmers started a proposed class action against ITCAN, 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 ITCAN 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.

[10] On March 29, 2010, ITCAN served a notice under s. 7 of the comprehensive agreement, which is a withholding provision that allows ITCAN to pay into escrow funds owing to Ontario if an action in respect of a released claim is commenced by a responsible government.

[11] Section 7 provides as follows:

> Without prejudice to any other rights or remedies as provided in paragraphs 15, 16, 17, 18 and 19 of this Agreement, in the event that monetary liabilities (including all fees, expenses and disbursements on a full indemnity scale) are incurred by Released Entities in any way relating to, arising out of or in connection with any Released Claims or Claims Over made by a Releasing Entity or an Entity claiming through or on behalf of a Releasing Entity (and for the avoidance of doubt including such Government's Crown-controlled corporations or Crown agencies) (a "Responsible Government"), the amount of the Payment due in the fiscal year in which the monetary liabilities are incurred, and Payments due in subsequent fiscal years, shall be reduced by such amounts incurred. Upon learning of the existence of any claim, action, suit, or proceeding that could give rise to such liabilities, ITCAN may, upon giving 30 days' notice to the Responsible Government, begin paying any funds which are then or thereafter due into an interest-bearing escrow account, up to the amount claimed in such claim, action, suit, or proceeding pending its resolution. The amount by which the Payments shall be so reduced or escrowed shall not exceed the then-remaining Responsible Government's share of the Payments (as set out in Schedule "C" hereto).

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[12] ITCAN (supported by RBH and JTI) took the position that the claim of the Tobacco Board is a released claim by a responsible government pursuant to the comprehensive agreement.

[13] As a result, on April 30, 2010, Ontario commenced this application. ITCAN responded by serving a notice of arbitration under the comprehensive agreement. It brought a motion to challenge the court's jurisdiction to hear the application. The motions judge granted ITCAN's request for a stay of the application and ordered that the parties arbitrate the issue.

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[14] Ontario, supported by Canada and the Tobacco Board appealed. The Court of Appeal allowed the appeal in part, on the basis that an arbitrator has no jurisdiction to determine whether the Tobacco Board's claim in the class action is a released claim by a releasing entity. The matter was remitted to the Superior Court for a determination of this issue.

The Tobacco Regulatory Regime

[15] 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. Its principle role has been to regulate and control the production and marketing of Ontario grown tobacco.

[16] The Ontario Farm Products Marketing Commission is a statutory body. It has the power to regulate virtually all aspects of the production and marketing of agricultural products in Ontario and to delegate powers to marketing boards. Pursuant to regulation[1], the Commission delegated supply management powers to the Tobacco Board to enable it to promote, regulate and control tobacco marketing and production. These powers included the power to establish a quota system, to license producers and buyers and to require all tobacco to be sold through the Tobacco Board's auction warehouse.

---

[1] R.R.O. 1980, Reg. 383; R.R.O. 1990, Reg. 435.

[17] Up until June 1, 2009, one of the Tobacco Board's functions was to negotiate agreements with tobacco manufacturers on behalf of tobacco growers and producers for the sale of their tobacco. The Tobacco Board was charged with responsibility to set the price of tobacco, collect the amounts owed by manufacturers and distribute proceeds among the growers and producers.

[18] The right to contract and to sue on those contracts was within the sole authority of the Tobacco Board. Section 8 of Regulation 383 and its successor, Regulation 435, provided as follows:

> The Commission authorizes the local board to require the price or prices payable or owing to the producers for tobacco to be paid to or through the local board and to recover such price or prices by suit in a court of competent jurisdiction.

[19] As I understand the regime, individual growers and producers did not sue on their own behalf. Their interests were to be protected by the Tobacco Board.

[20] On February 13, 2009, the Tobacco Board and Canada concluded an agreement to eliminate the tobacco production quota system in Ontario. Substantial changes to the role and function of the Tobacco Board resulted. On March 25, 2009, the Commission ordered the Tobacco Board to obtain its written approval before it commenced litigation for the recovery of any payments owed to the growers and producers by the manufacturers.

[21] On June 1, 2009, the Commission's order was replaced with new regulations[2], which permitted growers and producers to sell tobacco directly to the manufacturers; changed the Tobacco Board's role to primarily one of licensing; and required the consent of the Commission prior to the Tobacco Board commencing legal actions.

[2] O. Reg. 208/09, 207/09 and 306/09.

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[22] Prior to the Commission's March 25, 2009 order, the Tobacco Board did not require the Commission's consent to commence a class (or other) action because under Regulation 435 (and its predecessor Regulation 383) the Board was authorized to sue in its own name. However, thereafter, the Commission's authorization was required. By letter dated June 8, 2009, the Commission granted the Tobacco Board authorization to commence the class action that is at the center of this application.

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The Parties' Positions

[23] Ontario (supported by the Tobacco Board) submits that the Tobacco Board is not a releasing entity and that its claim as particularized in the class action is not a released claim. In support of its submission, Ontario makes the following points:

- The Tobacco Board is not a party to the Comprehensive Agreement.
- The Tobacco Board does not benefit from the settlement reached under the Comprehensive Agreement.
- The Tobacco Board's claim in the class proceeding is brought on behalf of and for the benefit of growers and producers of tobacco – not in any way for Ontario's benefit or on behalf of Ontario.
- The claim asserted by the Tobacco Board is in relation to losses suffered by growers and producers of tobacco in relation to lower purchase prices for tobacco – not in relation to unpaid taxes or to any losses suffered by Ontario or to which Ontario would have a valid claim.

[24] ITCAN (supported by RBH) submits that the class action is a released claim by a releasing entity against a released entity. In support of its contention, it asserts the following:

- the class action is

  a) "civil proceeding", "action", "suit" or "claim";

b) for "damages", "monies", "losses", "costs", "legal fees and disbursements" and/or "interest in loss";

c) "relating, arising out of or in connection with";

d) the "smuggling ... into Canada or any of the provinces ... of tobacco products, manufactured, distributed or sold by" ITCAN.

e) ITCAN is clearly a released entity;

f) the Commission is part of the Ontario Crown and the Tobacco Board is an agent of the Ontario Crown and they are therefore bound by the comprehensive agreement.

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The Law

[25] Releases are subject to the same principles that guide contractual interpretation: see Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2007 (Markham: Lexis Nexis).

[26] Hall goes on to explain that releases are subject to a special rule, which is derived from an 1870 decision of the House of Lords: *London and South Western Railway v. Blackmore* (1870), L.R. 4 H.L. 610. In that case, the rule was expressed in this way:

> The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given. But a dispute that had not emerged or a question which had not at all arisen, cannot be considered as bound and concluded by the anticipatory words of a general release.

[27] The rules governing the analysis are neatly summarized in *Bank of British Columbia Pension Plan v. Kaiser*, [2000] B.C.J. No. 903; 137 B.C.A.C. 37 (B.C.C.A.) quoting from *Chitty on Contracts:*

> *Chitty on Contracts* sums up the relevant case law with respect to the interpretation of a discharge of a contract or release as follows (pp. 1084-5):

1. No particular form of words is necessary to constitute a valid release. Any words which show an evident intention to renounce a claim or discharge the obligation are sufficient.

2. The normal rules relating to the construction of a written contract also apply to a release, and so, a release in general terms is to be construed according to the particular purpose for which it was made.

3. The court will construe a release which is general in its terms in the light of the circumstances existing at the time of its execution and with reference to its context and recitals in order to give effect to the intention of the party by whom it was executed.

4. In particular, it will not be construed as applying to facts of which the party making the release had no knowledge at the time of its execution or to objects which must then have been outside his contemplation.

5. The construction of any individual release will necessarily depend upon its particular wording and phraseology.

[28] The Supreme Court of Canada's decision in *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888 is an often cited source of these hallmarks of contractual interpretation:

> Even apart from the doctrine of contra proferentem as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket

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> the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

[29] Another decision that is frequently cited is *Eli Lilly & Co. v. Novopharm Ltd.*, [1988] 2 S.C.R. 129. The principles that emerge from it may be summarized as follows:

- the goal of contract interpretation is "to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract";
- the contractual intent of the parties is determined by reference to the words used, read in light of the surrounding circumstances or put another way, in context;
- evidence of one party's subjective intention is not permissible; and
- extrinsic evidence is unnecessary when a document is clear and unambiguous on its face.

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Analysis

[30] I have come to the conclusion that the class proceeding is not a released claim by a releasing entity, for the following reasons.

[31] First, the context and circumstances giving rise to the comprehensive agreement are important. The claims of the governments that were being settled under the agreement were for the non-payment of taxes and related charges on the allegedly smuggled tobacco products. Support for this conclusion is found in the language of the agreement. The opening recital stipulates that the parties agree to "address [their] shared objective of combating the manufacture, sale, distribution, transport and storage of illicit and contraband tobacco products in Canada, as follows":

[32] The definitions follow.

[33] The definition of released claim is very broadly and comprehensively drafted and includes damages…however arising… known and unknown. However, it clearly relates,

arises from, or is in connection to smuggling activities and any resulting "failure by the Released Entities to pay taxes, duties, excise, customs or excise taxes or duties or other amounts payable on account of smuggled ... tobacco products."

[34] The definition goes on to exclude from the operation of the release, claims related to the recovery of alleged health care costs and two specifically identified existing proceedings. Of course, the Tobacco Board's claim is not mentioned because it had not yet been commenced and there is no evidence that it was in the contemplation of the parties to the agreement.

[35] Releasing entities are defined as including the Canada Revenue Agency and the Canada Border Services Agency, the two entities who would have been impacted by the failure to remit "taxes, duties, excise, customs or excise taxes or duties...."

[36] This too demonstrates that what the parties contemplated was a release of claims arising from or related to the failure to pay taxes to the governments. I agree with Ontario that the word "includes" as it is used here is equivalent to "means and includes" with the result that the definition restricts rather than enlarges the meaning of Canada and Ontario.

[37] It is also significant that the Canada Revenue Agency and Canada Border Services Agency are specifically named, and no others, particularly when contrasted with the language in ITCAN'S release at paragraph 19. It says that ITCAN releases the releasing entities "and for the avoidance of doubt including Crown-controlled corporations and Crown agencies ... together with ministers, employees and agents...." By contrast, the definition of releasing entity does not contain this more expansive language.

[38] Further support for this conclusion is found elsewhere in the definition of released claim. It is said to include "all civil claims that may be allowable to the releasing entities." It is noteworthy that any damages that may be awarded under the class action would not

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benefit Ontario. If successful, the claims are not allowable to Ontario but would be allowable to the Tobacco Board for the benefit of growers and producers.

[39] Even if the Tobacco Board is a Crown agency, the Tobacco Board is not acting as an agent of the Crown of the benefit of the Crown in pursuing the class action. Clearly, it is acting as an agent for the growers and producers as it was obliged to do by statute and regulation. It is the case that the negotiating parties are sophisticated and knowledgeable and capable of protecting their interests through contractual language. At the risk of repetition, had the parties intended the comprehensive agreement to apply to Crown agencies, then they would have been added to the definition as they were in the language of ITCAN's release at para. 19.

[40] For these reasons, Ontario's application is granted.

[41] I will receive brief written submissions from the applicant by January 18, 2013 and from the responding parties and intervener two weeks thereafter.

"Justice H. A. Rady"
Justice H. A. Rady

Date: January 2, 2013

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This is **Exhibit "F"** of the **Affidavit of Harvey T. Strosberg, Q.C.**, sworn March 16, 2021.

A Commissioner for taking Affidavits
David Robins (LSO #42332R)

2013 ONCA 481 (CanLII)

COURT OF APPEAL FOR ONTARIO

CITATION: Ontario v. Imperial Tobacco Canada Ltd., 2013 ONCA 481
DATE: 20130716
DOCKET: C56568 & C56569

Hoy A.C.J.O., Feldman and Simmons JJ.A.

BETWEEN

Her Majesty the Queen in Right of Ontario

Applicant (Respondent)

and

Imperial Tobacco Canada Limited

Respondent (Appellant)

and

The Ontario Flue-Cured Tobacco Growers' Marketing Board

Respondent (Respondent)

Orestes Pasparakis and Rahool P. Agarwal, for the appellant

John Kelly, Lise G. Favreau and Kristin Smith, for the respondent Her Majesty the Queen in Right of Ontario

William V. Sasso, for the respondent The Ontario Flue-Cured Tobacco Growers' Marketing Board

Peter J. Osborne, for the intervener Her Majesty the Queen in Right of Canada

Brian H. Greenspan, for the intervener Rothmans, Benson & Hedges

Heard: July 3, 2013

On appeal from the order of Justice Helen A. Rady of the Superior Court of Justice, dated January 2, 2013, with reasons reported at 2012 ONSC 6027.

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ENDORSEMENT

[1] The issue to be decided on this application and therefore on this appeal was set out in this court's Order dated July 20, 2011, para. 2 as follows:

> 2. THIS COURT ORDERS that the appeal be allowed in part and the stay of this Application be lifted to allow the Application to proceed, to seek a declaration that the claim of the Tobacco Board in Court file no. 6475CP is not a Released Claim for the purposes of s. 15 of the Comprehensive Agreement dated July 31, 2008.

[2] The Comprehensive Agreement dated July 31, 2008 (the "2008 Agreement") was entered into between the appellant, Imperial Tobacco Canada Limited, Her Majesty the Queen in Right of Canada, Her Majesty the Queen in Right of Ontario and the nine other provinces, to settle claims arising out of a course of conduct by Imperial between 1985 and 1996 whereby Imperial smuggled tobacco out of Canada then back in without paying required duties and taxes. A number of other tobacco companies, including the intervener, Rothmans, Benson & Hedges Inc. ("Rothmans"), entered into similar agreements to settle similar claims with the same government entities.

[3] The claim of the Tobacco Board referred to in the 2011 Order is contained in a class action brought in December 2009 against Imperial and other tobacco companies by the respondent, The Ontario Flue-Cured Tobacco Growers' Marketing Board and four individual tobacco farmers, as representative plaintiffs.

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[4] In the proposed class action, the Board and the farmers seek damages for breach of contract on behalf of a proposed class comprised of growers and producers in Ontario who sold tobacco through the Board pursuant to contracts between the Board and tobacco companies, including Imperial, during the period from January 1, 1986 and December 31, 1996.

[5] The alleged breaches arose out of Imperial's underpayment to the Board for tobacco that was being sold illegally in Canada. As described in the statement of claim, Imperial purchased tobacco from the producers through the Board at the lower price applicable to tobacco intended for export and sale outside Canada, even though the tobacco was ultimately smuggled back into Canada and sold domestically.

[6] Section 15 of the 2008 Agreement releases Imperial from certain claims and reads as follows:

> 15. The Releasing Entities hereby, without any further action on the part of such Releasing Entities, absolutely and unconditionally fully release and forever discharge, the Released Entities from the Released Claims. Without in any way limiting the generality of the foregoing, the Releasing Entities further agree that:
>
> > (a) in the event that a proceeding, claim, action, suit or complaint with respect to a Released Claim is brought by Releasing Entity against a Released Entity, this release may be pleaded as a complete defence and reply, and may be relied upon in such a proceeding as a complete

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> estoppel to dismiss the said proceeding; and
>
> (b) in the event of (a), the Releasing Entity that initiated the proceeding shall be liable for all reasonable costs, legal fees, disbursements and expenses incurred by the Released Entity as a result of such proceeding.

In other words, if the claims the Board seeks to advance in the class action against Imperial are "Released Claims" by a "Releasing Entity", then the release in s. 15 constitutes a complete defence for Imperial to those claims and to the class action.

[7] The terms "Released Claims", "Releasing Entities" and "Released Entities" are all defined terms in the 2008 Agreement. Section 1 provides that "Releasing Entities" means "Her Majesty in Right of Canada and in right of the Provinces and includes for greater certainty the Canada Revenue Agency and the Canada Border Services Agency."

[8] The Board was established in 1957 on vote of Ontario's tobacco producers. It is a corporation without share capital established by regulation under the *Farm Products Marketing Act*, R.S.O. 1990, c. F.9. The Ontario Farm Products Marketing Commission delegated broad supply management powers to the Board. The Commission is a statutory body whose members are appointed by the Lieutenant Governor and whose employees are public servants. The Commission deposits moneys it receives into the Consolidated Revenue Fund.

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[9] The Board's primary role during the class period and at the time the 2008 Agreement was signed was to regulate and control the production and marketing of Ontario-grown tobacco. During this period, the Board operated autonomously. Its board of directors consisted of directors elected by the tobacco producers representing each of the tobacco growing districts in Ontario, plus an additional member appointed by the elected members.

[10] Among other things, the Board had the power to, and did require that producers only market their tobacco through the Board. The Board entered into annual contracts on behalf of the producers for the sale of the producers' tobacco, including those annual contracts at issue in the proposed class proceedings.

[11] When the 2008 Agreement was signed, and during the class period, the Board had the sole authority to enforce the rights of the producers to recover payments owed by tobacco companies under the annual contracts. Significantly, while the tobacco producers were the beneficiaries of those contracts, they were not parties to the contracts. Counsel for Imperial (and counsel for the intervener Rothmans) fairly advised the court that they do not concede that the tobacco producers can bring class actions like the current one, without the involvement of the Board.

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[12] On the question of whether the claims are "Released Claims" within the meaning of the 2008 Agreement, s. 1 provides:

> "Released Claims" means (excepting only the obligations under this Agreement); all manner of civil, administrative and regulatory proceedings, actions, causes of action, suits, duties, debts, dues, accounts, bond, covenants, contracts, complaints, claims, charges, and demands of whatsoever nature for damages, liabilities, monies, losses, indemnity, restitution, disgorgement, forfeiture, punitive damages, penalties, fines, interest, taxes, assessments, duties, remittances, costs, legal fees and disbursements, expenses, interest in loss, or injuries howsoever arising, known or unknown, including without limitation any claims arising at common law or in equity, by any federal or provincial statute or regulation and including all civil claims that may be allowable to the Releasing Entities within criminal or other proceedings in the form of restitution, disgorgement, forfeiture, punitive damages, penalties, fines or interest or otherwise, which hereto may have been or may hereafter arise in any way relating to, arising out of or in connection with:
>
> > (a) any exportation transhipment or shipment out of Canada, smuggling, reimportation or transhipment into Canada or any of the provinces thereof of tobacco products manufactured, distributed or sold by the Released Entities (including aiding or participating in such activities), smuggling or any conduct in any way relating to smuggling, contraband tobacco products, the exportation, reimportation, transhipment or shipment of tobacco products manufactured, distributed or sold by Released Entities that were otherwise contraband, during the Relevant Period;
> >
> > (b) any failure by the Released Entities to pay taxes, duties, excise, customs or

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excise taxes or duties or other amounts payable on account of smuggled and/or reimported and/or transhipped (including inter-provincial transhipments) and/or otherwise contraband tobacco products manufactured, distributed, sold by the Released Entities and/or sold, delivered or consumed in Canada, or any expenditures relating to enforcing or recovering any such tax, duty, excise or other amounts alleged to be payable, or any failure to file a return, form, account or any other required documentation in respect of such amounts (including aiding or participating in such activities) in relation to the Relevant Period; and

(c) any after-the-fact conduct including any oral or written statements, representations or omissions related to the matters referred to in (a) and/or (b) whether during the Relevant Period or afterward or during the negotiation of this Agreement.

(d) for avoidance of doubt, Released Claims shall not include any claims

(1) whether already commenced or that may be commenced, related to the recovery of alleged health care costs, unless such claims arise from (a), (b) or (c) above. This paragraph is not intended to limit the ability of a Releasing Entity to claim, in any health care cost recovery litigation, damages on an aggregated basis based on the actual incidence of smoking. For greater certainty, this Agreement does not limit the Releasing Entities' ability to introduce and rely on evidence of smoking incidence, even if such incidence may arise out of or is related to (a),

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> (b) or (c) above, and a Released Entity shall not raise as a defence or lead any evidence that the actual incidence of smoking or the health care costs caused or contributed to by smoking should be reduced by reason of (a), (b) or (c) above;
>
> (2) in proceedings bearing Court File Nos. 04-CL-5530 and O3-CV-253858 CMI, in the Ontario Superior Court of Justice (the "Actions"). For the avoidance of doubt, this exclusion shall not include any claims made against the Released Entities; or
>
> (3) against the CTMC.

[13] The dispute between the parties on what is included under this definition turns on whether the word "and" should be implied between clauses (a) and (b), having the effect of limiting the general words in clause (a) to the types of tax and penalty claims described in clause (b), or whether the word "or" should be read in, having the effect that each clause is given a separate meaning and that clause (b) does not modify or limit the claims described in clause (a).

[14] The respondent, Her Majesty the Queen in Right of Ontario, argues that clause (a) sets out the transactions that could have given rise to the payment of taxes and duties while clause (b) addresses the failure to pay those taxes and duties. As a result, the respondents submit that clause (b) modifies and limits the claims as described in clause (a).

[15] Imperial's position is that clause (a) and clause (b) should be read disjunctively. According to Imperial, the reference in clause (c) to "after-the-fact

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conduct ... related to the matters referred to in (a) *and/or* (b)" (emphasis added) means that after-the-fact conduct related to either clause (a) or clause (b) is a released claim. It would not make sense, Imperial argues, that after-the-fact conduct related to clause (a) alone be released, but not the actual conduct referred to in clause (a) alone. Imperial also relies on clause (d) which exempts certain claims by government for the recovery of health care costs "unless such claims arise from (a), (b) or (c) above." Again, if the claims in the three clauses are individually treated in the exempt claims provision, they must be individually released when they are not exempt.

[16] We accept the interpretation suggested by Imperial based on the use of the word "or" as described. Furthermore, it would not be necessary to exempt government health care claims against the tobacco companies – which are not limited to taxes and duties - from the definition of Released Claims, if such health care claims could not otherwise be included as Released Claims.

[17] However, although the claims asserted in the class action may come within the words of the definition of "Released Claims", they are only released under s. 15 of the 2008 Agreement if they are released by a Releasing Entity. In this way, the 2008 Agreement ensures that only claims within the definition of Released Claims that belong beneficially to a Releasing Entity are released.

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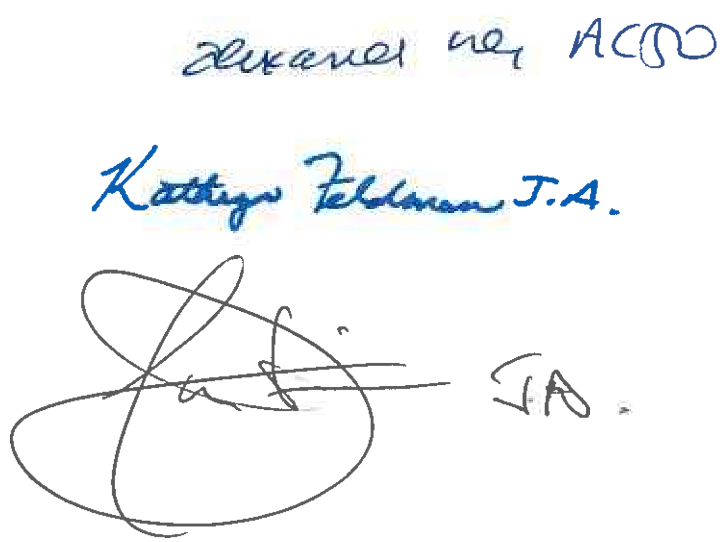
[18] It is clear that in bringing the proposed class action, the Board is acting only as agent for the producers to enforce the annual contracts entered into by the Board on their behalf, and not as an agent on behalf of the Crown or for the benefit of the Crown. Accordingly, in bringing the proposed class action, the Board is not asserting a "Released Claim" belonging beneficially to the Crown and is not acting as a "Releasing Entity" within the meaning of the 2008 Agreement.

[19] The appeal is therefore dismissed with costs payable by Imperial to the respondent Board in the amount of $15,000, and payable by Imperial and Rothmans to the respondent Her Majesty the Queen in Right of Ontario in the amount of $18,500, all inclusive of disbursements and HST.



This is **Exhibit "G"** of the **Affidavit of Harvey T. Strosberg, Q.C.**, sworn March 16, 2021.

A Commissioner for taking Affidavits
David Robins (LSO #42332R)

CITATION: The Ontario Flue-Cured Tobacco Growers' Marketing Board v. Rothmans, Benson & Hedges, Inc., 2014 ONSC 3469
COURT FILE NO.: 64462 CP
DATE: 2014/06/30

2014 ONSC 3469 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: 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)

AND BETWEEN:

COURT FILE NO.: 64757 CP

RE: 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)

AND BETWEEN:

COURT FILE NO.: 1056/10 CP

RE: The Ontario Flue-Cured Tobacco Growers' Marketing Board, Andy J. Jacko, Brian Baswick, Ron Kichler and Arpad Dobrentey (Plaintiffs)

-and-

JTI-Macdonald Corp. (Defendant)

BEFORE: Justice H. A. Rady

COUNSEL: William Sasso & David Robins, for the plaintiffs
Orestes Pasparakis & Rahool Agarwal, for the defendants Imperial Tobacco Canada Limited
Brian Greenspan & Naomi Lutes, for the defendants Rothmans, Benson & Hedges, Inc.
Patrick Flaherty & Alex Smith for the defendants, JTI-Macdonald Corp.

HEARD: January 30 & 31, 2014

ENDORSEMENT

Introduction

[1] The defendants seek an order for summary judgment dismissing the plaintiffs' three claims as statute barred. They say that the plaintiffs knew or ought to have known with the exercise of reasonable diligence the material facts on which their claims are based long before 2009 and 2010 when these proposed class actions were commenced.

[2] The plaintiffs allege that the defendants were involved in the smuggling into Canada of tobacco designated for export abroad. As a result, they say that they did not receive the correct compensation for tobacco they sold to the defendants. Tobacco designated for export commands a lower price than that intended for the domestic market. The claims are framed in breach of contract.

[3] The defendants say that throughout the claims period, the plaintiffs knew that tobacco sold to the defendants was being smuggled back into Canada; that the defendants did not pay the higher domestic price for that tobacco; and as a result, the plaintiffs suffered a loss. They submit that the constituent elements of the breach of contract claim were therefore known to the plaintiffs during the claims period.

[4] The defendants further submit that their involvement in smuggling is not a material fact necessary to the breach of contract claim. Nevertheless, the defendants point to the volumes of media reports and other documentation that demonstrate speculation, if not the conclusion, that they were complicit in smuggling activities. They say that their involvement was open and notorious.

[5] In contrast, the plaintiffs say that they could not reasonably have known of the defendants' involvement in smuggling or responsibility for the breach of contract until the disclosure of certain settlement agreements, more particularly described

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below, and guilty pleas to a breach of the *Excise Act* that were made in 2009 and 2010. They point out that the defendants have consistently denied any involvement in smuggling activities. They submit that knowledge of the defendants' identity as participants in smuggling is an essential element of the breach of contract claim.

[6] For the reasons that follow, I have concluded that there is a genuine issue requiring a trial respecting when the plaintiffs knew or ought to have known that they had a cause of action against the defendants.

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The Parties

- The Ontario Flue-Cured Tobacco Growers' Marketing Board (the Tobacco Board) and Messrs. Jacko, Baswick, Kichler & Dobrentey who are individual tobacco growers.
- Imperial Tobacco Canada Ltd. (ITCAN)
- Rothmans, Benson & Hedges Inc. (RBH)
- JTI-MacDonald Corp. (JTI)

The Claims

[7] On November 5, 2009, the Tobacco Board and the four individual tobacco farmers started a proposed class action against RBH, seeking damages of $50,000,000. The action is 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 by the same plaintiffs against ITCAN on December 2, 2009 and JTI on April 23, 2010.

The Proceedings

[8] On July 31, 2008, RBH entered into a comprehensive agreement with Her Majesty the Queen Right of Canada and the provinces including Ontario, to settle claims arising from RBH's alleged role in tobacco smuggling between January 1, 1985

and December 31, 1996. Nearly identical agreements were executed that day with ITCAN and subsequently with JTI as well. The allegation was that tobacco designated for export was smuggled back into Canada and sold on the domestic market. As a result, it was alleged that RBH, ITCAN, and JTI avoided payment of taxes, duties, excise or customs taxes.

[9] On the same day, RBH and ITCAN issued media releases announcing the settlements with Canada and the provinces to resolve an RCMP investigation and the governments' civil claims arising from the companies' involvement in tobacco smuggling in the late 1980s and early 1990s. That day, as a term of the settlements, both Rothmans and ITCAN 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".

[10] On April 13, 2010, JTI issued a media release announcing its settlement with Canada and the provinces to resolve the RCMP's investigation and civil claims arising from its involvement in tobacco smuggling in the late 1980s and early 1990s. That day, as a term of the settlement, 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". The plaintiffs say it was only at this time that they were aware of all of the constituent elements of their claim.

[11] The class action against RBH was commenced in November 2009 and against ITCAN in December 2009, within approximately 16 months of the announcement of the settlement agreements.

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[12] The class action against JTI was commenced in April 2010, ten days after the announcement of JTI's settlement with the governments.

[13] In each of the class actions, the plaintiffs claim on behalf of themselves and a putative class of Ontario tobacco producers that the defendants paid less to the Tobacco Board than contracted for prices for tobacco bought for duty-free and export cigarette/tobacco products but which were smuggled back into Canada and sold in the domestic market.

[14] The proposed class in each of the actions consists of Ontario growers and producers who sold tobacco through the Tobacco Board pursuant to agreements during the period January 1, 1986 to December 31, 1996.

[15] On March 29, 2010, following service of the statement of claim, ITCAN delivered notice to the province of Ontario of its intention to withhold payment under the settlement agreements. ITCAN asserted that the Tobacco Board's claim was a "released claim" as defined in the settlement agreements. Ontario disagreed. As a result, Ontario commenced an application for an order to compel ITCAN to pay the settlement money to Ontario pursuant to the settlement agreement. RBH participated in the application as an intervener and JTI agreed to be bound by the result.

[16] On January 25, 2012, I directed that the defendant's limitation period motions should follow the hearing of the application as the just, most expeditious and least expensive course of action. The application was argued on September 19, 2012. On January 2, 2013, I rendered a decision, which found in favour of the plaintiffs. I concluded that the class action was not a released claim by a releasing entity. On July 16, 2013, the Court of Appeal dismissed RBH's appeal of my decision.

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[17] On May 3, 2013, each of the defendants served statements of defence in the class actions denying any involvement in tobacco smuggling. They also plead that the actions are barred by the provisions of either the *Limitations Act*, R.S.O. 1990, c. L.15 or in the alternative, the *Limitations Act*, 2002, S.O. 2002, c. 24, Schedule B.

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The Evidence on the Motion

[18] In support of their motion, the defendants have filed a joint motion record containing the notices of motion of each defendant and an affidavit sworn by Chrysanthe Gravina sworn on July 23, 2013 with a number of exhibits appended.

[19] Ms. Gravina is a law clerk employed by Greenspan, Humphrey and Lavine, the solicitors who act for RBH Her affidavit consists of four volumes containing 143 exhibits and 1,349 pages of media and other reports that can be conveniently grouped into the following categories:

- Comments and opinions on taxes and policies relating to the tobacco industry, their effect upon the Canadian tobacco industry and the smuggling and sale of contraband cigarettes in Canada that has resulted from changes in Canadian government policies;

- Reports on alleged activities involving the illegal re-importation and sale by third parties of tobacco products that had been exported from Canada;

- Commentaries on legal proceedings brought against certain individuals and corporations in the United States and Canada concerning their alleged involvement in smuggling activities; and

- Reports, transcripts and/or press releases in which the Tobacco Board or a representative of the Tobacco Board comments on matters relating to the Canadian tobacco industry.

[20] In response to the motion, the plaintiffs have filed an affidavit from George Gilvesy sworn November 21, 2013. Mr. Gilvesy was the director of the Tobacco Board from 1987 until 2004. From 1990 to 1994 he was the vice chair of the Board and from 1995 to 1996, he was chair of the Board. From 1998 to 1999, he was the vice chair and from 1999 until 2001, he was the chair. He was also a member of the Tobacco Advisory Committee (TAC) as will be more particularly described below. Mr. Gilvesy was also a tobacco grower from 1978 until 2004.

[21] Fred Neukamm also swore an affidavit dated November 21, 2013. He is the current chair of the Tobacco Board and has been a director since 2002.

[22] Finally, an affidavit from Barry Bresner, sworn November 21, 2013, was filed. Mr. Bresner is a partner at Borden Ladner Gervais, a Toronto law firm which has acted for the Tobacco Board since 1985. None of the affiants were cross-examined on their affidavits.

[23] Consistent with the practice as developed with respect to class proceedings, no documentary discovery nor examinations for discovery have occurred at this time.

[24] Mr. Gilvesy has deposed as follows:

> 6. Throughout my terms as officer and Director of the Board, I always held the same belief, namely, that none of the defendants in these proceedings had any active involvement in the smuggling of duty-free and export tobacco products for consumption in Canada.
>
> 7. The above core belief was supported by other related beliefs which I will explain in detail below. These beliefs include the following:
>
> a. The presence and growth of the contraband tobacco market due to smuggling undermine the legitimate tobacco market in Canada;

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b. the defendants could maximize profits from an orderly and legitimate tobacco marketplace which the three defendants effectively control;

c. the defendants were cooperating with the governments and collaborated with the Board through TAC to maintain the legitimate marketplace because it was in their best financial interest to eliminate contraband tobacco;

d. it was not possible for the defendants to determine which of their customers for duty-free and export tobacco were or were not legitimate;

e. the members of TAC, which included representatives of the defendants, shared the objective of eliminating contraband tobaccos;

f. it was inconceivable to me that the defendants would hire qualified independent experts to study and report on the causes and persons involved in smuggling if they, themselves, were among the perpetrators;

g. in the proof of export reports delivered to auditors Deloitte and later MacGillivray Partners LLP. The defendants represented that their sales of duty free and export products were *bona fide* and made to purchasers who they believed were legitimate;

h. the various opinions and speculations regarding the defendants alleged involvement in smuggling were not credible because they offered no evidence in support and many of the sources were biased and their purpose was often to advance their own anti-smoking agenda; and

i. the defendants' representatives were more believable when they denied any active involvement in smuggling and/or stated that their sales of duty-free and export tobacco products were legitimate.

[25] Mr. Neukamm has deposed as follows:

24. Prior to July 31, 2008, I believed that none of the defendants in these proceedings had any active involvement in the smuggling of duty-free and export tobacco products for consumption in Canada because:

(a) in their public statements, the defendants categorically denied any involvement in smuggling contraband tobacco;

(b) the defendants told the Board that they sold duty-free and export tobacco products to legitimate purchasers in the United States;

(c) the defendants collaborated with the Board in efforts to convince the federal and provincial governments to lower tobacco taxes in order to remove the incentive for smugglers;

(d) the defendants were also working with the governments in the effort to eliminate contraband tobacco;

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(e) the defendants were our business partners and it was in the best mutual financial interest of the defendants and the tobacco growers to eliminate contraband tobacco; and

(f) there was no way for the Board to prove that the defendants were actively involved in smuggling when the government had not been able to prove them guilty.

[26] Mr. Bresner has sworn to the following:

> 7. I am sure that I read one or more media reports on the tobacco smuggling problem, but I do not recall reading any reports which implicated the defendants in the smuggling activity. Similarly, I do not recall any discussions with anyone from the Board at that time about the possibility that the defendant manufacturers were involved in the smuggling. At no time prior to July 31, 2008, as detailed below, was I ever retained by the Board to advise it on any possible involvement by or recourse against the defendants in connection with the smuggling issues.

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The Facts

The structure of the Canadian tobacco market

[27] The Tobacco Board is a corporation without share capital established by regulation under the *Farm Products Marketing Act*. Before the class actions were commenced, the Tobacco Board's primary role was to regulate and control the production and marketing of Ontario grown tobacco using a quota system. The Tobacco Board was made up of members elected by the tobacco producers with exclusive power vested in the Board to act as the producers' bargaining agent for the sale of tobacco to the defendants.

[28] The Board made agreements annually with RBH, ITCAN and JTI and their predecessor and related companies regarding the sale of tobacco by producers at the Board's auctions. These were known as "heads of agreement". The heads of agreement set out the terms and conditions for the annual sale of tobacco, the price paid for tobacco and the quantities of tobacco to be produced and marketed. The Tobacco Board administered the sale of tobacco by the producers pursuant to the heads of agreement, received payment from the purchasers and after the deduction of certain fees and charges, the net proceeds were distributed to the producers.

[29] The tobacco purchased by RBH, ITCAN and JTI for duty-free and export sales (DFX tobacco) was sold at floor prices determined at auctions administered by the Tobacco Board for each lot of tobacco sold by the producers. Unlike tobacco that was purchased for products to be consumed domestically, DFX tobacco was purchased without the requirement to pay a higher guaranteed minimum average price under the heads of agreement. The higher price was paid by way of a make-up payment representing the difference between the guaranteed minimum average price and the floor price per pounds of tobacco.

[30] The annual heads of agreement for the purchase and sale of tobacco were negotiated at the TAC where plans for the production and marketing of tobacco in Ontario were negotiated. The resulting heads of agreement were referred by the Board and the tobacco manufacturers for ratification before they were formalized and executed. The TAC was not a committee of the Board. TAC membership consisted of the following:

(a) the chair who was a representative of and appointed by Ontario;

(b) an additional Ontario government appointee;

(c) two federal government appointees;

(d) representatives of the Leaf Tobacco Exporters' Association;

(e) representatives of each of the tobacco manufacturers, including the defendants or their predecessor or related companies;

(f) representatives of the Tobacco Board consisting of the Tobacco Board's Chair and/or Vice Chair up to two additional elected Board representatives and one to two Board staff members.

[31] Mr. Gilvesy has deposed that the TAC's mandate was described in a letter dated August 29, 1986 signed by the defendants as follows:

> The Domestic Manufacturers agree to continue with discussions which have been initiated under the Tobacco Advisory Committee for

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> the purpose of finding long-term solutions to optimize the growing and marketing of Canadian tobacco in a competitive [sic] manner, for the total market, such that a viable industry is the result.

[32] He also said he helped to create a work plan in 1992, the purpose of which was expressed as follows:

> …to operate a sound and viable industry encompassing growers, manufacturers, leaf dealers and governments in a manner to optimize the production of quality tobaccos, and to ensure the long-term reliability and stable supply of high quality Canadian tobacco to serve the total market in a competitive manner.

[33] Traditionally, the market for DFX tobacco products was very small, representing approximately one to three percent of Ontario tobacco farmers' total tobacco sales. DFX tobacco was used in products to supply consumers outside of Canada, including those Canadians living in the United States during the winter and ship chandlers and various other duty-free purchasers.

The Canadian contraband tobacco market

[34] Between 1991 and 1994, Canada experienced an increase in contraband tobacco product sales in response to significant tax increases imposed by the Canadian federal and provincial governments. These tax increases motivated consumers to seek cheaper contraband products, including DFX tobacco products.

[35] The single largest tax increase occurred February 1991. The federal government imposed new taxes on domestic tobacco products of approximately $6.00 per carton and this increase was matched by the provincial government. With these tax increases, the average retail price of a carton of cigarettes in Canada rose from $26.00 to $48.00 or more.

[36] DFX tobacco products were not subject to these tax increases. As a result, products sold in the duty-free market were substantially cheaper than domestic

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tobacco products. The same carton of cigarettes cost approximately $35.00 less in the United States than in Canada.

[37] The significant price differential between Canadian and American tobacco products created a demand among Canadian smokers for cheaper U.S. sourced cigarettes. The demand was met by smugglers who unlawfully brought U.S. sourced tobacco products into Canada.

[38] While there were apparently several sources of contraband tobacco products, the most significant were DFX tobacco products smuggled back into Canada from the United States. There is some evidence in the motion record filed by the defendants to suggest that more than half of the contraband market was comprised of DFX tobacco products.

[39] There is also evidence in the record that by 1992, the street value of the contraband tobacco product market was in the neighbourhood of $1.1 billion and one in almost every six cigarettes sold in Canada was contraband.

[40] It seems clear that the existence of the contraband market was quite open and notorious. The Tobacco Board and TAC were certainly aware of it and its relationship to tax increases.

[41] From 1990 to 1993, the defendants commissioned a number of expert reports that investigated the extent and nature of tobacco smuggling. The perpetrators were identified as aboriginal people and organized crime groups.

[42] In April 1992, an announcement was made by the then federal Minister of Revenue, Otto Jelinek, which disclosed that the government had eliminated an export tax on tobacco products because it had obtained the defendants' cooperation and commitment to use tracking codes on packaging for exported tobacco products.

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[43] By September 1993, the TAC work plan had been modified to include the objective of eliminating all contraband tobacco coming into Canada.

[44] During this time, the volume of DFX tobacco purchased by the defendants from the Tobacco Board had increased. In response to questions raised from time to time at the TAC meetings about the increased volume of DFX tobacco being purchased, the defendants responded that the purchases were made for legitimate buyers.

[45] The Board and the defendants administered the annual heads of agreement with the understanding that adjustments would be made if tobacco purchased for one purpose was used for another. Mr. Gilvesy has deposed that he believes those adjustments were made regularly. So, for example, if one of the defendants purchased tobacco for the domestic account at the higher price but used it for export, it would request an adjustment of volume in its account to reflect the discounted floor price. The converse was also true.

[46] There was an issue respecting a tobacco company that operated in the Quebec market, Delta Leaf Tobacco. Because of concerns that Delta was involved in smuggling of tobacco, a decision was taken by the TAC not to engage in business with it, a decision Mr. Gilvesy considered was supported by the defendants as part of the common objective of eliminating contraband tobacco in Canada.

[47] In 1995, the Tobacco Board commissioned KPMG to study the potential impact on smuggling by the government's plan to require plain packaging for tobacco products. Another report was prepared in 2002. I understand that these reports did not implicate the defendants.

[48] Finally, there were media reports from time to time, which contained speculation and allegations about the defendants' complicity in the smuggling activities.

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Those reports were consistently denied by the defendants. For example in 1999, the federal government filed a lawsuit against JTI's predecessor in the United States. The allegations were denied. In fact, the lawsuit and subsequent appeal were later dismissed. Similarly, in 2002, reports were made of the RCMP's investigation of the defendants regarding tobacco smuggling. Again, any suggestion of impropriety was denied by the defendants.

[49] Mr. Gilvesy and Mr. Neukamm have both sworn that they believed the defendants' denials and their reasons for that belief.

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The Law

The law respecting Rule 20

[50] On January 23, 2014, the Supreme Court of Canada released its decision in *Hryniak v. Mauldin*, 2014 SCC 7, which sets out the new test for summary judgment.

[51] It is helpful to set out the text of the rule before discussing the court's decision.

> 20.04
> …
>
> (2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment
>
> (2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.

> 2. Evaluating the credibility of a deponent
>
> 3. Drawing any reasonable inference from the evidence
>
> (2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

[52] The court outlined when summary judgment can be granted:

> [49] There will be no genuine issue requiring trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[53] The overarching issue to be answered is "whether summary judgment will provide a fair and just adjudication" [para. 50]. The court went on to say at para. 50 that "the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it *gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.*" [Emphasis mine.]

[54] The powers available under Rules 20.04(2.1) and (2.2) are presumptively available. They only become unavailable where it is in the interest of justice for such powers to be exercised only at trial. The court noted at para. 56: "[t]he interest of justice cannot be limited to the advantageous features of a conventional trial, and must account for proportionality, timeliness and affordability. Otherwise, the adjudication permitted with the new powers – and the purpose of the amendments – would be frustrated."

[55] The motion judge must engage in a comparison between the advantages of proceeding by way of summary judgment versus proceeding by way of trial. Such a comparison may include an examination of the relative cost and speed of each medium, as well as the evidence that is to be presented and the opportunity afforded by each medium to properly examine it. The court noted that, "when the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be

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against the interest of justice to do so." However, the inquiry must go further, and must also consider the consequences of the motion in the context of the litigation as a whole.

[56] The court suggested at para. 66 the following process to guide the motion judge's approach:

> 1. The judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-findings powers.
>
> 2. There will be no genuine issue requiring trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure.
>
> 3. If there appears to be a genuine issue requiring a trial, the judge should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2).
>
> 4. She may, at her discretion, use those powers unless it is against the interest of justice to do so. It will not be against the interest of justice if use of the powers will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

The Limitations Act, 2002

[57] The plaintiffs' claims are governed by the *Limitations Act, 2002*, which replaced the former *Limitations Act* on January 1, 2004. The new *Limitations Act, 2002* changed the limitation period applicable to most actions from six to two years and codified a test for discoverability.

[58] Section 4 of the *Limitations Act, 2002* provides that the basic limitation period of two years runs from the day on which a claim was discovered. A claim is defined as a claim to remedy an injury, loss or damage that occurred as a result of an act or omission.

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[59] Section 5 of the *Limitations Act, 2002* sets out the rule with respect to discoverability and contains a presumption. It states:

> 5(1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a)
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. [Emphasis added.]

[60] Section 24 of the *Limitations Act, 2002* sets out the transitional rules that apply to "claims based on acts or omissions that took place before the effective date and in respect of which no proceeding has been commenced before the effective date" [i.e. January 1, 2004].

[61] Section 24(5) of the *Limitations Act, 2002* provides as follows:

> If the former limitation period did not expire before the effective date and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, the following rules apply:
>
> 1. If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date.
>
> 2. If the claim was discovered before the effective date, the former limitation period applies.

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[62] The acts or omissions the plaintiffs allege against the defendants, namely breach of contract, took place before January 1, 2004, and the claims were not commenced until after January 1, 2004. Accordingly, the transitional rules apply to the claims.

[63] As a result, if the plaintiffs' claims were discovered before January 1, 2004, the former six year limitation period applies and the class actions would have been time barred before January 1, 2010. However, if the plaintiffs' claims were discovered after the January 1, 2004, the two year limitation period applies and the class actions are time-barred two years after the date of discovery.

[64] Section 15(2) of the *Limitations Act, 2002*, provides for an ultimate 15 year limitation period, but section 15(4)(1) states that period will not run in favour of a person who wilfully conceals that the act omission was that of the person against whom the claim is made.

[65] It has often been observed that the discoverability rule is a rule of fairness. See *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549; and *Smith v. Waterfall* (2000), 50 O.R. (3d) 481 (C.A.). It prevents a claim from expiring before its constituent elements can be said to have become known to the claimant. It involves not only the identification of the alleged wrongdoers but also the discovery of an act or omission that attracts liability. It is not enough that the plaintiffs have suffered a loss and have knowledge that someone might be responsible. The identity and culpable acts of the wrongdoers must be known or knowable with reasonable diligence.

[66] In *Sheeraz et al v. Kayani et al* (2009), 99 O.R. (3d) 450 (S.C.J.), the court made the following observation, albeit in the context of a solicitor's negligence action:

> [24] …it is the nexus between the loss and the defendant from whom the loss is sought to be recovered that is material to when it is

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> reasonable to expect a plaintiff to be in a position to commence an action to recover his loss from the defendant.

Analysis

[67] In my view, the plaintiffs have demonstrated that there is a genuine issue requiring a trial on the issue of discoverability and when the plaintiffs knew or ought to have known they had a cause of action against the defendants. I say this for several reasons.

[68] First, there has been no documentary or oral discovery, consistent with the practice that has developed in class proceedings. Consequently, the evidentiary record to date consists of what the parties have chosen to produce, rather than that which must be produced. The point is that there may be evidence in the defendants' control that is helpful to the plaintiffs' position.

[69] I have also considered the nature of the evidence led by the defendants and how it was placed before the court. None of the defendants swore an affidavit. Rather, the affidavit in support was sworn by a law clerk with no personal knowledge of the facts or issues.

[70] In this regard, the comments of Morgan J. in *Stever v. Rainbow International Carpet Dyeing & Cleaning Co.*, 2013 ONSC 4054; leave to appeal to Div. Ct. denied, 2013 ONSC 6395 are pertinent:

> [2] The courts have generally found that, given these elements of the summary judgment test, the "best evidence" rule must be adhered to by including in the record affidavit evidence, and, potentially, cross-examination transcripts. In fact, this court found in *Wynn v. Belair Direct*, 2003 CarswellOnt3433, at para 66, "summary judgment could not be granted on the evidence of the law clerk employed by the plaintiff's counsel and be based on evidence of attached documents given to the plaintiff by the defendant." That kind of nominal affiant is really no affiant at all.
>
> [3] That is the situation which the Defendants as moving parties present here. They have provided no substantive affidavit, and no affidavit that indicates that all of the relevant documents have been produced. The cross-examination of the

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> Plaintiff indicates that all of the correspondence between the parties during the relevant period is now in the record, but we know nothing of any other documents in the possession of the Defendants.
>
> [4] …Although a Plaintiff will have the ultimate onus of proof in the action, the record on a Rule 20 motion brought by Defendants should go beyond documents in the possession of the Plaintiff.
>
> [5] Cumming J. addressed a similar issue in the context of a motion for better production in *Cole v. Hamilton*, 1999 CanLII 14820, at para 3, where he commented that, "a party will often require production of documents by the opposition to prove the party's case." For that reason, summary judgment motions typically proceed wither after discoveries are complete, or with affidavit evidence and cross-examinations that go a long way to replicating what will be produced in discoveries.
>
> [7] …I certainly appreciate that the motion before me deals with the limitation period and not the merits of the Plaintiff's claim. Nevertheless, the Plaintiff's position is that the ultimate limitation period has not elapsed, and that the discoverability doctrine is engaged, if the franchise contract between the parties was renewed and is ongoing due to a course of conduct by the parties over time. Given this position, some evidentiary record appears necessary.
>
> [8] It may be, of course, that there is simply no evidence anywhere – including in the Defendants' files – that supports the Plaintiff's claim. The terms of the renewed contract that the Plaintiff submits were put in place, which include the Plaintiff being permitted to continue to run his franchise without paying any royalties to the Defendants, suggests that the Defendants *may* turn out not to have anything in their possession that supports the Plaintiff. Likewise, the fact that the Plaintiff apparently has not heard from the personal Defendant John Appel since 1995 suggests that his limitation defense *may* turn to be a cogent one. But the non-production by the Defendants at this stage, and the fact that they have put forward a legal assistant from their counsel's law firm as their sole affiant in support of summary judgment, makes me pause. The Defendants seek to end the case having produced nothing and having proffered no witnesses.
>
> . . .
>
> [10] The evidentiary record that Goldstein J. appears to have envisioned has not materialized. The Defendants have put forward a strong argument that the limitation period has passed, based on the pleadings and the limited record. In my view, however, it is dangerous for a motions judge to grant summary judgment and dispense with a party's rights in a final way in the absence of any evidence from the moving party.

[71] I agree with Morgan J.'s comment that it would be dangerous to grant summary judgment in the circumstances here.

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[72] The defendants point to their substantial record with media reports and so on containing evidence respecting the defendants suspected complicity in smuggling activities. They ask the court to conclude that their involvement was open and notorious and therefore the plaintiffs must have had sufficient knowledge to start an action. The defendants say that the plaintiffs did not do so because they did not wish to jeopardize their business relationship with the defendants.

[73] Yet, in stark contrast, Mr. Gilvesy and Mr. Neukamm have deposed to their belief that the defendants were not complicit and why. They were not cross-examined and so their evidence is essentially unchallenged. Indeed, the defendants continue to deny that they were involved in smuggling in their statements of defence. In my view, the court is being asked to make credibility findings against the plaintiffs, which are not appropriate in the circumstances at this stage of the proceedings.

[74] I cannot agree with the defendants' contention that it is clear from the record that the plaintiffs knew or ought to have known that there was a breach of contract within the relevant limitation period. As noted above, the nexus of the loss and the defendant from whom the loss is sought to be recovered is material to the doctrine of discoverability. This is a genuine issue requiring a trial.

[75] Mr. Gilvesy has deposed, and as already noted, his evidence is unchallenged, that the makeup payment was required under the heads of agreement when the tobacco manufacturer itself used tobacco it purchased for export purposes for products it later determined would be sold in the domestic market. He has said that the manufacturers who informed the Tobacco Board that their DFX purchases would be used for domestic sale, thereby triggering the obligation to make a makeup payment. Mr. Gilvesy makes the point that only the tobacco manufacturers knew whether the tobacco they purchased was ultimately used for a different purpose

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than originally intended. As a result, the plaintiff's ability to discover a breach of contract may have been impaired.

[76] Finally, there is a genuine issue requiring a trial about whether the defendants' conduct might justify the suspension of the limitation period. As already noted, the defendants have consistently denied their involvement in smuggling and continue to do so. Whether there has been a fraudulent or wilful concealment within the meaning of s. 15(4) of the *Limitations Act*, 2002 is an issue for trial when presumably the issue of the defendants' alleged complicity will be fully canvassed (assuming the case is certified).

[77] The motions are therefore dismissed. If the parties cannot agree, I will receive written submissions on costs first from the plaintiffs within 30 days and from the defendants within 15 days thereafter.

"*Justice H. A. Rady*"
Justice H. A. Rady

Released: June 30, 2014

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This is **Exhibit "H"** of the **Affidavit of Harvey T. Strosberg, Q.C.**, sworn March 16, 2021.

A Commissioner for taking Affidavits
David Robins (LSO #42332R)

CITATION: Ontario Flue-Cured Tobacco Growers Marketing Board v. Rothmans, Benson & Hedges, Inc., 2016 ONSC 3939
DIVISIONAL COURT FILE NO.:24/15
COURT FILE NO.: 64462 CP
DATE: 20160704

2016 ONSC 3939 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

H. SACHS, C.J. HORKINS and L.A. PATTILLO JJ.

Proceeding under the *Class Proceedings Act, 1992*

BETWEEN:	
THE ONTARIO FLUE-CURED TOBACCO GROWERS MARKETING BOARD, ANDY J. JACKO, BRIAN BASWICK, RON KICHLER and ARPAD DOBRENTEY Plaintiffs/Respondents **– and –** ROTHMANS, BENSON & HEDGES INC. Defendant/Appellant	*William Sasso* & *David Robins,* for the Plaintiffs/Respondents *Brian Greenspan* and *Naomi Lutes*, for the Defendant/Appellant
Divisional Court File No.: 22-2015 **COURT FILE NO.:** 1056/10 CP **B E T W E E N:** Proceeding under the *Class Proceedings Act, 1992* THE ONTARIO FLUE-CURED TOBACCO GROWERS MARKETING BOARD, ANDY J. JACKO, BRIAN BASWICK, RON KICHLER and ARPAD DOBRENTEY Plaintiffs/Respondents **- and -** JTI-MACDONALD CORP. Defendant/Appellant	*William Sasso* & *David Robins,* for the Plaintiffs/Respondents *Patrick Flaherty* and *Ezra Siller,* for the Defendant/Appellant
Divisional Court File No.: 23/15 **Court File No.**: 64757 CP **B E T W E E N**: Proceeding under the *Class Proceedings Act, 1992* THE ONTARIO FLUE-CURED TOBACCO GROWERS MARKETING BOARD, ANDY J. JACKO, BRIAN BASWICK, RON KICHLER and ARPAD DOBRENTEY Plaintiffs/Respondents **- and -**	*William Sasso* & *David Robins*, for the Plaintiffs/Respondents *Kevin O'Brien,* for the Defendant/Appellant

IMPERIAL TOBACCO CANADA LIMITED)
Defendant/Appellant)

HEARD at London: April 21, 2016

H. SACHS J.:

Introduction

[1] Between 1991 and 1994, changes to government tax policy in relation to cigarettes created a contraband market for cigarettes from the United States. The Defendants, Canada's three largest tobacco manufacturers, indirectly supplied this contraband market by exporting "duty-free" cigarettes into the United States that were then illegally imported into Canada and consumed domestically.

[2] During this time period, tobacco manufacturers purchased tobacco leaf directly from the Plaintiff, the Ontario Flue-Cured Tobacco Growers Marketing Board (the "Board"), pursuant to annual "Heads of Agreement" (the "Agreements"). The Agreements set one price for tobacco that was to be used in products to be consumed domestically ("Domestic Tobacco") and a lower price for tobacco used in products sold duty-free for export ("DFX Tobacco").

[3] In these three class actions, the Plaintiffs (who are the Board and four individual tobacco growers) allege that the Defendants breached the Agreements by paying the lower price for DFX Tobacco when they knew that the products manufactured with this tobacco would then be smuggled back into Canada and consumed domestically. As a result, the Plaintiffs suffered a loss, because instead of receiving the higher price for Domestic Tobacco, they only received the lower price for DFX Tobacco.

[4] The Plaintiffs' claims against the Defendants were commenced in 2009 and 2010, which is eighteen years after the events giving rise to the claims first occurred. The Defendants sought orders for summary judgment dismissing the Plaintiffs' claims as statute-barred, asserting that the Plaintiffs knew, or ought to have known with the exercise of reasonable diligence, the material facts upon which their claims were based more than six years before they filed their actions.

[5] The motions were heard before Rady J., and, on June 30, 2014, she dismissed the motions, finding that there was a genuine issue requiring a trial respecting when the Plaintiffs knew or ought to have known that they had a cause of action against the Defendants. This is an appeal from that decision.

[6] One of the issues in this appeal is a dispute as to whether, in order to establish their cause of action against the Defendants, the Plaintiffs must establish that the Defendants actually participated in the smuggling of DFX Products back into Canada to be consumed domestically.

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[7] According to the Plaintiffs, this is an essential element of their cause of action and they could not reasonably have known of the Defendants' involvement in smuggling until they were made aware of certain settlement agreements and guilty pleas in relation to a breach of the *Excise Act*, R.S.C. 1985, c. E-14, entered into by the Defendants in 2008 and 2010.

[8] According to the Defendants, the constituent elements of the cause of action pleaded by the Plaintiffs against them (i.e., breach of contract) does not require establishing knowledge of the Defendants' alleged smuggling activities (which the Defendants deny). Thus, the constituent elements of the cause of action were known or ought to have been known to the Plaintiffs long before 2009 and 2010.

[9] In any event, according to the Defendants, if knowledge of smuggling is an essential element of the Plaintiffs' cause of action, the allegations against the Defendants about being complicit in smuggling were open, notorious, widely-publicized and known to the Plaintiffs long before 2009 and 2010. The settlement agreements and guilty pleas added nothing to this knowledge.

[10] According to the Defendants, the motion judge erred in her analysis of the nature of the Plaintiffs' claim, erred in her application of the doctrine of discoverability and erred in failing to find that the matter was ripe for summary judgment in that she was being asked to apply established legal principles to undisputed facts.

[11] For the reasons that follow, I would dismiss the appeal.

Factual Background

The Board and the Agreements

[12] Between 1986 and 1996, tobacco manufacturers in Ontario purchased tobacco leaf directly from the Board. The Board is a corporation, without share capital, established under the *Farm Products Marketing Act*, R.S.O. 1990, c. F.9 to regulate and control the production and marketing of Ontario-grown tobacco using a quota system. It was comprised of members elected by the tobacco producers and vested with exclusive power to act as the producers' bargaining agent for the sale of tobacco to the Defendants.

[13] The Board made annual Agreements with the Defendants and their predecessor and related companies, as well as other tobacco purchasers, for the sale of tobacco by the producers at the Board's auctions. The Agreements set out the terms and conditions of the annual sale of tobacco, including the quantities of tobacco to be produced and marketed and the pricing to be paid for that tobacco. The Board administered the sale of tobacco by the purchasers pursuant to the Agreements, received payment from the purchasers and, after deducting certain fees and charges, distributed the net proceeds of sale to the producers.

[14] The terms of the Agreements were negotiated at the Tobacco Advisory Committee ("TAC"), where plans for the production and marketing of tobacco in Ontario were developed. TAC's membership included representatives of both the Ontario and federal

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governments, representatives of the Leaf Tobacco Exporters Association, representatives from each of the tobacco manufacturers, including the Defendants and their predecessors, and representatives of the Board.

[15] The Agreements provided for different pricing arrangements for products that the Defendants intended to sell domestically and tobacco products they intended to sell for duty-free and export purposes. The Defendants paid a minimum average price per pound for the former and a lower floor price for the latter. The difference between the two prices was referred to as Makeup Payments.

[16] The Agreements required the Defendants to account for export or DFX Tobacco that was ultimately returned and sold in Canada and to pay the Makeup Payments owing with respect to that tobacco.

The Contraband Tobacco Market

[17] From 1987 to 1994, taxes on tobacco products in Canada increased. The largest single tax increase occurred in February of 1991. As a result of that increase, the average retail price of a carton of cigarettes in Canada rose from $26 to $48 or more. DFX Products were not subject to these tax increases. As a result, the same carton of cigarettes cost approximately $35 less in the United States than it did in Canada.

[18] These tax increases led to a decrease in the consumption of Domestic Tobacco and the emergence of a demand in Canada for cheaper, contraband tobacco products. The most significant source of contraband products were DFX Tobacco products that had been exported to the United States and were smuggled back into Canada. Starting in 1991, DFX Tobacco sales began increasing substantially at the expense of Domestic Tobacco Sales.

[19] In February of 1994, the federal government rolled back tobacco taxes. As a result, the retail prices for tobacco products in Canada dropped almost in half. These tax rollbacks had an immediate effect on the contraband market and, in turn, on the demand for DFX Products, which dropped substantially.

The Plaintiffs' Claims Against the Defendants

[20] In 2009 and 2010, the Plaintiffs commenced the proposed class actions that are the subject of this appeal. In their Statements of Claim, they make the following assertions:

(a) That the Defendants "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."

(b) That the Defendants breached the Agreements by failing to pay to the Board the Makeup Payments on the sales of the DFX Products that were ultimately smuggled back into Canada.

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(c) That during the Class Period (defined as the period from January 1, 1986 to December 31, 1996) the Defendants "designated tobacco as being for export and duty free purposes intending that it be smuggled back into and sold in Canada", and that the Defendants "did not package or stamp the cigarette packages and cartons to conform to the *Excise Act* so as to facilitate the smuggling of cigarettes into Canada."

(d) As a result, "massive quantities of cigarettes and other tobacco products were smuggled back into Canada after [the Defendants] executed sham exports, leading to the distribution of these products throughout Canada on the black market."

[21] The Plaintiffs' claims against the Defendants were commenced after the Defendants entered into comprehensive agreements in 2008 and 2010 with the federal and provincial governments to resolve the RCMP investigations and the civil claims arising from their alleged involvement in tobacco smuggling between January 1, 1985 and December 31, 1996.

[22] As a term of the settlements, the Defendants pled guilty to violating s. 240(1)(a) of the *Excise Act* by "aid[ing] persons to sell or be in possession of tobacco manufactured in Canada that was not packaged and was not stamped in conformity with the *Excise Act* and its amendments and the ministerial regulations…", and they agreed to make payments expected to total about $1.15 billion.

The Defendants' Motion for Summary Judgment

[23] The Defendants brought a motion for summary judgment seeking to dismiss the Plaintiffs' claims as being statute-barred. On that motion, they argued that the Plaintiffs knew or ought to have known, with the exercise of reasonable diligence, the material facts upon which their claims were based long before the Statements of Claim were issued in 2009 and 2010.

[24] According to the Defendants, their alleged involvement in smuggling was not an essential element of the Plaintiffs' breach of contract claims against them. The breach asserted in that claim was based on the Defendants' knowledge that the DFX Tobacco they were paying lower prices for was going to be smuggled back into Canada and that, in spite of this knowledge, the Defendants did not pay the higher domestic price for that tobacco, causing the Plaintiffs to suffer a loss. These facts, according to the Defendants, were open and notorious and known to the Plaintiffs throughout the Claims Period.

[25] The Defendants also submitted that if their involvement in smuggling was a material fact necessary to prove the Plaintiffs' breach of contract claims against them, there were volumes of media reports and other documents that alleged that the Defendants were complicit in smuggling activities throughout the Claims Period.

[26] The Plaintiffs took the position on the motion both that the Defendants' involvement in smuggling was an essential element of their claims against the Defendants and that they could not reasonably have known of that involvement until the Defendants entered into

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the settlement agreements in 2008 and 2010. Prior to those agreements, the only knowledge they had of the Defendants' involvement in smuggling was based on speculative and unsubstantiated allegations that were occasionally published in the media. Weighed against this were the Defendants' denials that they were involved in any smuggling and the Defendants' actions in cooperating with the governments and TAC to try and maintain a legitimate domestic marketplace for tobacco.

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The Motion Judge's Decision

[27] The motion judge accepted that the existence of the contraband market during the Claims Period was "quite open and notorious" and that both the Board and TAC were aware of it.

[28] She also accepted that from 1990 to 1993, the Defendants, who were also members of TAC, participated in a number of efforts to determine the nature and extent of tobacco smuggling and that the results of those efforts revealed that "[t]he perpetrators were … aboriginal people and organized crime groups."

[29] However, she found that there was a genuine issue for trial as to whether the Plaintiffs had sufficient knowledge of the Defendants' complicity in smuggling contraband tobacco. In coming to this conclusion, the motion judge referred to the Defendants' substantial record of media reports and documents containing evidence of their suspected complicity in smuggling activities. These documents (which consisted of 143 exhibits) were attached to an affidavit filed by a law clerk employed by one of the law firms that acted for one of the Defendants.

[30] However, she contrasted this with the affidavit evidence filed by the Plaintiffs. This consisted of three affidavits: an affidavit from a tobacco grower who was a director and chair of the Board during the period from 1987 to 2004; an affidavit from the current chair of the Board who has been a director since 2002; and an affidavit from a partner in the law firm that has acted for the Board since 1985. In these affidavits, the deponents state that, prior to 2008, no one at the Board believed that the Defendants had any active involvement in the smuggling of DFX Tobacco products for consumption in Canada. The deponents go on to give their reasons for their belief, including the fact that the Defendants categorically denied any such involvement, advised the Board that all of the DFX Tobacco products they sold were to legitimate purchasers in the United States and collaborated with the Board and governments to eliminate contraband tobacco, including hiring and paying for experts to prepare reports on the subject.

[31] In dealing with this record, she noted that there had not yet been any oral or documentary discovery and that there may be evidence in the Defendants' control that is helpful to the Plaintiffs' position.

[32] She also noted that none of the Defendants filed an affidavit; instead, they chose to put their evidence in through the affidavit of a law clerk with no personal knowledge of the facts or issues. In her view, this was a situation where it would be dangerous to grant

summary judgment dismissing the Plaintiffs' claim in the absence of any direct evidence from any of the parties who were moving for summary judgment.

[33] Finally, she noted that the deponents who filed affidavits on behalf of the Plaintiffs were not cross-examined and, thus, their evidence was essentially unchallenged. Further, the Defendants were continuing to deny their involvement in any smuggling. She found that "the court is being asked to make credibility findings against the plaintiffs, which are not appropriate in the circumstances at this stage of the proceedings."

[34] The motion judge stated that she could not agree with the Defendants that it was clear from the record that the "plaintiffs knew or ought to have known that there was a breach of contract within the relevant limitation period." As she put it, "the nexus of the loss and the defendant from whom the loss is sought to be recovered is material to the doctrine of discoverability. This is a genuine issue requiring a trial."

[35] The motion judge also found that there was a genuine issue for trial on the question of whether the limitation period should be suspended because of the Defendants' conduct. The Defendants had continued to deny their involvement in smuggling and this raised the issue of whether there had been fraudulent or wilful concealment within the meaning of s. 15(4) of the *Limitations Act*, S.O. 2002, c. 24, Sch. B.

The Position of the Defendants (Appellants) on this Appeal

[36] The Defendants allege that the motion judge made a number of errors of law. In particular:

(i) She erred when she failed to confine her discoverability analysis to the claims as pleaded, which were claims for breach of contract that did not involve allegations that the Defendants were involved in smuggling. In any event, the public record contained "sufficient facts" to establish a claim that the manufacturers were involved in smuggling as early as 1994 and certainly no later than 2003. In this regard, the Defendants dispute the Plaintiffs' assertion that the settlement agreements and guilty pleas they entered into in 2008 and 2010 were in any way a "game-changer".

(ii) She erred when she found that it would be dangerous to rely on the affidavit filed by the Defendants in the summary judgment motion. That record put into evidence the uncontroverted public record, much of which the Plaintiffs admit that they were aware of at the time it was published.

(iii) She erred when she found that summary judgment would be inappropriate prior to oral and documentary discovery, in circumstances where the factual record was undisputed and would have resolved the litigation.

(iv) The motion judge applied the wrong standard of discoverability by focusing on the Plaintiffs' subjective beliefs about the Defendants' involvement in smuggling. Those beliefs are irrelevant in circumstances where the public record filed by the

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Defendants satisfied the objective, discoverability standard. Thus, the motion judge erred when she found that she was being asked to make a finding as to the credibility of the Plaintiffs' affiants.

(v) The motion judge erred when she found that there was a genuine issue requiring a trial as to whether the limitation period should be suspended because of the Defendants' conduct in denying their involvement in smuggling. A mere denial of misconduct cannot constitute "fraudulent concealment".

(vi) In dismissing the Defendants' motion, the motion judge failed to apply the summary judgment test as directed by the Supreme Court of Canada in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87. In particular, she failed to consider whether a trial was required for the timely, efficient and proportional resolution of the matter.

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The Position of the Plaintiffs (Respondents) on the Appeal

[37] The Plaintiffs dispute that there is any reason to doubt the correctness of the motion judge's decision. Further, they state that the motion judge's conclusion that it was not in the interests of justice for her to use her fact-finding powers under r. 20.04(2) of the *Rules of Civil Procedure* is a discretionary one that should attract deference from this court

[38] The Plaintiffs submit that the motion judge correctly construed their cause of action as pleaded, which was for breach of contract arising from the Defendants' smuggling activities. Absent a finding of complicity in smuggling, the Plaintiffs were clear that their claims against the Defendants could not succeed.

[39] Thus, the motion judge correctly found that the discoverability issue is not whether knowledge of smuggling was open and notorious, but whether knowledge of the Defendants' involvement in smuggling was known, or should have been known, to the Plaintiffs. In this regard, the motion judge correctly found that there was a conflict in the evidence that required a trial.

[40] The motion judge also correctly found that a trial, where the issue of the Defendants' complicity in smuggling would be fully canvassed, was the appropriate vehicle to determine whether any limitation period should be tolled by virtue of the doctrine of fraudulent concealment.

Analysis

Did the motion judge err in her analysis of the Plaintiffs' claim as pleaded?

[41] The Defendants submit that the Plaintiffs' claim as pleaded was discoverable when the Plaintiffs knew or ought to have known that the Defendants were paying them the lower DFX price for tobacco that was, in fact, being sold for consumption in Canada. Once everyone knew that the DFX product that was being lawfully sold by the Defendants into the United States was being smuggled back and sold to Canadians, the Plaintiffs' claim as pleaded was discoverable. Whether and to what extent the Defendants were involved in

smuggling is not an essential element of the Plaintiffs' claim and has no bearing on the limitations analysis.

[42] The Defendants argue that the public record filed by them indicates that this fact was certainly discoverable by the Plaintiffs by the end of 1992. In support of this argument, they point, as one example, to a newspaper article in the Kitchener-Waterloo Record that was published in December of 1992, in which it was reported that "about 80 percent of the cigarettes Canadian companies are exporting to the U.S. are coming back into Canada. But Ontario's tobacco growers are paid the lower export price for the leaves that go into all of the cigarettes that are exported into the U.S."

[43] Furthermore, as early as 1991, TAC, which consisted of members of the Board, expressly acknowledged that (i) "nearly all of the increase in [DFX Tobacco] is being returned to Canada…for consumption by Canadians in Canada" (TAC Minutes of Meeting, December 5, 1991) and (ii) the increase in the sale of DFX Tobacco resulted in a decreased volume of higher-priced Domestic Tobacco (TAC Minutes of Meeting, December 19, 1991). The Defendants also point out that the Plaintiffs' own affiants admitted that they knew that DFX Tobacco products were being smuggled back into Canada during the Claims Period.

[44] I accept that if all that was required to establish the Plaintiffs' breach of contract claim is that the Defendants knew that the cigarettes they exported to the U.S. were coming back into Canada and that this triggered an obligation under the Agreements to pay the higher price for Domestic Tobacco, the Plaintiffs' claims were discoverable well before the expiry of the applicable limitation period (6 years). However, the motion judge did not accept this analysis of the Plaintiffs' claims. She accepted the Plaintiffs' position that in order to prove their claims, they had to prove that the Defendants participated in some way in smuggling the DFX Tobacco products back into Canada. Again, before us, the Plaintiffs made it clear that the Agreements did not obligate the Defendants to pay Makeup Payments in the event that tobacco products that they sold to legitimate buyers in the U.S. were brought back into Canada by someone else without their knowledge or help.

[45] The question of the nature of the Plaintiffs' claims is a question of mixed fact and law, which requires that, in the absence of a demonstration of a palpable and overriding error, the motion judge's decision is entitled to deference.

[46] While not perfectly drafted, the Statements of Claims do assert that the Defendants "facilitated" the smuggling of cigarettes into Canada. In particular, at paragraphs 26 and 27 of the Statement of Claim against the Defendant, Imperial Tobacco (the Claims against all the Defendants are virtually identical), the Plaintiffs allege:

> 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

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> 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.

[47] Given these paragraphs, it cannot be said that the motion judge made a palpable and overriding error when she found that an essential element of the Plaintiffs' cause of action against the Defendants was that they participated in facilitating the smuggling of DFX Tobacco products back into Canada.

Did the Motion Judge err when she found that there was a genuine issue for trial as to whether the Defendants' involvement in smuggling was discoverable before the limitation period expired?

[48] The Defendants allege that while the motion judge may have articulated the correct legal test for discoverability, she erred in her application of that test. In particular, the motion judge focused on the stated "beliefs" of the Plaintiffs' affiants (which she found to be unchallenged) that the Defendants were not complicit in smuggling.

[49] According to the Defendants, the Plaintiffs' subjective beliefs are wholly irrelevant to objective discoverability. The critical question is what the Plaintiffs "ought to have known" based on the public record, not what any particular affiant believed. Thus, the motion judge failed to properly consider the public record with a view to finding whether the Plaintiffs ought to have known of their claim years before they issued their Claims, regardless of what they say they believed.

[50] With respect to discoverability, as the motion judge found, the new *Limitations Act, 2002*, which replaced the former *Limitations Act* on January 1, 2004, codified a test for discoverability and contains a presumption of knowledge. Both are set out at s. 5 as follows:

> 5(1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
> (iii) that the act or omission was that of the person against whom the claim is made, and
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

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> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission upon which the claim is based took place, unless the contrary is proved. [Emphasis added].

[51] Section 5(1)(b) contains the "objective" component of the discoverability test. It requires considering the "abilities and… circumstances" of the person with the claim and then to decide whether that person "ought to have known of the matters" giving rise to that claim.

[52] In the case at bar, the Plaintiffs' affiants depose as to their belief that the Defendants were not complicit in smuggling (which is relevant to the subjective part of the test) and then go on to give their reasons for this belief. Contrary to the assertion of the Defendants, these reasons are highly relevant to the objective part of the discoverability analysis. They address directly the "reasonableness" of the affiants' beliefs, an assessment that requires understanding the circumstances of the person making the claim before deciding whether that person ought to have known of the matters giving rise to the claim.

[53] As already noted, these reasons included the fact that the Defendants categorically denied any involvement in smuggling, advised the Board that all of the DFX Tobacco products they sold were to legitimate purchasers in the United States and collaborated with the Board and governments to eliminate contraband tobacco, including hiring and paying for experts to prepare reports on the subject. According to the affiants, it was also in the mutual financial interest of the Plaintiffs and the Defendants to eliminate contraband tobacco.

[54] Weighed against this evidence, which was not subject to cross-examination, and was therefore unchallenged, was the public record. While the motion judge expressed concern about granting summary judgment in the face of evidence attached through the affidavit of a law clerk with no personal knowledge of the circumstances giving rise to the claims, she did review the public record evidence filed by the Plaintiffs and concluded, as follows, with respect to that evidence:

> [74] I cannot agree with the defendants' contention that it is clear from the record that the plaintiffs knew or ought to have known that there was a breach of contract within the relevant limitation period. As noted above, the nexus of the loss and the defendant from whom the loss is sought to be recovered is material to the doctrine of discoverability. This is a genuine issue requiring a trial.

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[55] In other words, the motion judge found that the record, considered as a whole (including the public record), was not clear enough to make the finding the Defendants were asking her to make. While there may clearly have been widespread, public knowledge of DFX Tobacco products being smuggled back into Canada at the material times, the specific **knowledge** (as opposed to speculation and unsubstantiated assertions) of the Defendants' active involvement in this smuggling and sale was less clear and required a trial.

[56] I find that the motion judge made no error of law in her analysis. She applied the correct legal principles to the record before her and her findings are entitled to deference.

The Guilty Pleas and Settlement Agreements

[57] The Plaintiffs assert that their action against the Defendants were discoverable when the Defendants entered into comprehensive agreements in 2008 and 2010 with the federal and provincial governments and pled guilty to violating the *Excise Act*.

[58] According to the Defendants, these agreements and pleas added nothing to the Plaintiffs' knowledge about the Defendants' involvement in smuggling and, therefore, whatever knowledge the Plaintiffs had existed long before these pleas.

[59] This argument is part of an assertion that the motion judge erred in her analysis of the public record, an assertion that challenges the factual findings of the motion judge. Thus, to succeed on this argument, the Defendants must establish that the motion judge made a palpable and overriding error in her analysis of the public record, including the guilty pleas.

[60] All three Defendants pled guilty to one count of violating the offence contained in s. 240(1)(a) of the *Excise Act* which provides:

> Subject to subsections (2) and (3), every person who sells or offers for sale or has in the person's possession any manufactured tobacco or cigars, whether manufactured in or imported into Canada, not put up in packages and stamped with tobacco stamps or cigar stamps in accordance with this Act and the ministerial regulations, is guilty of an indictable offence …

[61] According to the Defendants, their pleas amounted to nothing more than that they were guilty of a strict liability "labelling" offence. They created no new information; they just acknowledged what everyone knew and what had been acknowledged as of the early 1990s.

[62] In support of their submission, the Defendants filed a transcript of the actual guilty plea that was made by the Defendant, Rothmans Benson & Hedges, on July 31, 2008. They did so with a view to buttressing their argument that this guilty plea made no admission about complicity in smuggling.

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[63] The following paragraphs of the Agreed Statement of Facts in that guilty plea are relevant in relation to this argument:

> 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. [Emphasis added].

[64] Given these paragraphs of the Agreed Statement of Facts, it is by no means clear that the only admission being made by the Defendants when they pled guilty was to a "labelling" offence. The Agreed Statement of Facts filed in support of the guilty plea speaks of the Defendant 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.

[65] In my view, this enhances the Plaintiffs' position on the summary judgment motion that, by entering into the settlement agreements and guilty pleas, the Defendants, for the first time, acknowledged their complicity in smuggling (something they are still denying and, thus, cannot credibly be said to have acknowledged prior to this time). Thus, I do not accept the Defendants' contention that the motion judge made a palpable and overriding error in her analysis of the public record when she failed to find that the settlement

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agreements and guilty pleas added nothing to the Plaintiffs' knowledge about the Defendants' complicity in smuggling.

[66] This finding is not to be taken as supporting the contention that an action is only discoverable at the point that a defendant admits to the conduct complained of. I agree with the Defendants that discoverability does not require certainty and can be found to exist even when the defendant continues to deny the impugned conduct. However, the motion judge in this case did not find that discoverability requires certainty or an admission. What she did find was that, on the record before her, there was a genuine issue for trial as to whether the Plaintiffs ought to have discovered the fact that the Defendants were complicit in smuggling before the Defendants' acknowledgment of this conduct in 2008 and 2010. Absent an error of law or a palpable and overriding error of fact, this finding is entitled to deference.

Other Arguments

[67] I agree with the Defendants that, in the appropriate case, it may be possible to grant summary judgment before discovery on the basis of a public record that was filed in the manner that the public record was filed in this case. However, the motion judge found that this was not such a case, and, given the record before her, I see no error in this regard.

[68] With respect to the motion judge's comments about the issue of fraudulent concealment, I agree with the Defendants that a denial of liability is not sufficient to ground the doctrine of fraudulent concealment. As stated by the Court of Appeal for Ontario in *Authorson (Litigation Administrator of) v. Canada (Attorney General),* [2007] O.J. No. 2603, at para. 139: "[c]oncealment not denial is that gravaman of equitable fraud…" [Emphasis removed].

[69] As well, the Plaintiffs do not appear to have raised the issue of fraudulent concealment in their Statements of Claim. However, even if the motion judge erred in finding that this was a genuine issue for trial, this does not affect her finding that there was a genuine issue for trial on the issue of discoverability and her conclusion that the Defendants' motion for summary judgment should be denied.

Conclusion

[70] For these reasons, the appeal is dismissed. In the absence of an agreement as to costs, the parties shall make written submissions on the issue. The Plaintiffs shall file their submissions within 10 days of the release of this judgment and the Defendants shall have 10 days to respond.

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H. SACHS J.

C.J. HORKINS J.

L.A. PATTILLO J.

Released: 20160704

2016 ONSC 3939 (CanLII)

CITATION: Ontario Flue-Cured Tobacco Growers Marketing Board, v. Rothmans, Benson & Hedges, Inc., 2016 ONSC 3939
DIVISIONAL COURT FILE NO.:24/15
COURT FILE NO.: 64462 CP
DATE: 20160704

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ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

H. SACHS, C.J. HORKINS and L.A. PATTILLO JJ.

Proceeding under the *Class Proceedings Act, 1992*

BETWEEN:

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

Plaintiffs/Respondents

– and –

ROTHMANS, BENSON & HEDGES INC.

Defendant/Appellants

Divisional Court File No.: 22-2015
COURT FILE NO.: 1056/10 CP

B E T W E E N:

Proceeding under the *Class Proceedings Act, 1992*

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

Plaintiffs/Respondents

- and -

JTI-MACDONALD CORP.

Defendant/Appellant

Divisional Court File No.: 23/15
Court File No.: 64757 CP

B E T W E E N:

Proceeding under the *Class Proceedings Act, 1992*

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

Plaintiffs/Respondents

- and -

IMPERIAL TOBACCO CANADA LIMITED

Defendant/Appellant

REASONS FOR JUDGMENT

H . SACHS J.

Released: 20160704

2016 ONSC 3939 (CanLII)

THE ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING BOARD, et al. Respondents (Plaintiffs)	and	ROTHMANS, BENSON & HEDGES, INC. Applicant (Defendant)	Court of Appeal File No.: M46771
THE ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING BOARD, et al. Respondents (Plaintiffs)	and	JTI-MACDONALD CORP. Applicant (Defendant)	Court of Appeal File No.: M46770
THE ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING BOARD, et al. Respondents (Plaintiffs)	and	IMPERIAL TOBACCO LIMITED Applicant (Defendant)	Court of Appeal File No.: M46767

BLAIR J.A. ~~Epstein J.A. HUSCROFT J.A.~~

COURT OF APPEAL FOR ONTARIO
BEFORE
DATE 4-NOV-16
DISPOSITION OF MOTION

The application for leave to appeal is dismissed. Costs to the respondents fixed in the amount of $15,000 inclusive of disbursements + all applicable taxes.

RA Blair JA
G. Epstein J.A.
Grant Huscroft JA

ONTARIO
COURT OF APPEAL

Proceeding commenced at LONDON

MOTION RECORD OF THE APPLICANTS

(Motion for Leave to Appeal to the Court of Appeal)

McCarthy Tétrault LLP
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto ON M5K 1E6
Fax: (416) 868-0673

Sarit E. Batner LSUC #42797N
Tel: (416) 601-7756
Anu Koshal LSUC #66338F
Tel: (416) 601-7991

Lawyers For Rothmans, Benson & Hedges Inc.

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
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDINGS COMMENCED AT
TORONTO

MOTION RECORD OF THE MOVING PARTY, THE ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING BOARD (MOTION FOR DECLARATIONS)

STROSBERG SASSO SUTTS LLP
Lawyers
1561 Ouellette Avenue
Windsor, Ontario N8X 1K5

WILLIAM V. SASSO (LSO# 12134I)
Tel: 519.561.6222
Email: wvs@strosbergco.com

DAVID ROBINS (LSO# 42332R)
Tel: 519.561.6215
Fax: 866.316.5308
Email: drobins@strosbergco.com

Lawyers for The Ontario Flue-Cured Tobacco Growers' Marketing Board, Moving Party/Claimant