

**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

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Plaintiffs

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Court File No. 1056/10 CP

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REPLY

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