

**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

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

-and- IMPERIAL TOBACCO CANADA LIMITED  
Defendant

Court File No. 64757

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LONDON

**REPLY**

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