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

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 - IMPERIAL TOBACCO CANADA LIMITED Defendant/Appellant	*William Sasso & David Robins*, for the Plaintiffs/Respondents *Kevin O'Brien,* for the 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.

[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 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.

(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 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.

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 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.

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 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
>
> (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.

[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.

[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 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.

[redacted]

H. SACHS J.

[redacted]

[redacted]

L.A. PATTILLO J.

Released: 201607$_{04}$

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

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