

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.

- 2 -

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, transshipment 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

- 4 -

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

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Proceeding Commenced at London

**STATEMENT OF DEFENCE**

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