CITATION: R. v. Imperial Tobacco Canada, 2012 ONSC 6027
COURT FILE NO.: CV 10 14709
DATE: 2013/01/02

SUPERIOR COURT OF JUSTICE – ONTARIO

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.

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, 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 03-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.

[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).

[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.

[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.

[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.

---

[1] R.R.O. 1980, Reg. 383; R.R.O. 1990, Reg. 435.

[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.

[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.

---

[2] O. Reg. 208/09, 207/09 and 306/09.

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.

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 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.

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 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

Date: January 2, 2013