

COURT OF APPEAL FOR ONTARIO

CITATION: Ontario v. Imperial Tobacco Canada Ltd., 2013 ONCA 481

DATE: 20130716

DOCKET: C56568 & C56569

Hoy A.C.J.O., Feldman and Simmons JJ.A.

BETWEEN

Her Majesty the Queen in Right of Ontario

Applicant (Respondent)

and

Imperial Tobacco Canada Limited

Respondent (Appellant)

and

The Ontario Flue-Cured Tobacco Growers' Marketing Board

Respondent (Respondent)

Orestes Pasparakis and Rahool P. Agarwal, for the appellant

John Kelly, Lise G. Favreau and Kristin Smith, for the respondent Her Majesty the Queen in Right of Ontario

William V. Sasso, for the respondent The Ontario Flue-Cured Tobacco Growers' Marketing Board

Peter J. Osborne, for the intervener Her Majesty the Queen in Right of Canada

Brian H. Greenspan, for the intervener Rothmans, Benson & Hedges

Heard: July 3, 2013

On appeal from the order of Justice Helen A. Rady of the Superior Court of Justice, dated January 2, 2013, with reasons reported at 2012 ONSC 6027.

ENDORSEMENT

[1] The issue to be decided on this application and therefore on this appeal was set out in this court's Order dated July 20, 2011, para. 2 as follows:

2. THIS COURT ORDERS that the appeal be allowed in part and the stay of this Application be lifted to allow the Application to proceed, to seek a declaration that the claim of the Tobacco Board in Court file no. 6475CP is not a Released Claim for the purposes of s. 15 of the Comprehensive Agreement dated July 31, 2008.

[2] The Comprehensive Agreement dated July 31, 2008 (the "2008 Agreement") was entered into between the appellant, Imperial Tobacco Canada Limited, Her Majesty the Queen in Right of Canada, Her Majesty the Queen in Right of Ontario and the nine other provinces, to settle claims arising out of a course of conduct by Imperial between 1985 and 1996 whereby Imperial smuggled tobacco out of Canada then back in without paying required duties and taxes. A number of other tobacco companies, including the intervener, Rothmans, Benson & Hedges Inc. ("Rothmans"), entered into similar agreements to settle similar claims with the same government entities.

[3] The claim of the Tobacco Board referred to in the 2011 Order is contained in a class action brought in December 2009 against Imperial and other tobacco companies by the respondent, The Ontario Flue-Cured Tobacco Growers' Marketing Board and four individual tobacco farmers, as representative plaintiffs.

[4] In the proposed class action, the Board and the farmers seek damages for breach of contract on behalf of a proposed class comprised of growers and producers in Ontario who sold tobacco through the Board pursuant to contracts between the Board and tobacco companies, including Imperial, during the period from January 1, 1986 and December 31, 1996.

[5] The alleged breaches arose out of Imperial's underpayment to the Board for tobacco that was being sold illegally in Canada. As described in the statement of claim, Imperial purchased tobacco from the producers through the Board at the lower price applicable to tobacco intended for export and sale outside Canada, even though the tobacco was ultimately smuggled back into Canada and sold domestically.

[6] Section 15 of the 2008 Agreement releases Imperial from certain claims and reads as follows:

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.

In other words, if the claims the Board seeks to advance in the class action against Imperial are "Released Claims" by a "Releasing Entity", then the release in s. 15 constitutes a complete defence for Imperial to those claims and to the class action.

[7] The terms "Released Claims", "Releasing Entities" and "Released Entities" are all defined terms in the 2008 Agreement. Section 1 provides that "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."

[8] The Board was established in 1957 on vote of Ontario's tobacco producers. It is a corporation without share capital established by regulation under the *Farm Products Marketing Act*, R.S.O. 1990, c. F.9. The Ontario Farm Products Marketing Commission delegated broad supply management powers to the Board. The Commission is a statutory body whose members are appointed by the Lieutenant Governor and whose employees are public servants. The Commission deposits moneys it receives into the Consolidated Revenue Fund.

[9] The Board's primary role during the class period and at the time the 2008 Agreement was signed was to regulate and control the production and marketing of Ontario-grown tobacco. During this period, the Board operated autonomously. Its board of directors consisted of directors elected by the tobacco producers representing each of the tobacco growing districts in Ontario, plus an additional member appointed by the elected members.

[10] Among other things, the Board had the power to, and did require that producers only market their tobacco through the Board. The Board entered into annual contracts on behalf of the producers for the sale of the producers' tobacco, including those annual contracts at issue in the proposed class proceedings.

[11] When the 2008 Agreement was signed, and during the class period, the Board had the sole authority to enforce the rights of the producers to recover payments owed by tobacco companies under the annual contracts. Significantly, while the tobacco producers were the beneficiaries of those contracts, they were not parties to the contracts. Counsel for Imperial (and counsel for the intervener Rothmans) fairly advised the court that they do not concede that the tobacco producers can bring class actions like the current one, without the involvement of the Board.

[12] On the question of whether the claims are "Released Claims" within the meaning of the 2008 Agreement, s. 1 provides:

"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 transshipment or shipment out of Canada, smuggling, reimportation or transshipment into Canada or any of the provinces thereof of tobacco products 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 products, the exportation, reimportation, transshipment 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 transshipments) 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 O3-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.

[13] The dispute between the parties on what is included under this definition turns on whether the word "and" should be implied between clauses (a) and (b), having the effect of limiting the general words in clause (a) to the types of tax and penalty claims described in clause (b), or whether the word "or" should be read in, having the effect that each clause is given a separate meaning and that clause (b) does not modify or limit the claims described in clause (a).

[14] The respondent, Her Majesty the Queen in Right of Ontario, argues that clause (a) sets out the transactions that could have given rise to the payment of taxes and duties while clause (b) addresses the failure to pay those taxes and duties. As a result, the respondents submit that clause (b) modifies and limits the claims as described in clause (a).

[15] Imperial's position is that clause (a) and clause (b) should be read disjunctively. According to Imperial, the reference in clause (c) to "after-the-fact

conduct ... related to the matters referred to in (a) *and/or* (b)" (emphasis added) means that after-the-fact conduct related to either clause (a) or clause (b) is a released claim. It would not make sense, Imperial argues, that after-the-fact conduct related to clause (a) alone be released, but not the actual conduct referred to in clause (a) alone. Imperial also relies on clause (d) which exempts certain claims by government for the recovery of health care costs "unless such claims arise from (a), (b) or (c) above." Again, if the claims in the three clauses are individually treated in the exempt claims provision, they must be individually released when they are not exempt.

[16] We accept the interpretation suggested by Imperial based on the use of the word "or" as described. Furthermore, it would not be necessary to exempt government health care claims against the tobacco companies – which are not limited to taxes and duties - from the definition of Released Claims, if such health care claims could not otherwise be included as Released Claims.

[17] However, although the claims asserted in the class action may come within the words of the definition of "Released Claims", they are only released under s. 15 of the 2008 Agreement if they are released by a Releasing Entity. In this way, the 2008 Agreement ensures that only claims within the definition of Released Claims that belong beneficially to a Releasing Entity are released.

[18] It is clear that in bringing the proposed class action, the Board is acting only as agent for the producers to enforce the annual contracts entered into by the Board on their behalf, and not as an agent on behalf of the Crown or for the benefit of the Crown. Accordingly, in bringing the proposed class action, the Board is not asserting a "Released Claim" belonging beneficially to the Crown and is not acting as a "Releasing Entity" within the meaning of the 2008 Agreement.

[19] The appeal is therefore dismissed with costs payable by Imperial to the respondent Board in the amount of \$15,000, and payable by Imperial and Rothmans to the respondent Her Majesty the Queen in Right of Ontario in the amount of \$18,500, all inclusive of disbursements and HST.

