

Court File No.:

64757

**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*

STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.


December 2, 2009

Issued
by:


Local Registrar

Address of Court Office:
80 Dundas Street
London, ON N6A 6A5

TO:
IMPERIAL TOBACCO CANADA
LIMITED
3711 Saint-Antoine Street
Montréal, Québec
H4C 3P6



CLAIM

DEFINITIONS

1. The following terms used throughout this pleading have the meanings indicated:

- (a) “**Act**” means the *Farm Products Marketing Act*, R.S.O. 1990, c. F.9;
- (b) “**Agreements**” means the agreements made during the Class Period among the Board, Imperial and other Canadian manufacturers of tobacco products under the Ontario Flue-Cured Tobacco Growers’ Marketing Plan, declared in force by the Farm Products Marketing Commission and set out in the chart at paragraph 17;
- (c) “**Baswick**” means Brian Baswick;
- (d) “**Board**” means the Ontario Flue-Cured Tobacco Growers’ Marketing Board;
- (e) “**Class Period**” means the period January 1, 1986 to December 31, 1996;
- (f) “**Class Members**” or “**Class**” means growers and producers in Ontario who sold tobacco through the Board pursuant to the terms of the Agreements during the Class Period;
- (g) “**CJA**” means the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (h) “**Dobrentey**” means Arpad Dobrentey;
- (i) “**Imperial**” means Imperial Tobacco Canada Limited;
- (j) “**Jacko**” means Andy J. Jacko;
- (k) “**Kichler**” means Ron Kichler; and
- (l) “**Makeup Payment**” means the difference between the domestic price per pound of tobacco and the floor price per pound of tobacco.

RELIEF CLAIMED

2. The Board, Jacko, Baswick, Kichler and Dobrentey claim on their own behalf and on behalf of the Class:

- (a) an order pursuant to the *Act* certifying this action as a class proceeding and appointing them as the representatives of the Class;
- (b) \$50,000,000.00 for damages for breach of the Agreements;
- (c) an order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;
- (d) prejudgment and postjudgment interest pursuant to the *CJA* or at the internal rate of return earned on capital by Imperial or its parent Imperial Inc. or its affiliated corporations during the Class Period;
- (e) costs of this action on a full or substantial indemnity basis plus applicable taxes; and
- (f) such further and other relief as to this court deems just.

NATURE OF THIS ACTION

3. Pursuant to the *Act*, the Board made the Agreements with Imperial and other Canadian manufacturers of tobacco products. The Agreements governed the purchase and sale of tobacco by the Class Members to Imperial during the Class Period. The Board administered and processed the sale of tobacco by the Class Members to Imperial pursuant to the Agreements, invoiced Imperial, collected the proceeds of sale from Imperial and, after deducting certain fees and charges, distributed the net proceeds of the sale to the Class Members.

4. Each of the Agreements provided that Imperial would pay a guaranteed, minimum average price per pound for tobacco it intended to sell domestically and a lower floor price for tobacco it intended to sell for duty free and export purposes. In the result, Imperial paid Class Members more for tobacco to be used for domestic purposes than for tobacco to be used for duty free and export purposes. Imperial paid the Makeup Payments to the Board. The Board distributed the Makeup Payments to each Class Member, pro rata.

5. Imperial was required to use the quantity of tobacco purchased and designated as being for duty free and export purposes only for such purposes.

6. The Agreements required Imperial to accurately disclose to the Board's auditors the quantity of tobacco Imperial delivered to the U.S. to be sold for duty free and export purposes. Imperial 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.

7. In breach of the Agreements, Imperial failed to pay to the Board the domestic price for the product ultimately smuggled into Canada. Imperial failed to pay to the Board the Makeup Payments on these sales, which would have been distributed to the Class Members. As such, Imperial caused the Class Members to suffer damages and loss.

THE PARTIES

8. The Board is a corporation without share capital established under the *Act* to control and regulate all aspects of the production and marketing of tobacco grown in Ontario. The Board's head office is located in Tillsonburg, Ontario.

9. Jacko is a farmer residing in Tillsonburg, Ontario. During the Class Period, Jacko grew tobacco in Ontario and sold it to Imperial through the Board.

10. Baswick is a farmer residing in Delhi, Ontario. During the Class Period Baswick grew tobacco in Ontario and sold it to Imperial through the Board.

11. Kichler is a retired farmer residing in Delhi, Ontario. During the Class Period, Kichler grew tobacco in Ontario and sold it to Imperial through the Board.

12. Dobrentey is a farmer residing in Mount Brydges, Ontario. During the Class Period, Dobrentey grew tobacco in Ontario and sold it to Imperial through the Board.

13. Each of the plaintiffs and each of the Class Members sold tobacco to Imperial for both domestic and export purposes.

14. Imperial is a Canadian corporation. It is a wholly-owned indirect subsidiary of British American Tobacco PLC. Imperial's registered head office is at

3711 Saint-Antoine Street, Montréal, Québec. At all material times, Imperial carried on business in Canada and elsewhere as a manufacturer and distributor of tobacco products. During the Class Period, Imperial purchased tobacco from the Class Members through the Board for domestic and export purposes.

THE AGREEMENTS

15. Pursuant to Ontario Regulation 435, the Farm Products Marketing Commission delegated supply management powers to the Board, including the power to establish a quota system, to license producers and buyers and to require all tobacco to be sold through the Board's auction exchanges.

16. The Agreements were the result of negotiations between the Board, Imperial and other domestic cigarette manufacturers. The Agreements set the terms and conditions of the annual sale of tobacco, the pricing for tobacco and the quantities of tobacco to be produced and marketed.

17. The dates of the Agreements for each crop year are as follows:

Crop Year	Date of Agreement
1986	June 4, 1986
1987	April 22, 1987
1988	May 27, 1988
1989	May 31, 1989
1990	October 22, 1990
1991	September 3, 1991
1992	September 8, 1992
1993	April 29, 1993
1994	July 12, 1994
1995	April 12, 1995
1996	July 3, 1996

18. Each of the Agreements required Imperial to pay to the Board a guaranteed average price per pound for tobacco for domestic use and floor prices for each pound of tobacco to be used for duty free or export purposes. Imperial paid the Board for each purchase contract. The Board then deducted its applicable fees and paid the net amounts to the Class Members who sold the tobacco.

19. Each of the Agreements required Imperial to deliver “proof of export” to the Board’s auditors, MacGillivray Partners LLP, accurately disclosing the quantity of tobacco Imperial delivered to U.S. to be sold for duty free and export purposes.

20. The Agreements established a two-tier pricing system with the per pound price for duty-free and export tobacco being less than the per pound price of tobacco used for domestic purposes.

21. By way of example, for the 1986 crop, Imperial agreed to pay a guaranteed average price of \$1.84 per pound for tobacco purchased for domestic purposes compared to the lower average floor price, which was calculated at the end of market for that year, at \$1.26 per pound for tobacco for duty free and export purposes.

22. In 1986, duty-free and export tobacco represented between 1% and 3% of all domestic tobacco sold through the Board.

23. Starting in 1987, taxes on tobacco products at the Canadian federal and provincial levels increased regularly and significantly until early 1994. During that same period, and largely as a result of the increased taxes, purchases in Canada of legal tobacco products for domestic use declined significantly.

24. In 1991, the Canadian government increased taxes and duties by 3 cents per cigarette (\$6 per carton). Applicable taxes and duties on other tobacco products were also increased. The provincial governments matched the federal tax increases with another \$6 per carton increase. The result was that applicable taxes and duties on cigarettes and tobacco increased by approximately 100%. In two years, the average price of a carton of cigarettes increased from \$26 to \$48 or higher. These tax increases were not applicable to export and duty free products.

25. During the Class Period, the amount of tobacco purchased by domestic manufacturers at the lower export or duty free price in comparison to the tobacco purchased for domestic account was as set out in the following chart:

CropYear	Ontario Duty Free and Export Poundage Purchased	Ontario Domestic Poundage Purchased	DFX/Domestic
1986	2,500,000	70,210,806	3.1%
1987	3,000,000	61,419,471	4.1%
1988	4,000,000	93,272,683	6.2%
1989	4,300,000	96,348,074	4.4%
1990	1,120,000	73,769,214	1.1%
1991	6,340,000	76,379,877	8.5%
1992	9,150,000	71,484,328	11.1%
1993	11,480,000	90,296,831	14.2%
1994	11,800,000	88,133,376	11.6%
1995	2,940,000	92,091,230	2.9%
1996	2,860,000	88,769,706	3.0%

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.

28. On July 31, 2008, Imperial 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* and its amendments and the ministerial regulations”, thereby admitting publicly for the first time its involvement in smuggling operations.

29. In breach of the Agreements, Imperial failed 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. It failed to pay the Makeup Payments on these sales to the Board, which would have been distributed to the Class Members, and thereby caused the Class Members to suffer damages and loss.

30. Imperial did not pay the domestic price to the Board for the product ultimately smuggled to the domestic market as it was required to do under the Agreements.

31. Imperial had the benefit of the Makeup Payments which it should have paid to the Board and used them for the purposes of its business and earned an average internal rate of return thereon which exceeded 10%.

SERVICE OUTSIDE OF ONTARIO

32. This originating process may be served without court order outside Ontario because the claim is:

- (a) in respect of a contract made in Ontario (rule 17.02(f)(i));
- (b) in respect of a breach of contract that was committed in Ontario (rule 17.02(f)(iv));
- (c) in respect of damages sustained in Ontario arising from a breach of contract wherever committed (rule 17.02(h)); and
- (d) against a person carrying on business in Ontario (rule 17.02(p)).

PLACE OF TRIAL

33. The plaintiffs propose that this action be tried in the City of London.

December 2 2009

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

vs. IMPERIAL TOBACCO CANADA LIMITED

C4757

Plaintiffs

Defendant

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**
PROCEEDINGS COMMENCED AT LONDON

STATEMENT OF CLAIM

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