

Court File No.: 64402 CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

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 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.

November 5, 2009

Issued
by:



Local Registrar

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

TO:
ROTHMANS, BENSON & HEDGES INC.
1500 Don Mills Road
Toronto, ON M3B 3L1

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, Rothmans 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) “**Jacko**” means Andy J. Jacko;
- (j) “**Kichler**” means Ron Kichler;
- (k) “**Makeup Payment**” means the difference between the domestic price per pound of tobacco and the floor price per pound of tobacco; and
- (l) “**Rothmans**” means Rothmans, Benson & Hedges Inc.

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 Rothmans or its parent Rothmans 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 Rothmans and other Canadian manufacturers of tobacco products. The Agreements governed the purchase and sale of tobacco by the Class Members to Rothmans during the Class Period. The Board administered and processed the sale of tobacco by the Class Members to Rothmans pursuant to the Agreements, invoiced Rothmans, collected the proceeds of sale from Rothmans 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 Rothmans 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, Rothmans paid Class Members more for tobacco to be used for domestic purposes than for tobacco to be used for duty free and export purposes. Rothmans paid the Makeup Payments to the Board. The Board distributed the Makeup Payments to each Class Member, pro rata.

5. Rothmans 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 Rothmans to accurately disclose to the Board's auditors the quantity of tobacco Rothmans delivered to the U.S. to be sold for duty free and export purposes. Rothmans 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, Rothmans failed to pay to the Board the domestic price for the product ultimately smuggled into Canada. Rothmans failed to pay to the Board the Makeup Payments on these sales, which would have been distributed to the Class Members. As such, Rothmans 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 Rothmans 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 Rothmans 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 Rothmans 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 Rothmans through the Board.

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

14. Rothmans is a Canadian corporation. It is a subsidiary of Rothmans Inc., a Canadian corporation. Rothmans' registered head office is at 1500 Don Mills Road,

Toronto, Ontario. At all material times, Rothmans carried on business in Canada and elsewhere as a manufacturer and distributor of tobacco products. During the Class Period, Rothmans 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, Rothmans 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 Rothmans 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. Rothmans 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 Rothmans to deliver “proof of export” to the Board’s auditors, MacGillivray Partners LLP, accurately disclosing the quantity of tobacco Rothmans 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, Rothmans 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 \$1.21 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, Rothmans designated tobacco as being for export and duty free purposes intending that it be smuggled into and sold in Canada. Rothmans 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 Rothmans executed sham exports, leading to the distribution of these products throughout Canada on the black market.

28. On July 31, 2008, Rothmans 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, Rothmans failed to report to the Board’s auditors the tobacco, designated as being for export and duty fee 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. Rothmans 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. Rothmans 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%.

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

November 5, 2009

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PROCEEDINGS COMMENCED AT LONDON

STATEMENT OF CLAIM

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