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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**APPEARANCES:**
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA, plaintiff,	E.W. Olson, Q.C. and R.R. Bell for the plaintiff
- and -	C. Wullum and J. Kay for JTI-MacDonald Corp.
	G.P. Riley and K. O'Brien for Imperial Tobacco Canada
ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., ALTRIA GROUP INC., PHILIP MORRIS U.S.A. INC., PHILIP MORRIS INTERNATIONAL INC., JTI-MACDONALD CORP., R.J. REYNOLDS TOBACCO COMPANY, R.J. REYNOLDS TOBACCO INTERNATIONAL INC., IMPERIAL TOBACCO CANADA LIMITED, BRITISH AMERICAN TOBACCO P.L.C., B.A.T. INDUSTRIES P.L.C., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, CARRERAS ROTHMANS LIMITED, AND CANADIAN TOBACCO MANUFACTURERS' COUNCIL,	B. Gorlick, Q.C. for Philip Morris International
	R. Sokalski for Rothmans, Benson & Hedges Inc. and Rothmans Inc.
	K. Boonstra for Canadian Tobacco Manufacturers' Council
defendants.	R. Literovich for PMI (U.S.A.), Altria Group
	Judgment Delivered: June 21, 2013

JOYAL, C.J.Q.B.

I. INTRODUCTION

[1] Fourteen defendants have been named in this action. Nine of the fourteen named reside outside of Canada. Eight of the named defendants have attorned to the jurisdiction and now move for an order pursuant to Rule 3.02(1) of the Court of Queen's Bench Rules extending the time for filing a statement of defence, requesting particulars and filing a motion to strike out part of the claim.

[2] The remaining defendants are not participating in this motion, not having attorned to the jurisdiction of the Manitoba courts and having each filed a motion to dismiss the action as against them on the ground that the court has no jurisdiction over the subject matter of the action. The "jurisdictional" motions are scheduled to be heard November 25-28, 2013.

[3] The attorning defendants (ADs) submit that this court has a discretion to extend the time within which a defendant must file a statement of defence. The plaintiff takes no issue with such a position. Rather, the plaintiff and the ADs differ as to whether, in the circumstances of this case, the court should exercise such a discretion, and if so, for what period of time.

II. BACKGROUND

[4] On May 31, 2012, the statement of claim was filed in this court pursuant to ***The Tobacco Damages and Health Care Costs Recovery Act***, C.C.S.M. c. T70 (the "***Act***"), passed in 2006 and proclaimed in force on May 31, 2012. The ***Act*** is substantially the same as legislation in British Columbia, the constitutionality of which was upheld by the Supreme Court of Canada.

[5] The claim was served on the ADs at various times between June and July, 2012.

[6] The non-attorning defendants (NADs) have raised jurisdictional challenges prior to filing a statement of defence as noted above. For their part, the ADs indicated they would be bringing preliminary challenges to the province's claim, including a request for particulars and/or a motion to strike out certain paragraphs of the claim. The ADs' request of the plaintiff, to consent to an extension of time for the filing of their statements of defence until the jurisdictional motions were determined, was refused.

[7] By consent of the parties, a case management judge was appointed and pursuant to the court's direction:

(a) The NADs were to file their jurisdictional motion materials no later than January 15, 2013;

(b) Motions to be brought by the ADs were to be filed no later than January 15, 2013. (None of the ADs filed their motions to strike any paragraphs of the statement of claim or to demand particulars, but rather all filed a motion for the extension of time to do so, until such time as the court might direct);

(c) The ADs' motion for an extension of time (the present motion) was fixed for June 11, 2013;

(d) The jurisdictional motions were set for November 25-28, 2013.

[8] Similar actions have been commenced by provincial governments in various jurisdictions across Canada and the actions have been subjected to various case management procedures in those jurisdictions. Different approaches have been taken

to comparable motions in Ontario, Newfoundland, Quebec, Saskatchewan and New Brunswick.

[9] While the parties in the present case have argued their respective positions respecting what they see as the most efficient and fair approach, the plaintiff and the ADs accept that this court has it within its jurisdiction to decide how, in the context of its case management, this action will be managed.

III. ISSUE

[10] The issue on this motion reduces to the following question: Should the ADs' motion for an order extending the time to file a statement of defence, request particulars and file a motion to strike out part of the claim be granted?

IV. ANALYSIS

Should the ADs' motion for an order extending the time to file a statement of defence, request particulars and file a motion to strike out part of the claim be granted?

[11] Rule 1.04(1) of the Court of Queen's Bench Rules reads as follows:

> 1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

[12] In arguing for the requested order extending time, the ADs invoke the general overarching principle applicable to every civil proceeding in Manitoba. That principle is enshrined in Rule 1.04(1) as set out above. The ADs say that that rule and principle has particular relevance and importance in cases like the present where there exist obvious complexities and potential inefficiencies that flow from the involvement of attorning and non-attorning defendants, multiple tracks of procedure, and allegations of

conspiracy and joint liability as between all defendants. The ADs suggest that granting the requested order extending time is not only consistent with judicial economy and efficiency generally, it is also the approach that will most obviously maximize fairness for all defendants.

[13] The ADs submit that the fact that there are in this case attorning and non-attorning parties, may lead to a multiplicity of motions and proceedings. This they say is particularly the case given that depending upon the outcome of the jurisdictional question, the NADs may be required to bring similar motions to those now being contemplated by the ADs. It is the position of the ADs that the granting of the order requested herein will avoid that multiplicity of motions and proceedings, avoid the risk of inconsistent findings on motions and generally facilitate the orderly and efficient progress of this action.

[14] The ADs also point to an "entwining" of allegations and liability as between the ADs and NADs. This they contend further demonstrates the importance of knowing which of the defendants are parties to the action, before requiring any defendant to respond to the claim. According to the ADs, the particular circumstances of this case underscore the importance of the pleadings of any one defendant from the perspective of another defendant and also underscores the desirability of all defendants being required to respond to the amended statement of claim (by motions as to its particularity or legal adequacy and by way of a statement of defence) at the same time. In this regard, the ADs contend that the staggered and duplicative approach proposed by the plaintiff would undermine the entitlement of each AD (before closing its own

pleadings) to know the rulings of the court on the plaintiff's pleading, vis-à-vis all defendants, and the pleadings of all other defendants. In short, it is the position of the ADs that it would be unjust and inefficient to require any defendant to respond to the amended statement of claim until the proper parties to the proceeding have been determined and the scope of the allegations to which they are required to respond is known.

[15] As a matter of fairness to the NADs, the ADs, as part of their argument on this motion, remind the court that the NADs (so as to avoid attorning) will not participate in the ADs' anticipated motions. In other words, in the context of those anticipated motions to be brought by the ADs, the NADs would be non-parties. Accordingly, should the motions of the NADs who are challenging jurisdiction ultimately fail, they too may wish to pursue their own motions regarding the particularity and adequacy of the amended statement of claim. The ADs contend that if and when such similar motions are brought by the NADs, *res judicata* or issue estoppel will not apply to bind the NADs to the results on the previous motions, as they were not parties. This they say may lead to different determinations of the same or similar issues. Alternately, having missed participating in the initial argument of the same or similar issues, the NADs may be, on subsequent and similar motions, prejudiced by a result which they had no opportunity to influence. Moreover, the ADs assert that if the jurisdictional challenges are dismissed and the NADs file their own motions, it will be unknown whether the issues the NADs raise concerning the plaintiff's pleading will be the same as the issues which will be raised by the ADs.

[16] In addition to the above, the ADs have cited two cases decided in the context of case management of class action proceedings:

- ***Attis v. Canada (Minister of Health)*** (2005), 75 O.R. (3d) 302 (Ont. S.C.J.); and
- ***Stewart v. Enterprise Universal Inc.***, 2010 ABQB 259, 489 A.R. 153.

[17] Respecting their position that they ought to be entitled to await the determination of the jurisdictional motion, the ADs submit that ***Attis***, *supra*, at para. 9 supports, amongst other things, the proposition that:

> … interests of both plaintiffs and defendants are advanced where a particular preliminary motion can serve the goal of litigation efficiency by reducing or eliminating expenditures of resources and time, if heard before the certification motion.

[18] The ADs also rely on ***Stewart***, *supra*, which, although again is a class action proceeding in Alberta, reaffirmed the proposition that the case management judge should retain jurisdiction to determine the appropriate sequence and timing of applications in order to ensure both a level of fairness between the parties and a corresponding and timely determination of procedures.

Decision

[19] For the reasons that follow, I will not be granting the ADs the requested order to extend time.

[20] I have determined that there is nothing inherently unfair or inefficient about obliging the ADs to file the identified motions (or any motions) prior to the adjudication of the jurisdictional issue. It is also my view, subject to the timelines set out in para. 38, *infra*, that the ADs should not be entitled to delay the filing of the statements of

defence irrespective of any comparable motion that may eventually be filed by any other defendants, non-attorning or otherwise.

[21] I am in agreement with the position of the plaintiff that absent obvious unfairness to a defendant and clear inefficiency, whether an action is under a case management regime or is simply proceeding in the ordinary course, a court should not be indifferent to the inherent prejudice that attaches to a plaintiff when it is prevented from moving its action at a reasonable pace through the pleading, discovery, and ultimately, the trial stage.

[22] Part of my determination on this motion is informed by my acceptance of the reality that claims involving multiple defendants may have to take multiple tracks during the course of litigation. Such multiple tracks are to some extent inevitable and, indeed, in the nature of multi-party litigation. Attempts to avoid this inevitability may in fact be counter-productive. In that regard, if each step in a proceeding is delayed until all defendants are in a position to plead it and proceed in lock step, multi-party litigation would, as the plaintiff suggests, take decades. Such well-intentioned, organized and choreographed timing in the name of judicial economy may in fact (in multi-party proceedings) have the paradoxical effect of delaying a party's entitlement to the timely adjudication of particular disputes, preliminary or otherwise. That delay becomes significant where the timely adjudication of those particular disputes – at whatever stage of the litigation – inhibits what could have been some specific advantage or clarifying benefit for one or more of the parties in the ultimate unfolding of the action.

[23] There may very well be multi-party civil actions where, because of the nature of the motions themselves, the allegations in the claim or because of the particular circumstances of the action generally, it would be manifestly unfair and/or inefficient to require a party or a group of parties to bring their preliminary challenges or motions and their response to a statement of claim or an amended statement of claim. This is not such a case.

[24] Respecting the anticipated motions to be brought by the ADs, I note that they involve further particularization and a motion to strike. In neither case does the nature of the motions themselves require, for reasons of fairness or efficiency, delaying their hearing and adjudication.

[25] The motions to strike may themselves be dispositive of parties or issues. While I appreciate that both the jurisdictional motion and the motions to strike are potentially dispositive, there is no apparent advantage in delaying the ADs' motions to strike pending the determination of the jurisdictional issue. An adjudication of the ADs' motions to strike may actually have the benefit of narrowing the issues and potentially eliminating the necessity of another party from having to file further motions, file a defence or otherwise participate in the action, irrespective of what ultimately happens on the jurisdictional motion.

[26] Even if the NADs are unsuccessful in their jurisdictional motion, if they themselves decide to bring an eventual motion to strike, they will have the benefit of a prior decision by the case management judge or some other judge on many or all of the same issues raised by the ADs. While the NADs are free to raise any similar motion

as will be raised by the ADs, subject to the possibility of new arguments or changes in law, the issues will more than likely be determined in the same or similar ways. While that by itself may have certain advantages as it relates to efficiency, I do agree with the position of the plaintiff that it is precisely because *res judicata* and issue estoppel would not apply that the NADs would not be seen to be prejudiced if the ADs proceed now, in a timely manner, with their motions (assuming the NADs were to proceed with similar procedural motions later).

[27] As it relates to a possible motion for particulars, I again accept the position of the plaintiff that the ADs are not deprived of anything or disadvantaged in any way by the motion proceeding forthwith. In ***Bellan v. Curtis***, 2007 MBQB 221, 219 Man.R. (2d) 175 at para. 14, Hanssen J. noted as follows:

> 14 An order for particulars is a discretionary remedy. Particulars should be ordered where they are necessary:
>
> (a) to inform the defendant of the nature of the case they have to meet as distinguished from the mode in which it is to be provided;
>
> (b) to prevent the defendants from being taken by surprise;
>
> (c) to enable the defendants to know what evidence they ought to be prepared with and to prepare for trial;
>
> (d) to limit the generality of the plaintiff's claim;
>
> (e) to limit and decide the issues to be tried, and as to which discovery is required; and
>
> (f) to tie the hands of the plaintiffs so they cannot, without leave, go into any matters not included in their claim.
>
> See *Dumont v. Canada (Attorney General) et al.* (1992), 75 Man.R. (2d) 273 at para. 29.

[28] As the plaintiff has argued, the presence or not of the NADs as parties in the proceedings at the time a motion for particulars is brought by an AD, does not raise a "necessary issue that will in any significant or determinative way assist the court on the motion for particulars itself".

[29] As it relates to the nature of the allegations in the claim, there is nothing obvious that would require or would justify the requested delay.

[30] As earlier mentioned, the ADs have invoked the allegations of conspiracy and joint liability to support their position that it is essential that they be aware of which of the defendants are parties to the action before any defendant is required to respond to the claim. In my view, the plaintiff in its brief at paras. 28 and 29 has provided a persuasive response:

> 28. Insofar as the allegation of conspiracy is concerned, if one or more of the defendant's position is going to be that there was in fact a conspiracy but not with all of the named parties, there may be some merit to such an approach as that suggested by the moving ADs. However, if that is not their position, but rather they will be saying that they were not part of any conspiracy, no matter what party might be a named defendant, it is totally irrelevant as to who the other parties are (or how many there are) for the response to be made to the allegation of conspiracy as against that defendant.
>
> 29. Further, insofar as the same argument is made with respect to the allegations of joint liability between defendants, again it is disputed that the specific parties who might be the subject of a joint liability allegation need be determined at this stage, nor, as argued in para. 29 of ITCL's brief, "what market share is being alleged and sought from the remaining defendants". The issue of joint and several liability will be determined pursuant to section 4 of the Act. Subsection 4(2), the "deemed joint breach" provision, specifically provides when two or more manufacturers "whether or not they are defendants in the action" are deemed to have jointly breached a duty or an obligation.

[31] In addition to the above, I note that insofar as conspiracy has been alleged, it is not clear given the elements, test and particular evidentiary rules that may apply, that

the continuing presence of any one particular defendant (or supposed co-conspirator) would be determinative. Given the definition of conspiracy and its import in law, it may be an open question as to whether or not an alleged co-conspirator in a civil action need be someone who is or remains a named defendant.

[32] When I examine the circumstances of this case generally and I attempt to envision the so-called efficiencies and fairness of granting the required extension of time, it is far from obvious that the ADs' suggested approach will result in either.

[33] The invoking of the Ontario example by the plaintiff is not misplaced. Ontario is one of the jurisdictions that have permitted the ADs to effectively place in abeyance any preliminary motions pending the resolution of the jurisdictional issue raised by NADs. There, in Ontario, after delivery of the demand for particulars and a motion to strike in December 2009 (by the ADs), nothing further has been scheduled except the jurisdictional challenges. It is now three years and seven months since those motions were filed and as the plaintiff is right to point out, with the Ontario Court of Appeal only recently rendering its judgment, subject to a likely attempt to seek leave to appeal to the Supreme Court of Canada, it will be at least four years or longer before the procedural motions of the ADs will be heard.

[34] I do understand and appreciate the ADs' position that in the end, irrespective of how quickly any preliminary or procedural motion proceeds prior to the jurisdictional issue being resolved, at some point – even if it is after the NADs have finished with any of the anticipated appeals or procedural motions of their own – the process will still have to converge for trial, with no one party being able to proceed without the other.

Yet even if this is so, it raises the question as to whether all parties are required to have those particular clarifying and potentially dispositive interim adjudications delayed pending the approach of the slowest party in a multi-party action. I also agree that there is both a plaintiff's right and a court's inherent obligation to see that an action proceeds through the courts in as timely a manner as fairness and efficiency permit. I repeat, preliminary motions, even if brought by only some of the parties in a multi-party proceeding, may directly or indirectly assist the speed of the ultimate adjudication by clarifying and/or perhaps disposing of issues and parties. Conversely, requiring all parties, including the plaintiff, to wait several years for each potentially dispositive motion to be determined and then, as the plaintiff underscores, many more months for procedural steps to be taken sequentially by all parties at the same time (all this before the filing of a statement of defence), serves neither fairness nor efficiency, two of the key reference points for much of the ADs' argument.

[35] Insofar as the ADs are relying upon the earlier-mentioned cases of ***Attis*** and ***Stewart***, *supra*, I note the following. In ***Attis***, Winkler J.'s (as he then was) quoted comments respecting the reduction or elimination of expenditures of time and resources were made in the context of a class action proceeding where the certification motion involved what he identified as the "burden" on the plaintiffs and the corresponding "stigma" of defending such an action. That respective "burden" and that "stigma" are such that it rendered it important and attractive for the defendants to be able to resolve the matter (the certification motion) as quickly as possible, even prior to proceeding (in that case) with a motion to strike a third party claim.

[36] While the logic of the court in ***Attis*** is compelling, it is a rationale that is less clearly applicable in a case like the present (not a class action) where there is no such "burden" (respecting certification) on the plaintiff, nor is there the same "stigma" attaching to the defendant as may occur when a defendant is required to defend in a class action. Yet even in deciding ***Attis*** as it did, the court noted at para. 10:

> [10] As always, however, the question of scheduling and the order of proceedings must of necessity be decided on a case-by-case basis depending upon the peculiar circumstances of the matter. …

[37] As it relates to ***Stewart***, also a class action proceeding, the defendants rely upon that decision to further emphasize that in a complex proceeding, a case management judge should retain the jurisdiction to determine the appropriate sequence and timing of the applications with a view to ensuring both a timely determination of procedural matters and an overall fairness between the parties. I accept without hesitation that proposition, although for the reasons already given, it is my view that in the particular circumstances of the present case, delaying the ADs' preliminary motions is not consistent with the timely determination of procedural matters and the ideal of fairness as between the parties. Indeed, granting the requested order will result in the ADs standing idly by, perhaps for years, pending the initial and appellate determinations of the jurisdictional issue.

[38] For the foregoing reasons, the ADs' motion is dismissed. In the result, while the jurisdictional challenges remain outstanding, I am ordering in the spirit of the requested case management, the following:

(a) Each AD seeking further particulars of the plaintiff's claim shall file and serve a request for particulars no later than October 1, 2013;

(b) Each AD taking preliminary objection to the entire or parts of the statement of claim, or the particulars provided, will file and serve its motion(s) and supporting affidavit(s) within 30 days of the date upon which the plaintiff serves its last reply to any request for particulars; any such motions will be scheduled, heard and determined by this honourable court within a reasonable time thereafter;

(c) Each AD will file and serve its statement of defence within 30 days of the latter of:

  (i) the date upon which its motions, referenced in (b) above, have been finally resolved;

  (ii) the date upon which a reply to its request for particulars, if any, has been served; or

  (iii) October 1, 2013;

(d) Each AD that does not take preliminary objection to the entire or parts of the statement of claim, or the particulars provided, will file and serve its statement of defence within 60 days of the date upon which the plaintiff serves its reply to request for particulars.

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C.J.Q.B.