COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-025385-154
(500-06-000070-983, 500-06-000076-980)

MINUTES OF THE HEARING

DATE: December 9, 2015

THE HONOURABLE MARK SCHRAGER, J.A.

APPELLANT	COUNSEL
IMPERIAL TOBACCO CANADA LTD.	Mtre DEBORAH GLENDINNING Mtre ÉRIC PRÉFONTAINE *(Osler, Hoskin & Harcourt, S.E.N.C.R.L./s.r.l.)*
RESPONDENTS	COUNSEL
CONSEIL QUÉBECOIS SUR LE TABAC ET LA SANTÉ **JEAN-YVES BLAIS** **CÉCILIA LETOURNEAU**	Mtre GORDON KUGLER Mtre PIERRE BOIVIN *(Kugler, Kandestin s.e.n.c.r.l., L.L.P.)*

DESCRIPTION: **Motion of Appellant Imperial Tobacco Canada Ltd. for directions on the Schedule to Furnish Security (Articles 2, 20, 46, 497, 520 & 522.1 *C.C.P.*)**

Clerk: Mihary Andrianaivo	Courtroom: RC-18

HEARING

14: 00 Commencement of the hearing. Continuation of the December 7, 2015 hearing. The presence of the Parties, at the Court, is not required today.

By the Judge: Judgment – See page 3.

End of the hearing.

Mihary Andrianaivo

Clerk

JUDGMENT

[1] On October 27, 2015, the undersigned rendered judgment in this file ordering the Petitioner now before me, Imperial Tobacco Canada Ltd. ("ITL") to furnish security. Petitioner now seeks the rectification of that judgment and more specifically a change to the schedule of payments of security ordered by the undersigned.

[2] Some background information is required. Petitioner, together with two other tobacco companies,[1] have appealed the judgment of May 27, 2015 of the Superior Court, District of Montreal (the Honourable Justice Brian Riordan),[2] condemning them to pay, in a class action, moral and punitive damages aggregating in excess of $8 billion, plus interest, additional indemnity and costs. The judgment of the Superior Court also ordered provisional execution in respect of a portion of the condemnation but that order was cancelled by judgment of the Court following motions presented by Petitioner (and its two Co-Appellants).[3] The appeal is scheduled to be heard in the autumn of 2016.

[3] After the judgment of the Court cancelling provisional execution, Respondents moved for the posting of security. Their motion, filed against the three Appellants, proceeded against two of them and the undersigned granted the motion on October 27, 2015.[4]

[4] I found that the Respondents had demonstrated a "special reason" within the meaning of article 497 *C.C.P.* that justified an order to furnish security to guarantee payment of part of the condemnation. Petitioner had been distributing earnings to its out of jurisdiction parent company which, if the practice were to continue, would lead to the inability to pay any substantial condemnation that this Court might uphold. This lack of availability of funds or "inability to pay" was indeed one of the arguments advanced by Petitioner in support of the cancellation of the order of provisional execution.

[5] The security ordered by the undersigned corresponded to the amount of the initial deposit towards satisfaction of the class claims ordered by the trial judge ($1.131 billion). The pro rata share of Petitioner as determined by the trial judge (67%) resulted in my order of security of $758 million.

[6] Once I had determined to order the furnishing of security, I said this in the judgment:

> [53] That being said, in fixing the mode of payment, I am willing to make some compromise to the cash requirements of Appellants. As Justice Riordan said, the object of the exercise is not to bankrupt the Appellants, nor should Appellants appeal rights be defeated by the amount of security.

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1 Rothmans, Benson & Hedges inc. and JTI-Macdonald Corp.
2 *Létourneau v. JTI-MacDonald Corp.*, 2015 QCCS 2382.
3 *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2015 QCCA 1224.
4 *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2015 QCCA 1737 (Schrager, J.A.) [Judgment].

Consequently, I ordered that the security be provided in quarterly instalments.

[7] The amount of the quarterly instalments was calculated as a function of average annual net earnings before tax as determined by the trial judge based on the period 2008 – 2013. Petitioner's annual pre-tax earnings figure is $483 million or, if divided by four, $120,750,000. This would serve as a notional ceiling for the quarterly instalments of security.

[8] Petitioner's 2014 financial statements were filed in the record of this Court in support of the motions to cancel provisional execution. These statements demonstrate that Petitioner showed a loss (contrary to 2008 - 2013) due to repayments of a loan contracted to fund the settlement of the "Flintkote litigation". Since it was an exception to an otherwise consistently profitable enterprise, the 2014 financial year was not considered by me in the determination of average pre-tax earnings. Moreover, I had no financial statements for any portion of 2015.

[9] Petitioner was allowed 60 days before the first quarterly instalment of security was due, as requested by counsel for Co-Appellant Rothmans, Benson & Hedges inc.

[10] Pursuant to my judgment of October 27, 2015, Petitioner is bound to furnish $108,285,000 of security on or before the last juridical day of 2015. This figure is one seventh of the total security of $758 million and less than the notional quarterly average pre-tax earnings of $120,750,000.

[11] Petitioner has now lodged a motion entitled "Motion of Appellant Imperial Tobacco Canada Ltd. for directions on the schedule to furnished security (Articles 2, 20, 46, 497, 520 & 522.1 *C.C.P.*)".

[12] Petitioner states that the final instalment of $100,000,000 of reimbursement of the Flintkote loan is payable on December 23, 2015, as indicated in its 2014 financial statement. Consequently, Petitioner submits that it should only be required to pay $8,285,000 on account of the security in December 2015. Petitioner's motion is artfully drafted to suggest that sufficient funds are not available to pay both the Flintkote loan instalment and the security. However, there is no assertion of inability to pay *per se*. No current financial statements or an affidavit of a financial officer are produced.[5] Moreover, there is no mention of the position of Petitioner's parent and related companies on the subject of helping to fund the security. Petitioner relies on the factual record as constituted upon presentation of its motion to cancel provisional execution.

[13] Petitioner argues that the reasoning of the undersigned in allowing quarterly payments was premised on three principles:

> 17. (...):
>
> (i) ITL not be bankrupted by the Security;
>
> (ii) ITL's appeal rights not be defeated by the Security; and
>
> (iii) The amount of each instalment of the Security not exceed ITL's average quarterly earnings.

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[5] The motion is supported by the affidavit of one of Petitioner's attorneys drafted in general terms.

[14] Thus, Petitioner submits that it was by inadvertence that the undersigned, in determining the schedule of payments of security, did not allow for the December 23, Flintkote payment.

[15] Petitioner concludes that I should now change the schedule of instalment payments of security to reflect the following:

> (...)
>
> (a) a first instalment of $8,285,000 due on the last juridical day of December 2015;
>
> (b) a second instalment of $100,000,000 due on the last juridical day of March, 2016;
>
> (c) six consecutive and equal quarterly instalments of $108,285,000, beginning on the last juridical day of June, 2016 and ending on the last juridical day of September, 2017;

[16] Petitioner cannot succeed. It is wrong on two counts.

[17] In principle, once an adjudicator (here a judge of this Court sitting in chambers) has rendered judgment, he or she cannot afterward alter it. This is an application of the doctrine of *functus officio*.[6] Historically, this rule, that only an appellate body can rehear and correct a matter, was subject to two exceptions. Firstly, the Court or one of its judges may correct clerical errors which power is now expressed in article 520 *C.C.P.* to include the power to correct errors "in writing or calculation, or any other clerical error". A clerical error is not the basis of Petitioner's submission in this case. Article 520 *C.C.P.* also permits the correction of "a judgment which, by obvious inadvertence, has granted more than was demanded, or has omitted to adjudicate upon part of the demand". Again, this is not the present situation.

[18] Petitioner has submitted that it merely seeks an additional delay. However, the additional delay requires a modification of the conclusions of my judgment setting out the schedule of payments. This is not a situation where the party in default to furnish security is defending a motion to dismiss its appeal. In such a case, the presiding judge of the Court benefits from a discretion whether or not to dismiss the appeal. The last paragraph of article 497 *C.C.P.* states:

497. (...)	**497.** [...]
If the appellant does not furnish security within the fixed time, a judge of the Court of Appeal **may**, upon motion, dismiss the appeal.	Si l'appelant ne fournit pas le cautionnement dans le délai fixé, un juge de la Cour d'appel **peut**, sur requête, rejeter l'appel.
	[My underlining]

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[6] *Doucet-Boudreau v. Nova-Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62, paras. 77-79 and paras. 113-117 [*Doucet-Boudreau*]; *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, p. 860-862 [*Chandler*]; *Paper Machinery Ltd. et al. v. J.O. Ross Engineering Corp. et al.*, [1934] S.C.R. 186, 188, 1934 CanLII 1; see also *Boudreault v. Syndicat des salariées et salariés de l'entrepôt Bertrand, distributeur en alimentation inc. Chicoutimi (CSN)*, 2011 QCCA 1495, paras. 75-76, where the Court adopts *Chandler* adding that a third source of exception to the doctrine of *functus officio* would be a statutory provision empowering an adjudicator to decide anew or reconsider a judgment once rendered. Revocation pursuant to art. 482 *C.C.P.* is an example of such a statutory provision (see in this regard *Droit de la famille – 091431*, 2009 QCCA 1169).

The discretion to dismiss may include an ancillary jurisdiction to extend a delay, particularly based on facts arising after the judgment, such as a technical difficulty or formal defect impeding the party from furnishing security within the delay imposed.[7] The situation presented to me is that a relevant fact (i.e. the $100 million payment on the Flintkote loan) was not given proper consideration in the judgment. That is a wholly different situation because Petitioner contends that the judgment contains an error of omission.

[19] In essence, Petitioner submits that the manifest intention of the undersigned in the judgment was to link payments on account of security to available cash. This gives rise to consideration of the second exception to the doctrine of *functus officio* – i.e. that a judge may correct an error in expressing his manifest intention.[8] Thus, where by slip or inadvertence, the conclusions of a judgment do not reflect the reasons, or the judge's manifest intent, a correction is permitted.[9]

[20] Respondents argue that article 520 *C.C.P.* occupies the entire field of possibility to correct a judgment short of an appeal or some other statutory recourse (such as revocation). Whether the aforementioned exception to the doctrine of *functus officio* forms part of the law in Quebec by the vehicle of article 46 *C.C.P.* and whether such inherent jurisdiction can be exercised by a judge as opposed to the Court, need not be decided by me presently, for the reasons which will become self-evident below.

[21] If the conclusions of my judgment ordering security failed to take into account and give effect to an element which was on record and which operated to produce a conclusion other than that contained in the judgment, that would be an error, which could only be corrected on appeal. Thus, if the conclusion to order payment of one of the instalments of security, at the end of December, of $108,285,000 instead of $8,285,000 is an error, not of arithmetic but rather of omission to consider a relevant factual element (i.e. the scheduled Flintkote loan payment) then I am without power to correct it because of the doctrine of *functus officio*. If the element was considered but not given effect in the conclusions of the judgment, such situation would not lend itself to rectification.[10] For this reason, Respondents correctly characterized the motion before me as a disguised appeal.

[22] While it was true that the payment schedule was crafted to make the furnishing of security feasible, the calculations in the judgment are estimates only. These estimates were made on the basis of the trial judge's findings of average pre-tax earnings for the period of 2008-2013. I did not consider any data for quarterly cash flow, current or projected in making these calculations. The estimates were clearly based on history to heed in some way Petitioner's "inability to pay" argument initially raised in seeking cancellation of the order of provisional execution.

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7 *Fakhri v. Faucher*, 2008 QCCA 1004 (Rochon, J.A.); *Carrier v. 9071-2852 Québec inc.*, 2010 QCCA 451.

8 *Doucet-Boudreau* and *Chandler*, *supra*, note 6. See for example *Deng v. Wang*, 2010 QCCS 4057, where the judge, seeking to put an end to the co-ownership of an immovable inadvertently omitted to order the judicial sale of the immovable as an alternative conclusion, where the defendant failed to purchase the Plaintiff's undivided interest; suspension of provisional execution refused *Wang v. Deng*, 2010 QCCA 1861 (Kasirer, J.A.).

9 *Doucet-Boudreau* and *Chandler*, *supra*, note 6.

10 *Garantie, compagnie d'assurance de l'Amérique du Nord (La) v. Construction Québec Labrador inc.*, 1998 CanLII 12924, J.E. 98-1351 (C.A. Qué).

[23] Most significantly, there is no inadvertence or slip in the judgment regarding the Flintkote loan. The payments were raised in argument by Petitioner to illustrate that it had stopped paying dividends at the end of 2014. Previously, it had paid out earnings for all the years in evidence. It was, as a consequence of these submissions, brought to light that the lender to whom payments were made was Petitioner's parent company, British American Tobacco (or a closely related corporation). In point of fact, as disclosed by the 2014 financial statements and as confirmed by Petitioner's representative in his deposition, Petitioner paid in excess of $300 million in dividends during 2014 to its parent but at year end owed $400 million to a related company for borrowings to finance the settlement of the Flintkote litigation. Respondents' position to the effect that virtually all available cash was being funnelled to related corporations situated out of jurisdiction was reinforced rather than rebutted. Petitioner submits that its obligation to pay $100 million to a related entity on December 23, 2015 should not be treated differently than would be the case if the loan was due to an institutional lender dealing with Petitioner at arm's length. In all of the circumstances of this matter, it is impossible to conveniently ignore the benefit of earnings received over the years and the position asserted by Petitioner's parent that it would not commit to fund a final judgment.[11]

[24] In ordering that security be furnished, I found it unacceptable that Petitioner would continue to distribute its earnings to related entities located out of this jurisdiction notwithstanding the judgment in first instance, which albeit subject to an appeal, benefits from a presumption of validity as I stated in the judgment with the supporting authority.[12] For this reason, as well as the various demands known and for that matter, unknown, on Petitioner's cash flow going forward, I stated that:

> [52] (...) A strategic decision is required by Appellants in caucus with their parent companies and related entities who have received the benefit of the profitable operations over the years and who continue to do so. Are they willing to do the necessary to help fund security to allow Appellants to continue their appeal? (...) Continuing the practice of distributing earnings out-of-jurisdiction at this point is at best disingenuous and at worst, bad faith.

[25] Later in the judgment, I added that:

> [59] (...) Again, according to the figures that we have, I am fully cognizant that Appellants may require some infusion or assistance of their related entities on a short or medium term basis in order to furnish the security. (...).

[26] As can be seen, it was foreseeable that available cash generated from operations might be, in the "short or medium term", inadequate to meet one or more of the instalment payments of security. Indeed, the affidavit of Petitioner's officer filed in support of the motion to cancel provisional execution claims that the amounts outstanding under Petitioner's line of credit fluctuated between $72 million and $317 million during the period of January to June 2015. It is also conceivable but unknown to the undersigned now, as it was when the judgment was rendered, that 2015 may have been a stellar year for Petitioner and there is ample cash to pay both the security and the Flintkote loan in December 2015. The contrary is not asserted in Petitioner's motion. In any event, there was no inadvertent omission by the undersigned to take into account

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[11] Judgment, para. 39.
[12] Judgment, para. 43.

the payment of the Flintkote loan to Petitioner's parent or related entity. Petitioner is wrong on that account.

[27] Accordingly, the factual premise of Petitioner's motion is unfounded as there is no error in my previous judgment requiring correction. However, even if there was such an error, its nature is such that the doctrine of *functus officio* applies and I would be without power to correct it.

FOR THE FOREGOING REASONS, THE UNDERSIGNED:

[28] **DISMISSES** Petitioner's motion, with costs.

MARK SCHRAGER, J.A.