Date: 20081212

Docket: T-1761-07

Citation: 2008 FC 1371

Ottawa, Ontario, December 12, 2008

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

**MERCHANT LAW GROUP, STEVENSON LAW OFFICE,
ANNE BAWTINHIMER, DUANE HEWSON,
JUDITH LEWIS AND MARCEL WOLF**

Plaintiffs (Respondents)

and

**CANADA REVENUE AGENCY AND
ATTORNEY GENERAL OF CANADA**

Defendants (Appellants)

REASONS FOR ORDER AND ORDER

[1] This is an appeal pursuant to Rule 51(1) of the *Federal Courts Rules* of a decision by the learned Prothonotary dated July 11, 2008, directing that the motion to strike of the defendants (the appellants in this matter) be heard at the same time as the motion for class certification.

FACTS

[2] The named plaintiffs in this proposed class action are two law firms and four clients of those law firms acting for all law firms in Canada and all clients of those law firms which have paid GST since 1990 on disbursements. The issue in the action is whether law firms act as agents for clients with respect to the payment of certain disbursements and thus should not have to charge and remit GST a second time on those disbursements when billing their clients. This is GST on GST. One of the plaintiffs in this action, Merchant Law Group, brought a successful appeal to the Tax Court of Canada with respect to assessments for GST on legal disbursements charged to the law firm's clients. This proposed class action before the Federal Court is for recovery of GST since 1990 paid by law firms. It is founded in misfeasance in public office, and alternatively, in restitution or unjust enrichment.

[3] The plaintiffs filed the original statement of claim on October 1, 2007. The defendants brought a motion to strike in January 2008. The plaintiffs subsequently served and filed a notice of motion seeking leave to file an amended statement of claim and to dismiss the defendants' motion to strike. In the alternative, they sought to adjourn the defendants' motion to strike to be heard at the hearing of the certification motion.

[4] The defendants submitted that the motion to strike should be heard before the motion for certification, on the basis that judicial economy favours hearing the motion to strike first. The defendants assert three grounds in the motion to strike. The first is that the issues in the proposed class action are matters falling within the exclusive jurisdiction of the Tax Court of

Canada. The second is that the plaintiffs are procedurally barred from seeking monetary damages because they were required to pursue statutory remedies under the *Excise Tax* Act and the *Excise Tax Act* specifically excludes common-law relief. Third, they submit that the amended statement of claim does not disclose a reasonable cause of action.

Decision of the Prothonotary

[5] The Prothonotary found that, on the basis of the circumstances of this case, the motion to strike should be heard concurrently with the certification motion. The Prothonotary relied on *Campbell v. Canada*, 2008 FC 353, 167 A.C.W.S. (3d) 46, in which Justice Hansen recently considered the order in which a motion to strike and a certification motion should be heard. In that case, Justice Hansen found at paragraph 25:

> 25. It is evident from the jurisprudence that although, in principle, a certification motion ought to take precedence over other preliminary motions, in the end, the order of the proceedings will be determined on the basis of the circumstances of the particular case.

[6] The Prothonotary held at page 7 of the Order that the issues of jurisdiction and certification are "inextricably wound up in the certification process" so that the strike motion should be heard with the certification motion:

> The cause of action and the foundation for the claim in this proposed class action provides the framework from which a determination will be made whether or not the Federal Court has jurisdiction to entertain the claim. The Court will have to make a determination whether or not the cause of action arises out of the legislation and an assessment and its validity or is independent of the legislation as the Plaintiffs allege. If the cause of action arises purely from assessments relating to the imposition and collection of GST/HST, then the Federal Court will be found to

> have no jurisdiction in this matter and the certification motion would fail and the claim dismissed. However, if it is resolved in favour of the Plaintiffs, then the issue of reasonable cause of action will still have to be argued on the certification motion.
>
> The first element to be satisfied on a certification of motion is, do the pleadings disclose a reasonable cause of action? In my view, the issue of jurisdiction and the issues for certification are inextricably wound up in the certification process. The preferred process in the circumstances of this particular case is that the motion to strike be heard with the certification motion.

[7] The Prothonotary also held at page 9 that even if the plaintiffs' argument on jurisdiction succeeds, the Court would still have to decide if there was a reasonable cause of action at the certification motion:

> Here, I am not persuaded that the jurisdiction argument should be heard before the certification motion. If the jurisdiction argument were to go in favour of the Plaintiffs, there would still be an attack on the reasonable cause of action at the certification motion. Thus, I see no great saving in judicial resources. The issues are inextricably wound up and the best use of judicial resources is to permit the certification motion to proceed. Further, in my view, the motion to strike will not refine the issues for certification.

ISSUE

[8] The issue in this appeal is whether the Prothonotary erred in directing that the defendants' motion to strike and the certification motion be heard together.

STANDARD OF REVIEW

[9] Discretionary decisions of Prothonotaries may be set aside on appeal only if:

(a) they are clearly wrong, in the sense that the exercise of discretion by the Prothonotary was based upon a wrong principle or a misapprehension of the facts; or

(b) they raise questions vital to the final issue of the case.

Canada v. Aqua-Gem Investments Ltd. [1993] 2 F.C. 425 (C.A.), per Justice MacGuigan at paragraph 95; *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, 224 D.L.R. (4th) 577, per Justice Bastarache at paragraph 18.

[10] The order in which the motions are heard is not vital to the final outcome of the case. The defendants submit that the Prothonotary based his decision on a wrong principle and a misapprehension of the facts. Thus, the Prothonotary's decision will only be set aside if it is clearly wrong.

RELEVANT LEGISLATION

[11] Section 312 of the *Excise Tax Act*, R.S.C. 1985, c. E-15, provides:

Statutory recovery rights only	Droits de recouvrement créés par une loi
312. Except as specifically provided in this Part, the *Customs Act* or the *Financial Administration Act*, no person has a right to recover any money paid to Her Majesty as or on account of, or that has been taken into account by Her Majesty as, tax, net tax, penalty, interest or any other amount under this Part.	312. Sauf disposition contraire expresse dans la présente partie, dans la *Loi sur les douanes* ou dans la *Loi sur la gestion des finances publiques*, nul n'a le droit de recouvrer de l'argent versé à Sa Majesté au titre de la taxe, de la taxe nette, d'une pénalité, des intérêts ou d'un autre montant prévu par la présente partie ou qu'elle a pris en compte à ce titre.

[12] Section 12 of the *Tax Court of Canada Act*, R.S.C. 1985, c.T-2, provides:

Jurisdiction

12. (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the *Air Travellers Security Charge Act*, the *Canada Pension Plan*, the *Cultural Property Export and Import Act*, Part V.1 of the *Customs Act*, the *Employment Insurance Act*, the *Excise Act, 2001*, Part IX of the *Excise Tax Act*, the *Income Tax Act*, the *Old Age Security Act*, the *Petroleum and Gas Revenue Tax Act* and the *Softwood Lumber Products Export Charge Act, 2006* when references or appeals to the Court are provided for in those Acts.

Compétence

12. (1) La Cour a compétence exclusive pour entendre les renvois et les appels portés devant elle sur les questions découlant de l'application de la *Loi sur le droit pour la sécurité des passagers du transport aérien*, du *Régime de pensions du Canada*, de la *Loi sur l'exportation et l'importation de biens culturels*, de la partie V.1 de la *Loi sur les douanes*, de la *Loi sur l'assurance-emploi*, de la *Loi de 2001 sur l'accise*, de la partie IX de la *Loi sur la taxe d'accise*, de la *Loi de l'impôt sur le revenu*, de la *Loi sur la sécurité de la vieillesse*, de la *Loi de l'impôt sur les revenus pétroliers* et de la *Loi de 2006 sur les droits d'exportation de produits de bois d'oeuvre*, dans la mesure où ces lois prévoient un droit de renvoi ou d'appel devant elle.

[13] Section 221 of the *Federal Courts Rules*, SOR/98-106, provides:

Motion to strike

221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

(*a*) discloses no reasonable cause of action or defence, as the case may be,

(*b*) is immaterial or redundant,

(*c*) is scandalous, frivolous or vexatious,

(*d*) may prejudice or delay the fair trial of the action,

(*e*) constitutes a departure from a previous

Requête en radiation

221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

a) qu'il ne révèle aucune cause d'action ou de défense valable;

b) qu'il n'est pas pertinent ou qu'il est redondant;

c) qu'il est scandaleux, frivole ou vexatoire;

d) qu'il risque de nuire à l'instruction

pleading, or

(*f*) is otherwise an abuse of the process of the Court,

and may order the action be dismissed or judgment entered accordingly.

Evidence

(2) No evidence shall be heard on a motion for an order under paragraph (1)(*a*).

équitable de l'action ou de la retarder;

e) qu'il diverge d'un acte de procédure antérieur;

f) qu'il constitue autrement un abus de procédure.

Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

Preuve

(2) Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)*a*).

ANALYSIS

Position of the Defendants

[14] The defendants submit that the Prothonotary was clearly wrong in failing to find that the defendants' motion to strike has the potential to resolve or significantly narrow the case for certification. The defendants allege the following errors in the Prothonotary's reasons:

1. the Prothonotary misapprehended the basis for the motion to strike, finding that if the plaintiffs were successful on the jurisdiction argument, the question of whether the pleadings disclose a reasonable cause of action would still remain to be determined as part of the certification motion. In fact, whether the pleadings disclose a reasonable cause of action is part of the motion to strike and would not have to be determined as part of the certification motion;

2. the Prothonotary improperly assumed that evidence arising at the certification motion would be relevant to the motion to strike. The motion to strike is pursuant to Rule 221(1)(a) of the *Federal Courts Rules*, and does not depend on any evidence or matter which would arise at the certification hearing; and
3. the Prothonotary failed to give effect to the principle that a motion to strike on the basis of jurisdiction provides an exception to the general principle that motions for certification should be heard before other interlocutory motions.

Position of the Plaintiffs

[15] The plaintiffs submit that the decision of the Prothonotary should not be set aside for the following reasons:

1. the learned Prothonotary was alive to the issues and correctly stated the law. The Prothonotary then exercised his discretion as the case management Prothonotary and determined that the motions would be heard at the same time. The Court should only interfere with this exercise of discretion in the clearest case of a misuse of judicial discretion. The Court should not substitute its discretion for that of the Prothonotary unless the Prothonotary was clearly wrong on a principle of law or a misapprehension of the facts;
2. judicial economy favoured hearing the motion to strike at the same time as the certification motion. The Prothonotary's Order was dated July 11, 2008 and this appeal to the Federal Court has delayed the action by four months. The hearing of motions to strike prior to the motion for certification can be characterized as a

"tactical foray" designed to delay the hearing of the certification motion. Motions for certification are mandated by the *Federal Courts Rules* to be made returnable no later than 90 days after the Statement of Defence is filed; and

3. the plaintiffs plead the tort of misfeasance as the basis for their claim. The elements of the offence are set out in paragraphs 12 to 18 of the Amended Statement of Claim. The facts in this case are complicated and the action should not be struck out unless it is plain and obvious that they disclose no cause of action.

Was the Prothonotary's decision based on a wrong principle or a misapprehension of fact?

[16] The Prothonotary correctly stated at page 7 of the Order:

> If the cause of the action arises purely from assessments relating to the imposition and collection of GST/HST, then the Federal Court will be found to have no jurisdiction in this matter and the certification motion would fail and the claim dismissed.

[17] The Prothonotary continued:

> However, if it is resolved in favour of the Plaintiffs, then the issue of reasonable cause of action will still have to be argued on the certification motion.

With respect, this is clearly wrong. The issue of reasonable cause of action would not remain to be argued on the certification motion if the motion to strike pursuant to Rule 221(1)(a) proceeded first. The Federal Court may be procedurally barred, not just jurisdictionally barred by the *Tax Court Act of Canada*, from hearing such an action because section 312 of the *Excise*

Tax Act limits the rights of any person to recover GST except as provided in the *Excise Tax Act.* This procedural issue should be settled first on the facts as pleaded on the strike motion.

[18] The Prothonotary held on pages 7-8 of the Order:

> The first element to be satisfied on a certification of motion is, do the pleadings disclose a reasonable cause of action? In my view, the issue of jurisdiction and the issues for certification are inextricably wound up in the certification process.

With respect, this is also a clear error. The issue of jurisdiction is not related to the issues for certification. In fact, as required by Section 221(2) of the *Federal Courts Rules,* the motion to strike cannot rely on any evidence and is strictly based on the Amended Statement of Claim not disclosing a cause of action. Accordingly, the strike motion is separate and distinct from any evidence which would be heard by the Court as part of the certification process.

[19] The defendant submits that particularly where jurisdiction is at issue in a preliminary interlocutory motion, that motion should be heard before the certification motion. It cites a decision of Prothonotary Morneau in *Galarneau v. Canada (Attorney General),* 2004 FC 718, 266 F.T.R. 52, in which the Prothonotary held that it was appropriate to hear the motion to strike before the certification motion. The Prothonotary held at paragraph 34:

> 34 On the situation in Quebec, I think like the defendants that the prevailing line of authority in that province is that it is proper to raise the lack of jurisdiction *ratione materiae* at the first opportunity. A very complete review of the position is contained in the reasons of Crépeau J. of the Quebec Superior Court in the Court's judgment on December 17, 2002 in Option Consommateurs v. Servier Canada Inc., [2002] J.Ql. No. 5672…

At paragraphs 37-38, the Prothonotary continued:

> 37 At the same time, the plaintiff vigorously argued that at the present stage the class action aspect of the proceeding at bar has not yet been defined and that a series of points of law and fact can only be decided upon as a whole at the sage of the merits, or at least at the authorization stage…
>
> 38…Allowing such an argument would give the rules of this Court on class actions a power of conferring jurisdiction. That cannot be the case.
>
> …

In her decision affirming the Prothonotary's decision in *Galarneu v. Canada (AG)* 2005 FC 39., 306 F.T.R. 1, Justice Gauthier stated at paragraphs 24-29:

> 24 …the Court agrees with the comments of Prothonotary Morneau in paragraphs 22 to 40 of his decision and does not intend to repeat them. Nevertheless, it should be mentioned that since the prothonotary's order, the Quebec Court of Appela has handed down a major decision on the issue in *Société Asbestos Ltée v. Lacroix* [2004] J.Q. No. 9410 (C.A.) (QL), confirming on all the points the interpretation of the Quebec courts and the decision of Prothonotary Morneau.
>
> …
>
> 26 The Quebec Court of Appeal therefore had to determine whether this motion filed prior to the hearing on the motion for authorization was premature. After analyzing the various trends in the cases, including the authorities cited by the plaintiff, it held that jurisdiction *ratione materiae* is a question of public order and that it is in the interest of the sound administration of justice if lack of jurisdiction *ratione materiae* can be raised at the first opportunity.
>
> …

> 29 Like Prothonotary Morneau, the Court determines, therefore, that it is not premature to decide this motion by the defendants.

Although these decisions from the Quebec courts are not binding on this Court, I find, as Justice Gauthier and Prothonotary Morneau found, that their reasoning is persuasive and applicable in the case at bar. Accordingly, the Prothonotary in the case at bar should have first heard the motion to strike based on jurisdiction, particularly since the *Excise Tax Act* and the *Tax Court of Canada Act* confer exclusive jurisdiction on the Tax Court with respect to GST/HST matters.

Legal issues on the strike motion

[20] The Court will outline the legal issues to be determined on the motion to strike and the ways in which they might be determinative. The legal issues to be determined on the motion to strike are as follows:

1. Does the Federal Court of Canada have jurisdiction to hear and determine the plaintiffs' claim that they are entitled to recover GST/HST illegally charged by the Canada Revenue Agency under the *Excise Tax Act* in light of section 12 of the *Tax Court of Canada Act*, which provides that the Tax Court of Canada has the exclusive original jurisdiction to hear and determine matters arising under the *Excise Tax Act*;

2. In the alternative, does section 312 of the *Excise Tax Act* mean that no person, including the plaintiffs, have the right to recover any GST/HST paid to her Majesty except as specifically provided for in the *Excise Tax Act*;

3. Further in the alternative, does the Amended Statement of Claim, as pleaded, disclose a reasonable cause of action for the tort of misfeasance against a public official or, in the alternative, for restitution or unjust enrichment?

Tax Court of Canada exclusive jurisdiction

[21] One of the plaintiffs, Merchant Law Group, brought a successful appeal to the Tax Court of Canada with respect to unpaid GST on legal disbursements charged to the law firm's clients: see *Merchant Law Group v. Canada*, [2008] T.C.J. No. 265. In the action at bar, recovery of GST back to 1990 for these disbursements is sought in the Federal Court by framing the cause of action as malfeasance or restitution. However, the Federal Court may find that the plaintiffs are trying to indirectly appeal their GST assessments, which they cannot do directly under the *Excise Tax Act* because the time limits for appealing their assessments have expired. If this is found to be the case, only the Tax Court has the jurisdiction over the matter.

Reasonable Cause of Action

1. Misfeasance in Public Office

[22] For the plaintiffs to establish the tort of misfeasance in public office, the defendant submits that the pleadings must allege the material facts required to establish the tort:

1. there was deliberate and unlawful conduct by a public officer in the exercise of public functions;
2. the public officer was aware the conduct was unlawful and likely to injure the plaintiff; and
3. there was causation and that damages flow to the plaintiffs.

[23] The defendants submit that as the plaintiffs have not named an individual public official, they have not met one of the elements of a misfeasance claim. The plaintiffs point to a recent decision of the Saskatchewan Court of Appeal in *Swift Current (City) v. Saskatchewan Power Corporation*, 2007 SKCA 27, 156 A.C.W.S. (3d) 578. In that case, Justice Lane held at paragraph 29 that the defendant crown corporation could be found liable for misfeasance of public office without pleading the name of the individual in the Amended Statement of Claim:

> 29 A corporation may itself be found liable for an intentional tort. A corporate entity must, of course, act through the medium of individuals who are the directing mind of the corporation. The identity of such individuals, however, is a matter of evidence, not an essential element of the claim.

[24] However, the defendants also submit that the plaintiffs have not pled any material facts relating to deliberate and unlawful conduct, or awareness of such conduct, in the Amended Statement of Claim. This is a legal question to be determined on the motion to strike purely on the basis of the pleadings.

2. Restitution or Unjust Enrichment

[25] The defendants submit that the Supreme Court of Canada has held that where the GST statute establishes a scheme for providing compensation so that common law rights which might have otherwise operated cannot be relied upon (such as restitution or unjust enrichment). See *Reference re: Goods and Services Tax* [1992] 2 S.C.R. 445, 92 D.L.R. (4th) 51. The Court will, on a motion to strike, decide this legal question.

[26] In the case at bar, the allegation of abuse of power is the tort of misfeasance. The plaintiffs did have the past right to appeal the GST chargeable on legal disbursements, as, indeed, the plaintiff Merchant Law Group did. They did not bring such an appeal within the timeframes provided by the *Excise Tax Act*. On the motion to strike this Court must decide if the Supreme Court in *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, 284 D.L.R. (4th) 385, gives them a second cause of action in the Federal Court to recover this GST.

Delay

[27] The plaintiffs submit that this "misfeasance" is an ongoing event, and that further delay of the certification motion will prolong the misfeasance of the government. In this regard, law firms presumably will take notice of the Tax Court of Canada judgement in *Merchant Law Group v. Canada, supra*, holding that GST is not exigible on disbursements incurred by the law firm as an agent for its clients, and then billed to the client. GST is exigible on a taxable supply by the law firm, not on disbursements incurred by the law firm as an agent for client, and then passed on to the client. Accordingly, they will not remit GST on such disbursements. That is the law at the moment and accords with the Canada Revenue Agency interpretation bulletins: Canada Revenue Agency *GST/HST Policy Statement P-209R*, "Lawyers and Disbursements," (7 July 2004). However, the Tax Court of Canada decision is currently under appeal to the Federal Court of Appeal.

Conclusion

[28] The issues summarized above are legal questions separate and distinct from issues arising on the certification motion. In *Pearson v Canada (Minister of Justice)* 2008 FC 62, 322 F.T.R. 202., the Prothonotary held that a preliminary motion to strike was not incompatible with class proceedings. The Prothonotary summarized this decision at page 9 of the Order:

> In *Pearson*, the circumstances were such that a motion to strike prior to certification was appropriate as there was a pure legal question to be answered on the motion to strike which would be determinative.

[29] The motion to strike in the case at bar relies strictly on the pleadings, and is not "wound up" with any of the evidence or issues arising at certification. Each of the legal questions described above can be decided on the motion to strike independent of any evidence arising at the certification motion. Thus, the reasoning in *Pearson* is applicable here.

[30] In distinguishing *Pearson*, the Prothonotary held that if the jurisdiction argument were to go in favour of the plaintiffs, there would still be an attack on the reasonable cause of action at the certification motion. Accordingly, the Prothonotary saw no saving in judicial resources in hearing the motion to strike first. The Court, with respect, finds that the Prothonotary misapprehended the grounds for the motion to strike. The motion to strike included as a ground that the action should be struck out for failing to disclose a reasonable cause of action. Accordingly, the Prothonotary was clearly wrong in finding the certification motion would still have to proceed to decide whether there was a reasonable cause of action. In fact, whether there was a reasonable cause of action would be decided as part of the motion to strike before the motion to certify.

[31] The Court will hear the motion to strike on an expedited basis and be prepared to hear the motion to certify shortly thereafter on an expedited basis if the motion to strike is dismissed. At this point, the motion to certify has not been filed in final form, and more work is required by the plaintiffs in this regard. Accordingly, the Court does not expect that the hearing of the motion to strike first will delay the motion to certify.

COSTS

[32] The Court will make no order as to costs with respect to this appeal. The defendants could have waited until the motion for certification to proceed with the motion to strike. The delay for this appeal was significant. In any event, the Court is faced with this appeal and must acknowledge that the Order of the learned Prothonotary was based upon a principle of law and apprehension of the facts which were clearly wrong. Accordingly, the Court must allow the appeal.

ORDER

THIS COURT ORDERS that:

1. this appeal is allowed and the decision of the learned Prothonotary dated July 11, 2008 is set aside;

2. the defendants' motion to strike pursuant to Rule 221 of the *Federal Courts Rules* will proceed before the plaintiffs' motion for certification (which has not yet been formally filed); and

3. the defendants' motion record for the motion to strike will be filed within three weeks from the date of this Order (not including December 24, 2008 to January 4, 2009) and the plaintiffs' responding record will be filed three weeks thereafter.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Anthony Merchant, Q.C. Casey Churko	FOR THE PLAINTIFFS (RESPONDENTS)
Myra Yuzak Naomi Goldstein	FOR THE DEFENDANTS (APPELLANTS)

SOLICITORS OF RECORD:

Merchant Law Group Barristers & Solicitors Regina, Saskatchewan	FOR THE PLAINTIFFS (RESPONDENTS)
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE DEFENDANTS (APPELLANTS)