Federal Court  Cour fédérale

Date: 20120829

Docket: T-1359-07

Citation: 2012 FC 1030

Toronto, Ontario, August 29, 2012

PRESENT: Kevin R. Aalto, Esquire, Case Management Judge

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

> *The Canadian Pacific Railway, and all stations and station grounds, workshops, buildings, yards and other property, rolling stock and a pertinence as required and used for the construction and working thereof in the capital stock of Canadian Pacific Railway Company,* ***shall be forever free from taxation by the Dominion, or by any Province hereafter to be established, or by any Municipal, Corporation, therein*** …[1]

[1] Emphasis added. Contract between Minister of Railways and Canals and the Canadian Pacific Railway, dated October 21, 1880 (the 1880 Contract). The 1880 Contract was annexed to and forms part of *The Canadian Pacific Railway Act*. 37 Victoria c. 14

Introduction

[1] This motion is brought by the Defendant (the Crown) to strike this action. The motion raises the thorny issue of whether or not the claims asserted by the Plaintiff (CPR) fall within the jurisdiction of the Federal Court or are matters that are exclusive to the Tax Court of Canada. Central to the action and this motion are the implications to CPR of the 1880 Contract and the Exemption quoted above. The Further Amended Statement of Claim (Claim) issued January 25, 2012, seeks repayment of two types of tax which CPR alleges were wrongfully collected by the Crown. CPR also seeks declarations that the Crown is not entitled to collect certain taxes from CPR as described in more detail below.

[2] In essence, the Crown on this motion argues that the relief sought is not within the jurisdiction of the Federal Court and falls solely within the jurisdiction of the Tax Court. As a result, this action in its entirety should be dismissed. During the course of argument of the motion, the Crown did concede that the Claim "as pled" did not fall within the jurisdiction of the Federal Court but it was possible that a further amended pleading might bring the claims within the jurisdiction of the Federal Court.

Background Facts

[3] The following summary of the background facts giving rise to this action is essentially taken from the Claim, which, on a motion to strike, must be taken as true [see *Operation Dismantle Inc. v. Canada* (1985) 1 S.C.R. 441 at para. 27].

[4] The legislation and contracts giving rise to the issues in this proceeding go back some 130 years to a period just after Confederation relating to an undertaking given by the Government of Canada to build a railway to connect the province of British Columbia, which joined Confederation on May 16, 1871, to the railway system of Canada as it then was (the Undertaking). The Undertaking required the completion of the railway within 10 years from the date British Columbia joined the Canadian Confederation.

[5] Enabling legislation to permit Canada to fulfill the Undertaking was passed by Parliament as *The Canadian Pacific Railway Act*, 37 Victoria c. 14 (the *CPR Act*). The *CPR Act* described the railway to be constructed as being composed of four sections and two branch lines along a course and line to be approved by the Governor-in-Council. That railway was the Canadian Pacific Railway and is sometimes referred to as the "exempt main line".

[6] Between 1874 and 1881 the declared preference of Parliament was for the construction and operation of the Canadian Pacific Railway by means of an incorporated company, aided by grants of money and land, rather than by the Government of Canada. However, by 1880 the enactments of Parliament had not resulted in the construction of the Canadian Pacific Railway within the time contemplated by the Undertaking.

[7] Thus, on October 21, 1880 the 1880 Contract was entered into and duly executed by the Minister of Railways and Canals, Sir Charles Tupper, on behalf of Her Majesty the Queen in Right of Canada and by George Steven, and other persons (the Incorporators) on behalf of a company to be incorporated. The central purpose of the 1880 Contract was to bring about the construction of

the remaining portion and permanent working of the Canadian Pacific Railway. Annexed to the 1880 Contract was a draft charter to be granted to the Incorporators for a corporation to be incorporated by the name of The Canadian Pacific Railway Company.

[8] The *CPR Act* was enacted by the Parliament of Canada. It received Royal Assent on February 15, 1881, and was the mechanism by which the railway was finally built. The 1880 Contract was annexed as a schedule to the *CPR Act* which also included the draft charter of the corporation to be incorporated. That corporation was The Canadian Pacific Railway Company.

[9] Pursuant to the provisions of the *CPR Act*, the Parliament of Canada approved and ratified the 1880 Contract and authorized the Government of Canada to perform and carry out the conditions of the 1880 Contract.

[10] Section 2 of the *CPR Act* authorized the Governor General to issue to The Canadian Pacific Railway Company a charter in accordance with the terms of the 1880 Contract and that such charter, upon being published in the Canada Gazette, "shall have force and effect as if it were an Act of the Parliament of Canada and should be held to be an Act of incorporation within the meaning of" the 1880 Contract. The Canadian Pacific Railway Company Charter was published in full in the Canada Gazette on February 19, 1881, after having been issued by the Governor General on February 16, 1881.[2]

[2] The Canadian Pacific railway was finally completed some five years later. The famous last spike for the main exempt line of the CPR was driven by Donald A. Smith (later Lord Strathcona) on November 7, 1885.

[11] As noted above, clause 16 of the 1880 Contract contains the provision which is central to this action: "that the Canadian Pacific Railway Company **shall be forever free from taxation by the Dominion**, or by any Province hereafter to be established, or by any municipal corporation therein ..." (emphasis added) [the Exemption].

[12] Apparently, the Exemption has never been repealed, amended, abrogated or overwritten and CPR claims that it is still in full force and effect as a contractual, constitutional and statutory right. CPR claims in this action for relief from taxation as a matter of statutory and contractual right and regardless of whether the taxes in question are direct or indirect.

[13] That is the statutory and contractual background to this dispute.

[14] The specific tax issues in dispute relate to first, fuel taxes levied under Part 3 of the *Excise Tax Act* (*ETA*) and, second, to large corporation's tax (LCT) imposed under Part I of the *Income Tax Act* (*ITA*). The specific years in question with reference to the LCT are the years 2000 and 2005.

Fuel Tax

[15] The tax under the *ETA* is an indirect fuel tax. CPR pays invoices on fuel purchased for use in its operations from various manufacturers and suppliers. The fuel manufacturer or supplier pays as a component part of the per litre purchase price charged to CPR a fuel tax levied under part 3 of the *ETA*. It is to be remembered that the Exemption only applies with respect to the Canadian Pacific Railway as defined in the *CPR Act* and the 1880 Contract or the exempt main line.

[16] CPR uses fuel in other aspects of its business. Thus, as pleaded in the Claim, because of the difficulty in determining what portion of its fuel purchases are not taxable, CPR was granted permission by the Canada Revenue Agency (CRA), by letter dated July 27, 1990, to file directly for refunds of fuel tax overpaid on fuel subsequently determined to have been used under non-taxable conditions notwithstanding that the person paying such tax in the first instance was the manufacturer or supplier of the fuel (the CRA Authorization).

[17] CPR pleads that the CRA Authorization remains in effect. However, commencing on May 31, 2005 CPR filed the first of a series of refund claims to recover fuel tax paid on fuel used by it for the exempt main line. The refund claims related to the period June, 2003 to March, 2007. These claims were denied by CRA on the basis that CPR was not "the taxpayer under Part 3 of the *Excise Tax Act*".

[18] CPR filed notices of objections arguing that the fuel tax was an indirect tax on CPR on its exempt main line operations and that the Exemption applied to exempt CPR from both direct and indirect taxation. The claims and objections were filed without prejudice to the ability of CPR to generally exercise its rights under the Exemption. CRA has denied the objections filed by CPR on the basis that there is no provision in the *ETA* that permits the refunding of the fuel tax to CPR. Thus, CPR claims in this action an order for repayment to CPR of the amounts of tax wrongfully collected in connection with the purchases of fuel. It also seeks a declaration that CRA is not entitled to collect fuel taxes on fuel purchased, consumed or used in connection with the exempt main line of CPR.

LCT

[19] The second tax or the LCT is paid in respect of the "capital stock" of CPR. It is paid under Part 1.3 of the *ITA*. CPR has received refunds in respect of LCT for its 2001, 2002, 2003 and 2004 taxation years. However, there has been an overpayment in respect of its 2000 and 2005 taxation years. CPR seeks recovery of LCT in respect of both the 2000 and 2005 taxation years. In respect of the LCT, CPR also seeks a declaration that the Crown is not entitled to collect tax imposed under Part l of the *ITA* on income earned by CPR in connection with the operation of its railway as originally defined in the *CPR Act*. In its Claim, CPR pleads that the Exemption is one the of "rights" in the 1880 Contract that was transferred and invested in CPR by force of statute in accordance with section 2 of the *CPR Act* and sections 3 and 4 and the CPR Charter.

[20] CPR also alleges in the Claim:

> ***Constitutional Force and Effect of the Exemption***
>
> > [49] Further, pursuant to the *British North America Act, 1871* (now the *Constitution Act, 1871*) and pursuant to the *Constitution Act, 1982* sections 52(2) and Schedule, the Exemption was incorporated into and continues to be part of the Constitution of Canada, and is binding upon Canada and the provinces of Manitoba, Saskatchewan and Alberta, by virtue of the *Boundaries of Manitoba Act, 1881* (44 Vict. c. 16 (Canada)), the *Saskatchewan Act, 1905*, and the *Alberta Act, 1905* (4-5 Edw. VII, c. 3 (Canada)), such that any purported action that is inconsistent with the Exemption is, to the extent of the inconsistency, of no force or effect.

[21] While the phrase "*ultra vires"* does not appear in this paragraph, during the course of oral argument it was noted that in substance the allegation is that any taxation laws or taxes imposed on CPR are *ultra vires* given the statutory and constitutional background of the Exemption. In addition, it is alleged that the imposition of the two taxes in issue is a wrongful breach of the 1880

Contract, a breach of the express statutory provisions of *CPR Act* and the CPR Charter and the provisions of the Constitution of Canada.

Position of the Crown

[22] Simply put, the Crown argues that this claim should be stuck out "as it improperly attempts to circumvent the appeal procedures for tax assessments established by Parliament".

[23] The Crown argues that the Claim is an abuse of the process of this Court because Parliament has legislated a system of tax assessments and appeals which it is alleged this action seeks to circumvent. Apart from that general principle, the Crown also argues that the Federal Court cannot provide the remedy sought of a refund of any tax to CPR nor can this Court issue the declarations sought by CPR.

[24] There are three legislative provisions that the Crown relies on. First, there is section 18.5 of the *Federal Courts Act* which it is argued precludes any dealings with this matter and the Federal Court. Section 18.5 provides as follows:

> Exception to sections 18 and 18.1
>
> 18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.
> 1990, c. 8, s. 5; 2002, c. 8, s. 28.

[25] Second, section 12 of the *Tax Court of Canada Act* (*TCCA*) sets out the jurisdiction of the Tax Court as follows:

> 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.

[26] Third, the Crown also relies upon sections 68, 68.01 and, 71 and particularly 72 of the *ETA*. Section 72 (9) provides as follows:

> Determination valid and binding
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> (9) A determination under subsection (4), including a determination varied under section 81.17, subject to being varied or vacated on an objection or appeal under this Part and subject to an assessment, shall be deemed to be valid and binding notwithstanding any irregularity, informality, error, defect or omission therein or in any proceeding under this Act relating thereto.

[27] The Crown argues that the net effect of all of these provisions is that there is a statutory mechanism for the recovery of monies paid under the *ETA* and unless that is followed there is no right of recovery in this action.

[28] To further buttress its position, the Crown points to a number of authorities to the effect that the *ITA* combined with the *TCCA* provide a complete code for the determination of tax assessments.

In particular, the Crown relies upon the Supreme Court's *obiter dictum* in *Canada v. Addison & Leyen Ltd.* [2007] 2 S.C.R. 793 at para. 11 as follows:

> [11] The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims …. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament …
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> [see also *Water's Edge Village Estates (Phase II) Ltd. v. The Queen*, 94 D.T.C. 6284 (FCTD) at 6285]

[29] In essence, any claim for repayment of tax cannot be had in this action, so argues the Crown, because the Federal Court does not have the jurisdiction to compel the Minister to repay assessed tax based on a claim of statutory exemption.

Position of CPR

[30] CPR argues in essence that the 1880 Contract exempts CPR from taxation as a matter of contractual, statutory and constitutional rights regardless of whether the taxes in question are direct or indirect. This is an issue that does not relate to assessments or the provisions of the *ITA* or *ETA per se* but rather creates rights which CPR can pursue in this Court. Thus, it is argued there is no impermissible circumvention of the appeal processes or refund processes relating to assessments under the *ITA* or to refunds under the *ETA*.

[31] CPR claims a unique status arising from the Exemption that is enshrined in statute and any attempt to assess tax against CPRC amounts to an *ultra vires* tax.

Issues

[32] This motion raises a number of issues as follows:

(a) Should the action be struck because the Federal Court lacks jurisdiction by virtue of section 18.5 of the *Federal Courts Act* and is therefore an abuse of process?

(b) Is CPR's claim for refunds of any tax by way of action in the Federal Court bereft of any chance of success because of the provisions of the *TCCA*?

(c) Can CPR obtain declaratory relief in this Court from the collection of future taxes?

[33] In my view, for the reasons set out below, these issues should be resolved in favour of CPR.

Discussion

[34] The Crown's motion to strike is founded on Rule 221(1)(a) and (f) which reads as follows:

> 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,
>
> (f) is otherwise an abuse of the process of the Court,
>
> and may order the action be dismissed or judgment entered accordingly.

[35] On a motion to strike it is first necessary to consider the tests to be applied. It is generally accepted that in order to strike a claim it must be plain and obvious that the case is bereft of any chance of success or discloses no reasonable cause of action [*Hunt v. Carey*, 1992 S.C.R. 959].

[36] It is also well-settled that a novel cause of action should not be struck at this stage. As was noted in *Apotex Inc. v. Eli Lilly and Company*, 2012 ONSC 3808 (CanLII), per J. Macdonald J.:

> ... The fact that the law has not yet recognized a particular cause of action is not determinative on a motion to strike. The law is not static and unchanging. It is evolving continuously to meet the needs of a dynamic society. In dealing with novel claims on a motion to strike, the Court must ask whether, assuming the facts pleaded to be true, there is a reasonable prospect that the claim will succeed. As McLachlin C.J.C. held in *R v. Imperial Tobacco Canada Limited* (*supra*) at para. 21, "(t)he approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial."

[37] The facts contained in the pleading must be accepted as correct unless it is manifest that they cannot be proved [see *Operation Dismantle Inc. v. Canada* (1985) 1 S.C.R. 441 at para. 27]. Further, this Court and the Federal Court of Appeal have both observed that a statement of claim should only be struck in the clearest and most obvious of cases [see *Apotex Inc. v. Syntex Pharmaceuticals Int. Ltd.*, 2005 FC 1310; affirmed 2006 FCA 60, para. 33].

Refund of Tax

[38] As noted, the Crown argues that no refund of tax can be had in this action based on section 18.5 of the *FCA*. The Crown argues that the *TCA* and the *ITA* taken together create a complete code dealing with appeal rights available to parties regarding their payment of taxes. CPR concedes that in the absence of the Exemption, which they characterize as a statutory, constitutional and legislative right, CPR would be restricted to pursue recovery in the ordinary course by way of objections and ultimately a claim in the Tax Court. The meaning, extent, and application of the Exemption are central to the claims made by CPR in this action.

[39] The *CPR Act* has been considered in prior cases before the courts. However, the Exemption appears not to have yet been interpreted within the constitutional fabric of Canada. The cases which have considered the *CPR Act* to a large degree have observed the extraordinary nature of the powers that were granted to the CPR in exchange for completing the railway. For example, in *Canadian Pacific Limited v. Matsqui Indian Band*, [2001] F.C. 325 (CA) 1, Marceau, J.A. makes the following observations regarding the *CPR Act*:

> My first comment is simple enough. It is perhaps more important with respect to the *CPR Act* than with most other pieces of legislation that one come to it bearing in mind that very special historical circumstances in which it came into being. My colleague, in his reasons, is clear enough in this respect and I need not go into it in detail. It will not be useless, nevertheless, to refer again to the preamble to the Act which speaks: of the commitment taken by the federal government in the act of union bringing the colony of British Columbia into Canada to construct a railway that would connect the seaboard of the new province with the railway system of the rest of the country; of the failure of the Government to satisfy its obligation within the time frame of ten years that had been contemplated; of the perceived necessity to do all that was required to complete what had been commenced; and finally, of the direct involvement of the good faith and the honour of the Government in finding, at last, a viable solution. **That a piece of legislation passed under such circumstances was meant to produce extraordinary effects should surprise no one.** In delivering judgment in the *Vancouver (City) v. Canadian Pacific Railway*, the Supreme Court was quite clear to that effect:
>
> > **The object of …[An Act Respecting the Canadian Pacific Railway Act] … plainly was … to give the company incorporated for the purpose of this great public national work extending over the continent … much greater powers and privileges than were given to the railway companies of purely commercial character constructed under the provisions of the Railway Act, 1879…**
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> And again, in Canadian Pacific Railway v. James Bay Railway, Girouard J., after noting the failure of earlier legislation and other efforts to meet the obligation imposed by the Terms of Union, wrote:

> As it may easily be understood from the past experience **more extensive and, in fact, unprecedented powers were demanded and obtained**. To do so **the whole policy of the country as expressed in the *Railway Act of 1879*, had to be set aside and a new and exceptional one adopted**."[Emphasis added]

[40] As the full scope and breadth of the Exemption has yet to be interpreted by a court it is therefore a novel proceeding. The words "forever free from taxation" will have to be interpreted in light of the legislative history of that provision. One interpretation suggested by CPR was that any purported restriction or limitation in a federal statute, such as the *ITA* or the *ETA*, which limits recovery of the amounts imposed as a tax is of no force in effect given the constitutional and contractual natural of the Exemption. A further interpretation could be that the CPR does not bear the economic burden of any taxation nor is it subject to the procedural burdens and limitations contained within the taxation regime. These are matters of statutory interpretation flowing from the legislative history of the *CPR Act* and its application.

[41] Given the varying interpretations of the Exemption including the interpretation that would render section 12 of the *TCCA* of no force in effect insofar as it affects CPR, one is hard pressed to conclude that the claim of CPR is bereft of any chance of success. The claim respecting overpayment of taxes engages more than determining the correctness of an assessment or a refund arising from an assessment. The case goes to the very heart of the ability of the Crown to collect any direct or indirect tax relating to the exempt main line of CPR's business. It is a claim that has been founded in breach of contract, statutory entitlement and interpretation and constitutional principles.

[42] While the Crown vigorously argues that this Court cannot order a repayment of taxes, the argument, in my view, misses the point. It is not a refund of assessed taxes that is in dispute but rather the seminal issue of whether any taxes collected are unconstitutional or otherwise *ultra vires*. Again, that is not an assessment issue. It falls within the scope of the law of restitution as developed by the Supreme Court of Canada in *Kingstreet Investments Ltd. v. New Brunswick*, [2007] 1 S.C.R. 3. In that case, the Supreme Court of Canada recognized a unique public law remedy which forms part of the law of restitution.

[43] *Kingstreet* concerned corporate tax payers which had been operating a number of night clubs in New Brunswick and which were licensed to sell alcoholic products. The New Brunswick Provincial Liquor Corporation collected a user charge in addition to the retail price of the alcoholic beverages which were purchased for sale in the night clubs. The corporations challenged the validity of the user charge and sought reimbursement of the amounts which they had paid over many years together with compound interest.

[44] The Court of Queens Bench of New Brunswick declared the user charge to be an unconstitutional indirect tax but for various reasons denied recovery of that tax to the corporations. The main argument was that the corporate tax payers had passed on the user charge to their customers by way of increased prices on the alcoholic beverages and thus the "passing on" defence was an answer to the corporate tax payers' claim for unjust enrichment. The New Brunswick Court of Appeal in its majority decision granted the corporate tax payers' restitution with respect to monies paid from the time they first commenced legal proceedings to declare the tax *ultra vires*.

[45] On further appeal to the Supreme Court of Canada, Bastarache, J. described the issue and the approach to be taken as follows:

> [12] This appeal concerns whether restitution is available for the recovery of monies collected under legislation that is subsequently declared to be *ultra vires*. For the reasons given below, I find that restitution is generally available. I agree with Robertson J.A. that there is no general immunity affecting recovery of an illegal tax. I would, however, decide the case on the basis of constitutional principles rather than unjust enrichment. An unjust enrichment analysis is ill-suited to deal with the issues raised by *ultra vires* taxes. The Court's central concern must be to ensure the constitutionality of fiscal legislation. Moreover, the availability of suspended declarations of invalidity as ordered in *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, and the possibility of retroactive ameliorating legislation are sufficient to guard against the possibility of fiscal chaos. I would also reject the passing-on defence raised by the Crown in this case. Accordingly, I would allow the appeal in part.
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> [13] This case is about the consequences of the injustice created where a government attempts to retain unconstitutionally collected taxes. Because of the constitutional rule at play, the claim can be dealt with more simply than one for unjust enrichment in the private domain. Taxes were illegally collected. Taxes must be returned subject to limitation periods and remedial legislation, when such a measure is deemed appropriate. As will later be discussed, no passing-on defence should be entertained.
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> [14] The Court's central concern must be to guarantee respect for constitutional principles. One such principle is that the Crown may not levy a tax except with authority of the Parliament or the legislature: *Constitution Act, 1867*, ss. 53 and 90. This principle of "no taxation without representation" is central to our conception of democracy and the rule of law. As Hogg and Monahan explain, this principle "ensures not merely that the executive branch is subject to the rule of law, but also that the executive branch must call the legislative branch into session to raise taxes" (P. W. Hogg and P. J. Monahan, Liability of the Crown (3rd ed. 2000), at p. 246. See also P. W. Hogg, Constitutional Law of Canada (loose-leaf ed.), vol. 2, at pp. 55-16 and 55-17; Eurig, at para. 31, per Major J.).

Finally, Bastarache, J. concluded that:

> Restitution for *ultra vires* taxes does not fit squarely within either of the established categories of restitution. The better view is that it comprises a third category distinct from unjust enrichment. Actions for recovery of taxes collected without legal authority and actions of unjust enrichment both address concerns of restitutionary justice, but these remedies developed in our legal system along separate paths for distinct purposes. The action for recovery of taxes is firmly grounded, as a public law remedy in a constitutional principle stemming from democracy's earliest attempts to circumscribe government's power within the rule of law. Unjust enrichment, on the other hand, originally evolved from the common law action of *indebitatus assumpsit* as a means of granting plaintiffs relief for quasicontractual damages (Maddaugh and McCamus, at p. 1-4; Goff and Jones, *The Law of Restitution* (4th ed. 1993), at p. 7; *Peel*, at pp. 784 and 788, *per* McLachlin J.).

[46] Thus, on the facts of this case, if the interpretation of the *CPR Act*, the 1880 Contract and consideration of the constitutional principles result in a finding that the collection of taxes from the business of CPR relating to the exempt main line, either direct or indirect, is *ultra vires* then the public law remedy described by Bastarache, J. would apply and CPR would be entitled to recovery of those taxes. That is within the jurisdiction of this Court as it is not a matter of assessment but one which goes to the ability to collect a tax in the first place from CPR in these circumstances.

[47] The Crown sought to rely on a number of cases which they argued were similar to this case and which relieved this court of jurisdiction. In particular, the Crown relied on the Federal Court of Appeal's decision in *Canada v. Merchant Law Group*, [2010] FCA 184. In that case, the Federal Court of Appeal made the following observations regarding *Kingstreet* and why the plaintiff in *Merchant* could not assert the claim in this Court. The Federal Court of Appeal observed as follows:

> [21] In summary, in *Kingstreet*, the Supreme Court did not create a new, sweeping constitutional remedy to recover tax assessed under a misapplication or misinterpretation of a taxing statute. It certainly did not create a new, sweeping constitutional remedy that would allow aggrieved taxpayers to bypass all of the legislative schemes in force across the country that govern the recovery of tax assessed under a misapplication or misinterpretation of a taxation statute. Rather, the Supreme Court based the taxpayer's recovery on the common law cause of action for restitution, changing the analysis somewhat to reflect the fact that an *ultra vires* taxing provision was involved.
>
> [22] The Court of Appeal in *Sorbara*, *supra*, interpreted *Kingstreet* the same way. It held that *Kingstreet* does not create a constitutional right in taxpayers to recover tax assessed under a misapplication or misinterpretation of a taxation statute. It held that such recovery must be done in accordance with applicable statutory provisions. I agree. As the appellants' claim does not seek the recovery of GST under an *ultra vires* provision, *Kingstreet* does not apply.

[48] Similarly, another case relied upon by the Crown is *Sorbara v. Canada (Attorney General)*, [2009] ONCA 506, leave to appeal refused [2009] S.C.C.A. No. 299. That case dealt with an allegation that GST was improperly being collected from law firms and that in certain circumstances, law firms were exempt from payment of GST on certain financial services provided. The action was dismissed. On appeal to the Ontario Court of Appeal, the Court dealt with the *Kingstreet* argument as follows:

> [3] The appellants sought to invoke the constitutional jurisdiction of the Superior Court, claiming that their cause of action alleged unconstitutional conduct by the taxing authorities. **The dispute as framed in the amended Statement of Claim does not challenge the constitutionality** of Part IX of the *Excise Tax Act*…., **but rather contends that on a proper interpretation of the provisions of Part IX**, the appellants are exempt from payment of the GST in respect of certain financial services provided to them. …. **In short, the claim as framed raises questions of statutory interpretation. The claim as framed does not raise questions of the *vires* of the Act or its compliance with s. 53 of the *Constitution Act, 1867*.**

…..

> [5] **We do not read *Kingstreet* as creating a constitutional cause of action available to a taxpayer whenever he or she claims a right to recover tax assessed under a misapplication or misinterpretation of a taxing statue**. Like the motion judge, **we do not characterize the appellants' claim as constitutional in nature**. It follows that the appellants cannot rest their assertion of jurisdiction in the provincial Superior Court on the undoubted and unchallenged authority of the provincial Superior Court to adjudicate constitutional claims. [emphasis added]

[49] This case was argued as reinforcing the Crown's position that the *ETA* provides a complete statutory framework with respect to a taxpayer's claim for rebate paid under Part 9 of the *ETA*. However, the case is distinguishable from the current action because this case does not deal with "a right to recover tax assessed under a misapplication or misinterpretation of a taxing statute" as noted by the Court. Rather, this case concerns whether a contract has been breached; whether or not the taxes are constitutional; and whether the *ETA* or *ITA* has any application to CPR given the historical background. On similar grounds, *Merchant Law Group* is also distinguishable.

[50] The Crown also relied heavily on the case of *Addison & Leyen* as quoted above for the proposition that caution must be exercised in permitting any encroachment of the Tax Court jurisdiction by virtue of the carefully developed system of tax assessments and appeals. However, *Addison & Leyen* does not completely proscribe tax issues from being heard in courts other than the Tax Court. As was noted in *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue et al.*, 2012 FC 651:

> [18] In essence, the Supreme Court determined that as the case actually turned on an interpretation of section 160, judicial review was not available "on the facts of this case". [par. 9] This was because the delay which gave rise to the allegation of abuse was essentially a limitation period argument which the Federal Court of

> Appeal had read into section 160. Such a limitation period is not found in section 160. The Supreme Court adopted the analysis of Justice Rothstein of the Federal Court of Appeal (as he then was) to the effect that the circumstances of the transactions in issue in the case make clear "that Parliament intended that there be no applicable limitation period and no other condition on when the Minister might assess." [par. 92]
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> **Notably, the Supreme Court went on to observe that this did not mean that the Minister's discretion to assess is "never reviewable" [par. 10] it was just on the specific facts of the applicant's case that it was not. Judicial review is available "provided the matter is not otherwise appealable" and can "control abuses of power" and "abusive delay". [par. 8]**
>
> [20] *Addison & Leyen* is a frequently cited case and generally stands for the proposition that tax assessment matters must be brought in the Tax Court of Canada. . . .
>
> [21] There are three important points to be taken from *Addison & Leyen*. First, the decision of the Supreme Court turned on the unique facts of the case. Second, the Minister is part of the group of decision-makers that are covered by section 18.5 of the *Federal Courts Act* meaning a federal board, commission or other tribunal. Third, judicial review is available of a decision of the Minister on condition that there are no other avenues of appeal, which can include such matters as abuse of power or abusive delay. . . .
> [emphasis added]

[51] Notably, *Addison & Leyen* was a judicial review proceeding not an action for breach of contract and breach of a statutory scheme put in place to complete the railway. It also did not involve allegations of legislative and constitutional entitlement. Finally on this point, there appears to be no appeal route under the *ETA* for CPR to recover the Fuel Tax which it alleges was improperly collected.

[52] Similarly, the interpretation of the Exemption within the constitutional framework within which it arose applies equally to both the claim for indirect tax Fuel Tax under the *ETA* and the LCT under the *ITA*.

Declaratory Relief

[53] With respect to the declaratory relief, the position of the Crown is that this Court cannot grant such declaratory relief because in part it is a declaration that prevents a Minister from carrying out their mandated jurisdiction to implement the laws of Canada. The Minister must enforce the ETA and ITA. There are two answers to this submission. First, if the ambit of the Exemption is such that any claim for taxes against CPRC are void and of no effect and essentially *ultra vires* then any declaration to that effect simply clarifies the mandate of the Crown in collecting taxes qua CPR. Second, this Court has the jurisdiction to issue a declaration.

[54] For example, such declaratory relief was allowed to stand on a motion to strike in *Dene Nation v. Canada* 1992 CarswellNat 301 (CA). In that case the Crown argued that certain declaratory relief sought by the plaintiff regarding the income of band members and an Exemption for tax could stand. The Court made the following observation:

> [The Crown's] reasoning would be compelling if the plaintiffs were seeking by their action to set aside or vary income tax assessments. But that is not what they claim. **They merely pray for a declaration that certain kinds of income be declared to be exempt from tax and that the tax they paid on that income be refunded. As they are not attacking any assessments, section 29 [the predecessor of current s. 18.5] has no application here.**
>
> …

> [The Crown] also argued that, in any event, the jurisdiction of the Court to entertain the plaintiffs' action is impliedly taken away by the *Income Tax Act*… I do not agree. I do not see anything in the Act which limits the jurisdiction of the Trial Division, in an appropriate case, to issue a declaration as to the taxability of certain revenues or to order the repayment of taxes that the Minister unduly retains. [emphasis added]

[55] In support of their position that this Court has no jurisdiction to grant the declaratory relief, the Crown also relies on a sequence of other cases in particular *Saugeen Indian Band v. Canada* [1989] 3 FC 186. That action was for a refund of federal sales tax paid on certain commodities. The particular commodities had been purchased for use on an Indian reserve. The *ETA* imposed a sales tax on the sale price of all goods manufactured or imported or sold in Canada. It is an indirect tax in that it is expected that the taxpayer will recuperate the amount of tax paid in the prices charged to the next purchaser.

[56] The issue was whether or not this indirect tax should apply and whether a refund should be given to the Indian Band involved as section 86of the *Indian Act* exempts the personal property of an Indian or Indian Band situated on a reserve from taxation. In its decision the Court determined that the tax was not levied with respect to the personal property of an Indian or Indian Band. Further there was no legal basis for a refund as there was no express Exemption for Indian Bands and Indians in the *ETA*. Notably, this was a case that was pursued in the Federal Court.

[57] While it is not abundantly clear from the Claim that an *ultra vires* argument is being made founded on constitutional grounds, on statutory interpretation and breach of contract principles, it is clear from the argument of this motion and the written representations of CPR that indeed the constitutionality of the *ETA* and the *ITA* qua CPR are clearly in dispute.

[58] Finally, the key distinguishing features of the Claim is the 1880 Contract. As a matter of contract CPR claims that no tax can be collected. In issue is whether the assessments and the regime for dealing with assessments trump the statutory and contractual scheme enacted by Parliament to ensure the completion of the railway. This is an issue which is neither an abuse of process nor can it be said to be bereft of any chance of success.

[59] While the Crown raised some other cases in support of their position, a consideration of those cases does not provide grounds upon which to strike this claim as being bereft of any chance of success.

[60] However, the Claim requires further clarity to enable the Crown to plead and understand fully the case it has to meet. The Written Representations of CPR on this hearing provided the detailed nature of the relief sought and the grounds giving rise to that relief. Thus, as counsel for CPR agreed at the hearing, the heads of relief should be clarified by incorporating allegations from paragraph 49 of the Claim which was conceded as being an "*ultra vires*" claim. Further, the "*Kingstreet*" allegation for restitution as articulated during argument should be set out as a basis for recovery in the Claim. This will enable the Crown to plead and provide a better understanding of the scope of the claims.

[61] In the result, the motion is dismissed but subject to the amendments directed. Given the result, and in exercising the discretion granted by Rule 400 (1) of the *Federal Courts Rules*, the costs of this motion shall be in the cause.

ORDER

THIS COURT ORDERS that:

1. The motion is dismissed.

2. The Plaintiff shall amend the Further Amended Statement of Claim in accordance with these reasons within 30 days of the date of this Order.

3. All timelines relating to the conduct of this action are extended accordingly.

4. In the event there are any issues arising from this Order a case conference may be requested by any of the parties.

"Kevin R. Aalto"
Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1359-07
STYLE OF CAUSE:	CANADIAN PACIFIC RAILWAY COMPANY v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 10, 2012
REASONS FOR ORDER AND ORDER:	KEVIN R. AALTO
DATED:	AUGUST 29, 2012

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