Federal Court Cour fédérale

Date: 20160720

Docket: T-2547-14

Citation: 2016 FC 836

Ottawa, Ontario, July 20, 2016

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

ROBBIE DICKSON and RAINBOW TOBACCO G.P.

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, LISE OUELLETTE, RONALD JEAN-LÉGER, DENIS BEAUSOLEIL, VLADIMIR DESRIVEAUX, STAN LOACH and RCMP OFFICERS JANE and JOHN DOE

Defendants

JUDGMENT AND REASONS

I. Overview

[1] The Plaintiffs, Robbie Dickson and Rainbow Tobacco G.P., appeal an order of Prothonotary Richard Morneau, dated August 5, 2015, striking their amended statement of claim against all the Defendants except Her Majesty the Queen in Right of Canada. The scope of their

appeal concerns only the Canada Revenue Agency [CRA] employees, Lise Ouellette, Ronald Jean-Léger, Denis Beausoleil, Vladimir Desriveaux and Stan Loach, and the Royal Canadian Mounted Police [RCMP] officers Jane and John Doe [collectively referred to as the Individual Defendants].

[1] The underlying action arises from a refusal by the Minister of National Revenue to renew Rainbow's federal tobacco manufacturing licence, which it held from 2004 until 2011. The Plaintiffs commenced an action against Her Majesty the Queen, the Attorney General of Canada, the Minister of National Revenue, the RCMP, Commissioner Bob Paulson and the Individual Defendants seeking fifty million dollars ($50,000,000) in moral damages, an undetermined amount in material damages, one million dollars ($1,000,000) in punitive, exemplary and aggravated damages and damages pursuant to subsection 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[2] Her Majesty the Queen and the Attorney General of Canada brought a motion to strike the Plaintiffs' amended statement of claim against all of the Defendants, except for Her Majesty the Queen. They argued that the Federal Court does not have jurisdiction to entertain the claim against the Commissioner of the RCMP and the Individual Defendants because the claim against them is founded on principles of liability grounded in provincial law and only incidentally requires the application of federal law. They also moved to strike the Attorney General of Canada, the RCMP and the Minister of National Revenue from the action on the basis that the action should only be directed against the Crown. In response, the Plaintiffs argued that the

Federal Court has jurisdiction to entertain the claim against the Individual Defendants on the basis that the claim, as pleaded, is governed by a detailed framework of federal law that is essential to the disposition of their case and which nourishes the statutory grant of jurisdiction to the Federal Court.

[3] The Plaintiffs' motion proceeded in writing only. Prothonotary Morneau granted the motion to strike and struck out the Plaintiffs' amended statement of claim as against all of the Defendants with the exception of Her Majesty the Queen.

[4] The main issue in this appeal involves the determination of whether it is plain and obvious that the Federal Court lacks jurisdiction to entertain the Plaintiffs' claim against the Individual Defendants.

[5] For the reasons set out below, I have concluded that the appeal should be allowed.

II. <u>Background</u>

[6] The Plaintiffs allege the following facts in their amended statement of claim.

[7] Robbie Dickson is a Mohawk member of the Kahnawá:ke community and a status Indian within the meaning of the *Indian Act*, RSC 1985, c I-5. He is a partner of Rainbow Tobacco G.P., a general partnership established under the laws of Québec.

[8] In July 2004, the CRA granted Rainbow a federal licence to manufacture tobacco products pursuant to the *Excise Act, 2001*, SC 2002, c 22. The licence permitted Rainbow to import, transport, possess, store, sell and manufacture tobacco products. The tobacco manufacturing licence issued to Rainbow by the CRA was renewed each year from 2005 to 2011. The CRA confirmed in correspondence to Rainbow that it did not require Rainbow to hold any provincial tobacco licences as a condition of its federal licence because it was producing products for sale on the reserve.

[9] In addition to manufacturing tobacco products for sale in Kahnawá:ke, Rainbow also sold its products to First Nations on different reserves across Canada. The CRA expressed to Rainbow that it was its position that the provinces had no jurisdiction over Rainbow's business activities and that Rainbow was not in contravention of any provincial laws.

[10] In September 2010, the Ontario Provincial Police and the RCMP seized a large quantity of Rainbow's manufactured tobacco products while it was being transported between Kahnawá:ke and other First Nations in Ontario. Mr. Dickson was charged with violations of Ontario's *Tobacco Tax Act*, RSO 1990, c T 10, for failing to possess provincial tobacco permits.

[11] A few months later, the RCMP and the Alberta Gaming and Liquor Commission seized a much larger quantity of Rainbow's manufactured tobacco while in storage on the Montana Cree First Nation in Alberta. The RCMP charged Mr. Dickson with violations of Alberta's *Tobacco Tax Act*, RSA 2000, c T4, for failing to possess provincial tobacco permits.

[12] As a result of the seizures conducted in Ontario and Alberta, Rainbow's tobacco products became stale and unmarketable.

[13] In November 2011, Rainbow applied to the CRA for the renewal of its tobacco manufacturing licence for 2012. By letter dated December 15, 2011, the Defendant Lise Ouellette advised Rainbow that its licence would not be renewed after December 31, 2011. The grounds provided were: 1) Rainbow's failure to comply with provincial legislation regarding the taxation or control of tobacco products as required under subparagraph 2(2)(*b*)(i) of the *Regulations Respecting Excise Licences and Registrations*, SOR/2003-115 [the Regulations]; and 2) Rainbow had insufficient financial resources to conduct its business in a responsible manner, as per the requirements of subparagraph 2(2)(*c*)(ii) of the Regulations.

[14] The Plaintiffs allege in their amended statement of claim that the CRA Individual Defendants were required to exercise reasonable diligence in the tobacco licensing process pursuant to the *Excise Act, 2001* and related regulations, and that they owed a fiduciary duty to Mr. Dickson as a result of his alleged Aboriginal right to trade in tobacco with other First Nations people. The Plaintiffs allege the following faulty conduct committed by the CRA Individual Defendants:

i) the failure to respect the rules of behaviour incumbent upon them;

ii) the failure to exercise the due diligence required by their position;

iii) the failure to provide relevant information to Rainbow as required by their position;

iv) the failure to honour the agreements and understandings between the CRA and Rainbow;

v) the provision of misleading or inappropriate advice to Rainbow regarding federal and provincial licensing requirements and Rainbow's compliance with those requirements;

vi) improperly charging excise duties that were not owed by Rainbow;

vii) making decisions with respect to issuing a tobacco licence to Rainbow based on inappropriate or improper factors;

viii) the failure to acknowledge Mr. Dickson's Aboriginal rights and to act in accordance with the Honour of the Crown;

ix) the breach of Rainbow's rights to natural justice and procedural fairness.

[15] As for the unnamed and yet to be identified RCMP officers, Jane and John Doe, the Plaintiffs allege that they had a duty to engage in the investigation of Rainbow's business in a competent and professional manner. The Plaintiffs state that the officers conducted a negligent

investigation, orchestrated unlawful seizures of merchandise, inappropriately lobbied against the renewal of Rainbow's tobacco licence, were incompetent to carry out the duties of police officers and failed to exercise the standard of care required by their position.

[16] The Plaintiffs also allege in their amended statement of claim that both the CRA and the RCMP Individual Defendants committed misfeasance in public office and acted in a manner that is inconsistent with their duties as outlined in the *Canada Revenue Agency Act*, SC 1999, c 17 and the *Excise Act, 2001*, as well as the duty of good faith incumbent upon them pursuant to articles 6 and 7 of the *Civil Code of Québec*, CQLR c C-1991. In support of their allegation, the Plaintiffs state that the Individual Defendants intentionally and/or recklessly engaged in a course of unlawful conduct in advocating and/or participating in the CRA's refusal to renew Rainbow's licence based on improper and discriminatory grounds. The Plaintiffs also state that the Individual Defendants knew or were reckless to the fact that the taxation provisions of the *Excise Act, 2001* were inoperative as against the Plaintiffs because of their conflict with section 87 of the *Indian Act*.

[17] The Plaintiffs also allege that the Individual Defendants were reckless to the fact that the Plaintiffs' conduct in manufacturing, transporting and distributing cigarettes manufactured on reserve to Indians and bands is a lawful exercise of Aboriginal rights. As such, the Individual Defendants interfered with the Plaintiffs' economic interests and lawful exercise of Aboriginal rights.

[18] Finally, the Plaintiffs allege that the Individual Defendants unlawfully conspired for the purpose of causing economic harm to the Plaintiffs and frustrating Mr. Dickson's Aboriginal rights.

[19] In addition to their allegations against the Individual Defendants, the Plaintiffs allege that the Defendant Her Majesty the Queen is liable, pursuant to section 3 of the *Crown Liability and Proceedings Act*, RSC 1985 c C-50, in respect of damages resulting from the Individual Defendants' violations of the *Canadian Charter of Rights and Freedoms*, the *Canadian Bill of Rights*, SC 1960, c 44 and the Québec *Charter of Human Rights and Freedoms*, CQLR c C-12.

III. Analysis

A. *Standard of review*

[20] A discretionary order of a prothonotary shall not be disturbed on appeal unless the questions raised in the motion are vital to the final issue of the case, or the order is clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle of law or upon a misapprehension of the facts (*Merck & Co. v Apotex Inc.*, 2003 FCA 488 at para 19 [*Apotex*]; *Canada v Aqua-Gem Investments Ltd.*, [1993] 2 FCR 425 (FCA) at paras 67-68).

[21] This Court has held that where a defendant is successful in bringing a motion to strike, the decision is vital to the final issues of a case. In such circumstances, the Court will proceed to consider the appeal on a *de novo* basis (*Peter G. White Management Ltd v Canada (Minister of Canadian Heritage)*, 2006 FCA 190 at paras 33 to 36 [*Peter G. White Management*]; *Teva*

Canada Ltd. v Pfizer Canada Inc., 2014 FC 69, [2014] FCJ No 856 (QL) at para 24; *Bayer Healthcare AG v Sandoz Canada Incorporated*, 2007 FC 1068 at para 6).

[22] The Defendants submit that the removal of the Individual Defendants is not vital to the final issue of this case because the claim will continue against Her Majesty the Queen. The Defendants argue that the Crown is being sued for the same causes of action as the Individual Defendants and that if any of the Individual Defendants were found to have acted in a manner inconsistent with their public duties, the Crown would be vicariously liable for their actions.

[23] To the extent that the wrongs allegedly committed by the Individual Defendants flow from their duties as Crown servants, I agree with the Defendants that it is likely that the Crown would be vicariously liable. Pursuant to subparagraph 3(*a*)(i) of the *Crown Liability and Proceedings Act*, the Crown is liable in Québec for the damages caused by the fault of a servant of the Crown, and pursuant to subparagraph 3(*b*)(i) of the same Act, the Crown is liable in any other province in respect of a tort committed by a servant of the Crown. The Plaintiffs have acknowledged the Crown's liability for the damages committed by the Individual Defendants in paragraph 47 of their amended statement of claim.

[24] If, however, the alleged wrongs were found to be outside the performance of their duties or insufficiently connected to the Individual Defendants' employment, then the Crown would not necessarily be held vicariously liable. Although the Individual Defendants could be sued before the provincial courts, the removal of the Individual Defendants from this claim would put an end to the Plaintiffs' action against them in the Federal Court. The Federal Court of Appeal relied

upon the same rationale in *Peter G. White Management* at paragraph 35 to conclude that the removal of the individual defendants was vital to the final issue of the case.

[25] Even if I were to find that the removal of the Individual Defendants is not vital to the final issue of the case on the basis that the Crown would be held vicariously liable for the alleged wrongs committed by the Individual Defendants, I am nonetheless of the view that the second prong of the *Apotex* test has also been met. The Prothonotary's Order is based on a wrong principle in law and as such, it is clearly wrong.

[26] In finding that it was plain and obvious that the amended statement of claim could only be pursued in the Federal Court against the Defendant Her Majesty the Queen, Prothonotary Morneau stated that he adopted the reasons developed by the moving defendants in their representations in chief as well as their written representations in reply. In reply, they argued that the Federal Court lacked jurisdiction over the claim against the Individual Defendants on the basis that the presence of the Individual Defendants was not vital to the final issue of the case.

[27] The determination of whether the inclusion of a defendant is vital to the final issue of a case does not form part of the test to be applied in determining whether this Court has jurisdiction. As stated by the Supreme Court of Canada in *ITO-International Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752 at 766 [*ITO*], the essential requirements to support a finding of jurisdiction in the Federal Court are :

1) There must be a statutory grant of jurisdiction by Parliament;

2) There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction;

3) The law on which the case is based must be a "law of Canada" as the phrase is used in section 101 of the *Constitution Act, 1867,* 30 & 31 Vict, c 3.

[28] By adopting the Defendants' written representations without further explanation, Prothonotary Morneau incorporated a new requirement in the *ITO* test and for that reason, his Order is clearly wrong. Consequently, I am of the view that I must consider the motion to strike the Individual Defendants from the amended statement of claim on a *de novo* basis.

B. *Motion to strike under Rule 221(a) of the Federal Courts Rules*

[29] The test for striking an action pursuant to Rule 221(1)(*a*) of the *Federal Courts Rules*, SOR 98-106, with or without leave to amend, for lack of jurisdiction is the same as the one for striking a claim on the ground that the claim discloses no reasonable cause of action; it is a stringent one (*Hodgson v Ermineskin Indian Band No. 942,* [2000] FCJ No 313 at para 10 (FCA)). For such a motion to succeed, it must be "plain and obvious" that the action cannot succeed because it is bereft of any chance of success. The facts pleaded in the statement of claim must be presumed to be true and the burden of satisfying this high standard lies with the party seeking to strike the pleading (*Hunt v Carey Canada Inc,* [1990] 2 SCR 959 at 980; *R v Imperial Tobacco Canada Ltd,* 2011 SCC 42 at paras 17, 21 and 22).

[30] The Plaintiffs argue that it is not "plain and obvious" that their claim cannot succeed against the Individual Defendants. The Defendants argue the contrary.

[31] I now turn to the crux of the matter before this Court which is to determine whether it is plain and obvious that this Court does not possess jurisdiction to entertain the Plaintiffs' claim against the Individual Defendants.

C. *Jurisdiction of the Federal Court*

[32] As stated earlier, in order to support a finding of jurisdiction in the Federal Court it must be established that: (1) there is a statutory grant of jurisdiction by the federal Parliament; (2) there is an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; and (3) the law on which the case is based must be "a law of Canada" as the phrase is used in section 101 of the *Constitution Act, 1987* (*ITO,* at 766).

[33] The Defendants concede that the first requirement of the *ITO* test has been met in that paragraph 17(5)(*b*) of the *Federal Courts Act,* RSC 1985, c F-7 confers jurisdiction to the Federal Court over the acts and omissions of officers, agents or servants of the Crown. They argue however that the second and third requirements set out in *ITO* are not met in the case at hand.

[34] The issue is thus whether there is an "existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction" and whether it may constitute a "law of Canada".

[35] The Plaintiffs submit that the Federal Court of Appeal decision in *Peter G. White Management* is dispositive of the issue and is binding authority with respect to the jurisdiction of the Federal Court. In particular, the Plaintiffs rely on paragraphs 59 and 60 of the decision where the Federal Court of Appeal states that "the fact that a plaintiff's cause of action is in tort or in contract does not necessarily preclude the matter from federal jurisdiction" and that "when parties' rights arise under and are extensively governed by a 'detailed statutory framework', disputes may be adjudicated in the Federal Court". The Plaintiffs also rely on the earlier cases of the Federal Court of Appeal in *Oag v Canada*, [1987] 2 FC 511 (FCA) [*Oag*] and *Kigowa v Canada*, [1990] 1 FC 804 (FCA) (WL) [*Kigowa*] to support their argument that the Federal Court has jurisdiction over the Individual Defendants.

[36] The Plaintiffs argue that, as in those cases, there is a nexus between the Plaintiffs' rights and federal law. The rights at issue include first, a tobacco licence that is a creature of the *Excise Act, 2001* and has no existence outside that statute, and secondly, the Aboriginal rights of Mr. Dickson under the *Indian Act* and the *Constitution Act, 1867*. The legal relationship between the parties can be expressed either as that of federal tobacco licensee and licensor and/or enforcement body, or as a relationship between First Nation member and federal Crown agent. In either case, the very existence of the relationship is entirely a function of federal law emanating from the *Excise Act, 2001* and its regulations, the *Canada Revenue Agency Act*, the *Royal Canadian Mounted Police Act*, RSC 1985 c R-10, the *Indian Act*, and the *Constitution Act, 1982*. In summary, the Plaintiffs submit that the pith and substance of their claim is that the conduct of the Individual Defendants was not authorized by the federal laws under which they purported to act and the lawfulness of that conduct must be decided by reference to those statutes.

[37] The Defendants argue that the Plaintiffs' claim is in pith and substance one for damages arising from the alleged misuse of statutory powers and that there is no general body of federal law "covering the area of the dispute". The Defendants note that the Plaintiffs rely upon the *Civil Code of Québec* and the Québec *Charter of Human Rights and Freedoms*. As for the Plaintiffs' claim concerning Aboriginal title and the right to "sell and exchange tobacco with other First Nations", the Defendants argue that the Plaintiffs have not alleged an Aboriginal treaty right and are not seeking a declaration to that effect, in which case, such a declaration would have to be directed against the Crown and not the individuals. With respect to the Plaintiffs' argument concerning the Honour of the Crown, the Defendants submit that not all interactions between the Crown and Aboriginal peoples will engage this principle and in any event, the Honour of the Crown is not a cause of action in and of itself. In summary, the Defendants argue that the Plaintiffs' claim is in pith and substance based on provincial law and the fact that the claim incidentally requires the determination of a question of federal law does not bring the action within federal jurisdiction. There is no statutory cause of action for damages and there is no tort recognized in Canadian law arising from a statutory breach in and of itself.

[38] The issue of whether or not there is an "existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction" has been widely examined by the courts. The decisions are not always easy to reconcile, and as pointed out in *Peter G. White Management,* the issue of how much federal law is required to justify federal jurisdiction, particularly in the context of an action against Crown servants in tort, remains difficult to determine (*Peter G. White Management,* at para 60).

[39] In a number of cases, the Courts have struck out actions against Crown servants on the basis that the Federal Court did not have jurisdiction because the right to damages emanated from provincial tort law (*Pacific Western Airlines Ltd. v The Queen,* [1980] 1 FC 86 (FCA); *Stephens v The Queen,* (1982) 26 CPC 1 (FCA); *Braybrook v Canada,* 2005 FC 417; *Robinson v Canada,* [1996] FCJ No 1524 (QL); *Leblanc v Canada*, 2003 FCT 776).

[40] The Federal Court has also found in certain cases that it possesses jurisdiction over alleged torts committed by Crown servants. For example, in *Maguire v The Queen,* [1990] 1 FC 742, a fisherman alleged that he had been wrongly deprived of his commercial salmon fishing licence by the actions of two fisheries officers. The fisheries officers moved to be struck from the action for want of jurisdiction. This Court determined that the *Fisheries Act,* RSC, 1985, c F-14 constituted a detailed statutory framework sufficient to nourish the grant of jurisdiction to the Federal Court as it provided a detailed regulatory regime governing the terms and conditions for obtaining commercial salmon fishing licences.

[41] Following the decision of the Supreme Court of Canada in *ITO*, the Federal Court of Appeal appears to have gradually adopted a more expansive interpretation of this Court's jurisdiction over individual Crown servants or agents who are sued personally for alleged torts.

[42] Beginning in *Oag*, the Federal Court of Appeal found that the Trial Division (as it then was) had jurisdiction to entertain a claim in tort for false arrest, false imprisonment, assault and battery against two individual defendants who served as members of the National Parole Board. The plaintiff had been entitled to be released from prison on mandatory supervision; however,

due to the alleged actions of the defendants, he was detained. The Federal Court of Appeal observed that the *Parole Act,* RSC 1970, c P-2 and the *Penitentiary Act,* RSC 1970, c P-6 were the source of the plaintiff's freedom and concluded that the alleged torts were committed because the Plaintiff's right to remain free had been interfered with. In other words, the tort was dependant on a right which was created by federal law.

[43] Later, in *Kigowa*, an immigration officer was found to have been appropriately named as an individual defendant in an action for damages due to unlawful detention. In that case, the plaintiff was stopped by the officer after he jumped off a ship and entered Canada. He was detained on the basis that he was a danger to the public or would fail to appear, however he contested the officer's grounds for his detention. The Federal Court of Appeal found that the Court had jurisdiction over the claim as the plaintiff's right to be at liberty in Canada while awaiting an inquiry into his potential removal was governed by the *Immigration Act,* 1976, SC 1976-77, c 52. In concurring reasons, Justice Heald articulated the connection between the plaintiff's claim and the federal law as follows: "[i]f the torts were committed, it was because the plaintiff's right to remain free pursuant to the provisions of the Immigration Act were interfered with" (*Kigowa*, at para 18).

[44] Similarly, in *Canada v Smith*, 2002 FCA 348 [*Smith*], two individual defendants who served as RCMP officers were allowed to remain on the statement of claim as their presence met the requirements of the *ITO* test. The Federal Court of Appeal found that the essence of the plaintiff's claim was supported by an existing body of federal law, notably the *Witness Protection Program Act*, SC 1996, c 15. Under the terms of section 8 of that statute, a protection

agreement was deemed to include an obligation on the part of the Commissioner to take such reasonable steps as are necessary to provide the protection referred to in the agreement to the person protected. The plaintiff argued that he had fulfilled his obligations under the agreement and that as a result, the officers were responsible for his protection. The plaintiff sued the Crown and five RCMP officers personally for negligence, undue influence, and breach of fiduciary, statutory and contractual duties in relation to the plaintiff's rights under the *Witness Protection Program Act*. The Federal Court of Appeal found that the damage alleged consisted of the deprivation of rights under a federal statute and was purportedly caused by federal officers' abuse of their powers under that statute (*Smith,* at para 18).

[45] Finally, in *Peter G. White Management*, a claim against a Minister and three federal public servants was held to be within the jurisdiction of the Federal Court. The plaintiff was the assignee of a lease granted for use of a commercial ski area in Banff National Park. It asserted that the lease entitled it to the use of a gondola during the summer months. The Field Unit Superintendent of Banff National Park declined to issue the plaintiff a licence for such use on the basis that it was not in compliance with Banff National Park Management Plan that had been adopted and tabled in the House of Commons pursuant to a provision in the *National Parks Act*, 1985 RSC c N-14. In a statement of claim seeking damages against Her Majesty the Queen and other defendants including the CEO of Parks Canada and the Superintendent and Field Superintendent of the Banff National Park personally, the plaintiff made numerous allegations including breach of contract, tortious interference with business relations and abuse of public office. The essence of the claim was that the Crown, by enacting the Management Plan for Banff National Park which included a prohibition against summer operation of the plaintiff's gondola,

made it impossible for the plaintiff to obtain a business licence, and thus to have the quiet enjoyment of the leased premises, something to which the Crown had engaged itself contractually when it leased the land.

[46] While recognizing that the causes of action pleaded against the non-Crown defendants were common law torts, the Federal Court of Appeal found that the lease to operate the gondola in the summer months was a key element in each cause of action. Additionally, although the rights under the lease were contractual in nature, they had been created in a legal environment that was heavily regulated by federal legislation and which also established the parameters within which leases could be granted. The Federal Court of Appeal found that the plaintiff's rights under the lease were expressly made subject to applicable federal legislation and the need to obtain a licence and in particular, the *National Parks of Canada Businesses Regulations, 1998,* SOR/98-455, which dealt extensively with the licensing of business operations in national parks. The Federal Court of Appeal concluded that, on the facts of the case, the claim against the individual defendants was in "pith and substance" based on federal law, with provincial law being only incidental. Federal legislation respecting national parks, which governed leases and the operation of businesses, comprised a detailed statutory framework. The federal legislation upon which the Court relied to reach this conclusion consisted of the *National Parks Act*, the *Parks Canada Agency Act*, SC 1998, c 31, the *National Parks of Canada lease and Licence of Occupation Regulations,* SOR/92-25, and the *National Parks of Canada Businesses Regulations, 1998*.

[47] The requirements of the second branch of the *ITO* test were recently examined by the Federal Court of Appeal in *Canadian Transit Company v Windsor (Corporation of the City),* 2015 FCA 88 [*Canadian Transit Company*]. The issue to be determined in that case was whether the Federal Court had jurisdiction to entertain an application brought by *Canadian Transit Company* seeking a declaration to the effect that the city of Windsor's bylaws did not apply to its properties on the basis of the constitutional doctrines of interjurisdictional immunity and paramountcy. The Federal Court struck out the application because there was insufficient federal law in the proceeding to support its jurisdiction; however, the Federal Court of Appeal overturned this decision on appeal.

[48] In discussing the application of the second branch of the *ITO* test, the Federal Court of Appeal noted that the first step consists of assessing the nature of the proceeding, including what body of law will be necessary to determine the outcome of the case. The second step requires an assessment of whether overall, federal law will play a primary role, in the sense of being "essential to the outcome of the case and nourishing the statutory grant of jurisdiction" (*Canada Transit Company*, at para 29). The Court found that the provisions of the relevant federal statute would bear on the issue of whether *Canadian Transit Company* would be entitled to the declarations it was seeking. Upon review of several provisions in the statute, the Court found that federal law was essential to the determination of the proceedings (*Canada Transit Company*, at paras 34, 36) and that provincial law played only a subsidiary or incidental role. The Court also noted the different words and approaches used to describe the degree of federal law that is sufficient to support a finding of federal jurisdiction:

> [39] Different cases use different words and approaches to describe the degree of federal law that is sufficient. *ITO-Int'l*

> *Terminal Operators*, above, inquires into whether provincial law is only "incidentally necessary" to the federal law in the case (at pages 781-782). Other authorities start with the federal law and ask whether it bears upon the case. For example, one formulation is whether "the rights and obligations of the parties are to be determined to some material extent by federal law" or whether the cause of action "is one affected" by federal law: *Bensol Customs Brokers Ltd. v. Air Canada*, [1979] 2 F.C. 575 at pages 582-83, 99 D.L.R. (3d) 623 (C.A.). Yet another formulation is whether "the federal statute has an important part to play in determining the rights of the parties": *The Queen v. Montreal Urban Community Transit Commission*, [1980] 2 F.C. 151 at page 153, 112 D.L.R. (3d) 266 (C.A.).

[49] The Court then provided examples of cases involving elements of provincial law in which the Federal Court was found to have jurisdiction, including the *Peter G. White Management* decision to which I referred to earlier.

[50] The decision of the Federal Court of Appeal in *Canadian Transit Company* has been appealed to the Supreme Court of Canada. Leave was granted on October 8, 2015, and the appeal was heard on April 21, 2016; however no decision has yet been made. Until then, the principles emanating from the decisions of the Federal Court of Appeal remain the law.

[51] Having provided an overview of the principal decisions in which the Federal Court's jurisdiction has been considered, I now turn to the case at hand.

[52] The Plaintiffs' claim in damages essentially involves allegations of misuse of statutory powers by the Individual Defendants. The Courts have found that the rights arising from such misuse of power are common law torts which generally fall within provincial jurisdiction (*Stephens Estate v Canada*, [1982] FCJ No 114 at para 15). However, the examination of this

Court's jurisdiction does not end there. As stated by the Federal Court of Appeal in *Peter G. White Management*, the fact that the Plaintiffs' causes of action may be in tort, or in Québec, civil liability, does not necessarily preclude the matter from federal jurisdiction (*Peter G. White Management,* at para 59; *Rhine v The Queen,* [1980] 2 SCR 442 at 447). The Court must examine whether overall, federal law plays a primary role in the sense that it is essential to the outcome of the case and nourishes the grant of jurisdiction, or as stated in *Peter G. White Management*, whether the Plaintiffs' claim against the Individual Defendants is "in pith and substance" based on federal law and whether the rights arise under, or are extensively governed by, a detailed federal statutory framework (*Canadian Transit Company,* at paras 29 and 60).

[53] While the Plaintiffs' causes of action against the Individual Defendants may be based in civil liability and in tort, I am satisfied that the Plaintiffs' claim is "in pith and substance" that the conduct of the Individual Defendants was not authorized by the federal legislation under which they purported to act. I am also satisfied that the federal legislation provides a sufficiently detailed framework to nourish the Federal Court's jurisdiction and which is essential to the outcome of the case.

[54] The issuance of a licence authorizing the manufacture of tobacco products is governed by the *Excise Act*, *2001* and its Regulations, which both deal with the production and possession of tobacco products and are administered by the Minister of National Revenue. Parts 3 and 3.1 of the *Excise Act, 2001* are specifically dedicated to tobacco and establish its regulations, duties, special duties, excise warehouses and inventory tax. In terms of tobacco manufacturing licensing requirements, paragraph 14(1)(*d*) establishes the Minister's discretion to issue a licence and

paragraph 23(1)(*b*) provides that the Minister may refuse to issue a licence if he has reason to believe that the refusal is otherwise in the public interest. Subsection 23(3) of the *Excise Act, 2001* also stipulates that the Minister or his authorized representative can specify the activities that may be exercised under the licence and impose any conditions considered appropriate to carry-on the activities under the licence. The Minister can also require an applicant to provide adequate security in an amount that is determined in accordance with the Regulations.

[55] The Regulations also provide a detailed framework governing the issuance and cancellation of licences to manufacture tobacco. Specifically, subparagraph 2(2)(*b*)(i) provides that an applicant is eligible for a licence if they have complied with provincial law respecting the taxation of or control of tobacco products during the five years preceding the application. Section 5 establishes the amount and the type of security that must be provided by an applicant. Additionally, section 9 details the requirements for the renewal of a licence and sections 10 and 11 establish the conditions for suspending and cancelling a licence.

[56] The *Excise Act, 2001*, also sets out the role of the RCMP in the federal regulation of tobacco products. RCMP members are designated as “officers” under section 2 of the *Excise Act, 2001,* and as such they are entitled to enforce its provisions. Part 6 of the *Excise Act, 2001* is dedicated to the enforcement of the Act, and specifies the duties of officers and the scope of their enforcement responsibilities. In particular, section 260 sets out the responsibilities of an officer who conducts an inspection, section 261 details officers’ responsibilities regarding the custody and retention of seized goods and sections 264 to 266 provide for the return of seized goods upon

the payment of a security. Section 271 also provides for a certain procedure to be followed if the Minister decides that a penalty or seizure was imposed in error.

[57] The Plaintiffs also rely on paragraph 87(1)(*b*) of the *Indian Act* which provides that the "personal property of an Indian or a band situated on a reserve" is exempt from taxation. The Plaintiffs argue that because the partners of Rainbow are "Indians", they are not subject to tax on personal property, and that the taxation provisions under the *Excise Act, 2001* and related regulations are also inapplicable to tobacco products manufactured by Rainbow in Kahnawá:ke. They further argue that as a member of the Kahnawá:ke community, Mr. Dickson possesses an Aboriginal right to sell and exchange tobacco with other First Nations people pursuant to subsection 35(1) of the *Constitution Act, 1982*.

[58] The *Canada Revenue Agency Act* and the *Royal Canadian Mounted Police Act* are also alleged by the Plaintiffs to be applicable.

[59] That being said, there is also a provincial element to the Plaintiffs' claim. The Plaintiffs' licence was not renewed as a result of the charges which were brought against Mr. Dickson in Ontario and Alberta for failing to comply with their respective provincial tobacco tax acts. The Plaintiffs also rely on the duty of good faith found in articles 6 and 7 of the *Québec Civil Code*.

[60] In my view, the determination of whether the Individual Defendants are liable for wrongfully refusing to renew the Plaintiffs licence on the basis that they failed to comply with provincial legislation respecting the taxation of tobacco products, will ultimately depend on

whether the Plaintiffs are exempt from taxation pursuant to section 87 of the *Indian Act*. For this reason, I am satisfied that the Plaintiffs have successfully demonstrated that, on the basis of the amended statement of claim as pleaded, their claim is "in pith and substance" based on federal law and is governed by a detailed federal statutory framework essential to the outcome of the case.

[61] As for the third branch of the *ITO* test, the *Excise Act, 2001* and the *Indian Act* are federal legislation and clearly constitute a "law of Canada" as the phrase is used in section 101 of the *Constitution Act, 1867* (*Peter G. White Management,* at para 55).

[62] Accordingly, on the basis of the record before me, I am satisfied that it is not plain and obvious that this Court lacks jurisdiction to entertain the Plaintiffs' claim against the Individual Defendants.

[63] In light of my conclusion, it is not necessary for me to consider the Plaintiffs' other arguments in relation to the sufficiency of reasons, the failure to order an oral hearing on the motion to strike and whether leave to amend should have been granted.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The appeal is allowed;
2. The Individual Defendants Lise Ouellette, Ronald Jean-Léger, Denis Beausoleil, Vladimir Desriveaux, Stan Loach and the Royal Canadian Mounted Police officers Jane and John Doe are re-added to the style of cause;
3. Costs are awarded to the Plaintiffs for a total amount of $2,500.00, which covers both the motion to strike and the appeal proceedings.

"Sylvie E. Roussel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2547-14
STYLE OF CAUSE:	ROBBIE DICKSON and RAINBOW TOBACCO G.P. v HER MAJESTY THE QUEEN IN RIGHT OF CANADA, LISE OUELLETTE, RONALD JEAN-LÉGER, DENIS BEAUSOLEIL, VLADIMIR DESRIVEAUX, STAN LOACH, and RCMP OFFICERS JANE and JOHN DOE
PLACE OF HEARING:	MONTRÉAL, QUÉBEC
DATE OF HEARING:	NOVEMBER 23, 2015
JUDGMENT AND REASONS:	ROUSSEL J.
DATED:	JULY 20, 2016

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