Date: 20091203

Docket: T-1363-09

Citation: 2009 FC 1238

BETWEEN:

ELI HUMBY

First Plaintiff

and

CENTRAL SPRINGS LTD.

Second Plaintiff

A&E PRECISION FABRICATION AND MACHINE SHOP INC.

Third Plaintiff

-and-

ATTORNEY GENERAL OF CANADA

First Defendant

and

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR, AS REPRESENTED BY THE OFFICE OF THE HIGH SHERIFF

Second Defendant

and

GERRY PEDDLE

Third Defendant

and

DAVID TAYLOR

Fourth Defendant

REASONS FOR ORDER

PROTHONOTARY MORNEAU

[1] This is a motion by the first, third and fourth defendants in the style of cause (collectively the defendants) essentially for an order striking the third defendant (the defendant Peddle) and the fourth defendant (the defendant Taylor) and striking out various paragraphs of the plaintiffs' statement of claim (the statement of claim) on the ground that this Court has no jurisdiction *ratione materiae* with respect to these defendants or paragraphs, pursuant to paragraphs 104(1)(*a*) and 221(1)(*a*), (*c*) and (*f*) of the *Federal Courts Rules* (the Rules).

[2] In their motion, the defendants also seek under paragraph 221(1)(*a*) of the Rules an order striking out a series of paragraphs in the statement of claim on various grounds that indicate to the defendants that these paragraphs disclose no reasonable cause of action.

[3] Furthermore, if the preceding relief is not ordered, the defendants ask the Court, in the alternative, to stay this action under subsection 50(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended, until the determination of the appeals filed in the Tax Court of Canada (the TCC) by the second and third plaintiffs, Central Springs Ltd. (Central) and A&E Precisions Fabrication and Machine Shop Inc. (A&E).

Essential background

[4] The background that is essential to assess the context of the statement of claim and, in turn, the motion before us, may be described broadly as follows.

[5] Although some of the facts related below may not appear in the specific wording of the statement of claim, but in certain written representations filed by the plaintiffs in opposition to this motion, the Court is not unduly formalizing this because when assessing the Court's jurisdiction *ratione materiae*, the Court is not limited to the strict wording of a statement of claim.

[6] If the Court has clearly understood the facts of the case, the starting point to keep in mind is that in 2002-2003, Humby Enterprises Ltd. (HEL), one of the three businesses owned by the plaintiff Eli Humby, was involved in litigation with the provincial government of Newfoundland. Around the same time, HEL and the plaintiff Humby's two other businesses, Central and A&E, although to a much lesser extent than HEL, owed taxes according to the Canada Revenue Agency (the Agency).

[7] According to the plaintiff Humby, the defendants Peddle and Taylor gave him the impression at that time that no enforcement action, however, would be taken for the moment. Nonetheless, notices of assessment were prepared in July 2003 against, *inter alia*, Central and A&E, but the plaintiff Humby did not know about the notices. It was not until June 2005 that Mr. Humby became aware of the notices. However, in the meantime, at the beginning of 2005,

the defendants Peddle and Taylor who worked, *inter alia*, as collection officers with the Agency began very aggressive enforcement action against Central and A&E to collect the amounts set out in the notices of assessment.

[8] Although in September 2006 Central and A&E, under the direction of Mr. Humby, had the TCC acknowledge the promptness of their notices of objection to the notices of assessment (deemed to have been received in June 2005) and although ultimately Central and A&E launched an appeal to the TCC concerning the accuracy of the notices of assessment—a debate that the TCC has not yet heard on the merits—the plaintiffs nonetheless commenced an action in this Court in August 2009.

[9] In their action, they seek general, punitive and exemplary damages, essentially on the grounds that the defendants conspired among themselves and committed a host of various torts by wrongfully issuing notices of assessment to Central and A&E and by taking enforcement action against them that had devastating consequences.

[10] In that regard, the plaintiffs state at paragraphs 8 and 9 at the beginning of the statement of claim:

> 8. The Plaintiffs claim generally that the First, Third and Fourth Defendants, through its officers, agents and servants conspired to falsely assess the Second and/or Third, Plaintiffs as owing monies to the CRA.

> 9. The Plaintiffs further claim in the alternative that these aforementioned defendants, through its officers, agents and servants, in furtherance of the unlawful objective of securing the wrongful assessment of the First, Second and Third Plaintiffs, did commit jointly and severally, numerous unlawful acts including torts and breaches of legislation and also the Constitution Act, 1992 and/or in particular, malicious prosecution, attempting to obtain wrongful assessments, abuse of process, defamation, conspiracy to injure, negligence, wilful violation of constitutional rights, intentional interference with business relations, and/or breaches of legislation, common law and statutory duties of care.

[11] It was the scope and the number of the defendants' enforcement actions that appear to have deeply distressed the plaintiffs and that seem to be the main reason why they commenced their action in this Court. The last paragraph on page 10 of the statement of claim (which numbers 30 pages), contains the following summary of the enforcement actions that were taken in the field:

> Knowing the amounts allegedly owed CRA, the CRA nevertheless caused enforcement procedures to continue, where a building was seized, equipment was seized, land was seized, inventory was seized, and over 12 employees were thrown out of work. The amount of the seized property was approximately $1 million, and the debt "alleged" by the CRA was only $63,000 (approximately 6%).

Analysis

[12] As the Federal Court of Appeal pointed out in the following passage from *Sweet et al. v. Canada* (1999), 249 N.R. 17, at paragraph 6 on page 23, striking out under one or more of the paragraphs of rule 221 occurs only where the situation is plain and obvious:

> [6] Statements of claim are struck out as disclosing no reasonable cause of action only in plain and obvious cases and where the Court is satisfied that the case is beyond doubt (see *Attorney General of Canada v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735 at 740; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 and *Hunt v. Carey Canada. Inc.*, [1990] 2 S.C.R. 959). The burden is as stringent when the ground argued is that of abuse of process or that of pleadings being scandalous, frivolous or vexatious (see *Creaghan Estate v. The Queen*, [1972] F.C. 732 at 736 (F.C.T.D.), Pratte J.; *Waterside Ocean Navigation Company, Inc. v. International Navigation Ltd et al.*, [1977] 2 F.C. 257 at 259 (F.C.T.D.), Thurlow A.C.J.; *Micromar International Inc. v. Micro Furnace Ltd.* (1988), 23 C.P.R. (3d) 214 (F.C.T.D.), Pinard J. and *Connaught Laboratories Ltd. v. Smithkline Beecham Pharma Inc.* (1998), 86 C.P.R. (3d) 36 (F.C.T.D.) Gibson J.). The words of Pratte J. (as he then was), spoken in 1972, in *Creaghan Estate, supra,* are still very much appropriate:
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>> “ . . . a presiding judge should not make such an order unless it be obvious that the plaintiff's action is so clearly futile that it has not the slightest chance of succeeding . . .

[13] Specifically, where the issue is striking out for want of jurisdiction, the following passage from *Hodgson et al. v. Ermineskin Indian Band et al.* (2000), 180 F.T.R. 285, page 289 (affirmed on appeal: 267 N.R. 143; leave to appeal to the Supreme Court of Canada denied: 276 N.R. 193) establishes that if a motion raises the issue of jurisdiction under paragraph 221(1)(*a*) of the

Rules, it is only in plain and obvious cases that the Court will grant the motion. This passage also points out that evidence is admissible on the jurisdictional aspect.

> [9] I agree that a motion to strike under rule 221(1)(a) [previously rule 419(1)(a)] on the ground that the Court lacks jurisdiction is different from other motions to strike under that subrule. In the case of a motion to strike because of lack of jurisdiction, an applicant may adduce evidence to support the claimed lack of jurisdiction. In other cases, an applicant must accept everything that is pleaded as being true (see *MIL Davie Inc. v. Société d'exploitation et de développement d'Hibernie ltée* (1998), 226 N.R. 369 (F.C.A.), discussed in Sgayias, Kinnear, Rennie, Saunders, *Federal Court Practice 2000*, at pages 506-507).
>
> [10] . . . The "plain and obvious" test applies to the striking out of pleadings for lack of jurisdiction in the same manner as it applies to the striking out of any pleading on the ground that it evinces no reasonable cause of action. The lack of jurisdiction must be "plain and obvious" to justify a striking out of pleadings at this preliminary stage.

[14] Before addressing the striking out sought by the defendants, it is appropriate to immediately deal with one of the heads of relief requested by the defendants in their motion, i.e., that Her Majesty the Queen be substituted for the Attorney General of Canada in the style of cause. The defendants are correct on this point, and the plaintiffs do not object to this change. Consequently, it will be ordered that the "Attorney General of Canada" be replaced by "Her Majesty the Queen" in the style of cause.

Striking out

[15] I will now deal with the request to strike the defendants Peddle and Taylor.

[16] It appears that at all relevant times these two defendants were collection officers with the Agency and that it was they who specifically saw and participated in the improper enforcement that the plaintiffs are denouncing. By their actions, these two defendants allegedly abused various powers in federal statutes and regulations and deliberately ignored guidelines contained in policies and internal directives.

[17] However, even if that is the factual backdrop to the plaintiffs' claim and even if they invoke breaches of the *Canadian Charter of Rights and Freedoms* (the Charter) and maintain that commencing a separate action against the defendants Peddle and Taylor in the provincial superior court would be a waste of time and money and contrary to the effective administration of justice, the fact remains that, in the Court's view, it is clear that the plaintiffs' action against the defendants Peddle and Taylor is fundamentally based and focused on torts whose legal foundation is not derived from or nourished by federal law but by principles of liability grounded in provincial law. This is an issue of jurisdiction *ratione materiae* that cannot be disregarded on grounds of convenience or some sort of prejudice. In short, the Court concurs with the following approach and analysis in the defendants' written representations:

A. The Court's Jurisdiction over Third and Fourth Defendants

1. The Federal Defendants submit that this Court has jurisdiction to determine the claim as against the Crown, but not the jurisdiction to determine the tort claims against Gerry Peddle ("Peddle"), the Third Defendant, and David Taylor ("Taylor"), the Fourth Defendant.

2. As against Peddle the Plaintiffs claim in:

   a. Abuse of power;
   b. Negligence;
   c. Malicious prosecution;
   d. Breach of legislation, policies and procedures; and (sask. Wheat pool)
   e. Defamation

Statement of Claim, paragraph 36

3. As against Taylor the Plaintiffs claim in:

   a. Negligence;
   b. Abuse of power; and
   c. Defamation

Statement of Claim, paragraphs 44 and 45

4. The jurisdiction of the Federal Court over a party is set out by the Supreme Court of Canada in *International Terminal Operators Ltd.* V. *Miida Electronics*, 1986 CanLII 91 (S.C.C.), [1986] 1 S.C.R. 752 at 766:

   a. There must be a statutory grant of jurisdiction by the federal Parliament;
   b. 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; and

c. The law on which the case is based must be “a law of Canada” as the phrase is used in s. 101 of the *Constitution Act, 1867*.

5. The Federal Court does not have jurisdiction over claims between subjects, where the cause of action is said to be defamation, libel, fraud and negligence. The fact that a power allegedly misused by a federal public servant emanates from a federal statute or that a duty alleged to have been breached was created by a federal statute is not sufficient in itself to satisfy the second part of the test. The rights arising from such misuse of power of breach of statutory remain emanations of provincial law relating to tortuous liability.

Harris v. Canada (Attorney General), 2004 FC 1051 at para. 22

Leblanc v. Canada (2003), 237 F.T.R. 169, at para. 24; appeal dismissed (2004), 256 F.T.R. 8; appeal on other grounds dismissed (2005), 339 N.R. 244 (FCA)

6. The Federal Defendants submit that there is no existing body of federal law which his essential to the disposition of the case against Peddle and Taylor as the claims against them are essentially common law torts. The claims against them are not based on a detailed federal statutory framework.

White (Peter G.) Management Ltd. v. Canada (Minister of Canadian Heritage) et al., (2006), 350 N.R. 113 (FCA), at paras. 55 and 60

Stephens Estate et al. v. Minister of National Revenue, (1982), 40 N.R. 620 (FCA)

[18] Moreover, in my view, even if the plaintiffs were granted leave to amend to also plead the tort of public misfeasance, that would not mean that the action against the defendants Peddle and Taylor would be nourished by or based on federal law.

[19] Therefore, it will be ordered that the defendant Peddle and the defendant Taylor be struck from the style of cause.

[20] It is now appropriate to look at each of the defendants' various requests to strike out various groups of paragraphs in the statement of claim.

Striking out paragraphs 8, 12, 16, 24, 26 and 29

[21] According to the defendants, these paragraphs should be regarded as an attempt to implicitly lead this Court to determine, to review in some way the validity or accuracy of the notices of assessment issued against Central and A&E. Although the plaintiffs are explicitly seeking damages in their statement of claim, the defendants see these paragraphs as a collateral attack against the notices of assessment.

[22] Of course, one cannot directly or indirectly seek a review of the accuracy or validity of notices of assessment in this Court. Justice Décary of the Federal Court of Appeal pointed out the following at paragraphs 19 and 20 of his decision in *Roitman v. R.*, 2006 CarswellNat 2299 (*Roitman*):

> 19 Subsection 152(8) of the *Income Tax Act* deems an assessment to be valid and binding unless varied or vacated in accordance with the appeal process under the Act. The Tax Court has exclusive jurisdiction to determine the correctness of tax assessments. This exclusive jurisdiction is established by a combination of ss. 152(8) and 169 of the *Income Tax Act*, s. 12 of the *Tax Court of Canada Act* and ss. 18, 18.1 and 18.5 of the *Federal Courts Act*.
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> 20 It is settled law that the Federal Court does not have jurisdiction to award damages or grant any other relief that is sought on the basis of an invalid reassessment of tax unless the reassessment has been overturned by the Tax Court. To do so would be to permit a collateral attack on the correctness of an assessment. (See *M.N.R v. Parsons*, 84 D.T.C. 6345 (F.C.A.) at p. 6346; *Khan v. M.N.R.*, 85 D.T.C. 5140 (F.C.A.); *Optical Recordings Corp. v. Canada*, [1991] 1 F.C. 309 (C.A.), at pp. 320-321; *Bechtold Resources Limited v. M.N.R.* 86 D.T.C. 6065 (F.C.T.D) at p. 6067; *A.G. Canada v. Webster* (2003), 57 D.T.C. 5701 (F.C.A.); *Walker v. Canada*, 2005 FCA 393; *Sokolowska v. The Queen*, 2005 FCA 29; *Walsh v. Canada(M.N.R.)*, 2006 FC 56; *Henckendorn v. Canada*, 2005 FC 802; *Angell v. Canada (M.N.R.)*, 2005 CF 782.)

[23] It is certainly assumed that the parties and their counsel are aware of these teachings; at paragraph 16 of his decision, Justice Décary points out that the judge must go beyond the words used by the parties to ensure that the statement of claim is not a disguised attempt to lead this Court to make an order that it does not have jurisdiction to make, i.e., to determine the validity or accuracy of a notice of assessment:

> 16. A statement of claim is not to be blindly read at its face meaning. The judge has to look beyond the words used, the facts alleged and the remedy sought and ensure himself that the statement of claim is not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court. To paraphrase statements recently made by the Supreme Court of

> Canada in *Vaughan v. Canada*, [2005] 1 R.C.S. 146 at paragraph 11, and applied by this Court in *Prentice v. Canada (Royal Canadian Mountain Police)*, 2005 FCA 395, at paragraph 24, leave to appeal denied by the Supreme Court of Canada, May 19, 2006, SCC 31295, a plaintiff is not allowed to frame his action, with a degree of artificiality, in the tort of negligence to circumvent the application of a statute.

[24] By way of example, among the paragraphs referred to, paragraphs 8, 12 and 16 of the statement of claim provide as follows:

> 8. The Plaintiffs claim generally that the First, Third and Fourth Defendants, through its officers, agents and servants conspired to falsely assess the Second and/or Third, Plaintiffs as owing monies to the CRA.
>
> . . .
>
> 12. At the time of involvement of this matter by the CRA, the following are facts with respect to the involvement of the Plaintiffs:
>
> A) Eli Humby was the sole owner of three separate and distinct companies, namely Humby Enterprises Limited. (hereinafter referred to as "HEL"), CS, and A&E.
>
> B) At the time of the action taken by CRA against the Plaintiffs, monies were owed by HEL to CRA, but negligible amounts were owed by the Second and Third Plaintiffs to the CRA.
>
> C) That CRA representatives did an "assessment", and as a result of this "assessment", monies were arbitrarily "transferred" as owing from HEL to CS and/or A&E and now monies were stated to be owed by these companies to CRA, (which the Plaintiffs vehemently dispute) (**according to the legislation governing the CRA an arbitrarily assessed amount can't be enforced upon).**

. . .

16. The Plaintiffs repeat the above and state that not only were these instructions by CRA to seize the aforementioned properties, against the agreement made by CRA and the Plaintiffs, it was for property of CS and A&E (not HEL), and was made on the basis of an illegal and incorrect assessment in any event. The Plaintiffs state that the actions of CRA was also **premature** to any Notice of Assessments given to either of the Plaintiffs and with the Second and Third Defendants having an opportunity to object these assessments.

[Emphasis added by the plaintiffs but underlining added by the Court.]

[25] In my view, it is clear that paragraphs 8, 12 and 16, to use Justice Décary's expression at paragraph 17 of *Roitman*, ". . . clearly put[s] the validity and merits of the reassessment squarely at issue."

[26] Therefore, it will be ordered that these paragraphs be struck out. However, I do not think that paragraphs 24 and 26 contain such a collateral attack, and they may remain in the statement of claim. The same is true for paragraph 29 and its numerous subparagraphs, except for all of subparagraph 29(iii), which will be struck out.

Striking out paragraphs 29(v) (5th paragraph on page 14), 34, 36 (page 20, 6th unnumbered paragraph) and 46

[27] According to the defendants, these various allegations or paragraphs contain defamatory attacks that should be seen as disclosing no reasonable cause of action since they do not provide details of the material facts to support them. The defendants therefore ask that they be struck out.

[28] It is true that the impugned paragraphs do not contain the type of material facts identified by the defendants at paragraph 31 of their written representations. However, given that the order accompanying these reasons will ask the plaintiffs to serve and file an amended statement of claim to take into account, *inter alia*, the parts that have been struck out, the Court does not intend to order that these paragraphs be struck out; however, the Court will order that the amended statement of claim contain the details sought by the defendants at paragraph 31 of their written representations if the plaintiffs actually intend to base their attacks on defamation.

Striking out paragraphs 31, 32, 36 (page 20, 5th unnumbered paragraph) and 45

[29] The defendants ask that these paragraphs be struck out on the ground that they refer to commencing a malicious prosecution and that this allegation can only be raised against criminal proceedings, which is not the case here.

[30] I agree that commencing a malicious prosecution can only occur in criminal proceedings and that this case does not fall within this area.

[31] Paragraphs 36 (page 20, 5th unnumbered paragraph) and 45 of the statement of claim specifically refer to commencing a malicious prosecution. I do not intend, however, to strike out these paragraphs but, in the order accompanying these reasons, I intend to order that the plaintiffs' amended statement of claim use different wording in place of these words.

[32] As for paragraphs 31 and 32 of the statement of claim, the expression "malicious prosecution" is not really used, and I do not believe that these paragraphs need to be struck out.

Striking out paragraphs 30(i) and 33

[33] The defendants submit that these paragraphs are a conspiratorial attack and, like the paragraphs in the statement of claim about defamation, these paragraphs should be seen as disclosing no reasonable cause of action since they do not provide details of the material facts to support them.

[34] It is true that the impugned paragraphs do not contain the type of material facts identified by the defendants at paragraph 41 of their written representations. However, given that the order accompanying these reasons will ask the plaintiffs to serve and file an amended statement of claim to take into account, *inter alia*, the parts that have been struck out, the Court does not intend to order that these paragraphs be struck out; however, the Court will order that the amended statement of claim contain the details sought by the defendants at paragraph 41 of their written representations.

Striking out various subparagraphs of paragraph 53 of the statement of claim about Charter violations

[35] After considering the parties' written and oral representations, I find that it is plain and obvious that the plaintiffs' allegations under sections 6(2) and 15 of the Charter disclose no reasonable cause of action, and they will be struck out.

[36] With respect to the subparagraphs about sections 7, 8 and 12 of the Charter, again here the Court does not intend to strike them out but, as with the allegations of defamation and conspiracy, it will order that the amended statement of claim contain the details sought by the defendants.

Striking out parts of paragraph 9 of the statement of claim

[37] Since the Court has not granted most of the defendants' requests to strike out, which are referred to at paragraph 9 of the statement of claim, the Court will not strike out parts of paragraph 9 of the statement of claim.

Other reliefs

[38] Moreover, given that the Court will order that paragraphs 8, 12, 16 and 29(iii) of the statement of claim be struck out, it does not have to deal with the request for a stay of proceedings in this case.

[39] The defendants' defence shall be served and filed within twenty days after the plaintiffs serve and file their amended statement of claim.

[40] Since the Court finds that success on this motion is divided, there will be no order as to costs.

"Richard Morneau"

Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

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