Federal Court  Cour fédérale

Date: 20131108

Docket: T-1363-09

Citation: 2013 FC 1136

Ottawa, Ontario, November 8, 2013

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ELI HUMBY

First Plaintiff

and

CENTRAL SPRINGS LTD.

Second Plaintiff

and

A&E PRECISION FABRICATION AND MACHINE SHOP INC.

Third Plaintiff

and

HER MAJESTY THE QUEEN

First Defendant

and

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

Second Defendant

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This was an action against the 1st Defendant, in fact the Canada Revenue Agency [CRA], and the Office of the High Sheriff of Newfoundland and Labrador, the 2nd Defendant, in respect to the enforcement of tax judgments against the Plaintiffs. The allegations are wide sweeping but, properly focused, relate to the seizure and sale of real and personal property in Gander and Benton, Newfoundland and Labrador.

[2] This has not been an easy matter to decipher and these Reasons attempt to organize the case into recognizable issues. The Court is cognizant of the emotional toll that this decision may cause the principal plaintiff, Eli Humby, but neither he nor his companies are entitled to any of the relief claimed.

[3] The corporate Plaintiffs were assessed taxes for, among other matters, failure to remit the employees' source tax deductions. The amounts were certified in the Federal Court and collection actions commenced. The tax assessments were confirmed in part. Therefore, the Plaintiffs owed tax

moneys which were not paid. The 1st Defendant was entitled to collect; the 2nd Defendant acted on the seizure and sale of assets owned by the Plaintiffs.

[4] The Plaintiffs claim damages for what they say were the unlawful acts of the Defendants in enforcing the confirmed assessments.

[5] As this Court has found, the Defendants' actions were lawful; the corporate Plaintiffs owed the money and failed to pay. Collection was authorized and carried out in accordance with the law.

II. FACTUAL BACKGROUND

[6] The 1st Plaintiff, Eli Humby [Humby], is a director and the ultimate controlling shareholder of Central Springs Ltd. [Central Springs], the 2nd Plaintiff, and A&E Precision Fabrication and Machine Shop Inc. [A&E], the 3rd Plaintiff. Humby holds the same position in respect of Humby Enterprises Limited [HEL] which is not a party but plays a critical role in the background to and genesis of this action.

[7] HEL was in the logging business, principally in central and western Newfoundland. In 2000 its logging contract to cut wood was not renewed. The effect of the loss of the right to cut wood was to reduce HEL's income by 90%. HEL commenced legal action against Corner Brook Pulp and Paper and A.L. Struckless & Sons Ltd. It was ultimately unsuccessful in this litigation which concluded in 2003.

[8] Also in 2000, HEL failed to remit payroll deduction amounts and GST. Active collection steps by CRA began in 2001 including the issuance of a Requirement to Pay.

[9] Also relevant to this litigation is the medical evidence that in this period of 2000-2001 Humby began to suffer both physical and emotional issues related to the problems with his businesses.

[10] In 2001, Humby and his representatives indicated to both CRA and the Province of Newfoundland and Labrador that HEL was in a desperate position, "at the brink of financial ruin", and that without some help from government was in significant financial difficulty.

[11] HEL asked the provincial government for forgiveness of taxes and an allocation of wood supply on Crown lands. Whatever the wood supply granted, it did not continue and HEL and Humby sued the Province for breach of a promise to supply wood. This litigation took until May 2005 to conclude.

While unsuccessful at trial and on appeal, Humby relied on his expected success to suggest to CRA that it ought not to take collection action during the course of the litigation.

[12] In 2001, there was considerable contact between Humby and CRA concerning the arrears in remittance of payroll deductions of both the employer's and employees' tax amounts.

[13] In late 2002, balances on the payroll deductions and HST accounts for HEL were certified in the Federal Court and registered with the Judgment Enforcement Registry for Newfoundland and

Labrador. A series of further Certificates were issued over the relevant time. The effect of the Certificates is that of a judgment of the Federal Court which led to the issuance of Writs of Seizure and Sale directed to the Sheriff of Newfoundland and Labrador.

[14] Turning back in time (and largely based on the findings of Justice Boyle of the Tax Court of Canada in the decision *Central Springs Ltd v Canada*, 2010 TCC 543, [2010] TCJ No 412), in 1995 or 1996 Central Springs was incorporated and in 1998 or 1999 A&E was incorporated. These corporations were established because HEL had started to carry on related precision mechanics and metal manufacturing business utilizing HEL employees who were servicing large machinery and equipment used in its wood harvesting business.

[15] The related businesses were transferred over to A&E and Central Springs but initially all the employees continued as employees of HEL. Appropriate chargebacks were made by HEL to A&E and Central Springs.

[16] Part way through 2002, A&E and Central Springs became the employers for those workers needed for the respective businesses. A&E and Central Springs had the obligation of withholding and remitting to CRA for the small number of employees in the respective companies.

[17] As a result of field visits to 325 Garrett Drive in Gander (the headquarters for Humby's corporations), Jerry Peddle [Peddle], a CRA tax collector, noted certain discrepancies in the source deduction account of HEL and of the corporate Plaintiffs.

[18] An Enhanced Requirement to Pay was issued during this period with respect to the payroll debts and CRA instructed the Sheriff to execute against a Timberjack Porter owned by HEL.

[19] There is a suggestion in the evidence that Peddle, who was the principal CRA official dealing with the Humby-related collection files, took umbrage with Humby's attempt to sell the Timberjack "out from under" CRA. Whether that is the source of the animus between Humby and Peddle, it is evident from the oral and documentary evidence that Humby disliked Peddle and made every effort to have Peddle removed from his files including complaints to the Minister of National Revenue.

[20] In June 2003, the parties reached an agreement with respect to the tax debts of HEL and the corporate Plaintiffs. Under that agreement HEL, Central Springs and A&E were to keep all accounts current (including payroll and HST); CRA would not file further certificates and the tax debts would be paid off at the conclusion of Humby's litigation in the Supreme Court of Newfoundland and Labrador related to the failure to obtain a wood supply.

[21] Although the agreement was never signed, David Taylor [Taylor], Peddle's team leader and direct supervisor, believed that there was an agreement to hold off collection action on condition that HEL and the corporate Plaintiffs complied with the terms. CRA did hold off but no further payments were made pursuant to the agreement.

I conclude that there was an agreement, the parties relied on it and the Humby companies failed to respect its terms largely because it could not afford to do so.

[22] Humby alleges that at this June 2003 meeting Peddle used words to the effect that he was going "to take Humby down". Donald Farrell [Farrell], Humby's long-time accountant, seems to confirm that statement.

Robert Anstey, counsel to the Plaintiffs and present at that meeting, never confirmed that version of events. There is insufficient corroboration of this statement. Absent better evidence, I am not satisfied that those words or something similar were said despite what was clearly a growing antagonistic environment between Humby and Peddle.

[23] Peddle caused a trust audit examination which, in July 2003, resulted in assessments against A&E and Central Springs for failure to remit payroll deduction, interest and penalties in respect of the tax years 2001, 2002 and 2003.

These are the assessments which Justice Bowie of the Tax Court (*Central Springs Ltd v Canada*, 2006 TCC 524, [2006] TCJ No 414) determined had not been sent to the taxpayers and therefore allowed them to proceed with the Notice of Objection and appeal process.

[24] Over the period between July 2003 and June 2004, CRA was in communication with Humby about the growing arrears of HEL, Central Springs and A&E. This led to a meeting in June 2004 which Humby says did not take place.

[25] It is noted that Humby's recollection of many events was frequently flawed. The evidence suggests that Humby is a changed man and his medical problems may explain his recall issues. The Court has been cautious in accepting his version of events.

[26] According to Peddle and Taylor, Winnie Humby – the office manager – was also present at the June 2004 meeting but she was never called. Despite Humby's position, largely because Peddle wrote a synopsis of the meeting, I find that such a meeting occurred and that Peddle's synopsis is the best evidence available.

[27] At the meeting Humby was advised of the amounts owing and the requirement to make a lump sum payment, failing which the amounts would be certified. Again, no payment was made.

[28] Subsequent to that meeting, CRA moved forward with certifying the debts of the corporate Plaintiffs. The debts of HEL had previously been certified and registered. Amounts were certified in the Federal Court and registered in the Judgment Enforcement Registry as follows:

Date of Certificate	Debtor	Amount	Act	Exhibit Reference
November 2002	HEL	$98,805.47	ITA	ID32
November 2002	HEL	$17,488.58	ETA	ID33
August 2004	Central	$18,663.61	ETA	ID27
August 2004	A&E	$16,668.42	ITA	ID28
August 2004	A&E	$2,046.14	ITA	ID29
December 2004	Central	$73,664.16	ITA	ID30
December 2004	A&E	$62,441.91	ITA	ID31

The last four entries relate to the failure to remit.

[29] In January 29, 2005, CRA began the enforcement actions which individually and cumulatively form a major basis for the Plaintiffs' claim in this litigation. On that day Peddle

instructed the Office of the High Sheriff to begin enforcement against the assets of HEL, A&E and Central Springs, by seizing and selling the equipment and inventory of all three companies.

[30] There is some question as to what precipitated the enforcement action. It was suggested that Peddle acted on information from a third party (a Mr. Mahoney who was never called) who was a competitor of Humby's. The gist of the information allegedly received from Mr. Mahoney was that assets were being removed from the Garrett property in Gander.

[31] Messrs. Freake and Cross, Sheriff's officers in Gander and Benton respectively, took charge of the operation. Freake testified and I find his evidence to be credible. Some aspects are lost in time and there may be some crossover of dates and who initiated which conversations with and within the High Sheriff's Office but none of that undermines the veracity of his narrative.

On this point, Pauline Butler, now retired from the High Sheriff's Office and the key connection between CRA and the High Sheriff, also testified. Her recollection was clear, dispassionate and entirely credible. Where there is a conflict or confusion between her evidence and any other witness', I accept her evidence.

[32] At the time of the seizures in Gander, Humby reacted very emotionally, as he had throughout his dealings with CRA. He barricaded himself in his office, ordered everyone to leave the premises and locked the place down. There is no corrobative evidence that Humby or anyone acting for him removed any assets as CRA had believed.

[33] The following day, Freake, acting through instructions from Peddle, secured Bailee Undertakings from Humby, the effect of which was to allow the personal property to remain on site. The evidence is that the use of Bailee Undertakings in this type of situation is unusual. The usual practice is to seize personal property, and remove and store it off site.

[34] The letter of instructions to the High Sheriff's Office from CRA required the execution of Bailee Undertakings, the taking of inventory and 24-hour security. Freake determined that insurance was in place. Humby agreed to these terms and any suggestion that he did not understand what he was doing must be rejected. There is no evidence that he lacked legal capacity and he had his counsel intimately involved in most, if not all, aspects of the dealings with CRA and the High Sheriff's Office.

[35] On February 2, 2005, Plaintiffs' counsel, Robert Anstey, wrote to the High Sheriff's Office to obtain the release from seizure of the Benton property because it was not owned by the judgment debtors. Peddle instructed the High Sheriff to release the property and the Plaintiffs were informed that instructions to sell land and buildings at Benton were discontinued.

[36] On March 4, 2005, Butler instructed Freake to obtain an appraisal, not only of real property which is required under the Newfoundland *Judgment Enforcement Act*, SNL 1996, c J-1.1, but on the personal property as well. This was done so that the High Sheriff's Office had some guidance on what it should be seeking by way of payment for the assets, even though such an appraisal is not required.

[37] On the same day, March 4, 2005, Anstey advised the Defendants that his clients could no longer afford to keep insurance on the buildings.

[38] During this period of February-April, the sale of assets was postponed by the High Sheriff, David Jones, with a new date to be set for the sale of personal property and the land at Garrett Drive. In a manner consistent with other seizures, issues of third party objections to the seizures of property over which third parties claimed ownership or interest therein were dealt with during this period as well.

[39] By late March, Butler recognized that there was a need to move the assets in Gander. There was no insurance, there was no electrical power and the Bailee Undertakings were in jeopardy. There were issues of access to the property which impacted the ability to take inventory.

[40] Although Humby objected to any moving of the property, he had no reasonable alternative to offer. The Defendants recognized the cost of moving and the problem of dismantling the assets, but also recognized that it would be impossible to sell assets from unheated, unpowered premises.

[41] On March 29, 2005, CRA instructed that the assets be moved. The High Sheriff's Office proceeded with the move and with obtaining appraisals. This was not an easy task as appraisals came from local Grand Falls companies where the assets had been moved.

[42] At that time no one foresaw that it would take two years to complete the disposal of the assets. The responsibility for the delay cannot fairly be laid at the feet of either CRA or the High

Sheriff's Office. Humby continued to object to the sale of assets, to litigate and to impede the orderly disposition of the assets because he felt that the whole process was unjustified.

[43] In April 2005, the Plaintiffs filed proceedings in the Supreme Court of Newfoundland and Labrador challenging the executions in January 2005. The applications were adjourned and not resumed until 2006.

[44] In 2006, the Plaintiffs agreed with CRA that in exchange for the return of assets at Benton, Humby would sign a release on behalf of himself, HEL, Central Springs and A&E. That release was witnessed by Plaintiffs' counsel in this action, Mr. Anstey.

[45] The Plaintiffs continued to object to the sale of assets in August 2005 and the sale was postponed in September.

[46] The sale of the seized assets of Central Springs and A&E occurred on June 28, 2006 by bids. The proceeds were not very far off the appraised value for those sold assets. Assets which did not attract over 75% of appraised value were not sold.

[47] Commencing in August 2005, the Plaintiffs filed Notices of Objection in respect to the payroll account assessments. Having been notified that the Notices were filed out of time, the Plaintiffs sought an extension of time from the Tax Court of Canada.

[48] On September 26, 2006, Justice Bowie ruled that CRA had not proven that the Notices of Assessment were sent and received and therefore the time for filing the Notices of Objection had not expired. This matter ultimately ended in the judgment of Justice Boyle of the Tax Court of Canada (*Central Springs Ltd v Canada*, 2006 TCC 524, [2006] TCJ No 414).

[49] On October 22, 2007, Justice Heneghan of this Court dismissed a motion by CRA to continue the seizure of property and sale of Central Springs' property. A few days later the remaining unsold items were returned to the Plaintiffs.

[50] On March 13, 2006, CRA instructed the High Sheriff's Office to sell the seized personal property. The real estate at Garrett Drive was not to be sold and has not been sold pursuant to the writs of executions.

[51] In December 2010, Justice Boyle of the Tax Court of Canada (*Central Springs Ltd v Canada*, 2010 TCC 543, [2010] TCJ No 412) clarified and amended his judgment in respect of the payroll deductions covered by the Notice of Objection for the years 2001-2003. The learned judge held that the assessments for 2001 and part of 2002 prior to the reorganization of employees and the "deemed employer" claim by CRA were not supported.

Of critical importance is that Justice Boyle found that the assessments for the remainder of 2002 and 2003 in respect to payroll deductions were valid and were confirmed.

[52] To complete the relevant facts, A&E was dissolved on August 26, 2008 and has not been revived.

The Plaintiffs' Statement of Claim was filed August 17, 2009.

III. ANALYSIS

A. *General*

[53] Before proceeding with the legal basis for the Plaintiffs' claim, it is important to set out some general and preliminary matters: the relevant tax provisions, issues of limitations and the dissolution of A&E.

(1) Tax Provisions

[54] Counsel for CRA sets out in her Written Submissions a helpful analysis of the relevant statutory provisions to which the Plaintiffs have no counter. The analysis is clear and has the added advantage of being correct. I adopt those submissions and summarize them in the following paragraphs.

[55] Section 225.1 of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) [ITA] limits, with certain exceptions, the Minister's right to recover unpaid taxes where the taxpayer disputes his assessed amounts and an impartial hearing has not been concluded.

225.1 (1) If a taxpayer is liable for the payment of an amount assessed under this Act, other than an amount assessed under subsection 152(4.2), 169(3) or 220(3.1), the Minister shall not, until after the collection-commencement day in respect of the amount, do any of the following for the purpose of collecting the amount:	225.1 (1) Si un contribuable est redevable du montant d'une cotisation établie en vertu des dispositions de la présente loi, exception faite des paragraphes 152(4.2), 169(3) et 220(3.1), le ministre, pour recouvrer le montant impayé, ne peut, avant le lendemain du jour du début du recouvrement du montant, prendre les mesures suivantes :

(a) commence legal proceedings in a court,

a) entamer une poursuite devant un tribunal;

(b) certify the amount under section 223,

b) attester le montant, conformément à l'article 223;

(c) require a person to make a payment under subsection 224(1),

c) obliger une personne à faire un paiement, conformément au paragraphe 224(1);

(d) require an institution or a person to make a payment under subsection 224(1.1),

d) obliger une institution ou une personne visée au paragraphe 224(1.1) à faire un paiement, conformément à ce paragraphe;

(e) [Repealed, 2006, c. 4, s. 166]

e) [Abrogé, 2006, ch. 4, art. 166]

(f) require a person to turn over moneys under subsection 224.3(1), or

f) obliger une personne à remettre des fonds, conformément au paragraphe 224.3(1);

(g) give a notice, issue a certificate or make a direction under subsection 225(1).

g) donner un avis, délivrer un certificat ou donner un ordre, conformément au paragraphe 225(1).

(1.1) The collection-commencement day in respect of an amount is

(1.1) Le jour du début du recouvrement d'un montant correspond :

(a) in the case of an amount assessed under subsection 188(1.1) in respect of a notice of intention to revoke given under subsection 168(1) or any of subsections 149.1(2) to (4.1), one year after the day on which the notice was mailed;

a) dans le cas du montant d'une cotisation établie en vertu du paragraphe 188(1.1) relativement à un avis d'intention de révoquer l'enregistrement délivré en vertu du paragraphe 168(1) ou l'un des paragraphes 149.1(2) à (4.1), un an après la date de mise à la poste de l'avis d'intention;

(b) in the case of an amount assessed under section 188.1,

b) dans le cas du montant d'une cotisation établie en vertu de

one year after the day on which the notice of assessment was sent; and

(c) in any other case, 90 days after the day on which the notice of assessment was sent.

(2) If a taxpayer has served a notice of objection under this Act to an assessment of an amount payable under this Act, the Minister shall not, for the purpose of collecting the amount in controversy, take any of the actions described in paragraphs (1)*(a)* to *(g)* until after the day that is 90 days after the day on which notice is sent to the taxpayer that the Minister has confirmed or varied the assessment.

(3) Where a taxpayer has appealed from an assessment of an amount payable under this Act to the Tax Court of Canada, the Minister shall not, for the purpose of collecting the amount in controversy, take any of the actions described in paragraphs 225.1(1)*(a)* to 225.1(1)*(g)* before the day of mailing of a copy of the decision of the Court to the taxpayer or the day on which the taxpayer discontinues the appeal, whichever is the earlier.

(4) Where a taxpayer has agreed under subsection 173(1) that a question should be determined by the Tax Court of Canada, or where a taxpayer is served with a copy of an application made under

l'article 188.1, un an après la date d'envoi de l'avis de cotisation;

c) dans les autres cas, 90 jours suivant la date d'envoi de l'avis de cotisation.

(2) Dans le cas où un contribuable signifie en vertu de la présente loi un avis d'opposition à une cotisation pour un montant payable en vertu de cette loi, le ministre, pour recouvrer la somme en litige, ne peut prendre aucune des mesures visées aux alinéas (1)*a)* à *g)* avant le quatre-vingt-onzième jour suivant la date d'envoi d'un avis au contribuable où il confirme ou modifie la cotisation.

(3) Dans le cas où un contribuable en appelle d'une cotisation pour un montant payable en vertu de la présente loi, auprès de la Cour canadienne de l'impôt, le ministre, pour recouvrer la somme en litige, ne peut prendre aucune des mesures visées aux alinéas (1)*a)* à *g)* avant la date de mise à la poste au contribuable d'une copie de la décision de la cour ou la date où le contribuable se désiste de l'appel si celle-ci est antérieure.

(4) Dans le cas où un contribuable convient de faire statuer conformément au paragraphe 173(1) la Cour canadienne de l'impôt sur une question ou qu'il est signifié au contribuable copie d'une

subsection 174(1) to that Court for the determination of a question, the Minister shall not take any of the actions described in paragraphs 225.1(1)*(a)* to 225.1(1)*(g)* for the purpose of collecting that part of an amount assessed, the liability for payment of which will be affected by the determination of the question, before the day on which the question is determined by the Court.

demande présentée conformément au paragraphe 174(1) devant la Cour canadienne de l'impôt pour qu'elle statue sur une question, le ministre, pour recouvrer la partie du montant d'une cotisation, dont le contribuable pourrait être redevable selon ce que la cour statuera, ne peut prendre aucune des mesures visées aux alinéas (1)*a)* à *g)* avant la date où la cour statue sur la question.

(5) Notwithstanding any other provision in this section, where a taxpayer has served a notice of objection under this Act to an assessment or has appealed to the Tax Court of Canada from an assessment and agrees in writing with the Minister to delay proceedings on the objection or appeal, as the case may be, until judgment has been given in another action before the Tax Court of Canada, the Federal Court of Appeal or the Supreme Court of Canada in which the issue is the same or substantially the same as that raised in the objection or appeal of the taxpayer, the Minister may take any of the actions described in paragraphs 225.1(1)*(a)* to 225.1(1)*(g)* for the purpose of collecting the amount assessed, or a part thereof, determined in a manner consistent with the decision or judgment of the Court in the other action at any time after the Minister notifies the taxpayer in writing that

(5) Malgré les autres dispositions du présent article, lorsqu'un contribuable signifie, conformément à la présente loi, un avis d'opposition à une cotisation ou en appelle d'une cotisation devant la Cour canadienne de l'impôt et qu'il convient par écrit avec le ministre de retarder la procédure d'opposition ou la procédure d'appel jusqu'à ce que la Cour canadienne de l'impôt, la Cour d'appel fédérale ou la Cour suprême du Canada rende jugement dans une autre action qui soulève la même question, ou essentiellement la même, que celle soulevée dans l'opposition ou l'appel par le contribuable, le ministre peut prendre les mesures visées aux alinéas (1)*a)* à *g)* pour recouvrer tout ou partie du montant de la cotisation établi de la façon envisagée par le jugement rendu dans cette autre action, à tout moment après que le ministre a avisé le contribuable par écrit que, selon le cas :

(a) the decision of the Tax Court of Canada in that action has been mailed to the Minister,

(b) judgment has been pronounced by the Federal Court of Appeal in that action, or

(c) judgment has been delivered by the Supreme Court of Canada in that action,

as the case may be.

a) le jugement de la Cour canadienne de l'impôt dans l'action a été posté au ministre;

b) la Cour d'appel fédérale a rendu jugement dans l'action;

c) la Cour suprême du Canada a rendu jugement dans l'action.

(6) Subsections 225.1(1) to 225.1(4) do not apply with respect to

(a) an amount payable under Part VIII;

(b) an amount required to be deducted or withheld, and required to be remitted or paid, under this Act or the Regulations;

(c) an amount of tax required to be paid under section 116 or a regulation made under subsection 215(4) but not so paid;

(d) the amount of any penalty payable for failure to remit or pay an amount referred to in paragraph 225.1(6)*(b)* or 225.1(6)*(c)* as and when required by this Act or a regulation made under this Act; and

(e) any interest payable under a provision of this Act on an

(6) Les paragraphes (1) à (4) ne s'appliquent pas :

a) aux montants payables en application de la partie VIII;

b) aux montants à déduire ou à retenir, et à remettre ou à payer, en application de la présente loi ou de son règlement;

c) à l'impôt à payer en application de l'article 116 ou d'un règlement d'application du paragraphe 215(4) et qui n'a pas encore été payé;

d) aux pénalités payables pour défaut de remettre ou de payer un montant visé à l'alinéa *b)* ou *c)* de la manière et dans le délai prévus à la présente loi ou à sone règlement;

e) aux intérêts payables en application de la présente loi

amount referred to in this paragraph or any of paragraphs 225.1(6)*(a)* to 225.1(6)*(d)*.

sur l'un des montants visés au présent alinéa ou aux alinéas *a)* à *d)*.

(7) If an amount has been assessed under this Act in respect of a corporation for a taxation year in which it was a large corporation, or in respect of a particular amount claimed under section 110.1 or 118.1 where the particular amount was claimed in respect of a tax shelter, then subsections (1) to (4) do not limit any action of the Minister to collect

(7) Lorsqu'une cotisation est établie en vertu de la présente loi relativement à une société pour une année d'imposition au cours de laquelle elle est une grande société ou relativement à une somme qui est déduite en application des articles 110.1 ou 118.1 et qui a été demandée relativement à un abri fiscal, les paragraphes (1) à (4) n'ont pas pour effet de limiter les mesures que le ministre peut prendre pour recouvrer :

(a) at any time on or before the particular day that is 90 days after the day of the sending of the notice of assessment, 1/2 of the amount so assessed; and

a) à tout moment jusqu'au quatre-vingt-dixième jour suivant la date d'envoi de l'avis de cotisation, la moitié du montant de la cotisation ainsi établie;

(b) at any time after the particular day, the amount, if any, by which the amount so assessed exceeds the total of

b) à tout moment après le 90e jour suivant la date de mise à la poste de l'avis de cotisation, l'excédent éventuel du montant de la cotisation ainsi établie sur le total des montants suivants :

(i) all amounts collected before that time with respect to the assessment, and

(i) les montants recouvrés avant ce moment relativement à la cotisation,

(ii) 1/2 of the amount in controversy at that time.

(ii) la moitié de la somme en litige à ce moment.

(8) For the purposes of this section and section 235, a corporation (other than a corporation described in subsection 181.1(3)) is a "large corporation" in a particular

(8) Pour l'application du présent article et de l'article 235, une société, sauf celle visée au paragraphe 181.1(3), est une « grande société » au cours d'une année d'imposition

taxation year if the total of the taxable capital employed in Canada of the corporation, at the end of the particular taxation year, and the taxable capital employed in Canada of any other corporation, at the end of the other corporation's last taxation year that ends at or before the end of the particular taxation year, if the other corporation is related (within the meaning assigned for the purposes of section 181.5) to the corporation at the end of the particular taxation year, exceeds $10 million, and, for the purpose of this subsection, a corporation formed as a result of the amalgamation or merger of 2 or more predecessor corporations is deemed to be the same corporation as, and a continuation of, each predecessor corporation.	donnée si le total de son capital imposable utilisé au Canada, à la fin de cette année, et du capital imposable utilisé au Canada de toute autre société, à la fin de la dernière année d'imposition de celle-ci se terminant au plus tard à la fin de l'année donnée, qui est liée (au sens de l'article 181.5) à la société en cause à la fin de l'année donnée, excède 10 000 000 $. Pour l'application du présent paragraphe, la société issue de la fusion ou de l'unification de plusieurs sociétés remplacées est réputée être la même société que chacune de ces sociétés et en être la continuation.

[56] Subsection 225.1(1) of the ITA provides that, with certain exceptions, the Minister shall not take any of the listed collection actions against a taxpayer until after the day that is 90 days after the day that a Notice of Assessment (or Reassessment) is mailed to the taxpayer, or if the taxpayer files a notice of objection or an appeal of the assessment, until the objection or appeal has been dealt with finally. These listed collection actions are:

(a) commence legal proceedings in a court;

(b) certify the amount under section 223;

(c) require a person to make a payment under subsection 224(1);

(d) require an institution or a person to make a payment under subsection 224(1.1);

(e) require a person to turn over moneys under subsection 224.3(1); or

(f) give a notice, issue a certificate or make a direction under subsection 225(1).

[57] It should be noted that the collections restrictions found in subsection 225.1(1) of the ITA exclude the issuance of a requirement to make a payment under subsection 224(1.2) of the ITA, which is often referred to as the "enhanced garnishment" provisions of the ITA. In addition, exceptions to subsection 225.1(1) of the ITA are found in subsection 225.1(6) of the ITA. In effect, the 90-day collection restriction does not apply in respect of the employees' deductions from payroll of the amount for withholding and remission to CRA; a critical matter in this case.

[58] Paragraph 225.1(6)*(b)* is important to this litigation:

225.1 (6) Subsections 225.1(1) to 225.1(4) do not apply with respect to	225.1 (6) Les paragraphes (1) à (4) ne s'appliquent pas :
…	…
(b) an amount required to be deducted or withheld, and required to be remitted or paid, under this Act or the Regulations;	*b)* aux montants à déduire ou à retenir, et à remettre ou à payer, en application de la présente loi ou de son règlement;

[59] As a result of paragraph 225.1(6)*(b)* of the ITA, source deductions (payroll amounts) which are required to be deducted or withheld and remitted pursuant to subsection 153(1) and Regulation 101 of the ITA, are not subject to the collections restrictions imposed by subsection 225.1(1) of the ITA. In addition, penalties and interest payable as a result of the failure to remit an amount referred to in paragraph 225.1(6)*(b)* are also not the subject of collections restrictions.

[60] Amounts deducted or withheld pursuant to subsection 153(1) of the ITA are deemed held in trust for Her Majesty pursuant to subsection 227(4) of the ITA.

[61] There are no collections restrictions with respect to amounts collected and not remitted under the *Excise Tax Act*, RSC 1985, c E-15 [ETA] pursuant to section 315 of the ETA. Such amounts are deemed held in trust for Her Majesty pursuant to subsection 222(1) of the ETA.

[62] An assessment is deemed to be valid and binding notwithstanding an error, defect or omission in the assessment or in any proceeding under the ITA relating thereto, subject to being varied or vacated at objection or appeal pursuant to subsection 152(8) of the ITA. A taxpayer's liability for tax is not affected by an incorrect or incomplete assessment or by the fact that no assessment has been made.

[63] The net effect of these provisions is that in respect of the employees' deduction from payroll of the amount for withholding and remission to CRA, CRA can take collection action immediately and does not have to wait the 90-day period otherwise generally preventing CRA enforcement action.

[64] The policy behind this result is that the money for the employees' tax liability is their money not the employers. The employee remains liable for his/her taxes and the failure of an employer to remit becomes a disguised form of employee financing for the employer.

[65] The situations which usually give rise to this trust relationship and the ability of CRA to move quickly are those where there are third party claims against an employer and both the government and the employee need to be protected. However, that does not preclude the type of situation here where CRA may move to collect immediately despite the absence of third party claimants against the assets of the employer.

[66] The extent to which CRA can combine other tax liabilities which have collection restrictions in the same assessment with employee deductions which do not and thereby seize assets immediately which it might otherwise not be able to do is an interesting but, in this case, theoretical issue as referred to later in these Reasons.

(2) Dissolution of A&E

[67] On August 26, 2008, before the Statement of Claim was issued, A&E was dissolved pursuant to section 331 of the Newfoundland *Corporations Act*, RSNL 1990, c C-36, as evidenced by a certificate of dissolution dated on that day. Pursuant to subsection 331(4) of that *Corporations Act*, A&E ceased to exist on that day.

> 331. (4) A body corporate is revived on the date shown on the certificate of revival, and afterward the body corporate, subject to the reasonable terms that may be imposed by the registrar and in the case of an insurance company the Superintendent of Insurance and to the rights acquired by a person after its dissolution, has the rights and privileges and is liable for the obligations that it would have had if it had not been dissolved.

[68] While no Newfoundland authority was cited to me as to the effect of dissolution on a later filed action in the dissolved corporation's name, the finding in *Swale Investments Ltd v National*

Bank of Greece (Canada), [1997] OJ No 4997, 51 OTC 144, sets out the applicable legal principle that the dissolved corporation, ceasing to exist, cannot bring an action. The action is a nullity.

[69] There is no evidence that the corporation was revived. Therefore, the action, as far as it relates to A&E, is a nullity and any claim would be dismissed on this ground alone.

(3) Limitation Periods

[70] Both Defendants raise the provincial *Limitations Act*, SNL 1995, c L-16.1 as grounds to dismiss some of the causes of action pleaded.

[71] The federal *Crown Liability and Proceedings Act*, RSC, 1985, c C-50, incorporates the provincial limitations of actions law in force in the province in which the cause(s) of action arose. Newfoundland and Labrador is the applicable limitations regime.

[72] While it is sometimes difficult to determine with precision what causes of action are claimed, at least some fall within paragraphs 5(a), (c), (d) and (g) of the provincial *Limitations Act*.

> 5. Following the expiration of 2 years after the date on which the right to do so arose, a person shall not bring an action
>
> (a) for damages in respect of injury to a person or property, including economic loss arising from the injury whether based on contract, tort or statutory duty;
>
> (b) for damages in respect of injury to person or property including economic loss arising from negligent misrepresentation and professional negligence whether based on contract, tort or statutory duty;
>
> (c) for trespass to property not included in paragraph (a);

(d) for defamation other than defamation referred to in section 17 of the *Defamation Act*;

(e) for false imprisonment;

(f) for malicious prosecution;

(g) for conspiracy to commit a wrong referred to in paragraphs (a) to (e);

(h) which is a civil action, to recover a fine or other penalty and to recover a fine or penalty imposed by a court or law;

(i) under the *Fatal Accidents Act*; or

(j) under the *Privacy Act*.

[73] Sections 6 and 7 of that Act set limitation periods of six and ten years for other actions. The most pertinent is paragraph 6(a) which establishes a limitation period of six years for causes of action related to damages for conversion or detention of goods.

[74] The Plaintiffs plead jurisdictional grounds such as the lack of authority of CRA to take any action, the prematurity of authorized action by CRA, unreasonable conduct, and bad faith. This aspect of the Plaintiffs' action is not subject to the provincial *Limitations Act*. These are not claims of breach of statutory duty as much as they are claims of absence of jurisdiction or exceeding of jurisdiction.

[75] However, the Plaintiffs do claim in defamation, and in negligence and with respect to the High Sheriff's Office's breach of statutory duty, all of which are caught by the two-year limitation. To the extent that the Plaintiffs' claim is grounded as well in intentional tort and civil conspiracy, these two claims are caught by the two-year limitation period. Therefore, all of this part of the

Plaintiffs' action would be dismissed on grounds of limitation period. In addition, for reasons to follow, they are dismissed on their merits.

[76] The CRA owes no specific duty to the Plaintiffs in respect of their conduct. In contrast, the High Sheriff's Office has a duty under paragraph 3(5)(f) of the Newfoundland *Judgment Enforcement Act* to act in good faith and in a commercially reasonable manner.

> 3. (5) The following applies to enforcement proceedings:
>
> …
>
> (f) all rights, duties and functions of creditors and the sheriff under this Act shall be exercised or discharged in good faith and in a commercially reasonable manner;

[77] The gravamen of the Plaintiffs' claim against the High Sheriff's Office is the breach of this statutory duty. By operation of the two year limitations period the action against the High Sheriff's Office should be dismissed in whole. As outlined later in these Reasons, the action against the High Sheriff's Office is also dismissed on its merits.

[78] The Plaintiffs' response to the applicable limitation period is that Humby was under some form of disability due to the emotional turmoil of the events surrounding the financial difficulties with his companies.

[79] The medical evidence does not specifically address the fact that he lacked legal capacity. As seen from the events, he was actively engaged with his counsel and his accountant in litigation in the provincial Supreme Court, the Tax Court of Canada and this Court. I can find no basis for this

position that Humby was unable to give instructions or otherwise act on his own behalf or to understand the nature of his dealings.

(4) Release

[80] In the Receipt, Release and Discharge of August 29, 2005, the Plaintiffs and HEL gave a complete and unambiguous release of the 1st Defendant (and CRA) of

> any and all demands and claims of any kind or nature whatsoever arising out of any and all seizures undertaken on or about the 19 day of January 2005 at the property located at Main Road, in the Town of Benton …

[81] The Release was witnessed by Mr. Anstey, counsel for the Plaintiffs. It is not now open to the Plaintiffs to argue that it is not binding because Humby was so distraught that he would sign anything to obtain the return of certain chattels. He had counsel with him and if he was signing something which he should not have done or did not understand, his counsel would have and should have prevented it.

[82] The Plaintiffs are bound by that Release.

B *Claims against the CRA*

[83] The Plaintiffs' principal assertions are (1) that CRA did not have the right to take the collections actions it did; and (2) that if it had the authority to take any actions to enforce, CRA carried it out in an improper and unlawful manner.

(1) Right to Take Collection Action

[84] The Plaintiffs' assertion is that the assessments used on the basis of collection enforcement were arbitrary and premature.

[85] The Plaintiffs' position is a collateral attack on outstanding orders of this Court and judgments of the Tax Court of Canada. Collateral attacks in these circumstances are not permitted.

[86] The collection action was based on certificates, which have the effect of judgments of this Court. The proper time and place to challenge the certificates is when they were issued. The Plaintiffs took no steps to lift or limit the certificates, choosing instead to proceed to the provincial superior court which had no jurisdiction over the certificates.

[87] The Plaintiffs never asserted that there is no basis for some parts of the assessments and certificates. They advance no defence to the underlying claim by CRA for amounts owing by way of remission.

[88] The Plaintiffs go further and attack the assessments and thus the judgment of Justice Boyle. They have suggested that this Court should review the whole of the assessments.

This submission is not just a collateral attack on the Tax Court's judgment but a face-on attack. This Court does not sit in review of the Tax Court. The validity of the assessments are within the jurisdiction of the Tax Court and subject to appeal to the Federal Court of Appeal, the assessments for part of 2002 and for 2003 were confirmed. The assessments stand as modified by

the Tax Court and the corporate Plaintiffs owe the amounts confirmed; which amounts have not been paid.

[89] The Plaintiffs further assert that the enforcement action was premature because CRA was required to wait 90 days before taking action.

As outlined earlier, in respect of the failure to remit the employer's tax, the statute does not impose this collection restriction. A central part of the 2002-2003 assessments was the employees' remission amount which entitled CRA to commence enforcement immediately. The debts certified in August 2004 were GST debts; those certified in December 2004 were payroll and source deduction amounts. To the extent that the assessment and the certificates issued in respect of those assessments contained amounts which may be subject to the 90-day period, it was incumbent on the Plaintiffs to seek to vary or expunge the certificates. This they failed to do.

(2) Improper and Unlawful Enforcement

[90] Under this ground of attack the Plaintiffs have pleaded improper purpose, bad faith, unreasonable and unlawful conduct, all of which falls under excess of jurisdiction intentional tests, defamation, negligence and *Charter* right violations.

[91] The Plaintiffs' overarching allegation is that CRA and its employees conspired with each other to intentionally abuse their powers by wrongfully assessing amounts alleged to be owed by the corporate Plaintiffs and then initiating enforcement procedures in the collection of the amounts allegedly owing.

The aspect of the allegation concerning the assessments has already been dealt with.

[92] In regard to the administrative law principles of abuse or excess of jurisdiction/improper purpose, the Plaintiffs must show that the actions of collection were for a purpose other than collection of moneys believed to be owing. The test is basically the same for the test of abuse of process.

[93] In regards to the intentional tort of conspiracy and misfeasance in public office, the Plaintiffs must establish an intent to injure or other extraneous and improper purpose.

As in *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263, para 32, the Court summarized the element of misfeasance in public office as follows:

> … the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

[94] As to evidence of improper purpose and related allegations, the Plaintiffs can only point to an alleged comment by Peddle in June 2003 that he would "bring Humby down". That statement is uncorroborated and has not been made out as a fact. The best that the Plaintiffs can say as to why principally Peddle (and other CRA officials) was taking such forceful enforcement action against the Plaintiffs is "because he (Peddle) could". There is no evidence to support this speculative response.

[95] When the enforcement actions are looked at as a whole, there is nothing untoward or egregious in those actions. The actions are the ones a reasonable creditor would take. Some worked out; others did not.

[96] Throughout the dealings between Humby and CRA, Humby took personal exception to Peddle. It was his belief that Peddle had some personal grudge against him. Humby continued to insist that Peddle be removed from the file, at times citing the Taxpayers' Bill of Rights and the right to have a representative of his choice.

[97] Matters went so far that Humby officially claimed through the chain of command to the Minister of National Revenue. At each stage the complaint was dismissed. The then Minister was even called to testify at this trial. Her evidence was not helpful because, as she had warned in advance, she had no recollection of the matter.

[98] Peddle's immediate supervisors saw no basis to sustain the complaint. This, the Plaintiffs claim, is further evidence of the abusive behaviour of CRA.

[99] Justice Boyle seemed to be critical of Peddle although Peddle did not testify in the Tax Court case. Peddle did appear before me. Given Humby's actions, it would not be surprising that Peddle was annoyed with him and that he may have taken some greater enthusiasm in his collection activities. The animosity between Peddle and Humby was clear; it was palpable in Court. I took in Peddle's evidence with caution, particularly where not supported by documents.

[100] However, I do not accept the Plaintiffs' position that Peddle was so full of animus toward Humby that he acted outside his mandate, that he did things simply to cause Humby and his company harm. All of his activities were directed at securing payment for debts which were owed.

[101] It was these same people who agreed in 2003 to hold off CRA collection action until the litigation was concluded so long as the Plaintiffs maintained taxes current. This is hardly the acts of an individual or group that has a vendetta.

[102] The overarching problem for the Plaintiffs is that they failed to honour their obligations under the various arrangements in 2003 and 2004 previously referred to.

[103] The Plaintiffs also point to execution action taken in January 2005, prior to the adverse judgment in May 2005, as further proof of this part of the claim. As noted, the Plaintiffs were in default of the 2004 arrangement. The circumstances of the January 2005 actions have been discussed later.

[104] However, the Plaintiffs have not established that if CRA had waited until May 2005 for the judgment, the Plaintiffs' situation would have been any different. The Plaintiffs would have increased their tax debt but there is no suggestion that they would have been able to pay their tax obligation.

[105] A critical piece missing in the Plaintiffs' case is any showing that "but for" CRA's actions in January 2005, their eventual situation would have been any different from what occurred. At no

time did the Plaintiffs have any plan to deal with their debt except the hope that their litigation would be successful. It was not.

[106] CRA's willingness to delay collection while the Newfoundland litigation proceeded and the willingness of CRA to leave seized goods in Gander until it became unacceptable to do so because of security and power concerns is inconsistent with bad faith and improper purpose.

[107] There was nothing in the enforcement actions of CRA which were unreasonable or for purposes other than the due collection of debt. They proceeded in an honest belief that all the requisite steps (including service of the assessments) were completed.

[108] The Plaintiffs rely on the fact that CRA officials did not follow each and every step outlined in the Manual used by collection officers. It is trite law that manuals of this sort are not binding in law as regards third parties, nor are they binding on the employees themselves. The Plaintiffs' attempt to treat the Manual as if it was subordinate legislation is misplaced.

[109] The CRA officials were not required to follow the Manual nor did the Manual create a legitimate expectation in the Plaintiffs as to what CRA would do. There is no evidence that the Plaintiffs relied on the Manual until after this litigation commenced.

[110] The Plaintiffs complain that CRA acted unreasonably in moving goods to Grand Falls and in the manner of realizing on the corporate Plaintiffs' assets. The move to Grand Falls was fully justified by events and the Plaintiffs have not shown through any credible independent evidence that

either CRA (or the High Sheriff's Office as well) could have and should have sold the goods differently and were improvident in the manner of their dealings.

[111] Given my finding that CRA acted for no other purpose than the collection of debts owed and the actions were reasonable in all the circumstances, there is no basis for the claims of abuse of process, improper purpose, interference with economic relations, civil conspiracy or the myriad of other allegations of improper purpose and bad faith.

[112] The Plaintiffs' analysis fails to address the fact that taxes were assessed, the amounts were owed, the amounts were not paid and CRA had to take action to collect.

[113] The Plaintiffs also plead defamation by CRA and its agents in asserting that the Plaintiffs had not paid amounts due and that Humby was taking goods from the property of Central Springs and A&E.

[114] To constitute defamation, the statements must be false and likely to injury the reputation of the claimant.

[115] Any statements about the tax debt were true and made in the context of and for the purpose of carrying out the collection functions.

[116] The only statements proven to have been made about removal of property were those made to Freake and others in the High Sheriff's Office. Quite apart from any qualified privilege, the

statements were a repetition of what Peddle had been told and constituted his basis for giving instructions to the High Sheriff's Office.

[117] Not only do the statements not constitute defamation, this claim is one of those clearly caught by the two-year limitation period.

[118] The Plaintiffs have pleaded some form of negligence, but it is difficult to discern what the Plaintiffs say are negligent actions. All of the matters to which the Plaintiffs object have been dealt with – they are all intentional acts either covered by administrative law or intentional tort principles.

[119] The principles of negligence are well known. The first issue is whether there is a duty of care.

In *Anns v Merton London Borough Council*, [1978] AC 728 (HL), the House of Lords sets out a two-step analysis to determine the existence of a duty of care:

(a) Whether there is sufficient relationship of proximity such that carelessness on the part of one party may likely cause damage to the other, in which case a *prima facie* duty of care arises; and

(b) If the answer to (a) is yes, whether there are any considerations which ought to negative or limit the scope of the duty of the class of person to whom it is owed or the damages to which a breach of it may give rise.

[120] In the context of this case, the nature of the relationship is that of debtor-creditor; the parties are in a sense adverse. The Supreme Court of Canada has described the relationship between the

taxpayer and CRA during an audit as being one of "opposing positions" (see *R v Jarvis*, 2002 SCC 73, [2002] 3 SCR 757, para 84).

The parties are even more opposed when there is a debt due and unpaid.

[121] Except in very limited circumstances, there is no duty of care imposed on the Minister when the Minister is attempting to collect debt. By its nature, the debt collection activities will harm the debtor.

[122] The relationship between the debtor and the Minister is governed, in these circumstances, by statute. Absent a breach of the powers in the statute, the Minister has no duty towards a debtor other than to act in accordance with the statute for purposes of the statute.

[123] Even if there were some duty of care, at least not to act recklessly, there is nothing in CRA's actions which would constitute a breach of any such duty.

C. Charter *Rights*

[124] The Plaintiffs have claimed breach of sections 7, 8 and 12 of the *Canadian Charter of Rights and Freedoms*. However, they have advanced no authorities to support this claim of breach of *Charter* rights.

(1) Section 7 – Life, Liberty, Security

[125] Section 7 does not apply generally to corporations (*R v CIP Inc*, [1992] 1 SCR 843, SCJ No 34). It also does not apply to the ordinary stress and anxieties that a reasonable person would suffer

as a result of government action (*New Brunswick (Minister of Health and Community Services) v G*, [1999] 3 SCR 46, SCJ No 47).

[126] What is at stake in this case is principally economic interests which are not covered by the *Charter*. In the context of income tax assessments, Justice Rothstein in *Mathew v The Queen*, 2003 FCA 371, [2003] FCJ No 1470, rejected the notion that section 7 was engaged in respect of tax assessment.

> 29 I will accept that the power of reassessment of a taxpayer implicates the administration of justice. However, I do not accept that reassessments of taxpayers result in a deprivation of liberty or security of the person.
>
> 30 If there is a right at issue in the case of reassessments in income tax, it is an economic right. In *Gosselin*, McLachlin C.J.C., for the majority, observed that in *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 1003, Dickson C.J.C., for the majority, left open the question of whether section 7 could operate to protect "economic rights fundamental to human...survival". However, there is no suggestion in *Gosselin* that section 7 is broad enough to encompass economic rights generally or, in particular, in respect of reassessments of income tax. I am, therefore, of the view that the appellants have not demonstrated a deprivation of any right protected by section 7 of the *Charter*.

[127] Finally, the Plaintiffs have failed to identify what fundamental principle of justice has been breached. Failure to do so negates a section 7 claim (*Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791).

(2) Section 8 – Unreasonable Search and Seizure

[128] It is impossible to see how section 8 is engaged in this case. The seizure of property (seizure of a person was not involved here) was authorized by law; the law was reasonable; the execution of the seizure was conducted reasonably.

[129] As found earlier, the seizures were authorized by law (section 223 and subsection 225.1(6) of the *Income Tax Act*, subsection 163(3) of the *Excise Tax Act*). Subsection 163(3) has been held not to violate sections 8, 11 and 12 of the *Charter* (*Porter v Canada*, [1989] 3 FC 403, 26 FTR 69) [*Porter*].

[130] There is no real suggestion that the law is unreasonable much less that it is not saved by section 1. As indicated earlier, the seizures were conducted reasonably.

(3) Section 12 – Cruel and Unusual Punishment

[131] To suggest that a dispute such as this, involving seizures of corporate assets for debts properly due and owing, engages aspects of cruel and unusual punishment trivializes the important interests protected by this provision of the *Charter*.

[132] In *Porter*, the Court expressly found that forfeiture in the context of tax enforcement did not violate s 12 of the *Charter*.

[133] The obligation to pay taxes is not "cruel and unusual punishment" within section 12 of the *Charter* (*Schindeler v Canada*, [1994] 1 CTC 2379, TCJ No 29). None of the actions of either Defendant constitute cruel and unusual punishment.

[134] This claim, as with all of the others made by the Plaintiffs, fails to address the facts that (a) they owed the taxes, (b) they had repeatedly failed to pay the taxes, and (c) they had neither a plan nor an ability to pay the taxes (save for litigation which was unsuccessful).

D. *Liability of High Sheriff's Office*

[135] The Plaintiffs' case against the High Sheriff's Office appears to be based firstly on the fact that the High Sheriff's Office officials carried out the instructions of CRA and secondly on the Plaintiffs' allegation that the manner in which the instructions were carried out was, either or both, done in bad faith and commercially unreasonable.

[136] The High Sheriff's Office has explained that the *Judgment Enforcement Act* seizure and sale is a creditor driven regime such that Sheriff's officer carry out the instruction of creditors. That, however, is not a complete answer to the Plaintiffs. The High Sheriff's Office is required pursuant to paragraph 3(5)(f) of that Act to act in good faith and in a commercially reasonable manner. This provision limits the suggestion of a creditor driven regime.

[137] As the Court has not found that the actions of CRA, including the instructions to the High Sheriff's Office, were wrongful, there is no basis for liability on the grounds of following CRA's instructions.

[138] On the second grounds, the Plaintiffs claim that the High Sheriff's Office seized assets which should not have been seized and thereafter carried out the seizure and sale in an improper manner. The improper seizure required the Plaintiffs to use the objection process under the *Judgment Enforcement Act* to secure release.

[139] In regard to this allegation, the legislation contemplates that situations may arise where assets are seized which either do not belong to the debtor or a third party has an interest in that asset. The procedure for objections is the device to sort out conflicting claims.

[140] There is no evidence that the High Sheriff's Office acted recklessly or without some basis for believing that one or more of the Plaintiffs had an interest in any asset CRA directed them to seize.

[141] The Plaintiffs also allege that the Sheriff's officials engaged in "overkill" in seizing assets by imposing the requirement of two Bailee Undertakings, having a Sheriff's officer present at 325 Garrett Drive as well as RCMP and imposing 24 hour/7 day security.

In the context of the situation, as explained by Freake, Butler and Peddle, it was not unreasonable to impose security restrictions.

[142] It is indicative of the proper purpose of CRA and the good faith and commercial reasonableness of the High Sheriff's Office that Humby and his companies were permitted to keep

assets on site rather than face the usual seizure mechanisms of removal and storage (until leaving assets on site became impossible).

[143] The requirement to move assets has already been dealt with in these Reasons. Nothing in regards to the move attracts liability to the High Sheriff's Office.

[144] The Plaintiffs also complain that the High Sheriff's Office did not move quickly enough to sell the seized assets and that they failed to carry out the sale in a commercially reasonable manner. There is no basis for this allegation.

[145] The High Sheriff's Office began the process by obtaining appraisals of personal property, even though not required to do so by the *Judgment Enforcement Act*. There were a number of aborted attempts to sell assets – all of which were resisted by the Plaintiffs. The Plaintiffs cannot now complain about the speed with which the sale(s) were completed.

[146] The Plaintiffs object to the manner in which the sale of personal property was completed. They complain that some equipment was not operable and different assets were lumped together in bins and not segregated by asset type.

[147] The High Sheriff's Office received just slightly less money for goods sold than the appraised value. This is clear and objective evidence of the commercial reasonableness of the sale process.

[148] The Plaintiffs have submitted no independent or expert evidence that the actions of the High Sheriff's Office fell below any standard of reasonable commercial behaviour. If the Plaintiffs were to sustain the allegations against the Sheriff, one might have expected evidence that the process was flawed; that the manner of sale deficient; that the amount realized was unreasonably or unconscionably low.

The Sheriff is not an expert in the sale of all types of goods and is not a "retailer" (*National Bank of Canada v Marguis Furs Ltd*, [1987] OJ No 1228, 1987 CarswellOnt 1817). However, the actions of the Sheriff have not been shown to be unreasonable in the way in which goods were auctioned.

[149] Aside from there being no evidence of bad faith or commercially unreasonable behaviour, as noted earlier, all of the actions of the High Sheriff's Office occurred before January 2007. Since the allegations against the Sheriff are breach of statutory duties, the claim is barred by the Newfoundland *Limitations Act*.

[150] The Plaintiffs have made a vague allegation that goods were damaged or stolen but nothing in this regard has been made out.

[151] Given the findings above, I do not have to deal with the defence asserted in respect to subsection 5(6) of the Newfoundland and Labrador *Proceedings Against the Crown Act*, RSNL 1990, c P-26.

> 5. (6) Proceedings do not lie against the Crown under this Act in respect of a thing done or omitted to be done by a person while discharging or purporting to discharge

> (a) responsibilities of a judicial nature vested in him or her; or
>
> (b) responsibilities that the person has in connection with the execution of judicial process.

[152] I have doubts that in the face of paragraph 3(5)(f) of the *Judgment Enforcement Act* the Sheriff is then entitled to claim immunity under the *Proceedings Against the Crown Act*.

[153] To conclude on this aspect of the case, the claim as against the High Sheriff's Office will be dismissed.

IV. DAMAGES

[154] To complete the analysis of this case, the Court will deal with damages only in the alternative. The Court was given little to no assistance as to the real amount of damages or its attribution as between the Plaintiffs or as between the Defendants.

[155] The damages claimed cover loss of property, loss of wages, loss of business income, loss of reputation and mental distress.

[156] The Plaintiffs have put in no expert evidence to assist the Court with any calculations. The Plaintiffs, at trial, tried to introduce a multi-page document from Farrell, the Plaintiffs' long-standing accountant, purporting to establish his estimate of some of the losses. The Court ruled his evidence to be inadmissible. It was clearly opinion evidence, it had not been tendered in accordance with the Court's Rules and pre-hearing expert witness orders. It was fundamentally unfair to the Defendants to spring the evidence at the conclusion of the trial.

[157] The evidence of Farrell would have held little weight as he was so intimately involved in the affairs of Humby, clearly sympathetic to an old client (admirable qualities) and so lacking in supporting evidence that it was not the type of objective evidence the Court needed.

[158] The Plaintiffs have put forward no evidence that had the Defendants not seized assets when they did, the Plaintiffs would have been able to satisfy the tax debts. There was no "before and after" financial analysis showing how the Plaintiffs were materially harmed by any of these actions.

[159] To the contrary, the evidence established that even before January 2005, Central Springs and A&E were in serious financial trouble. Farrell had described the Humby companies as teetering on the brink of bankruptcy.

[160] In 2004, the Business Development Bank of Canada [BDC] was working with Humby on "turnaround strategies" for the companies.

[161] In the T2 corporate income tax returns for Central Springs and A&E in 2003, both companies reported net losses. Central Springs had a substantial loss for the 2002 taxation year and neither company filed T2 returns or financial statements for 2004.

[162] As admitted in correspondence to CRA, Central Springs and A&E were under great financial burdens and had exhausted all avenues of financing.

As discussed earlier in these Reasons, the only financial card available to Humby and his companies was the hoped for results of the litigation with the provincial government. As the claim was dismissed in May 2005, the Plaintiffs in fact had no real assets with which to work.

[163] At the end of the day the Court must conclude that the Plaintiffs' financial difficulties stemmed substantially from the decision by Humby to have the other corporations fund HEL which was a failing business due to the loss of the wood cutting contract and an inadequate supply of wood. None of these events are attributable to the Defendants, individually or collectively.

[164] Regarding loss of profits, the Plaintiffs have failed to show that there was a reasonable probability that they could have achieved a certain level of profits "but for" the Defendants' actions.

[165] With respect to claims for loss of property, which CRA had seized and sold, the property at 325 Garrett Drive was sold by the first mortgagee BDC at a net loss. CRA was not involved in the sale and could not have been unless it had paid off the BDC. It is unreasonable to suggest that CRA should have done so given the end result.

[166] To the extent that Central Springs was paying its mortgage to BDC and thus BDC would not have moved against the property, it did so by not paying the source deductions and HST.

[167] The sale of a property at Baird Avenue was outside the scope of this action. There was no evidence concerning enforcement against this property by the Defendants.

[168] The real property at Benton was released from seizure and may still be in the possession of one of the Plaintiffs. The Plaintiffs signed a complete release in respect of damages and they are bound by the terms of that release.

[169] Inventory and equipment of Central Springs and A&E seized and sold were initially stored at 325 Garrett Drive, the premises from which they operated. There is no evidence of what inventory and equipment belonged to which company but the proceeds of the sale were applied to the tax debt. Unsold items were returned.

The Plaintiffs have not established any loss in respect of these items for which either Defendant is responsible.

[170] There was no evidence of loss of rental income and it is impossible to determine precisely the amount. It seems that the Plaintiffs were claiming loss in respect to Benton in which case they received judgment from another party and they are, in addition, bound by the release.

[171] There is no real evidence in respect of a claim for loss of receivables. The attempts to collect by CRA were unsuccessful as had been the case pre-January 2005 when the Defendants tried to collect the amounts.

[172] The Plaintiffs made claims for loss of ability to obtain financing and to obtain suppliers but there is no quantification of any amount. It would, if there was merit in the case, fall into general damages as would loss of reputation and the other less tangible claims.

[173] Humby claimed for loss of pre-trial earning capacity and for reduction in his future CPP benefits. There is no reliable evidence on this point from which this Court would make any calculation.

[174] The most significant aspect of Humby's general damages claim is that related to his medical condition. It was his assertion that the deterioration in his physical and mental health was attributable to the actions of the Defendants.

[175] It is no doubt difficult for Humby to face what has happened; it is difficult no doubt for his family and friends to see the change in this man. To watch the demise of one's business empire is tragic.

However, the Defendants are not legally responsible for Humby's pain and suffering.

[176] The evidence establishes that Humby's decline, his anxiety and mood disorders began in the early 2000s. His doctor's medical evidence establishes that Humby's medical issues are coincident with the financial difficulties due to the loss of the wood supply and the litigation commenced by Humby against numerous parties.

[177] The evidence establishes that if the stress of seizure and sale of assets may have added to Humby's problems, they were not the cause. There is also a significant issue of lack of mitigation which needs not be explored here.

[178] The Court wishes that there was a way to cushion, for Humby, the results of this decision and to lessen his adverse reaction to the results of the litigation in which, according to medical evidence, he apparently has put such personal and emotional reliance.

[179] There is no evidence to suggest that even if the Plaintiffs were entitled to some damages (to which they are not), an award of punitive or exemplary damages should be made.

V. CONCLUSION

[180] At the end of the day the Plaintiffs cannot avoid the fact that they owed tax moneys, that they failed to pay the amounts due and therefore the CRA was entitled to seize and sell assets to satisfy the amounts due. The Plaintiffs cannot also avoid the fact that the High Sheriff's Office carried out its duties as required by law and "in good faith and in a commercially reasonable manner".

[181] For all these reasons, the Plaintiffs' action is dismissed with costs for each Defendant at the usual scale of Column III of the Court's Tariff. Any aspects of the scale suggesting a range shall be settled at the mid-point of any range.

JUDGMENT

THIS COURT'S JUDGMENT is that the Plaintiffs' action is dismissed with costs for each Defendant at the usual scale of Column III of the Court's Tariff. Any aspects of the scale suggesting a range is to be settled at the mid-point of any range.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1363-09
STYLE OF CAUSE:	ELI HUMBY, CENTRAL SPRINGS LTD. AND A&E PRECISION FABRICATION AND MACHINE SHOP INC. v HER MAJESTY THE QUEEN AND HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR, AS REPRESENTED BY THE OFFICE OF THE HIGH SHERIFF
PLACE OF HEARING:	ST. JOHN'S, NEWFOUNDLAND AND LABRADOR
DATE OF HEARING:	FEBRUARY 11-15, 2013 MARCH 18-22 AND 25-28, 2013 APRIL 2-4, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	PHELAN J.
DATED:	NOVEMBER 8, 2013

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Rolf Pritchard	FOR THE SECOND DEFENDANT

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