Federal Court  Cour fédérale

Date: 20090724

Docket: T-1761-07

Citation: 2009 FC 755

Ottawa, Ontario, July 24, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

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

Plaintiffs (Respondents)

and

**CANADA REVENUE AGENCY and
ATTORNEY GENERAL OF CANADA**

Defendants (Applicants)

REASONS FOR ORDER AND ORDER

~~[1]~~ The defendants, who are the applicants on this motion, seek an Order striking the amended statement of claim pursuant to Rule 221(1) of the *Federal Courts Rules*, SOR/98-106 on the ground that the statement of claim discloses no reasonable cause of action.

FACTS

[2] The plaintiffs in this proposed class action are two law firms and four clients of those law firms. The law firms have collected and remitted GST on exempt amounts and passed the disbursement on to their client with additional GST. The Statement of Claim alleges that the government should not have required the law firms to collect or remit GST on amounts passed on to their clients for disbursements which were exempt from GST. In the action, the plaintiffs seek to recover the amounts of GST remitted to the government as GST on exempt disbursements, and passed on to the clients. If this action succeeds, the clients will be reimbursed with the GST recovered.

[3] The plaintiff Merchant Law Group (hereinafter referred to as "MLG") had not collected and remitted GST on disbursements incurred as agent for their clients. The plaintiff MLG was reassessed by the Minister of National Revenue (the Minister) for the 2000, 2001, 2002 and January 1 to April 30, 2003 GST reporting periods on the basis that it failed to collect and remit GST on legal disbursements for and on behalf of its clients. The Notice of Assessment issued by the Minister of February 5, 2004, adjusted the GST collectible by approximately $77,350, and required payment of this amount by MLG.

[4] MLG filed a Notice of Appeal to the Tax Court of Canada, which allowed the appeal, in large part, on June 16, 2008. In *Merchant Law Group v. Canada*, 2008 TCC 337, Mr. Justice Rossiter, as he then was, concluded that MLG was acting as an agent for its clients with respect to all the disbursements in issue, excepting office supplies, and was therefore not required to collect or

remit GST for these disbursements. Accordingly, the Tax Court held that disbursements incurred by law firms as agents for their clients are not subject to GST when passed on to their clients. The Crown has filed a Notice of Appeal to the Federal Court of Appeal from this Tax Court decision.

[5] There is no allegation that the plaintiffs Stevenson Law Office, Duane Hewson, Judith Lewis, Marcel Wolf and Anne Bawtinhimer filed Notices of Objection with the Minister in respect of their GST assessments.

ISSUES

[6] The defendants submit that the plaintiffs' Amended Statement of Claim should be struck for the following reasons:

a. This Court lacks jurisdiction. The action is an indirect attack on the assessing position of the Minister, which can only be challenged in the Tax Court of Canada pursuant to section 12 of the *Tax Court of Canada Act*;

b. Section 312 of the *Excise Tax Act* precludes the recovery of amounts paid as GST except in accordance with the provisions of part IX of the *Excise Tax Act*;

c. The pleadings fail to disclose a reasonable cause of action:

    i. against the Crown for the tort of misfeasance in public office; and

    ii. based on "wrongful receipt" or restitution. Alternatively, the defendants submit that if the Court determines that a cause of action in restitution or wrongful receipt exists, such an action is precluded by section 12 of the *Tax Court of Canada Act* and section 312 of the *Excise Tax Act.*

[7] The plaintiffs submit that the Court should first consider whether they have a reasonable cause of action in misfeasance in public office. If the Court finds in favour of the plaintiffs on this issue, it will not be necessary to consider the defendants arguments with respect to section 12 of the

Tax Court Act and section 312 of the *Excise Tax Act.* Accordingly, I will first consider whether the pleadings disclose a reasonable cause of action against the Crown for misfeasance in public office.

RELEVANT LEGISLATION

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

Motion to strike	Requête en radiation
221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(*a*) discloses no reasonable cause of action or defence, as the case may be,	*a*) qu'il ne révèle aucune cause d'action ou de défense valable;
(*b*) is immaterial or redundant,	*b*) qu'il n'est pas pertinent ou qu'il est redondant;
(*c*) is scandalous, frivolous or vexatious,	*c*) qu'il est scandaleux, frivole ou vexatoire;
(*d*) may prejudice or delay the fair trial of the action,	*d*) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
(*e*) constitutes a departure from a previous pleading, or	*e*) qu'il diverge d'un acte de procédure antérieur;
(*f*) is otherwise an abuse of the process of the Court,	*f*) qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered	Elle peut aussi ordonner que

accordingly.	l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.
Evidence	
(2) No evidence shall be heard	Preuve
on a motion for an order under paragraph (1)(*a*).	(2) Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)*a*).

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

Jurisdiction	Compétence
12. (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the *Air Travellers Security Charge Act*, the *Canada Pension Plan*, the *Cultural Property Export and Import Act*, Part V.1 of the *Customs Act*, the *Employment Insurance Act*, the *Excise Act, 2001*, Part IX of the *Excise Tax Act*, the *Income Tax Act*, the *Old Age Security Act*, the *Petroleum and Gas Revenue Tax Act* and the *Softwood Lumber Products Export Charge Act, 2006* when references or appeals to the Court are provided for in those Acts.	12. (1) La Cour a compétence exclusive pour entendre les renvois et les appels portés devant elle sur les questions découlant de l'application de la *Loi sur le droit pour la sécurité des passagers du transport aérien*, du *Régime de pensions du Canada*, de la *Loi sur l'exportation et l'importation de biens culturels*, de la partie V.1 de la *Loi sur les douanes*, de la *Loi sur l'assurance-emploi*, de la *Loi de 2001 sur l'accise*, de la partie IX de la *Loi sur la taxe d'accise*, de la *Loi de l'impôt sur le revenu*, de la *Loi sur la sécurité de la vieillesse*, de la *Loi de l'impôt sur les revenus pétroliers* et de la *Loi de 2006 sur les droits d'exportation de produits de bois d'oeuvre*, dans la mesure où ces lois prévoient un droit de renvoi ou d'appel devant elle.

[10] Section 261(1) and (2) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, provides:

Rebate of payment made in error

261. (1) Where a person has paid an amount

(*a*) as or on account of, or

(*b*) that was taken into account as,

tax, net tax, penalty, interest or other obligation under this Part in circumstances where the amount was not payable or remittable by the person, whether the amount was paid by mistake or otherwise, the Minister shall, subject to subsections (2) and (3), pay a rebate of that amount to the person.

Restriction

(2) A rebate in respect of an amount shall not be paid under subsection (1) to a person to the extent that

(*a*) the amount was taken into account as tax or net tax for a reporting period of the person and the Minister has assessed the person for the period under section 296;

(*b*) the amount paid was tax, net tax, penalty, interest or any other amount assessed under section 296; or

(*c*) a rebate of the amount is payable under subsection

Remboursement d'un montant payé par erreur

261. (1) Dans le cas où une personne paie un montant au titre de la taxe, de la taxe nette, des pénalités, des intérêts ou d'une autre obligation selon la présente partie alors qu'elle n'avait pas à le payer ou à le verser, ou paie un tel montant qui est pris en compte à ce titre, le ministre lui rembourse le montant, indépendamment du fait qu'il ait été payé par erreur ou autrement.

Restriction

(2) Le montant n'est pas remboursé dans la mesure où :

a) le montant est pris en compte à titre de taxe ou de taxe nette pour la période de déclaration d'une personne et le ministre a établi une cotisation à l'égard de la personne pour cette période selon l'article 296;

b) le montant payé était une taxe, une taxe nette, une pénalité, des intérêts ou un autre montant visé par une cotisation établie selon l'article 296;

c) un remboursement du montant est accordé en application des paragraphes 215.1(1) ou (2) ou 216(6) ou des articles 69, 73, 74 ou 76 de la *Loi sur les*

215.1(1) or (2) or 216(6) or a refund of the amount is payable under section 69, 73, 74 or 76 of the *Customs Act* because of subsection 215.1(3) or 216(7).	*douanes* par l'effet des paragraphes 215.1(3) ou 216(7).

[11] Section 312 of the *Excise Tax Act* provides:

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

ANALYSIS

Issue No. 1 : Tort of misfeasance in public office

a. Misfeasance in public office

[~~12~~] In *Odhavji Estate v. Woodhouse*, 2003 SCC 69, 233 D.L.R. (4th) 193, a case on the tort of misfeasance, the Supreme Court reviewed in detail the tort of misfeasance in public office. Liability for misfeasance in public office has been imposed on Crown officials since *Ashby v. White* (1703), 2 Ld. Raym. 938, 92 E.R. 126, wherein a cause of action was determined to exist against an elections

officer who maliciously and fraudulently deprived an individual of the right to vote. The landmark case *Roncarelli v. Duplessis,* [1959] S.C.R. 121, established that misfeasance in public office is a recognized tort in Canada. Subsequent cases have widened the scope of this cause of action.

~~[13]~~ At paragraph 23 of *Odhavji,* supra, Jutice Iacobucci defined the constituent elements of the tort. They are:

1. the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer; and

2. the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff.

~~[14]~~ At paragraph 25, Justice Iacobucci described the tort of misfeasance in public office as "action for the deliberate misconduct on the part of a public official". Deliberate misconduct consists of:

a. an intentional illegal act; and

b. an intent to harm an individual or class of individuals.

~~[15]~~ At paragraph 28, Justice Iacobucci stated:

> … The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in a public office requires an element of "bad faith" or "dishonesty".

~~[16]~~ Justice Iacobucci summed up the purpose of the tort at paragraph 30:

> … to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions.

[17] The ambit of the tort of misfeasance in public office is limited by the requirement that the conduct be deliberate and the public officers be aware of the likelihood that the conduct would injure the plaintiff. Thus, Justice Iaccobucci continued at paragraph 26:

> **¶26** …misfeasance in a public office is not directed at a public officer who inadvertently or negligently fails adequately to discharge the obligations of his or her office: see *Three Rivers*, at p. 1273, *per* Lord Millett. Nor is the tort directed at a public officer who fails adequately to discharge the obligations of the office as a consequence of budgetary constraints or other factors beyond his or her control.

[18] The tort's constituent elements mean that the identity of the public officers must be identified in the action. In *Odhavji*, supra, the public officers were named as defendants, so that the issue of whether the public officers needed to be named did not arise.

[19] In *Swift Current (City) v. Saskatchewan Power Corp.,* 2005 SKQB 505, 145 A.C.W.S. (3d) 1009 at paragraph 55 to 58 the Saskatchewan Court of Queen's Bench held that the pleadings must be clear as to which office-holder had the necessary state of mind to establish the tort. This is because the constituent element requiring that the public office engaged in deliberate unlawful conduct to harm the plaintiff must be ascribed to a certain person. On appeal in *Swift Current (City) v. Saskatchewan Power Corp.*, 2007 SKCA 27, 156 A.C.W.S. (3D) 578., the Saskatchewan Court of Appeal held that action against the defendant Crown corporation Saskatchewan Power was based on its alleged corporate policy, so that it was not necessary to prove that a particular individual

deliberately acted unlawfully with the intent to harm the plaintiffs. Justice Lane held at paragraph 27:

> … Because this is the alleged corporate policy of SaskPower it is not a required element that a particular individual be identified. The identity of the individual may be relevant in a pleading of vicarious liability against SaskPower. However, the identity of the employee or official who acted on behalf of SaskPower is not a necessary element of the tort.
>
> (Emphasis added)

[20] At paragraph 29, the Court of Appeal found that the claim against Saskatchewan Power was a direct action rather than a claim based upon vicarious liability. The basis for the finding that the defendant Crown corporation could be held directly liable was that direct liability may attach to a corporation for an intentional tort. However, with respect to recovery of GST, the Tax Court has exclusive jurisdiction.

[21] In the case at bar the plaintiffs would not have a direct claim for tort against the defendants. The Crown may not be held directly liable for tort because the liability of the Crown under the *Crown Liability and Proceedings Act*, R.S.C. 1985 c.50, is only vicarious, i.e. for a tort committed by a servant of the Crown. Section 3 of that *Act* provides:

Liability	Responsabilité
3. The Crown is liable for the damages for which, if it were a person, it would be liable	**3.** En matière de responsabilité, l'État est assimilé à une personne pour :
(*a*) in the Province of Quebec, in respect of	*a*) dans la province de Québec :
	(i) le dommage causé

(i) the damage caused by the fault of a servant of the Crown, or

(ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and

(*b*) in any other province, in respect of

(i) a tort committed by a servant of the Crown, or

(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.

par la faute de ses préposés,

(ii) le dommage causé par le fait des biens qu'il a sous sa garde ou dont il est propriétaire ou par sa faute à l'un ou l'autre de ces titres;

b) dans les autres provinces :

(i) les délits civils commis par ses préposés,

(ii) les manquements aux obligations liées à la propriété, à l'occupation, à la possession ou à la garde de biens.

[22] Section 10 of *Crown Liability and Proceedings Act* further provides:

Liability for acts of servants

10. No proceedings lie against the Crown by virtue of subparagraph 3(*a*)(i) or (*b*)(i) in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant

Responsabilité quant aux actes de préposés

10. L'État ne peut être poursuivi, sur le fondement des sous-alinéas 3*a*)(i) ou *b*)(i), pour les actes ou omissions de ses préposés que lorsqu'il y a lieu en l'occurrence, compte non tenu de la présente loi, à une action en responsabilité contre leur auteur, ses représentants personnels ou sa

or the servant's personal representative or succession.	succession.

[23] As the Saskatchewan Court of Appeal stated in *Swift Current*, if the claim is founded in vicarious liability, the identity of the specific officer may be necessary, which in this case it is to establish a necessary element of the tort, i.e. the requisite intent. The plaintiffs' Statement of Claim is therefore deficient in failing to name the specific officer or officers responsible for the alleged misfeasance in public office. In *Mahoney v. Canada* (1986), A.C.W.S. (2d) 437, Cullen J. of the Federal Court also held that the servants must be named if the claim is based on the Crown's vicarious responsibility for torts committed by public servants.

[24] In addition to the failure to identify specific individuals, the defendants further submit that the plaintiffs have not pled any material facts supporting the claim. The defendants submit that the pleadings fall far short of alleging deliberate, dishonest conduct by the defendants. The relevant allegations, at paragraph 12 of the amended Statement of Claim, state:

> Since 1992, the Government sought collection contrary to legislation, regulation, and its own policies, knowing that its conduct was unlawful and likely to injure the Class. In particular, for the purposes of harassing and injuring the Collector subclass, the government ignored P-182 R, P-209, and other interpretation and policy instruments…

[25] The plaintiffs submit that this is a sufficient pleading of the material facts. The Court must disagree. Rule 174 of the *Federal Courts Rules* sets out the requirement to plead material facts:

Material facts	Exposé des faits
174. Every pleading shall contain a concise statement of	**174.** Tout acte de procédure contient un exposé concis des

the material facts on which the party relies, but shall not include evidence by which those facts are to be proved.	faits substantiels sur lesquels la partie se fonde; il ne comprend pas les moyens de preuve à l'appui de ces faits.

[26] In this case, the amended Statement of Claim contains a set of conclusions, but does not provide any material facts for the conclusions. It is not sufficient for a claim to contain bare assertions without facts on which to base the assertions. See: *Johnson v. RCMP*, 2002 FCT 917, 116 A.C.W.S. (3d) 818, per Justice Dawson at paragraph 24. The pleadings do not state any factual basis for the allegation that the actions of the public officials were taken deliberately for the purpose of harming or harassing the plaintiffs. As my colleague Justice Hughes stated in *Zundel v. Canada*, 2005 FC 1612, 144 A.C.W.S. (3d) 645, at paragraph 15, "merely to use adverbs and adjectives such as "deliberately and negligently" or "callous disregard" does not constitute a proper pleading as to bad faith or abuse of power."

[27] Moreover, in the Tax Court decision preceding this action, Justice Rossiter's findings state that that the public officers' actions with respect to the plaintiff MLG's GST assessments were <u>not</u> deliberate, and indeed that the mistake was in "blindly" following the existing policy without adequately considering its applicability on a case-by-case basis: *Merchant Law Group v. Canada*, 2008 TCC 337. Justice Rossiter stated at paragraph 22:

> …Of particular concern in this policy are the common disbursements designated as - "not incurred as an agent" - in the area of civil litigation. In that area the policy is irrational and nonsensical. For example, it is difficult to comprehend why witness fees, fees paid for service of a document, fees for recording services or transcript production or fees for the preparation of experts' reports or an attendance fee for expert witnesses, fees for Court transcripts or any other fees of this nature, are any less incurred by a Barrister and Solicitor as an agent for his client, than are the filing fees for

> pleadings in the Court or registration fees or anything of that nature. They are necessary expenses and are only incurred with the client's consent. The line drawn by CRA's Policy Statement P-209R between legal disbursements "not incurred as an agent" and legal disbursements "incurred as an agent" seems arbitrary and lacks legal support or obvious forethought. Indeed, the only witness called by the Respondent at the trial, the appeals officer, basically said, and this was admitted by the Respondent, that this policy was king. No advice was sought with respect to the application of the policy; no direction was sought with respect to how the policy applies in a case by case basis. The policy was applied automatically as the auditor or appeals officer saw fit without consideration of the nature of the disbursement or other factors arising out of the relationship between the principal and its agent. If a disbursement was not one described in the Policy Statement as exempt, CRA would automatically conclude that GST is applicable. The policy was followed blindly regardless of the strength of evidence that would indicate otherwise. Someone with some civil litigation experience could have been consulted with respect to whether or not the principles of an agency relationship are applicable in a case such as the one before this Court.

[28] Accordingly, the actions of the public officers were characterized in the Tax Court MLG decision as essentially the opposite of deliberate, dishonest unlawful action. In the absence of any material facts in the pleadings for the allegation that the actions of the defendants were taken for the purpose of harassing and harming the law firms, the Court finds that the pleadings do not contain adequate material facts to support these allegations.

[29] I agree with Justice Rossiter that the GST policy is “irrational and nonsensical” in certain areas. The policy is difficult to understand, and I am not surprised that a CRA auditor would be confused in applying the policy and deciding which disbursements are subject to GST and which are not.

[30] As Justice Rossiter stated at paragraph 22, quoted above, the policy was applied automatically and "followed blindly regardless of the strength of the evidence that would indicate otherwise." The CRA witness in that case stated that "this policy was king". Accordingly, the CRA auditors followed the policy which they took to be a correct interpretation of the law. There was no evidence before the Tax Court that the auditors ever engaged in intentionally unlawful conduct to harm the plaintiff Merchant Law Group.

Issue No. 2: Restitution or "Wrongful Receipt"

[31] The plaintiffs claim a cause of action in "wrongful receipt" or for "monies wrongfully taken." The plaintiffs submit that the Supreme Court's recent decision in *Kingstreet Investments Ltd. V. New Brunswick (Finance),* 2007 SCC 1, 276 D.L.R. (4th) 342, confirms a cause of action for recovery of wrongfully paid taxes. In *Kingstreet,* the Supreme Court held that neither of the existing categories of restitution – restitution for wrongdoing and restitution for unjust enrichment – provided the appropriate framework for the recovery of taxes paid pursuant to *ultra vires* legislation. Justice Bastarache stated at paragraph 40:

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

> and Jones, The Law of Restitution (4th ed. 1993), at p. 7; Peel, at pp. 784 and 788, per McLachlin J.).

[32] In *Kingstreet*, the issue before the Supreme Court was whether restitution was available for the recovery of monies collected under New Brunswick legislation that was subsequently declared to be constitutionally *ultra vires.* The Court held that restitution for unjust enrichment did not apply and recognized the common law action of recovery of unconstitutional taxes as a public law remedy.

[33] There is no allegation that the GST collected in this case was unconstitutional, only that the GST law was incorrectly applied.

[34] The Supreme Court of Canada has held that the GST statute establishes a scheme for providing compensation so that common law rights which might have otherwise operated cannot be relied upon (such as restitution or unjust enrichment). See *Reference re: Goods and Services Tax* [1992] 2 S.C.R. 445, 92 D.L.R. (4th) 51. Here, the common law remedy has been supplanted by section 12 of the *Tax Court of Canada Act* and section 312 of the *Excise Tax Act.* In *Sorbara v. Attorney General of Canada*, 2009 ONCA 506, the Ontario Court of Appeal similarly concluded that the Supreme Court's judgment in *Kingstreet* does not create a common law remedy to recover taxes where section 12 of the *Tax Court of Canada Act* applies, stating at paragraphs 4-5:

> ¶4 …we think the appellants read *Kingstreet* too broadly. *Kingstreet* addressed the right of the taxpayer to recover tax monies imporpoerly paid to the provincial government under an *ultra vires* taxing provision. The court held that constitutional principles and not private law unjust enrichment concepts must control the

> taxpayer's right to recover tax monies paid under an unconstitutional taxing provision…
>
> ¶5 We do not read *Kingstreet* as creating a constitutional cause of action available to a taxpayer whenever he or she claims a right to recover tax assessed under a misapplication or misinterpretation of a taxing statute.

Issues No. 3: Jurisdictional Issues

Section 312 of the *Excise Tax Act* and section 12 of the *Tax Court of Canada Act*

[35] Section 312 of the *Excise Tax Act* provides that there is no right of recovery of any monies paid as GST except as provided in the *Excise Tax Act*:

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

[36] Section 12 of the *Tax Court of Canada Act* provides the Tax Court of Canada with the exclusive original jurisdiction to hear all matters arising under the *Excise Tax Act*, including GST:

Jurisdiction	Compétence
12. (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters	12. (1) La Cour a compétence exclusive pour entendre les renvois et les appels portés devant elle sur les questions

arising under the *Air Travellers Security Charge Act*, the *Canada Pension Plan*, the *Cultural Property Export and Import Act*, Part V.1 of the *Customs Act*, the *Employment Insurance Act*, the *Excise Act, 2001*, Part IX of the *Excise Tax Act*, the *Income Tax Act*, the *Old Age Security Act*, the *Petroleum and Gas Revenue Tax Act* and the *Softwood Lumber Products Export Charge Act, 2006* when references or appeals to the Court are provided for in those Acts.	découlant de l'application de la *Loi sur le droit pour la sécurité des passagers du transport aérien*, du *Régime de pensions du Canada*, de la *Loi sur l'exportation et l'importation de biens culturels*, de la partie V.1 de la *Loi sur les douanes*, de la *Loi sur l'assurance-emploi*, de la *Loi de 2001 sur l'accise*, de la partie IX de la *Loi sur la taxe d'accise*, de la *Loi de l'impôt sur le revenu*, de la *Loi sur la sécurité de la vieillesse*, de la *Loi de l'impôt sur les revenus pétroliers* et de la *Loi de 2006 sur les droits d'exportation de produits de bois d'oeuvre*, dans la mesure où ces lois prévoient un droit de renvoi ou d'appel devant elle.

[37] Accordingly, Parliament has supplanted the common law action for recovery of taxes with a statutory scheme which a taxpayer must follow. Section 312 of the *Excise Tax Act* is clear that it applies to any money collected as a tax. Section 12 of the *Tax Court of Canada Act* is clear that the Tax Court has the exclusive jurisdiction to hear any appeal relating to the recovery of any money collected as a GST tax. The plaintiffs submit that the money collected was not a tax because it was illegally collected as GST. This does not affect the jurisdiction of the Tax Court because the *Excise Tax Act* provides the Tax Court with jurisdiction over the recovery of <u>any money</u> collected as GST. The Amended Statement of Claim acknowledges that the money was paid by the plaintiffs as GST.

[38] In *British Columbia Ferry Corp. v. Canada (Minister of National Revenue)*, 2001 FCA 146, 271 N.R. 345, the Federal Court of Appeal per Strayer J.A. (as he then was) held at paragraphs 42

and 43 that the *Excise Tax Act* provides that no person has a right of action for the recovery of any monies paid as tax except as provided in the *Excise Tax Act* or any other Act of Parliament. Justice Strayer held at paragraph 43:

> …where taxes are lawfully collected even if by mistake of law the taxpayer was limited to the remedies, including the limitation periods, provided by the [statute]. There could be no recovery for unjust enrichment because initially there was a legal obligation to pay.

By implication, the Court held that the statutory scheme for recovery had replaced any common law (or, presumably, equitable) remedies.

[39] Therefore, the Federal Court of Canada does not have jurisdiction to hear this proposed class action to recover money collected as GST. The Supreme Court of Canada has held that where a taxing statute establishes a scheme for providing recovery of the tax, the common law rights which might otherwise have operated cannot be relied upon. In Reference *Re: Goods and Services Tax,* [1992] 2 SCR 445, the Supreme Court held at paragraph 50:

> …any right to remuneration for the time and trouble involved in collecting the GST would have to flow from the statute itself, which plainly lacks any such general provisions… As this Court recently decided in Zaidan Group Ltd. v. London (City), [1991] 3 S.C.R. 593, aff'g (1990), 71 O.R. (3d) 65 (C.A.), where a statute establishes a scheme providing for compensation, common law rights which might have operated but for the statute cannot be relied upon.

[40] In *Sorbara v. Attorney General of Canada,* (2008) 93 O.R. (3d) 241, the Ontario Superior Court of Justice heard a similar motion to strike a class action brought with respect to the liability of the plaintiffs for GST. The Court held that the *Excise Tax Act* ousted the jurisdiction of the Ontario Court. At paragraphs18 to 20, Justice Perell held:

> **18** The reality, however, is that there are procedures and proceedings available to the Sorbaras and other taxpayers that yield a ruling or assessment of their liability for GST and a right to appeal to the Tax Court. Sections 261 and 296 to 312 of the Excise Tax Act provide a statutory scheme entitling a person to claim a rebate of GST, and this scheme provides a procedure for the Sorbaras and others to challenge the validity of an assessment of GST, and the procedure provides an appeal to the Tax Court of Canada.
>
> **19** Under s. 261 of the *Excise Tax Act*, a person who has paid tax that was not payable may apply to the Minister of National Revenue for a rebate. There is a two-year limitation period for the application from the date of payment of the tax. On receipt of the application, the Minister must consider the application and assess the amount of the rebate, if any, payable. The Minister sends his or her decision by a notice of assessment. An assessment is deemed to be valid and binding subject to being varied on objection or appeal. Pursuant to ss. 299(3) and (4) of the Act, the assessment is binding regardless of whether there has been any error, defect, or omission therein or in any proceeding under Part IX of the *Excise Tax Act* relating thereto.
>
> **20** Pursuant to s. 301 of the *Excise Tax Act*, upon receipt of the notice of assessment, the person may dispute the validity of the Minister's decision by filing a notice of objection. The Minister must then reconsider the assessment and vacate or confirm it or make a reassessment. The Minister must then communicate his or her decision to the person who filed the notice of objection, who pursuant to s. 306 of the Act, then has a right to appeal to the Tax Court of Canada.

[41] These paragraphs described the statutory procedure under the *Excise Tax Act* for:

a. obtaining a rebate of GST that was not payable;

b. the two-year limitation period for this application;

c. the Minister must consider the application and assess the amount of the rebate if any;

d. the Minister should send the decision by notice of assessment which is deemed to be valid and binding unless appealed;

e. the assessment is binding regardless of whether there has been an error, defect or omission by the Minister under the *Excise Tax Act*;

f. the taxpayer may file a notice of objection to the assessment;

g. the Minister must reconsider the assessment and vacate it or confirm it and make a reassessment; and

h. the taxpayer would then have a right of appeal to the Tax Court of Canada from the Minister's decision.

[42] Justice Perell concluded at paragraph 47:

> The case law supports the proposition that if the Tax Court has been given exclusive jurisdiction over the issue to be determined, then the Superior Court does not have jurisdiction.

[43] Following the hearing of this motion which was held in Calgary on March 17, 2009, the Court agreed to reserve its Judgment until the Court of Appeal had handed down its decision on the appeal in *Sorbara*. The Ontario Court of Appeal handed down its decision on June 23, 2009 and conclusively dismissed the appeal and held that the Tax Court of Canada has exclusive jurisdiction. The Ontario Court of Appeal held at paragraphs 7-11:

> ¶7 …A Superior Court has jurisdiction to entertain virtually any claim unless that jurisdiction is specifically, unequivocally and constitutionally removed by Parliament. The motion judge also accepted this principle.
>
> ¶8 In our view, s. 12 of the *Tax Court of Canada Act*, read in combination with ss. 261 and 296-312 of the *Excise Tax Act*, does specifically exclude the jurisdiction of the Superior Court in language that is clear and unambiguous.

> ¶9 The *Excise Tax Act* provides a complete statutory framework with respect to a taxpayer's claim for a rebate of GST paid under Part IX of the *Excise Tax Act*. This framework also establishes the procedure that must be followed to challenge the validity of the assessment made by the Minister. That challenge must be by way of a Notice of Objection to the Minister and ultimately an appeal to the Tax Court. In particular, s. 312 of the *Excise Tax Act* provides:
>
> > Except as specifically provided in this Part, … no person has a right to recover any money paid to Her Majesty as or on account of, or that has been taken into account by Her Majesty as, tax, net tax, penalty, interest or any other amount under this Part.
>
> ¶10 As noted above, Part IX of the *Excise Tax Act* sets out a detailed procedure for the recovery of monies paid. That procedure ultimately ends in a challenge to the Minister's decision by way of an appeal in the Tax Court. The statutory circle is completed by s. 12 of the *Tax Court of Canada Act* which provides that the Tax Court has:
>
> > exclusive original jurisdiction to hear and determine references and appeals … on matters arising under … Part IX (the GST) of the Excise Tax Act.
>
> ¶11 The statutory provisions considered as a whole along with the explicit language in s. 12 of the *Tax Court of Canada Act* leave no doubt that Parliament has given the Tax Court exclusive jurisdiction to deal with claims arising out of GST assessments and taxpayers' claims for rebates of GST paid.

[44] Similarly, in *Canada v. Addison & Leyen Ltd.,* 2007 SCC 33, 284 D.L.R. (4th) 385, the Supreme Court stated at paragraph 11:

> … The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system

> of tax appeals established by Parliament and the jurisdiction of the Tax Court.

[45] While the Supreme Court was addressing the role of judicial review in *Addison,* the same principle is applicable in an action brought in the Federal Court to recover GST. A class action in the Federal Court should not be used to circumvent the system of tax recovery appeals established by Parliament in the Tax Court including the limitation period for such appeals.

[46] In *Canada v. Addison & Leyen Ltd.* supra, the Supreme Court of Canada upheld my Judgment that the Federal Court action should be struck out. This action was based on an abuse of authority by the Crown in assessing the taxpayer and that the Tax Court of Canada did not have jurisdiction to deal with abuse of authority. That is analogous to the claim by the plaintiffs at bar that the defendants are liable for bad faith in the administration of the GST with respect to the matter before the Court. This type of action cannot be used to circumvent the system of tax recovery appeals referred to above. While the tort of misfeasance in public office can be brought against the government ministry, that jurisprudence does not apply when Parliament has enacted specific statutes which give the exclusive jurisdiction to the Tax Court for the recovery of GST.

[47] The Federal Court does not acquire jurisdiction on matters of income tax assessments simply because a taxpayer has failed in due course to appeal his income tax assessments. In *Roitman v. Canada* 2006 FCA 266, 2006 D.T.C. 6514, leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 353, Mr. Justice Décary stated at paragraph 26:

> …it goes without saying that the Federal Court does not acquire jurisdiction in matters of income tax assessments simply because a taxpayer has failed in due course to avail himself of the tools given to him by the *Income Tax Act*.

By analogy, the Federal Court does not acquire jurisdiction in matters of GST simply because the plaintiffs failed to object to the payment of GST on certain disbursements and have not brought an appeal to the Tax Court of Canada. Justice Décary then quoted with approval from a B.C. Court of Appeal in *Smith v. Canada*, 2006 BCCA 237 where the taxpayer had brought a class action in the Supreme Court of British Columbia against the Queen in Right of Canada Justice Décary quoted with approval from the BC Court of Appeal at paragraph 28 in *Roitman* where MacDonald J.A. stated:

> The causes of action all have a common element: they allege that the respondents acted wrongfully toward the appellants in the rule-making and administration of the tax scheme regarding their meal expenses. This is, in reality, a challenge to the assessments by the Canada Revenue Agency. Since the *Income Tax Act* provides administrative remedies for disputes regarding income tax assessments, the issue lies outside the jurisdiction of the Supreme Court.

[48] By analogy, in the case at bar, the Federal Court does not have the jurisdiction to hear an action regarding the CRA administration of the GST.

[49] In *Roitman,* supra, Justice Décary also said at paragraph 16, that the Court must ensure that the Statement of Claim is not a disguised attempt to frame the action, with a degree of artificiality, in the tort of negligence to circumvent the application of a statute such as the *Excise Tax Act*. At paragraph 20 Justice Décary held:

> 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 invalid reassessments of tax unless the reassessments have been overturned by the Tax Court. To do so, would be to permit a collateral attack on the correctness of an assessment….

Accordingly, the Federal Court does not have jurisdiction to deal with a cause of action alleging that the defendants acted wrongfully by deliberately misapplying the GST tax law by misfeasance in public office. This action is in reality a challenge to the tax assessment. Since the *Excise Tax Act* provides administrative remedies for disputes regarding GST, the issues of whether any GST paid by the plaintiffs is not legally exigable is outside the jurisdiction of this Court following a decision by the Tax Court of Canada.

CONCLUSION

[50] The Court concludes that it is plain and obvious that the Amended Statement of Claim does not disclose a reasonable cause of action for the following reasons:

a. a tort of misfeasance against the Crown is based on vicarious liability because a particular public officer must have engaged in deliberate and unlawful conduct and been aware that this conduct was unlawful and likely to harm the plaintiff. To prove the illegal act was intentional and intended to harm the plaintiffs, this tort requires the plaintiffs identify the public officer.

b. the plaintiffs have not plead material facts to support their conclusion that the alleged illegal acts were deliberate and that the public officer knew they were illegal and intended to harm the plaintiff;

c. in the Tax Court case involving the plaintiff MLG, Justice Rossiter (as he then was), held that the tax auditors' actions with respect to MLG were not deliberately illegal or intended to harm MLG; and

d. there is no cause of action for restitution or wrongful receipt of wrongfully paid GST. Any Court appeal regarding wrongfully paid GST is within the exclusive jurisdiction of the Tax Court of Canada.

[51] For these reasons, the Court will allow this motion to strike out this action for failing to disclose a reasonable cause of action.

ORDER

THIS COURT ORDERS that:

1. the motion for an order striking the Amended Statement of Claim is granted;
2. the claims are struck out pursuant to Rule 221 of the *Federal Courts Rules*; and
3. in accordance with Rule 334.39(1) of the *Federal Courts Rules* with respect to class actions, no costs are awarded.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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