

Federal Court



Cour fédérale

Date: 20090608

Docket: T-2118-06

Citation: 2009 FC 625

Ottawa, Ontario, June 8, 2009

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

**STORA ENSO PUBLICATION
PAPER GmbH & Co. KG**

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The parties in this case have been caught in the legal equivalent of a “Perfect Storm” of conflicting decisions of the Federal Court of Appeal and of the Ontario Court of Appeal. The problem is not whether the Federal Court has subject-matter jurisdiction to determine the substance of the dispute; the problem is the method by which that jurisdiction is engaged.

II. NATURE OF THE MATTER

[2] The Plaintiff commenced an action in which it challenged the Minister of National Revenue's refusal to repay taxes paid by a company associated with the Plaintiff. The Plaintiff claimed that the payment was made in error and that the Minister had no authority to decide not to repay the monies. The Plaintiff sought orders in the nature of *certiorari* and *mandamus* and also made claims on the basis of unjust enrichment and conversion.

[3] The parties had submitted an Agreed Book of Documents and a Revised Partial Agreed Statement of Fact and Admissions. It does not appear that the basic facts are in dispute.

[4] When the case came on for hearing, there were no witnesses and the matter proceeded on the basis of argument alone.

[5] At the hearing, the Court - and the Defendant, for the first time - raised the question of whether this case ought to proceed by way of Notice of Application for Judicial Review. Rather than adjourn the matter, on consent of the parties, the Court heard the argument on the merits of the case.

[6] After the hearing, the parties filed further argument on the issue of the nature of the proceeding and whether it was necessary for the Plaintiff to first proceed by way of judicial review of the Minister's decision and actions.

III. NATURE OF THE ISSUE

[7] In *Grenier v. Canada*, 2005 FCA 348, the Federal Court of Appeal held that where the issue is the legality of a decision by a federal “board, commission or tribunal” (of which the Minister in these circumstances is one), it must be challenged by judicial review. Any claim for damages must await a determination of the legality of the decision which led to the alleged damages.

[8] The *Grenier* decision was upheld and elucidated upon in *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2008 FCA 362, which was issued just after the hearing of argument in this file.

[9] The Plaintiff, in its further submission filed after the hearing, relied on the Ontario Court of Appeal’s decision in *TeleZone Inc. v. Canada (A. G.)* (2008), 94 O.R. (3d) 19 (C.A.), issued December 24, 2008. In effect, the *TeleZone* decision was contrary to *Grenier* not only as to the jurisdiction of the Federal Court but also how that jurisdiction is or is not engaged.

[10] To add further to the debate, the Federal Court of Appeal in *Manuge v. Canada*, 2009 FCA 29, issued February 3, 2009, specifically disavowed the *TeleZone* decision and reiterated the exclusive jurisdiction of the Federal Court in any attack on a federal decision.

[11] Leaves to appeal to the Supreme Court of Canada have been filed in both *TeleZone* and *Manuge*. The last word on this issue may yet be heard.

[12] However, this Court must render judgment on this case according to the law as it now stands.

IV. ANALYSIS

[13] As I understand the state of the law in this area, as applicable to the Federal Court, it is that where a party seeks to challenge the legality of a “federal board, commission or other tribunal” decision, it must first proceed by an application for judicial review. Any claims, including those initiated by statement of claim, which flow from the allegedly illegal decision or action (including claims for damages), must await the determination on legality.

[14] The Plaintiff relies on the failure of the Defendant to raise the issue of jurisdiction until the last minute. While the Court has sympathy for the Plaintiff on this point, the failure to raise the jurisdiction matter cannot cloak the Court with jurisdiction which has not been properly engaged.

[15] Therefore, in respect of this case, the Plaintiff must proceed under s. 18 of the *Federal Courts Act* in respect of the Minister’s refusal to refund the amounts of withholding tax paid. While the law does not preclude the Plaintiff from proceeding by way of statement of claim in this Court with respect to other grounds pleaded, the jurisdiction of the Court to hear those claims depends upon the initiation of a judicial review of the Minister’s decision.

[16] The *Federal Courts Act*, s. 18.4, provides that a judicial review may be treated and proceeded as an action. Unfortunately for the Plaintiff, there is no provision permitting a statement of claim to proceed as a notice of application for judicial review.

[17] Therefore, this Court cannot decide the matters raised in the Statement of Claim until the Minister's decision is the subject of judicial review. Once the Court's jurisdiction is properly engaged, there may be procedural steps available to facilitate a fair, just, and expeditious resolution of the dispute.

V. CONCLUSION

[18] The Court will dismiss this action unless, within 30 days of the date of this judgment, the Plaintiff seeks to obtain an extension of time to file an Application for Judicial Review in respect of the matters pleaded in the Statement of Claim (to the extent permissible as a matter for judicial review).

[19] The Court will remain seized of this case, including any motion for leave to file an Application for Judicial Review.

[20] Costs shall be in the cause.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this matter will be dismissed unless, within 30 days of the date of this judgment, the Plaintiff seeks to obtain an extension of time to file an Application for Judicial Review in respect of the matters pleaded in the Statement of Claim (to the extent permissible as a matter for judicial review). The Court will remain seized of this case, including any motion for leave to file an Application for Judicial Review. Costs shall be in the cause.

“Michael L. Phelan”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2118-06

STYLE OF CAUSE: STORA ENSO PUBLICATION PAPER GmbH & Co.
KG

and

HER MAJESTY THE QUEEN

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: November 18, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** Phelan J.

DATED: June 8, 2009

APPEARANCES:

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Mr. Dan Wallace

Mr. John Ashley FOR THE DEFENDANT

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