

Federal Court



Cour fédérale

**Date: 20111222**

**Docket: T-1261-10**

**Citation: 2011 FC 1516**

**Ottawa, Ontario, December 22, 2011**

**PRESENT: The Honourable Mr. Justice Hughes**

**BETWEEN:**

**ASSOCIATION OF CHARTERED  
CERTIFIED ACCOUNTANTS AND  
ASSOCIATION OF CHARTERED  
CERTIFIED ACCOUNTANTS (UK) IN  
CANADA**

**Plaintiffs/  
Defendants by  
Counterclaim**

**and**

**THE CANADIAN INSTITUTE OF  
CHARTERED ACCOUNTANTS, INSTITUTE  
OF CHARTERED ACCOUNTANTS OF  
ONTARIO, ORDRE DES COMPTABLES  
AGRÉÉ DU QUÉBEC, INSTITUTE OF  
CHARTERED ACCOUNTANTS OF BRITISH  
COLUMBIA AND INSTITUTE OF  
CHARTERED ACCOUNTS OF ALBERTA**

**Defendants**

**and**

**INSTITUTE OF CHARTERED  
ACCOUNTANTS OF  
ONTARIO, ORDRE DES COMPTABLES  
AGRÉÉ DU QUÉBEC, INSTITUTE OF  
CHARTERED ACCOUNTANTS OF BRITISH  
COLUMBIA AND INSTITUTE OF  
CHARTERED ACCOUNTS OF ALBERTA**

**Plaintiffs by  
Counterclaim**

**REASONS FOR ORDER AND ORDER**

[1] This is an appeal from an Order of Prothonotary Milczynski dated June 2, 2011 in which she declined to strike out paragraphs 24 to 29 of the Plaintiffs' Defence to Counterclaim. For the reasons that follow I will set aside that Order and strike out those paragraphs with leave to amend so as to provide further and better particularization of these pleas.

[2] This action relates to a dispute between the parties as to the use by their members engaged in the accounting profession of terms including CA and others. The first plaintiffs claim to be a corporation incorporated by Royal Charter in England and Wales, and the second, a Canadian corporation which is affiliated with the first plaintiff. Four of the defendants are each professional bodies established by statute in each of the provinces of Ontario, Quebec, British Columbia and Alberta. I will call them the provincial defendants. They have counter-claimed. The other defendant is a Canadian corporation that can be described as an accountants' trade association. It is not involved in the matters under consideration in this appeal. Given the large

number of very experienced and able counsel appearing before me on this appeal there is no doubt that the parties are taking this litigation very seriously.

[3] The plaintiffs have chosen to join five separate defendants in a single action. In that action, they seek a declaration of invalidity in respect of several “section 9” trade-marks, of which some of the Defendants have given public notice - or propose to do so – and for a declaration of invalidity of several registered trade-marks owned by some of the defendants; and for a declaration that the Plaintiffs’ members do not violate certain trade-mark rights of some of the Defendants, and much other relief. The defendants have each defended the action, and each of the provincial defendants have counter-claimed, seeking injunctions against the plaintiffs and persons under their control from using certain of these trade-marks, as well as other relief.

[4] The plaintiffs have filed a Defence to these Counterclaims, which Defence includes the following paragraphs, which are the subject of the present appeal:

24. *In further response to the entirety of the Counterclaim, the Plaintiffs by Counterclaim are associations of competitors of one another in the provision of professional accounting services. Their counterclaims are made pursuant to agreements by competitors to seek an order of this Court to preclude ACCA and its members from any use in Canada of either their professional accounting designations or the name of the association that granted them such designations.*
25. *The purpose and effect of said agreements is to maintain, control, prevent or lessen the supply of professional accounting services in Canada.*
26. *In particular, prohibiting ACCA Canada from using or referring to its name or professional designations, even in contexts permitted by provincial accounting legislation, would effectively prevent ACCA Canada from operating in Canada.*

27. *Furthermore, prohibiting professional accountants who are members of ACCA from using or referring to their professional designations, or the name of the association that granted them, even in contexts permitted by provincial accounting legislation, would effectively prevent ACCA members from offering, providing, or seeking employment to provide professional accounting services in Canada.*
28. *Accordingly, said agreements are illegal and contrary to section 45 of the Competition Act (Canada).*
29. *The Court ought not issue a declaration or grant an injunction that implements an illegal agreement or agreements among competitors, contrary to section 45 of the Competition Act.*

[5] The provincial defendants moved before Prothonotary Milczynski to strike these paragraphs. She declined to do so. In her Order, she wrote, *inter alia*:

*Whatever the merits of the ACCA's claim may ultimately be determined to be, at this juncture the Court's discretion to strike any part of a pleading is only exercised where it is "plain and obvious" that the allegation cannot be supported and is certain to fail at trial. Where, as in this case, there is some controversy or contentious legal issue of statutory interpretation or arguable issues of mixed fact and law, the matter is better left for determination through the hearing on its merits. The onus is on the moving party to satisfy the Court on a motion to strike that the case or impugned allegations are clearly hopeless, and in this regard the Defendants/Plaintiffs by Counterclaim have not met the heavy burden. The allegations relating to the section 45 of the Competition Act are directed at members of each of the Defendant accounting associations, and that the members have not simply sought to enforce their IP rights under the Trade-Marks Act, but have entered into agreements and are acting through their associations in this proceeding by way of Counterclaim (to seek to enforce the IP and obtain injunctive relief) to lessen competition among those who would provide accounting services. Having regard to the ACCA's submissions and the authorities referred to (at paras. 37-38 of the written representations), I am not satisfied, at this juncture, that however novel or tenuous the ACCA's case may be, it can be concluded that the ACCA's section 45 claims*

*against the Defendant accounting associations are clearly and without doubt, doomed to fail.*

[6] No evidence was filed before Prothonotary Milczynski or before me, the motion to strike being brought under Rule 221(1) (a) as disclosing no reasonable defence.

[7] On an appeal from a Prothonotary such as this one, where a pleading has not been struck out, the Court should be reluctant to interfere with the Order unless it is clearly wrong or involves an issue vital to the case. I am particularly mindful of the recent decision of the Federal Court of Appeal in *United States Steel Corporation v Canada (Attorney General)*, 2011 FCA 277, which relied upon the decision of the Supreme Court of Canada in *Z.I. Pompey Industrie v ECU-Line N.V.*, [2003] 1 SCR 450, particularly at paragraph 18 where Bastarache J for the Court wrote:

*18 Discretionary orders of prothonotaries ought to be disturbed by a motions judge only where (a) they are clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts, or (b) in making them, the prothonotary improperly exercised his or her discretion on a question vital to the final issue of the case: Canada v. Aqua-Gem Investments Ltd., [1993] 2 F.C. 425 (C.A.), per MacGuigan J.A., at pp. 462-63. An appellate court may interfere with the decision of a motions judge where the motions judge had no grounds to interfere with the prothonotary's decision or, in the event such grounds existed, if the decision of the motions judge was arrived at on a wrong basis or was plainly wrong: Jian Sheng Co. v. Great Tempo S.A., [1998] 3 F.C. 418 (C.A.), per Décary J.A., at pp. 427-28, leave to appeal refused, [1998] 3 S.C.R. vi. For the reasons below, I conclude that the decisions of the prothonotary, the motions judge and the Court of Appeal are clearly wrong.*

[8] The provincial defendants, the appellants here, argue that the decision of the Prothonotary was “clearly wrong”. First, they argue that the Supreme Court of Canada in *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, has changed the standard for striking out a pleading from “plain and obvious” to that of “no reasonable prospect of success”. Therefore, they argue, any pleading that does not have at least a reasonable prospect of success should be struck out.

[9] I do not view *Imperial Tobacco* as changing the standard for striking out to the extent urged. Paragraphs 17 to 25 of that decision provide an extensive review of the law on that subject. I emphasize, as the Chief Justice wrote at paragraphs 21 and 22, that a motion to strike is a tool that is to be used with care; that the Court must be generous and err on the side of permitting a novel but arguable claim to proceed, and that the facts as pleaded must be accepted as true unless they are manifestly incapable of proof.

[10] Second, the provincial defendants argue that the pleadings at issue, particularly paragraphs 24 and 25, fail to set forth sufficient facts so as to support a plea under section 45 of the *Competition Act*, RSC 1985, c C-34. In particular, the simple plea as to “competitors” and “agreements” fails to set forth sufficient facts to engage that section. I note in this regard that the Plaintiffs did, in their Memoranda of Argument, and apparently in oral argument before Prothonotary Milczyncki, offer to amend their pleadings at least to a limited extent, so as to address this argument.

[11] The provincial defendants argue that the pleadings as they stand would simply serve as a vehicle for a fishing expedition on discovery, which would possibly include several questions;

the answers to which would be subject to privilege of one kind or another. The plaintiffs argue that pleadings of this kind are, of necessity, vague and bare-boned, as the relevant facts are exclusively in the possession of these defendants. They cite as an example the Reasons for Judgment of Belobaba J of the Ontario Superior Court in *Apotex Inc v Laboratoires Fournier SA*, (2006), 54 CPR (4<sup>th</sup>) 241. I repeat what he wrote at paragraphs 46 and 50 to 52:

*46 Both sides agree that in pleading conspiracy Apotex must identify the alleged conspirators, the agreement to conspire, the improper purpose, the actions taken and the damage that resulted: Normart Management Ltd. v. Westhill Redevelopment Co. (1998), 37 O.R. (3d) 97 (C.A.) at 104.*

...

*50 Solvay argues that more factual detail is required, particularly in a conspiracy pleading, about which defendant did what when. In my view, the pleading requirements do not oblige a plaintiff to provide such a detailed level of specificity at this stage of the proceeding. As this court noted in North York Branson Hospital v. Praxair Canada Inc. (1998), 84 C.P.R. (3d) 12, at para. 22, leave to appeal refused, [1999] O.J. No. 399 (Div. Ct.), "the very nature of a claim of conspiracy is that the tort resists detailed particularization at early stages ... such details would not usually be available to a plaintiff until discoveries. These considerations...militate against holding pleadings in civil conspiracy to an extraordinary standard."*

*51 In any event, in my opinion, the conspiracy pleading, at least on the basis of the common law tort, provides a sufficient level of detail to allow the defendants to reasonably draft, serve and file a statement of defence and then, if needed, to move for further particulars in the normal course.*

*52 As for the pleading based on ss. 36 and 45 of the Competition Act, here as well, in my view, there is a sufficient level of factual disclosure to allow Solvay to prepare their statement of defence. I do not agree that the failure to plead a specific sub-section of the s. 45 conspiracy provision is fatal. The various sub-sections of s. 45 are not so distinct as to alter the nature of the allegation. Indeed, in *Eli Lilly and Co. v. Apotex*, [2005] F.C.J. No. 1818, the Federal*

*Court of Appeal, on a motion to strike, dealt with s. 45 as a whole throughout their reasons for judgment.*

[12] It is difficult to understand this reasoning properly without seeing the pleadings at issue.

[13] The provincial defendants further argue that, being authorized by provincial statute, their activities are a complete defence to any assertion of section 45 of the *Competition Act*, relying in particular on subsection 45(7), which reads:

*45 (7) The rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province a defence to a prosecution under subsection 45(1) of this Act, as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under subsection (1).*

*(7) Les règles et principes de la common law qui font d'une exigence ou d'une autorisation prévue par une autre loi fédérale ou une loi provinciale, ou par l'un de ses règlements, un moyen de défense contre des poursuites intentées en vertu du paragraphe 45(1) de la présente loi, dans sa version antérieure à l'entrée en vigueur du présent article, demeurent en vigueur et s'appliquent à l'égard des poursuites intentées en vertu du paragraphe (1).*

[14] These defendants argue that the plaintiffs' pleadings amount to nothing more than a collateral attack on the validity of their respective provincial statutes.

[15] Further, the provincial defendants argue that to make a substantive assertion based on section 45 of the *Competition Act* where the activity complained of is apparently an exercise of an intellectual property right provided for in the *Trade-Marks Act*, RSC 1985, c. T-13; that there



must be “something more” than simply the exercise of those rights before section 45 is engaged. There is no plea directed to the “something more” in the pleadings at issue.

[16] In this situation, the Court must strike a balance. A pleading should not be struck out simply because a defence, which is anticipated might be raised, could well be a good defence to the matter. However, a party should not be permitted to plead in a minimalist fashion hoping to find sufficient facts on discovery that may support a more robust cause of action or defence. The Court must guard against opening the door to a discovery that may be a fishing expedition or far too broad or may inevitably impinge on areas of privilege.

[17] In the present case, and being mindful as to how cautious one must be in reversing a Prothonotary in matters of this kind, it is my opinion that paragraphs 24 to 29 of the current Defence to Counterclaim are too minimalist and do not set out sufficient facts so as to raise a proper plea, nor to enable the opposite party to provide a meaningful pleading over. In particular, the pleading is insufficient in respect of “competitors”, “agreements”, and does not address whether “something more” was done or, if the plaintiffs say that the law does not require something more then the plaintiffs should say that is their position. For these reasons, I find that, notwithstanding the Prothonotary’s disposition, that the most appropriate way to deal with the matter is to Order that paragraphs 24 to 29 be struck out with leave to amend.

[18] In amending the pleadings I ask that the plaintiffs go beyond the proposals made in the arguments before Prothonotary Milczynski and address clearly and fully the allegations respecting “competitors” and the “agreements” and state whether or not they are relying on “something more” and, if so, state what that “something more” is. It is my hope that the

pleadings may be sufficiently detailed so as to enable the provincial defendants to provide a detailed and meaningful defence. While counsel before me all gave lip service to the hope that this issue could be swiftly and efficiently resolved, I expect Counsel to work hard in fact to see that this hope is realized. It should be possible to eliminate or minimize the need for discovery on this issue. It should be possible to have a summary trial of this issue. This action is being competently case managed. Counsel should work with the case manager to ensure that this can be done.

[19] Costs of this motion will be in the cause.

**ORDER**

**FOR THE REASONS PROVIDED:**

**THIS COURT ORDERS that:**

1. The appeal is allowed, in part;
2. Paragraphs 24 and 25 of the Defence to Counterclaim are struck out with leave to amend, provided such amendments are consistent with the Reasons provided; and
3. Costs shall be in the cause.

“Roger T. Hughes”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1261-10

**STYLE OF CAUSE:** ASSOCIATION OF CHARTERED CERTIFIED  
ACCOUNTANTS AND ASSOCIATION OF  
CHARTERED CERTIFIED ACCOUNTANTS (UK) IN  
CANADA  
v.  
  
THE CANADIAN INSTITUTE OF  
CHARTERED ACCOUNTANTS, INSTITUTE OF  
CHARTERED ACCOUNTANTS OF ONTARIO, ORDRE  
DES COMPTABLES AGRÉÉ DU QUÉBEC, INSTITUTE  
OF CHARTERED ACCOUNTANTS OF BRITISH  
COLUMBIA AND INSTITUTE OF CHARTERED  
ACCOUNTS OF ALBERTA

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** December 20, 2011

**REASONS FOR ORDER  
AND ORDER BY:** HUGHES J.

**DATED:** December 22, 2011

**APPEARANCES:**

Sandra Forbes  
John Bodrug  
Jonathan Columbo  
James Dinning

FOR THE PLAINTIFFS

Trent Horne (Alberta) Richard  
Wagner (Quebec) Joanne Chirqui  
(Quebec)

FOR THE DEFENDANTS

Douglas Deeth (Ontario) Peter  
Jervis (BC)

FOR THE DEFENDANTS

**SOLICITORS OF RECORD:**

Bereskin & Parr  
Barristers & Solicitors  
Toronto, Ontario

FOR THE PLAINTIFFS

Bennett Jones LLP  
Barristers & Solicitors  
Toronto, Ontario

FOR THE (ALBERTA) DEFENDANT

Norton Rose  
Barristers & Solicitors  
Montréal, Québec

FOR THE (QUEBEC) DEFENDANT

Deeth Williams Wall  
Barristers & Solicitors  
Toronto, Ontario

FOR THE (ONTARIO) DEFENDANT

Davids LLP  
Barristers & Solicitors  
Vancouver, BC

FOR THE (BC) DEFENDANT