Federal Court of Appeal | Cour d'appel fédérale

Date: 20100708

Docket: A-351-09

Citation: 2010 FCA 184

CORAM: **BLAIS C.J.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

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

Appellants

and

CANADA REVENUE AGENCY and ATTORNEY GENERAL OF CANADA

Respondents

Heard at Winnipeg, Manitoba, on June 22, 2010.

Judgment delivered at Ottawa, Ontario, on July 8, 2010.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: BLAIS C.J.
DAWSON J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an appeal from the order of Justice Kelen of the Federal Court: 2009 FC 755. The Federal Court struck out the appellants' amended statement of claim for failing to state a cause of action that can succeed and for failing, in part, to plead material facts. The issue for this Court is whether the Federal Court was correct in law when it struck out the amended statement of claim.

A. Background

[2] This is a proposed class action. The appellants are two law firms and four of their clients. The appellants allege that the respondent Canada Revenue Agency should not have required the appellant law firms to collect or remit GST on exempt disbursements charged to their clients. They seek amounts of GST paid by the law firms and their clients that should not have been paid.

[3] In a related case, the Tax Court of Canada has already ruled on the issue of liability for GST in *Merchant Law Group v. Canada*, 2008 TCC 337. The Tax Court concluded that the Merchant Law Group, one of the appellants in this appeal, was acting as an agent for its clients concerning all of the disbursements in issue, excepting office supplies, and was not required to collect or remit GST for those disbursements. This Court has reserved judgment in an appeal from this decision: A-443-08.

[4] The amended statement of claim pleads two causes of action: the tort of misfeasance in public office, and restitution or "wrongful receipt." Later in these reasons, more will be said about how the appellants pleaded these causes of action.

[5] In articulate reasons, Justice Kelen of the Federal Court struck out the amended statement of claim. In his view, there were three objections, fatal to the amended statement of claim:

(i) *The objection to the restitution claim.* The common law cause of action of restitution or "wrongful receipt" is not available in these circumstances. Part IX, of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the "Act") establishes a scheme for providing compensation, and ousts any common law cause of action in these circumstances.

(ii) *The jurisdictional objection.* The appellants brought this proceeding in the Federal Court. The proceeding, properly characterized, is a claim for GST that was improperly charged and paid. However, the Tax Court of Canada – not the Federal Court – has the exclusive jurisdiction to hear any appeal relating to the recovery of any money collected as GST.

(iii) *The pleadings objection.* The appellants failed to plead sufficient material facts for the tort of misfeasance in public office.

[6] In this Court, the appellants submit that the Federal Court's decision on all three grounds was wrong in law. For the reasons below, I disagree and would dismiss the appeal, with costs.

B. Consideration of the issues on appeal

[7] Before us, there are two main issues:

(1) Have the appellants pleaded viable causes of action?

(2) Is the appellants' pleading sufficient?

(1) Have the appellants pleaded viable causes of action?

(a) The parties' submissions

[8] The appellants submit that the Federal Court erred: the causes of action are not ousted by Part IX of the Act. In their view, both causes of action are independent and freestanding:

(i) *The tort of misfeasance in public office.* The appellants say that this is a tort, long-recognized by the common law. For this tort, the appellants claim damages for harm done to them and the class: not just compensatory damages respecting the recovery of amounts of GST that were improperly collected from them, but also aggravated and punitive damages arising from the respondents' vindictive and harsh conduct, including harassment.

(ii) *The cause of action in restitution.* Here again, the appellants stress that this is a longstanding, well-established, independent cause of action that is available at common law. They also rely heavily on *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] 1 S.C.R. 3, 2007 SCC 1. They submit that *Kingstreet* creates an independent cause of action in restitution that is founded on constitutional principle: government is constitutionally obligated to return taxes wrongly paid. As

the tort is constitutional in nature, it exists independently and is unaffected by Part IX of the Act.

[9] The respondents disagree. In this Court, they combine the Federal Court's objection to the restitution claim and the jurisdictional objection into one central submission. The respondents say that the only permissible way to recover GST that should not have been paid is by following the procedural rules and substantive standards that Parliament has set out in the Act. Both of the causes of action, restitution and the tort of misfeasance in public office, aim only to recover GST that should not have been paid. Therefore, in these circumstances, the causes of action in restitution and the tort of misfeasance in public office are not available and so the amended statement of claim should be struck.

(b) Analysis: are the causes of action viable?

[10] I agree with the reasons and result reached by the Federal Court. The causes of action in the appellant's proposed class action cannot succeed. This conclusion is based on the validity of two propositions:

(i) The only permissible way to recover GST that should not have been paid is by going to the Tax Court of Canada and following the procedural rules and substantive standards that Parliament has set out in Part IX of the Act.

(ii) The appellant's proposed class action, properly characterized, is nothing more than an attempt to recover GST outside of the Act.

I shall examine each of these in turn.

(i) Part IX of the Act as the exclusive route for the recovery of GST

[11] The Federal Court analyzed this issue when considering the cause of action of restitution. In my view, this objection applies equally to the tort of misfeasance in public office: if recovery of GST can only be had under Part IX of the Act, all causes of action pursued outside of the Act must be barred.

[12] The Federal Court found that the common law cause of action of restitution was ousted by section 312 of the Act, which appears with the marginal note "statutory recovery rights only," and subsection 12(1) of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2. These provisions read as follows:

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.	**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.

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.

[13] In support of its conclusion that the common law cause of action of restitution is not available in light of these provisions, the Federal Court relied upon *Sorbara v. Canada (Attorney General)*, 2009 ONCA 506, 98 O.R. (3d) 673, which considered an attempt by a taxpayer to recover GST by way of a common law restitutionary action, rather than following the procedural rules and substantive provisions of Part IX of the Act in the Tax Court of Canada.

[14] In *Sorbara*, the Court of Appeal for Ontario observed (at paragraph 7) that a superior court has jurisdiction to entertain any common law claim unless that "jurisdiction is specifically, unequivocally and constitutionally removed by Parliament." The same is true for the Federal Court, with the only qualification (not material here) being that the jurisdiction of the Federal Court, a

statutory federal court, is conferred by the *Federal Courts Act*, R.S.C. 1985, c. F-7 and constrained by the *Constitution Act, 1867*, section 101. The Court of Appeal for Ontario found that Part IX of the Act and section 12 of the *Tax Court of Canada Act* did qualify as a specific, unequivocal and constitutional removal of the superior court's jurisdiction (at paragraphs 9 and 11):

> 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.
>
> …
>
> 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.

As a result, the Court of Appeal for Ontario dismissed the plaintiffs' action to recover GST by way of a common law restitutionary action.

[15] The Federal Court regarded the *Sorbara* decision as highly persuasive and directly on point. I agree.

[16] The Federal Court also correctly considered itself bound by *Canada v. Addison & Leyen Ltd.*, [2007] 2 S.C.R. 793, 2007 SCC 33. In that case, a taxpayer attempted to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court by launching an application for judicial review. The Supreme Court held that the application could not succeed. The taxpayer has to seek relief within the system of tax assessments and appeals that Parliament has established (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.

This definitive pronouncement from the Supreme Court of Canada applies directly to the case at bar.

[17] As the Federal Court also noted, the statutory language in this case is determinative. Section 312 of the Act has very specific language: it removes any "right to recover any money paid [as]…tax" except as provided by Part IX of the Act, the marginal note declares that there are "[s]tatutory rights only," and subsection 12(1) of the *Tax Court of Canada Act* provides that the Tax Court has "exclusive" jurisdiction over matters arising under Part IX of the Act.

[18] As is apparent from the above, I agree with the Federal Court's analysis of and reliance on these authorities and provisions. I conclude that the only permissible way for the appellants to recover GST is to proceed to the Tax Court of Canada and follow the procedural rules and substantive standards set out in Part IX of the Act.

(ii) The Kingstreet *decision*

[19] As mentioned above, a central part of the appellants' oral and written submissions in this Court concerns the Supreme Court of Canada's decision in *Kingstreet*, *supra*. The appellants urge that *Kingstreet* makes the recovery of wrongly paid taxes a constitutional right, and so, despite my

conclusion in the preceding section of these reasons, the appellants need not proceed under Part IX of the Act.

[20] I disagree. From beginning to end in its decision, the Supreme Court spoke only of the common law cause of action of restitution for *ultra vires* taxes. In the first line of its analysis in *Kingstreet* (at paragraph 12), the Supreme Court of Canada declared that the question before it was "whether restitution is available for the recovery of monies collected under legislation that is subsequently declared to be *ultra vires*." It then immediately answered that question: the cause of action of "restitution was generally available." However, it found (also at paragraph 12) that the normal "unjust enrichment analysis [was] ill-suited to deal with the issues raised by *ultra vires* taxes," and instead developed an analysis based on constitutional principles. It did so because the taxpayer "has recourse to a remedy as a matter of constitutional right" (at paragraph 34). In *Kingstreet*, the right was constitutional because the provision that imposed the tax had been declared to be unconstitutional and *ultra vires*. But the constitutional aspect in that case did not change the nature of the cause of action, which remained restitution. This is confirmed by observations made by the Supreme Court at the end of its analysis (at paragraph 40): the Court made it clear that the cause of action before it remained what it called "[r]estitution for *ultra vires* taxes."

[21] In summary, in *Kingstreet*, the Supreme Court did not create a new, sweeping constitutional remedy to recover tax assessed under a misapplication or misinterpretation of a taxing statute. It certainly did not create a new, sweeping constitutional remedy that would allow aggrieved taxpayers to bypass all of the legislative schemes in force across the country that govern the

recovery of tax assessed under a misapplication or misinterpretation of a taxation statute. Rather, the Supreme Court based the taxpayer's recovery on the common law cause of action for restitution, changing the analysis somewhat to reflect the fact that an *ultra vires* taxing provision was involved.

[22] The Court of Appeal in *Sorbara*, *supra*, interpreted *Kingstreet* the same way. It held that *Kingstreet* does not create a constitutional right in taxpayers to recover tax assessed under a misapplication or misinterpretation of a taxation statute. It held that such recovery must be done in accordance with applicable statutory provisions. I agree. As the appellants' claim does not seek the recovery of GST under an *ultra vires* provision, *Kingstreet* does not apply.

(iii) The proper characterization of the appellants' proposed class action

[23] In paragraphs 11 to 18, above, I found that GST may only be recovered in the Tax Court of Canada, in accordance with Part IX of the Act. Now it is necessary to consider whether the appellants' proposed class action does this. Is the appellants' proposed class action nothing more than an attempt to recover GST outside of Part IX of the Act, and thus barred? Or it is properly characterized as something that does not fall under Part IX of the Act, and can be brought in the Federal Court? In my view, the appellants' proposed class action is just an attempt to recover GST outside of Part IX of the Act, and, therefore, is barred.

[24] This is shown by comparing the compensatory relief sought in the proposed class action with the compensatory relief that can be sought under Part IX of the Act. The former and the latter are the same, and are aimed only at recovering GST:

(i) *Relief sought under the proposed class action.* The appellant law firms have paid GST and are now of the view that the GST was not owing. When they rendered accounts to clients, they included the GST amounts. The appellants, comprised of law firms and clients, have brought a proposed class action against the respondents, seeking these GST amounts. They want to be placed in the position they would have been in had the GST never been charged.

(ii) *Relief that can be sought under Part IX of the Act.* The law firms could have challenged the Minister's assessment under the procedures and standards in the Act and, in fact, the Merchant Law Group has done exactly that. If the challenge succeeds, the assessments would change and any GST that was wrongly paid would be refunded to the law firms. The law firms, as fiduciaries, would then be obligated to make their clients whole. To the extent that this does not happen, the clients have the right to claim a rebate for GST paid that should not have been charged: section 261 of the Act. The appellants would then be in the position they would have been in had the GST never been charged.

[25] In the proposed class action, the appellants also seek aggravated and punitive damages. They say they are entitled to these damages because the "Government" engaged in "substantial disturbances and harassment of the [law firms] resulting in confusion, frustration, desperation and helplessness in the process of providing legal services": amended statement of claim, paragraph 14. In addition, it froze the bank accounts of the appellant, Merchant Law Group, and "pursued, threatened, misinformed and cajoled the collection of GST": amended statement of claim, paragraphs 15 to 17.

[26] Does the claim for aggravated and punitive damages change my characterization of the proposed class proceeding as merely an attempt to recovery GST outside of Part IX of the Act? I think not. The appellants do not seek compensatory damages for this alleged conduct. As a result, the characterization of the proposed class action remains the same: it still seeks the recovery of GST outside of the Act, but with an added penalty due to the respondents' conduct.

[27] This conclusion can be tested. If one takes the amended statement of claim and removes everything that concerns the recovery of GST, in substance what is left? Only a complaint about harassment remains, without any claim for compensatory damages and without sufficient material facts and particulars that would establish a viable cause of action. This test confirms that the appellants' claims for aggravated and punitive damages are mere ornaments on a pleading that is aimed at recovering GST outside of Part IX of the Act.

[28] Therefore, I conclude that the appellant's proposed class action, properly characterized, is nothing more than an attempt to recover GST outside of the procedures and standards prescribed by the Act, which is forbidden. Therefore, the causes of action in the appellant's proposed class action cannot succeed.

(2) Is the appellants' pleading sufficient?

[29] Since the causes of action in the appellants' proposed class action cannot succeed, it is not necessary to consider the sufficiency of the appellants' pleading of the tort of misfeasance in public office. But we have received full argument on the issue, the Federal Court considered and determined the issue, and this is an issue of general importance. Therefore, I think it appropriate that I offer some comments on the issue.

[30] The Federal Court concluded that the appellants failed to plead sufficient material facts concerning the tort of misfeasance in public office. I agree.

[31] Rule 174 of the *Federal Courts Rules*, SOR/98-106 requires that a pleading "contain a concise statement of the material facts on which the party relies…".

[32] In paragraph 12 of the amended statement of claim, the appellants pleaded the tort of misfeasance in public office as follows:

> 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, and in bad faith, the Government ignored P-182R, P-209, and other interpretation and policy instruments.

[33] Paragraph 5 of the amended statement of claim defines "Government" very broadly. "Government" is the Attorney General of Canada, all of the Canada Revenue Agency, and potentially a wide range of additional, unascertained Crown officials: "their employees, agents, and other departments of the government of Canada who were the alter ego" of the Attorney General of Canada and the Canada Revenue Agency.

[34] I agree with the Federal Court's observation (at paragraph 26) that paragraph 12 of the amended statement of claim "contains a set of conclusions, but does not provide any material facts for the conclusions." When pleading bad faith or abuse of power, it is not enough to assert, baldly, conclusory phrases such as "deliberately or negligently," "callous disregard," or "by fraud and theft did steal": *Zundel v. Canada*, 2005 FC 1612, 144 A.C.W.S. (3d) 635; *Vojic v. Canada (M.N.R.)*, [1987] 2 C.T.C. 203, 87 D.T.C. 5384 (F.C.A.). "The bare assertion of a conclusion upon which the court is called upon to pronounce is not an allegation of material fact": *Canadian Olympic Association v. USA Hockey, Inc.* (1997), 74 C.P.R. (3d) 348, 72 A.C.W.S. (3d) 346 (F.C.T.D.). Making bald, conclusory allegations without any evidentiary foundation is an abuse of process: *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112 at paragraph 5. If the requirement of pleading material facts did not exist in Rule 174 or if courts did not enforce it according to its terms, parties would be able to make the broadest, most sweeping allegations without evidence and embark upon a fishing expedition. As this Court has said, "an action at law is not a fishing

expedition and a plaintiff who starts proceedings simply in the hope that something will turn up abuses the court's process": *Kastner v. Painblanc* (1994), 58 C.P.R. (3d) 502, 176 N.R. 68 at paragraph 4 (F.C.A.).

[35] To this, I would add that the tort of misfeasance in public office requires a particular state of mind of a public officer in carrying out the impunged action, *i.e.*, deliberate conduct which the public officer knows to be inconsistent with the obligations of his or her office: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69 at paragraph 28. For this tort, particularization of the allegations is mandatory. Rule 181 specifically requires particularization of allegations of "breach of trust," "wilful default," "state of mind of a person," "malice" or "fraudulent intention."

[36] The Federal Court also found (at paragraph 23) that the pleading was deficient because the Crown's liability is vicarious (see section 10 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50) and so the identity of the particular individuals who are alleged to have engaged in misfeasance in public office must be named. As noted above, in this case, paragraphs 5 and 12 of the amended statement of claim implicate entire departments and potentially others in the Government of Canada. The pleading fails to identify, with any particularity, the officials allegedly involved in the misfeasance.

[37] In this Court, the respondents submit that plaintiffs pleading this tort must always state the actual name of the individuals who committed the alleged misfeasance. In my view, such a requirement, if applied strictly in every case, would impose too onerous a burden upon plaintiffs in

some cases. In addition, it would go beyond the level of particularity necessary to fulfil the purposes of pleadings in civil proceedings.

[38] I do agree that the individuals involved should be identified. The plaintiff is obligated under Rule 174 to plead material facts and the identity of the individual who are alleged to have engaged in misfeasance is a material fact which must be pleaded. But how particular does the identification have to be? In many cases, it may be impossible for a plaintiff to identify by name the particular individual who was responsible. However, in cases such as this, a plaintiff should be able to identify a particular group of individuals who were dealing with the matter, one or more of whom were allegedly responsible. This might involve identifying job positions, an organizational branch, an office, or a building in which those dealing with the matter worked. Often such information is readily available from the oral and written communications and dealings among the parties that gave rise to the claim. In cases such as this, identification at least at this level of particularity, will usually be sufficient. The purposes of pleadings will be fulfilled: the issues in the action will be defined with reasonable precision, the respondents will have enough information to investigate the matter and the respondents will be able to plead adequately in response within the time limits set out in the Rules.

[39] The appellants submit that section 69 of the *Canada Revenue Agency Act*, S.C. 1999, c. 17 makes the Agency liable directly, not just vicariously. Accordingly, they say that it was not necessary for them to particularize the individuals. In the context of the tort of misfeasance in public office, I disagree. Section 69 provides that legal proceedings may be “brought against the Agency in

the name of the Agency" concerning "any…obligation incurred by the Agency." This simply makes the Agency a suable entity. It does not relieve the appellants from the requirement to plead material facts under the Rules, including the identification of the identification of the individuals allegedly involved in the tort of misfeasance in public office, as explained above.

[40] Finally, in an overarching submission, the appellants suggest that this Court should relax the rules of pleading whenever it has a proposed class action before it. The appellants submit that any deficiencies in the amended statement of claim can be addressed in the motion to certify the action as a class action. Related to this, the appellants suggest that this Court should view the pleading not as it has been drafted but rather "as how it might be drafted." The appellants cite no authority in support of these propositions. I reject them. A motion to strike may be brought at any time against a statement of claim in a proposed class action for failure to comply with the rules of pleading or for failure to state a viable cause of action: *Pearson v. Canada*, 2008 FC 62, [2008] 4 F.C.R. 373 *per* Prothonotary Aalto. The launching of a proposed class action is a matter of great seriousness, potentially affecting many class members' rights and the liabilities and interests of defendants. Complying with the Rules is not trifling or optional; mandatory and essential it truly is.

[41] For the foregoing reasons, I agree with the Federal Court that the pleading of the tort of misfeasance in public office in the amended statement of claim is insufficient and should be struck on this ground as well.

C. The motion

[42] At the hearing of this appeal, at the end of the appellant's reply submissions, counsel for the appellants suddenly presented the Court with a handwritten annotation of page 2 of the amended statement of claim. Two changes were made: section 69 of the *Canada Revenue Agency Act* was written into paragraph 2 of the amended statement of claim and the definition of "Government" in paragraph 5 of the amended statement of claim was narrowed to the Attorney General of Canada, the Canada Revenue Agency and two named employees of the Canada Revenue Agency. At counsel's request, this Court was prepared to accept the annotated page as a motion to amend the amended statement of claim. The Court received submissions on the motion.

[43] I would dismiss the motion. The circumstances behind this impromptu motion were known to counsel long ago. The appellants offered no explanation for the delay. The end of reply submissions in an appeal, long after the decision at first instance and long after service of a notice of motion to strike a pleading, is not an appropriate time to ask for an amendment: *R. v. Brooks*, 2010 SKCA 55 at paragraphs 15 and 16. Further, the Federal Court had already struck the pleading and so in this Court there was nothing left to amend. Finally, in any event, the proposed amendments, quite limited in nature, would not have supplied all of the material facts necessary for this pleading to survive.

D. Proposed disposition

[44] For the above reasons, I would dismiss the motion and the appeal, with costs.

"David Stratas"
J.A.

“I agree
Pierre Blais C.J.”

“I agree
Eleanor R. Dawson J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-351-09
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