Date: 2007 01 31
Docket: S-0001-CV2005000203

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BHP BILLITON DIAMONDS INC., BHP CANADIAN DIAMONDS COMPANY, CHARLES E. FIPKE and STEWART E. BLUSSON

Plaintiffs

- and -

GOVERNMENT OF THE NORTHWEST TERRITORIES

Defendant

MEMORANDUM OF JUDGMENT

A) Introduction and Background

[1] This is an application pursuant to Rule 303(1) of the *Rules of Court of the Northwest Territories* ("*The Rules of Court*") to have a point of law set down for a hearing in advance of trial.

[2] In this law suit, the Plaintiffs allege that the Defendant has been unjustly enriched by the Plaintiffs' overpayment of tax levied pursuant to *Petroleum Products Tax Act* R.S.N.W.T.1998, c. P-5 (the *Act*) and the *PetroleumProducts Tax Regulations* R.R.N.W.T. c. P-3 (" the *Regulations*").

[3] In general terms, the pleadings show that between 1996 and 2004, the Defendants received monies levied as tax for diesel oil purchased by the Plaintiffs. A portion of these taxes were calculated at the rate applicable to diesel oil used in a motor vehicle. Section 2 of the *Act* sets out various tax rates for different categories, and diesel oil used in motor vehicles is one of those categories.

[4] The Plaintiffs claimed refunds for a portion of the tax paid. These refund were requested with respect to diesel oil used in certain pieces of equipment that the Plaintiffs allege were not motor vehicles. The Plaintiffs received some refunds between 1996 and 1999. In 2000, the Defendant reassessed the Plaintiffs' entitlement to those refunds and determined that the Plaintiffs were not entitled to portions of the refunds claimed.

[5] The Plaintiffs maintain that they have paid more tax than they should have to the Defendant, and this is what their claim for unjust enrichmentis based on. The question of whether the equipment in question is or is not a motor vehicle will be an important issue in this action, since that characterization determines the applicable tax rate.

[6] The Statement of Defence raises a number of defences, including the fact that the applicable legislation precludes any cause of action at common law or in equityfor restitution of tax paid under this regime. One aspect of the defence will be that the legislation provides a mechanism for requesting refunds of tax paid, that anyone wishing to claim a refund must proceed through that route, and that the regime creates a bar to any other type of action. This is often referred to as a "complete code" argument.

[7] In this application the Plaintiffs seek to have the "complete code" defence severed from the rest of the case and dealt with as a preliminary issue. The Plaintiffs frame the question of law that they seek to have determined ahead of the trial in the following way: "Do the Act and Regulations containa CompleteCode for challenging the rate at which the Defendant collected tax under the Act, thereby precluding the Plaintiffs from bringing an unjust enrichment claim?"

[8] The Defendant opposes the application. It acknowledges that the "complete code" defence is raised in the pleadings but argues that the issue is intertwined with other possible defences and is not readily severable. The Defendant says that severing the issue from the rest of the case will mean the issue will be decided without proper context. It also argues that proceeding in this fashion will impair its ability to defend the case in the manner it wants to.

B) Applicable Principles

[9] Rule 303 of the *Rules of Court* reads as follows:

> 303 (1) Where a point of law has been raised by the pleadings, it may, by leave of the Court, be set down for hearing at any time before trial.
>
> (2) Where a point of law is not set down for hearing under subrule (1), it shall be disposed of at trial.

[10] As counsel mentioned during their submissions, most if not all jurisdictions in Canada have rules that provide for trials on preliminary issues in the context of civil litigation.

[11] The Plaintiff relies on cases from British Columbia,and in particularthe leading case of *Alcan Smelters and Chemicals Ltd., a division of Aluminium Co. of Canada* v. *Canadian Assn. Of Smelter and Allied Workers, Local No.1* [1977] B.C.J. No.35, as setting out the relevant criteria that must be applied in deciding whether a trial on a preliminary issue should be ordered.

[12] The Defendant relies on Alberta case law, more specifically principles articulated in *Esso Resources Canada Ltd.* v. *Stearns Catalytic Ltd.* [1991] A.J. No. 129 and a number of other cases that have followed it. The Defendant says these authorities are more persuasive and are the ones this Court should follow.

[13] I must first consider whether there is any significant difference between these two lines of authorities, and if so, which approach should be adopted by this Court.

[14] In the British-Columbia cases, the principles to be applied are summarized as follows:

> 1. The point of law to be decided must be raised and clearly defined in the pleadings.
>
> 2. The rule is appropriate only to cases where, assuming allegations in a pleading of an opposite party are true, a question arises as to whether such allegations raise and support a claim or a defence in law.

> 3. The facts relating to the point of law must not be in dispute and the point of law must be capable of being resolved without hearing evidence.
>
> 4. Whether a point of law ought to be decided before the trial of the action is discretionary, and it must appear that the determination of the question will be decisive of the litigation or a substantial issue raised in it.
>
> 5. In deciding whether the question is one which ought to be determined before trial the Court will consider whether the effects of such a decision will immeasurably shorten the trial, or result in substantial savings of costs.
>
> *Alcan Smelters and Chemicals Ltd., a division of Aluminium Co. of Canada* v. *Canadian Assn. of Smelter and Allied Workers, Local No.1*., *supra,* at para.5 (citations omitted)

[15] The principles adopted in the Alberta cases, outlined slightly differently in different cases, can be summarized as follows:

> a) The Courts do not encourage the piecemeal trials of actions. Only if the issue is readily severable and the Court is satisfied that the cost of a long trial may thereby be saved, will the order be granted.
>
> b) There is a danger in granting such orders, and they should be granted only in exceptional circumstances, where it is clear that the questions to be determined are completely severable, and where their determination will substantially expedite the litigation or materially curtail the cost of the same.
>
> c) The test is whether there is some evidence, which will make it at least possible that the issue will put an end to the action.
>
> d) The Courts should not attempt to determine substantial of difficult questions on preliminary issues.
>
> e) Where it seems clear that the trial on the preliminary issues would not save time or money unless the Applicant wins them completely, it is worth asking whether such a complete win is highly likely.
>
> f) The amount of documentation to be produced should be considered and the Court must be satisfied that the cost of a long trial would be saved by granting the order.

> g) The following appear to be the relevant factors: 1. Will it end the suit, at least if decided one way; 2. Will there be a saving in time and money spent on litigation, again at least if decided one way; 3. Will it create an injustice; 4. Are the issues complex or difficult; 5. Will it result in a delay of the trial?
>
> *Oil Sands Hotel (1975) Ltd.* v. *Alberta(Gaming and Liquor Commission)* [2002] A.J. No. 1444 at para.22.

[16] Clearly, there are similarities between the two sets of principles. However, in my view, there are also notable differences. The test set out in the Alberta authorities is more restrictive. The exceptional nature of this type of procedure and its inherent dangers are emphasized.

[17] To the extent that the two approaches differ, I prefer and adopt the approach developed in the Alberta authorities. I find those authorities more persuasive. The various rules of court that apply are quite similar, but I note that Rule 303 is virtually identical to Rule 220 of the *Alberta Rules of Courts*. More importantly, I agree with the importance of restricting hearings on preliminary issues to exceptional circumstances and the clearest of cases. In appropriate cases, these hearings can be very useful for litigants and for the Court. Often times, however, they prove to be the source of endless complications, additionaldelays, and costs. Learnedand experienced jurists have raised the importance of being cautious in contemplating this procedure:

> Bitter experience shows that these Rules are usually sirens whose songs lure a lawsuit onto the rocks. There is rarely any argument for a split other than the hope of saving time and money. Splitting off issues to try first usually ends by consuming more time and money, not less.
>
> Often both parties think that if a certain issue is decided a certain way, the rest of the suit will become academic or obvious. So one party moves to have that issue tried first, and maybe the other party does not object. The issue is tried first, possibly brieflyon documents and affidavits. A judge decides it. If it is decided one way, then it probably does not end the suit at all, and all the other issues must be tried anyway. Nothing has been saved by the split. If it is decided the other way and arguably ends the suit for all practical purposes, then the loser appeals. A year later the appeal court finds that the preliminary point of law could not be decided with so little evidence, or could not be decided in isolation. It quashes the order to try a separate issue. Alternatively, the appeal court allows the appeal on

> the merits and decides the preliminary issue the other way, so it does not end the suit.
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> W.A. Stevenson and J.E. Côté, *Alberta Civil Procedure Handbook 2002,* Juriliber, Edmonton, 2002, at p.186, as quoted in *Batex Energy Ltd.* v. *Enron Canada Corp* [2002] A.J. No. 1576, at para. 20.

[18] Another reason for limiting this procedure to exceptional circumstances is that disposing of an issue in a preliminary procedure means that the opposing party does not have the benefit of some of the procedural rights that it would otherwise have. *Batex Energy Ltd.* v. *Enron Canada Corp, supra*, at para. 57.

[19] Therefore, trials on preliminary issues should only be granted in exceptional circumstances, and the applicant has the onus of establishing that such exceptional circumstances exist and justify severance of the issue. *Esso Resources Canada Ltd.* v. *Stearns Catalytic Ltd., supra*, at p.3; 22 and 45; *Batex Energy Ltd.* v. *Enron Canada Corp, supra*, at para. 19 and 24.

C) Application of Principles to this Case

[20] The Plaintiffs acknowledge that the procedure they seek to resort to is to be reserved for exceptional cases. They acknowledge the concerns expressed in many authorities about the risks and pitfalls of proceeding in this way. They take the position that this is one of those rare cases where it makes sense to have a trial on the preliminary issue to deal with the "complete code" defence because that defence, if it succeeds, will put an end to their case. Hence, the Plaintiffs say, both parties will benefit from finding this before time, energy and money is spent on getting other issues ready for trial.

[21] As mentioned at the outset, one aspect of the dispute between the parties is the characterization of equipment that the fuel was used for. The Plaintiffs argue that considerable time and effort will have to be spent in discoveries, and at the trial, to address the specific nature and functions of this equipment. They argue that this will all be wasted effort if the Defendant's "complete code" defence is found to be a bar to the Plaintiffs claim for unjust enrichment. This, the Plaintiffs say, is why that issue should be severed and dealt with as a preliminary issue.

[22] The Plaintiffs also say that the "complete code" defence is an easily severable and straightforward issue. If they fail on that issue, the litigation will end. They also say that there is no disadvantage to the Defendants in proceedingin this way becauseif the Plaintiffs are successful on the preliminary issue, the Defendant will still have an open field to call whatever evidence it wants at trial, and raise whatever other defences it wants to raise.

[23] The Defendant strongly disagrees with this position. It wants to be able to argue every aspect of its defence, including the "complete code" defence, in the context of the full trial evidence. The Defendant says that the "complete code" defence is intertwined with several other trial issues and is not easily severed. It argues in particular that the "complete code" defence is closely connected to the issue of unjust enrichment which forms the basis of the Plaintiffs' claim. The Defendant argues that under the circumstances, the "complete code" issue must be argued, along with all the issues of the case, at trial, once all the evidence has been called. The Defendant claims that severing one aspect of the case will interfere with its ability to defend the action in the manner it wants to.

[24] It is somewhat difficult for this Court to assess the extent to which the Defendant will be prejudiced in presenting other defences if the "complete code" defence is argued separately. At this stage, much is unknown about the precisemanner in which the parties will argue their case. The Defendant, of course, knows its own case and strategy better than the Plaintiffs, and certainly better than the Court. Although it is not determinative, the Defendant's assertion that proceeding in this fashion will interfere with its ability to present its defence is something that this Court must take into account. With the limited information the Court has on this application about the details of the evidence and how the various arguments might unfold, it must be very cautious in second guessing a litigant's approach to its case.

[25] It is clear that allowing this application will only save time and money if the Court concludes that the "complete code" defence is available to the Defendant and if the Plaintiffs do not appeal that decision. That would end this case. It would result in savings for both parties, because they would not have to deal with the issues related to the characterization of equipment, or with the other defences.

[26] However, if the "complete code" defence is found to not have merit, nothing will be saved, as all the other issues will have to be litigated. The proceedings may be

delayed, and more costly, if the Defendant appeals the ruling on the preliminary issue, which is not an unlikely prospect.

[27] In addition, if, as the Defendant contends, the "complete code" defence is intertwined with other defences and other issues that will arise in this case, the parties and the trial judge will have to contend with *res judicata* findings made on a very limited record. If issues are interrelated, this is bound to complicate matters significantly. In particular, if some of the same evidence that is relevant to the "complete code" defence is relevant to other issues, it will raise questions as to what is *res judicata* and what is not, and the effect this has on evidence to be called at trial.

[28] If there are factual, evidentiary or legal overlaps between the various issues, having one defence dealt with as a preliminary issue will inevitably have an impact on the manner in which the Defendant will be able to present the rest of its case. The impact and significance of a ruling made on a trial on preliminary issue cannot be underestimated:

> The facts admitted on the submission on a point of law for determination under Rule 220 are deemed to be all of the facts relevant to the point of law as if they had been established in evidence on that issue at the trial had the issue proceeded to trial. The parties are bound by those facts on that point to the same extent that they would have been had the facts been found by the trial judge on evidence adduced before him.
>
> A judicial determination of a point of law on the admitted facts has the same binding effect that it would have if made at the conclusion of the trial. Once entered the decision operates as an estoppel by res judicata if the same point is sought to be re-litigated or re-argued by the same parties whether in the same action or another.
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> *Guarantee Trust Co. of Canada* v. *Bailey* [1987] A.J. No.442, p.5.

[29] Although it is difficult, at this early stage, to evaluate the extent to which the various issues on this case will intermingle, there certainly seems to be a possibility that there will be a link between the "complete code" defence and the broader issues of the applicability and availability of the unjust enrichment claim. At the very least

it can be said that the Defendant's approach to the case is to consider those issues interrelated. How all this will unfold at trial remains to be seen, of course, but the existence of this potential link raises concerns about the wisdom of severing any of those issues under the circumstances.

[30] Having carefully considered the principles which I find to be applicable, I am not satisfied that, in the circumstances of this case, it would be appropriate to resort to this exceptional procedure. I am not satisfied that the "complete code" issue is readily severable from the rest of the case, or that it is as simple or straightforward as the Plaintiffs assert. I am not convinced that it will not hamper the Defendant in the presentation of its defence. I am not convinced that the possibility that this ultimately will result in saving time or costs outweighsthe potentialdisadvantanges of proceeding in this way. On the contrary, I am concerned that allowing the application would have a serious potential of creating additional delays and complicate the trial.

[31] For these reasons, the application is dismissed.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
31st day of January 2007

Counsel for the Plaintiffs: Ian J. Gamble and Thomas M. Boddez
Counsel for the Defendant: William J. Kenny, Q.C.

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MEMORANDUM OF JUDGMENT OF THE
HONOURABLE JUSTICE L.A. CHARBONNEAU
