St. Catharines Court File No.: 1451/06

SUPERIOR COURT OF JUSTICE - ONTARIO

RE:	*HER MAJESTY THE QUEEN* (respondent) – and – *PETER EICKMEIER and HALINA JAWOR* (applicants)
BEFORE:	The Honourable Mr. Justice J.W. Quinn
COUNSEL:	Damien Frost, for the respondent Peter Eickmeier and Halina Jawor, Self-represented
HEARD:	May 7, 8 and 16, 2007, at St. Catharines
DATED:	May 16, 2007

ENDORSEMENT

Introduction

[1] I have two applications before me. The applicants separately ask that their committal for trial following a preliminary inquiry be quashed.

[2] The applicants are charged in a 138-count information with offences contrary to clauses 327(1)(a) and (d) of the *Excise Tax Act*, R.S.C. 1985, Chapter E-15, as amended. Following an 18-day preliminary inquiry, they were committed for trial on all counts. In addition, pursuant to s. 548 of the *Criminal Code*, the preliminary inquiry justice exercised her authority to order the applicants to stand trial for "any other indictable offence in respect

of the same transaction," and she did so for the offence of defrauding the public, contrary to clause 380(1)(a) of the *Criminal Code*.

[3] Although one of the applicants had counsel at the preliminary inquiry, both are self-represented in this court. The applicant, Peter Eickmeier, filed a 144-page factum setting out two grounds for his application. The applicant, Halina Jawor, filed a 163-page factum containing three grounds for her application. As two of her grounds were the same as those raised by Mr. Eickmeier, she repeated the first 143 pages of his factum, leaving the final 20 pages to outline her third ground. The facta are of high quality and the applicants made their oral submissions in an efficient, articulate and altogether impressive fashion.

[4] The factum of Mr. Frost, counsel for the respondent, was very helpful in setting out the legal principles governing proceedings of this nature (which I have followed), but I found that it did not specifically address the three arguments advanced by the applicants. Consequently, I requested a supplementary factum from Mr. Frost and the applications were adjourned for that purpose.

The offences

Excise Tax Act

[5] Clause 327(1)(a) of the *Excise Tax Act* makes it an offence if a person "made, or participated in, assented to or acquiesced in the making of, false or deceptive statements in a return, application . . . filed or made" under that *Act*.

[6] If a person "wilfully, in any manner, obtained or attempted to obtain a rebate or refund to which the person is not entitled . . .," clause 327(1)(d) makes that an offence, as well.

[7] It is alleged that the applicants attempted to obtain $5,206,889.88 in refunds by making false claims for input tax credits (such credits being available to those who can show, for example, that Goods and Services Tax (GST) has been paid or is payable in respect of transactions involving exported products for which GST is not collectable in law). The Canada Revenue Agency issued $3,289,112.87 in refunds.

Criminal Code

[8] Clause 380(1)(a) of the *Criminal Code* provides, in part, that "[e]very one who, by deceit, falsehood or other fraudulent means . . . defrauds the public . . . of . . . money . . . is guilty of an indictable offence . . . where . . . the value of the subject-matter of the offence exceeds five thousand dollars."

[9] This offence consists of "dishonest deprivation." Dishonesty does not require a deliberate misrepresentation but may be found in circumstances that a reasonable person would consider dishonest. Actual economic loss need not be shown to prove deprivation. It is sufficient that there is a risk of prejudice to the economic interests of the victim. The mental element of the offence is proved by establishing knowledge of the prohibited act and knowledge that the prohibited act could put the economic interest of the victim at risk: see *R. v. Theroux* (1993), 79 C.C.C. (3rd) 449 (S.C.C.); *R. v. Campbell* (1986), 29 C.C.C. (3rd) 97 (S.C.C.); and, *R. v. Olan* (1978), 41 C.C.C. (2nd) 145 (S.C.C.).

Requirements on preliminary inquiry

inquiry by justice

[10] The justice conducting a preliminary inquiry "shall . . . inquire into the charge and any other indictable offence, in respect of the same

transaction, founded on the facts that are disclosed by the evidence . . .": see s. 535 of the *Criminal Code*.

"sufficient evidence to put the accused on trial"

[11] The function of the justice on the preliminary inquiry is to decide whether "*in his opinion* there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction" (emphasis added): see clause 548(1)(a). If there is sufficient evidence, the court *shall* order the accused to stand trial; if there is not, the accused must be discharged.

[12] It is commonly said that the Crown need only adduce enough evidence to establish a *prima facie* case.

[13] The preliminary inquiry "is not meant to determine the accused's guilt or innocence": see *R. v. Russell*, [2001] 2 S.C.R. 804 at para. 20.

[14] On a preliminary inquiry, the court is to determine whether there is *any* evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty: see *United States of America v. Sheppard* (1976), 30 C.C.C. (2d) 424 at 428 (S.C.C.).

weighing competing inferences

[15] "The preliminary inquiry is not the forum for weighing competing inferences or for selecting among them. That is the province of the trier of fact": see *R. v. McIlwain* (1988), 67 C.R. (3d) 393 at 399 (Ont. H.C.).

Requirements to quash a committal for trial

not an appeal

[16] It is trite law that, on an application to quash a committal for trial, the court is not exercising an appellate-review function.

[17] "[R]eview on certiorari does not permit a reviewing court to overturn a decision of the statutory tribunal merely because that tribunal committed an error of law or reached a conclusion different from that which the reviewing court would have reached": see *R. v. Russell,* [2001] 2 S.C.R. 804 at para. [19], citing *R. v. Skogman,* [1984] 2 S.C.R. 93 at 100.

lack or excess of jurisdiction

[18] A committal to stand trial may be quashed only on the ground of a lack of or excess of jurisdiction: see *R. v. Deschamplain* (2004), 196 C.C.C. (3d) 1 (S.C.C.) at para. [17].

[19] Acting in excess of jurisdiction arises where there has been a failure to observe a mandatory provision of the *Criminal Code* or where there has been a denial of natural justice. Failure to prove an essential element of the offence amounts to jurisdictional error: see *R. v. Deschamplain, supra*, at paras. [17] and [23].

[20] Committing an accused to stand trial without *any* evidence is an obvious example of a committal without jurisdiction.

"*some evidence"*

[21] Where there is "some evidence" to justify the decision to commit for trial, it is within the jurisdiction of the preliminary inquiry justice to decide whether this evidence is of sufficient weight to order the accused to stand trial: see *R. v. Deschamplain, supra,* at para. [23].

[22] The role of the reviewing court is to determine whether there was *any* evidence at the preliminary inquiry that would allow the justice, acting judicially, to form the opinion that there was sufficient evidence to order the accused to stand trial: see *Martin, Simard and Desjardins v. The Queen* (1977), 41 C.C.C. (2d) 308 (Ont. C.A.); aff'd [1978] 2 S.C.R. 511; and *R. v. Sequin* (1982), 31 C.R. (3d0 271 (Ont. C.A.).

[23] If there is *some* evidence and if the preliminary inquiry justice has "properly directed his mind to the evidence and to the question of whether there was 'sufficient evidence' to commit, his decision is not subject to review": see *R. v. Skogman*, [1984] 2 S.C.R. 93 (S.C.C.) at para. 169.

Discussion

[24] As I previously mentioned, three grounds are raised in support of the applications.

the first ground

[25] The first ground of both applications is that the preliminary inquiry justice, in arriving at her decision, did not use the definitions of "commercial activity," "business," "supply" and "sale" as contained in subsection 123(1) of the *Excise Tax Act*.

[26] The preliminary inquiry justice made reference to s. 123 at paragraph [4] of her Reasons for Judgment (but did not set out its provisions), addressed the issue of commercial activity and s. 169 of the *Excise Tax Act* (which contains the wordy formula for claiming input tax credits) at paragraph [147], discussed the evidence in detail (her Reasons are 53 pages in length) and made findings on the evidence at paragraphs [152] and [153].

She found that there was no "commercial activity" as contemplated by the *Excise Tax Act*.

[27] I agree with Mr. Frost that a purposive interpretation of the statutory definitions of "commercial activity" and "business" in subsection 123(1) excludes from either definition the pretense of either being in business or being engaged in commercial activity and that the preliminary inquiry justice, effectively, found that, in this case, there was only a pretense of commercial activity. The preliminary inquiry justice was cognizant of the GST regime.

[28] In my opinion, the preliminary inquiry justice was alive to the statutory definitions of "commercial activity," "business," "sale" and "supply" (while not quoting them) and there was some evidence to support a conclusion that those definitions were satisfied. Put another way, the preliminary inquiry justice did not make any findings inconsistent with the statutory definitions.

the second ground

[29] The second ground advanced by both applicants is that the preliminary inquiry justice "did not realize that if the facts are equally consistent with guilt and innocence, there is no evidence of guilt." This ground misconstrues the law. "Facts" are items of evidence that have been accepted by the trier of fact. The preliminary inquiry justice deals with evidence and not facts. That said, where there is evidence (or inferences from the evidence) that point to the applicants being not guilty of the offences charged, the matter does not end there. If there is other evidence (or other inferences from that evidence) from which a reasonable jury, properly

instructed, could return a verdict of guilty, the preliminary inquiry justice is entitled to commit for trial.

[30] Mr. Dawson correctly submits that a justice presiding at a preliminary inquiry is not engaged in a fact-finding process and the justice is generally not permitted to weigh the evidence or make findings of credibility – although where a case depends solely upon circumstantial evidence, the justice may engage in a limited amount of weighing to determine whether such evidence is reasonably capable of supporting the inference argued by the Crown. As well, there is no requirement that the inference contended by the Crown be the only inference available. The so-called rule in *Hodge's Case*[1] does not apply in deciding whether an accused should be committed to stand trial: see *R. v. Arcuri* (2001), 157 C.C.C. (3rd) 21 (S.C.C.) at para. [25], and *R. v. Pan* (1999), 134 C.C.C. (3rd) 1 (Ont. C.A.), at para. [245]; aff'd 155 C.C.C. (3rd) 97 (S.C.C.).

[31] The applicants rely on *Stubart Investments Ltd. v. Canada,* [1984] 1 S.C.R. 536 and *Canada Trustco Mortgage Co. v. Canada*, [2005] SCJ No. 56, but I find that neither has any application at bar. To the extent that those decisions condone businesses availing themselves of tax benefits, they do not give their blessing to sham transactions (one of the issues at bar). Thus, one may organize one's activities to avoid, or lessen the payment of, taxes but the organization itself must not be a sham.

[32] The second argument of the applicants is without merit in the context of this application.

---

[1] (1838), 168 E.R. 1136 (Assize).

the third ground

[33] The third ground is relied upon only by Ms. Jawor. Although this ground is broken down by Ms. Jawor in her factum into 14 sub-issues, in their essence, they relate to the absence of evidence implicating her in the offences.

[34] In paragraphs [154]-[165] of her Reasons for Judgment, the preliminary inquiry justice addressed, in some detail, the evidence relating to Ms. Jawor. It cannot be said that there was a complete absence of evidence in respect of Ms. Jawor. As there was *some* evidence adduced at the preliminary inquiry implicating her in the offences for which she was ordered to stand trial, the preliminary inquiry justice did not lack jurisdiction to so order. It will be for the tier of fact to weigh and assess the evidence.

Conclusion

[35] There was some evidence upon which the preliminary inquiry justice was able to base her opinion to commit the applicants for trial. The preliminary inquiry justice directed her mind to the evidence, the applicable law and whether there was sufficient evidence to commit. There is no jurisdictional error. As such, the applications to quash the committal orders are dismissed.

The Honourable Mr. Justice J.W. Quinn

RELEASED: May 16, 2007