Federal Court  Cour fédérale

Date: 20150120

Docket: T-1352-11

Citation: 2015 FC 74

Toronto, Ontario, January 20, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

LOTHAR SCHEUER, ELIZABETH ANDRUSIAK, MICHAEL ANDRUSIAK, DONALD BELFOUR, DENISE BANGA, RON BILLINGTON, CAROLINE BIRD, WAYNE BOYCHUK, SUSAN BUCKLE, WAYNE BUCKLE, MICHAEL CHERWENUK, MICHAEL CHILLOG, LAURA CROTENKO, RONALD DAVIDSON, DWAYNE DECK, LINDA DEIS, BARABRA DICKSON, WILLIAM DICKSON, DEBORAH DOWSWELL, ROBERT DOWSWELL, PATRICK DUVAL, GARY FALKENSTEIN, COLIN FONG, PATRICK GENOWAY, BARRY GERVAIS, CHERYL GIAMBATTISTA, JORDAN GIAMBATTISTA, NICK GIAMBATTISTA, KEN HANLEY, DALE HANLEY, DONNA HARVEY, CHERYL HELMECZI, DENNIS HELMECZI, LAURIE HELMECZI, LINDA HELMECZI, RAND, DUANE HILLSENDAGER, GARTH HILTS, CAROL HIPFNER, JACQUELINE HOFFERT, RUSSELL HOLM, FREDERRICK HOWARD, FRED HUBER, GARTH HUBER, LORI IRELAND, GORDAN JOYCE, GORDON AND MAXINE JOYCE, TESS KOSSICK, KENNETH KRAWCZYK, FRANCES KULLMAN, GORDAN KULLMAN, DERRICK LAMB, BRADLEY

LAMONTAGNE, BRAD LANCE, WAYNE LARSEN, LESLIE PADWICK, NICK LOFFLER, RON LYKE, SHANE LYKE, SHERYL LYKE, JOHN MACDONALD, BARRY MALESH, MARTIN MARCHUK, ALICE MCKIM, MARK MELNYK, GLEN MISKOLCZ, HERBERT PADWICK, SUKHDEV PARMAR, ROCHELLE PATENAUDE, KELLY PERKINS, JOANN PIETT, JUSTIN PIETT, LORNE PIETT, MARGARET PIORO, BERNICE PREDENCHUK, BILL PREDENCHUK, JASON PUGH, MICHAEL PUGH, DENNIS READ, GWENDOLYN READ, CARLA REINHEIMER, JAMIE REINHEIMER, LANCE REINHEIMER. ALEXANDER ROBERTSON, CLIFF RUNGE, DELORES RUNGE, KURT SCHEMMER, JAMIE SCHNEIDER, LARRY SCHNEIDER, MICHAEL SCHNEIDER, RONALD SCHNEIDER, WARREN SCHULTZ, HEIDI SEVERSON, DAVID SHIPLETT, LISA SHOTTON, MICHAEL SNIDER, JANET STANZEL, KENT STANZEL, GREG STEWART, MAGDALINE STIEBEN, DANIEL SZMUTKO, KATHERINE SZMUTKO, ROB TEMSLAND, ANNA TROWER, DAVID TROWER, MARGARET TROWER, MERLIN TROWER, NORMA TROWER, LYLE ULRICH, MARLISE VITTUR, DAVID WEBSTER, SHEILA WEBSTER, ELEANOR WELSH, GERALD WELSH, LEONARD WEIBE, LORETTA WEIBE, WALTER WILHELMS, GREGORY WOITAS, CHRISTINE YOUNGHUSBAND, JAKE ZAPSHALLA AND KAREN ZATYLNY

Plaintiffs

and

HER MAJESTY THE QUEEN
CANADA REVENUE AGENCY AND
THE ATTORNEY GENERAL OF CANADA

Defendants

JUDGMENT AND REASONS

[1] This is an appeal, brought by the Defendants in this action, of the Order of Prothonotary Aalto [Prothonotary] dated April 17, 2014, in which he dismissed a motion to strike out the Plaintiffs' Amended Statement of Claim and to dismiss the Plaintiffs' action pursuant to Rules 221(1)(a) and (c) of the *Federal Courts Rules*, SOR/98-106.

[2] For the reasons that follow, this appeal is dismissed with costs.

I. The Pleaded Facts

[3] The Plaintiffs are a group of Canadian taxpayers who participated in a tax shelter donation program marketed by Global Learning Group Inc [GLGI]. The Plaintiffs made a claim in negligence in 2011 against Her Majesty the Queen, the Canada Revenue Agency [CRA], and the Attorney General of Canada for the CRA's alleged breach of its duty of care by failing to properly warn the Plaintiffs in a timely fashion of the consequences that could follow from their participation in the GLGI program.

[4] The Plaintiffs allege in the Amended Statement of Claim that CRA was aware of potential issues surrounding the charitable donations made to GLGI as early as the year 2000, but took no steps to warn or inform Canadian taxpayers, and in particular the Plaintiffs, of its concerns with the program. The Plaintiff Scheuer alleges that he relied upon the fact that CRA had issued a valid tax shelter number to GLGI and made various donations to GLGI for the years 2004 to 2007, for which he claimed charitable donation tax credits. The CRA later reassessed the Plaintiff Scheuer and disallowed those charitable donation tax credits. The Plaintiffs claimed damages from the Defendants for the CRA's failure to properly warn and protect them.

II. The Decision Under Appeal

[5] The Defendants sought to strike the claim on the basis that it revealed no reasonable cause of action. They argued that the CRA did not have a recognized duty of care to inform taxpayers of the consequences of investing in tax shelters, and that the Plaintiffs had not pled the facts necessary for the recognition of such a duty of care.

[6] The Prothonotary dismissed the motion to strike the claim, concluding that he was not convinced that it was abundantly clear that the claim was bereft of any chance of success, given: the findings in *Ficek v Canada (Attorney General* [*Ficek*] , 2013 FC 502, which supported the proposition that the within taxpayers were part of a targeted group within CRA who were being treated differently than other taxpayers; the provisions in the *Income Tax Act* [*ITA*]; the exceptions in section 241 of the *ITA to* the prohibition against providing confidential information; the relevant case law regarding motions to strike and duties of care; and the allegations in the Amended Statement of Claim.

III. Grounds of Appeal

[7] In this motion, the Defendants appeal the Order of the Prothonotary pursuant to section 51 of the *Federal Courts Rules*, seeking an order setting aside the Prothonotary's Order, as well as costs. The Defendants claim that the Prothonotary erred in law by:

1) improperly relying on the findings of fact in *Ficek*, above, as evidence to be considered on the motion to strike;
2) improperly finding that the facts were sufficient to disclose proximity by interaction;
3) failing to consider the role of legislation in determining proximity; and
4) failing to conduct the second part of the *Anns/Cooper* test.

[8] The Defendants argue that the facts pled in the Amended Statement of Claim fell short of meeting the proximity requirement to impose a duty of care on the CRA, and that there are policy considerations that dictate against the imposition of such a duty of care.

[9] The Plaintiffs argue that the standard for reviewing the Prothonotary's decision is a deferential one, and that it should not be interfered with, since the Prothonotary did not exercise his discretion based on a wrong principle or a misapprehension of the facts.

IV. Issues

[10] This matter raises the following issues:

a) What is the standard on which I am to consider the Prothonotary's Order?

b) Given this standard, should the Order stand?

A. *Issue #1: The standard of Review of the Decision below*

[11] The case law is clear that discretionary orders of prothonotaries ought only to be reviewed *de novo* by a judge on appeal where: (a) the questions raised in the motion are vital to the final issue of the case; or (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts: See *R v Aqua-Gem Investments Ltd*, [1993] 2 FC 425 (CA) at 462-63; *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27; *Merck v Apotex*, 2003 FCA 488 at para 19; *Gordon v Canada*, 2013 FC 597 at para 10 [*Gordon*] .

[12] The vitality issue raised in summary judgment case law was briefly addressed at the hearing. Although it is immaterial to the outcome of this motion, the Court recognizes that recent jurisprudence of this Court holds that appeals from dismissals of motions to strike should not be considered *de novo* as they do not raise a question that is vital to the final issue of the case: See *Teva v Pfizer*, 2014 FC 69 at paras 25-26; *Teva v Pfizer*, 2013 FC 1066 at para 10; *Gordon v Canada*, 2013 FC 597 at para 11; *Seanautic v Jofor*, 2012 FC 328 at paras 20-21; *Peter G White Management Ltd v Canada*, 2007 FC 686 at para 2. Thus, I will only conduct a *de novo* review where the Prothonotary exercised his discretion based upon a wrong principle or upon a misapprehension of the facts: *Seanautic*, above, at para 21.

B. *Issue #2: Should the Order stand?*

[13] Applying the above standard, I conclude that the Prothonotary's Order dismissing the motion to strike the Plaintiffs' claim should stand.

[14] A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 [*Imperial Tobacco*] . Claims should proceed through the court system in the usual way unless they have no reasonable chance of succeeding: *Imperial Tobacco* at para 25. On motions to strike, judges should err on the side of permitting novel but arguable claims to proceed to trial: *Imperial Tobacco* at para 21.

[15] The Prothonotary identified the proper framework for determining a duty of care where it has not been previously recognized in the case law, that framework being the *Anns/Cooper* test (*Anns v Merton London Borough Council*, [1978] AC 728; *Cooper v Hobart*, 2001 SCC 79 [*Cooper*]). On the first part of the *Anns/Cooper* test, a *prima facie* duty of care is established where the facts disclose foreseeability and proximity. Where the duty is said to be owed by a government actor, the duty may arise explicitly or implicitly from the statutory scheme, or alternatively from interactions between the claimant and the government. Where an alleged duty of care conflicts with an overarching statutory or public duty, the Court may find that the statute forecloses the existence of such a duty of care. If a *prima facie* duty of care is established, the second part of the *Anns/Cooper* test requires the Court to consider whether there are residual policy reasons which negate the imposition of the claimed duty of care: *Imperial Tobacco* at paras 41-44, 49-50, 52-54; *Cooper* at para 30.

[16] The Defendants submit that the Prothonotary erred in law in his consideration of the motion to strike in numerous respects. I will deal with each of these in turn.

(1) Reliance on *Ficek*

[17] The Defendants submit that the Prothonotary improperly considered the case of *Ficek*, above, as evidence, since judges on motions to strike are required to limit their consideration to the language of the pleadings: *Imperial Tobacco* at paras 23-24.

[18] I agree with the Defendants that evidence is not admissible on motions to strike: *Imperial Tobacco* at para 22. On a motion to strike, the facts pleaded are assumed to be true, and the test is whether it is plain and obvious that the pleadings disclose no reasonable cause of action: See *Imperial Tobacco* at paras 17, 22; *Taylor v Canada (Attorney General)*, 2012 ONCA 479 at para 22 [*Taylor*].

[19] As it is not entirely clear whether the Prothonotary relied on *Ficek* as evidence that the Plaintiffs were treated differently than other taxpayers, or whether he properly limited his consideration to the facts as pleaded in the Amended Statement of Claim, I have conducted a *de novo* review and find any error in this regard to be immaterial in any case. As explained below, the facts as pleaded in the Amended Statement of Claim are arguably sufficient to establish proximity in the duty of care analysis, and are therefore sufficient to prevent this claim from being struck at this time.

(2) Proximity analysis

[20] The Defendants argue that the Prothonotary erred by finding that the facts pleaded may be sufficient to ground proximity by interaction. Specifically, the Defendants submit that no specific interactions between CRA and the investors are pleaded other than the filing of tax returns by the investors and information returns by the tax shelter promoters. In any event, they

argue, any duty is foreclosed by the *ITA*, specifically by: its purpose which is to raise revenue for the treasury; section 241, the confidentiality provision; and the requirement on promoters in subsection 237.1(5).

[21] In this case, I am conducting a *de novo* review of the proximity analysis for two reasons. First, as discussed above, the Prothonotary's reference to *Ficek* made it unclear whether he had relied on the facts in *Ficek* as evidence. Second, while the Prothonotary alluded to having considered "the provisions of the ITA" in his conclusion, it is unclear whether he considered the statutory scheme in his proximity analysis, other than section 241 of the *ITA*. Therefore, my *de novo* proximity analysis follows.

[22] Where the claim is advanced against a regulator, the proximity analysis focuses first on the applicable legislative scheme, to determine whether it either imposes or forecloses a private law duty of care by the regulator, and then on the interactions between the regulator and plaintiff: See *Imperial Tobacco* at paras 43-45; *Taylor* at paras 75-79. The legislative scheme is not determinative one way or the other in this case. Thus, my *de novo* review focuses on the specific circumstances of the interactions between the regulator and the plaintiff in the context of the legislative scheme to determine whether a sufficiently "close and direct" relationship exists to justify the imposition of a *prima facie* duty of care: *Taylor* at para 79.

[23] In considering whether allegations of interactions between the Plaintiffs and the CRA are sufficient to survive a motion to strike at the pleadings stage, I bear in mind the warning of Chief Justice McLachlin at paragraph 47 of *Imperial Tobacco*:

> Since this is a motion to strike, the question before us is simply whether, assuming the facts pleaded to be true, there is any reasonable prospect of successfully establishing proximity, on the basis of a statute or otherwise. On one hand, where the sole basis asserted for proximity is the statute, conflicting public duties may rule out any possibility of proximity being established as a matter of statutory interpretation: *Syl Apps*. On the other, where the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult. So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, and the statute does not exclude that possibility, the matter must be allowed to proceed to trial, subject to any policy considerations that may negate the *prima facie* duty of care at the second stage of the analysis.
>
> [Emphasis added]

[24] "Proximity" is the term used to describe a relationship that is sufficiently "close and direct" to render it fair and reasonable to require the defendant, in conducting his or her affairs, to be mindful of the plaintiff's legitimate interests: *Cooper* at paras 32-33; *Taylor* at para 66. The case law is clear that findings of proximity are fact-specific, that there is no single unifying characteristic in the proximity analysis, and that the relevant factors will depend on the circumstances: *Cooper* at para 35; *Taylor* at para 80. Among the potentially relevant factors are considerations such as: expectations; representations made by the defendant, especially if made directly to the plaintiff; reliance by the plaintiff on the defendant's representations; the nature of the plaintiff's property or other interests engaged; the nature of the overall relationship between the plaintiff and defendant; the existence of a close and direct nexus between the decisions taken by the defendant and the harm alleged; and the magnitude of the effects of the defendant's discretionary decisions on the plaintiff that were obvious to the defendant at the time it made its decision: See *Cooper* at paras 34-35; *Leroux v CRA*, 2014 BCSC 720 [*Leroux*] ; *Taylor* at para 69.

[25] Neither physical proximity nor a personal relationship is necessary for a finding of proximity. Rather, the proximity analysis is concerned with whether the actions of the defendant had a close or direct effect on the plaintiff, such that the defendant ought to have had the plaintiff in mind as a person potentially harmed: *Taylor* at para 68, citing *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para 29. As such, the lack of face-to-face contact or similar direct communication in this case is not determinative.

[26] The pleadings provide various points in time at which sufficient proximity can be found, with increasing proximity at each point. The following facts, all obtained from the Amended Statement of Claim, may be sufficient to establish proximity by interaction, the merits of which of course will have to be determined if this matter makes it to trial. The relevant sections from the Amended Statement of Claim potentially establishing a basis for proximity are:

- CRA issued a tax shelter number to GLGI without properly assessing the scheme submitted by GLGI and with knowledge that the Plaintiffs would rely on the tax shelter number as an indication that GLGI had met the requirements of the *ITA* (para 147);

- The Plaintiffs relied on the tax shelter number (paras 147, 157);

- The Plaintiffs are separate from the general public in that they are part of a group of taxpayers who donated to GLGI (para 157);

- CRA was aware of potential issues surrounding the charitable donations made to GLGI as early as the year 2000 but took no steps to warn or inform Canadian taxpayers and in particular the Plaintiffs (para 149);

- The Plaintiffs filed their tax returns to CRA which included the specific information of the donations they made based on the tax shelter numbers (para 150);

- CRA received information returns from the GLGI promoters which reported all their sales, as required by subsection 237.1(4) of the *ITA* (para 151);

- CRA assessed each individual tax return separate and apart from all other Canadians. At this time, CRA had information available to it regarding GLGI's sales (para 152);

- CRA accepted the Plaintiffs' donations to GLGI, creating further reliance by the Plaintiffs on CRA that the scheme was approved by CRA (para 154);

- CRA waited until 3 years later to reassess the tax payer, when CRA knew or ought to have known that the donation would not be accepted (para 156); and

- CRA has continued to allow GLGI to market its program to Canadian taxpayers, knowing that none of the tax credits issued will be honoured by CRA (para 155).

[27] The duty of care jurisprudence has suggested that the following features are common among cases where regulators have been held to owe a duty: (i) the facts demonstrate a relationship and connection between the regulator and individual that is distinct from and more direct than the relationship between the regulator and that part of the public affected by the regulator's work; and (ii) the public statutory duties are consistent with the existence of a private law duty of care owed to an individual plaintiff: *Taylor* at paras 80, 88, 104.

[28] The facts as alleged above provide some basis for distinguishing the relationship between the CRA and these Plaintiffs from the relationship that exists between the CRA and all those affected by its actions. The facts suggest that despite CRA's knowledge as early as 2000 of potential issues surrounding the charitable donations made to GLGI, and the annual reporting by individual taxpayers and by GLGI of the names of individuals who were investing in the GLGI program, CRA confirmed the assessments of the individuals and did not reassess them until several years later. In my view, this provides at least an arguable case of sufficient proximity for a *prima facie* duty of care. Ultimately, it will be necessary to consider the entirety of the circumstances said to constitute the relationship to determine whether a duty exists: *Taylor* at paras 117-118. All we have at this very early stage of the proceedings are pleadings of the affected taxpayer Plaintiffs who participated in the GLGI scheme. We do not yet even have a statement of defense from the Defendants.

(3) The Legislative Scheme

[29] As mentioned above, the specific circumstances of the interactions between the regulator and the plaintiff are to be assessed in the context of the legislative scheme to determine whether a sufficiently "close and direct" relationship exists to justify the imposition of a *prima facie* duty of care: *Syl Apps Secure Treatment Centre v BC*, 2007 SCC 38 at paras 27-29. The Defendants have submitted here that the legislative scheme forecloses the possibility of a finding of proximity. I disagree.

[30] In response to the Defendants' arguments that the *ITA*'s (i) purpose to raise funds for the treasury, and (ii) self-assessment system, are both inconsistent with a private law duty of care by

the CRA to warn individual taxpayers of specific questionable tax schemes, I need refer only to the following discussion of the British Columbia Supreme Court in *Leroux*, above. Where *Leroux* is currently under appeal, and may resultantly be nuanced or reversed by the Court of Appeal, the case nonetheless establishes that these issues are arguable ones, and that the claims are not necessarily bound to fail:

> **303.** The close causal connection between the alleged misconduct and the harm is another indicator of proximity, according to *Odhavji*. The foreseeability of devastating consequences to Mr. Leroux in a general sense was evident to everyone involved at the time the assessment was levied, particularly in view of the extremely large penalties and the daily compounding of interest, even if the specifics of Mr. Leroux's business difficulties were not known to them. The fact that Mr. Leroux had reciprocal and perhaps even more important duties under the *Income Tax Act*, does not detract from the duty on the CRA employees to conduct themselves as reasonably careful professionals in these circumstances. There is nothing in the statutory scheme of the *Income Tax Act* that would suggest otherwise.
>
> […]
>
> **306.** The next consideration is whether policy considerations should prevent a duty of care from being imposed. While there is a duty to the public and to the Minister of National Revenue to collect taxes that are properly payable, as recognized in the cases above, I am unable to see that this duty conflicts with a duty to take reasonable care in assessing taxes, auditing taxpayers, and particularly in imposing penalties. It is true, as CRA contends, that the Canadian tax system depends on self-assessment, and therefore the honesty and full disclosure of taxpayer is crucial. However, within that scheme, CRA is given almost unchecked powers. CRA officials are not accountable to any independent body for their actions, except through an appeal to the Tax Court of Canada. As the Supreme Court of Canada observed at para. 56 of *Hill*, holding police officers to a standard of care that might make them more careful is not necessarily a bad thing. The same reasoning applies in this case.
>
> [Emphasis Added]

[31] Nor is any alleged duty of care determinatively foreclosed by the legislative requirement on promoters to display on written statements that tax shelter numbers are administrative only and do not confirm the entitlement of investors to claim tax benefits associated with the tax shelter (*ITA*, s 237.1(5)). I find that this, too, is an arguable issue, and should be determined only after an airing of a full record and after hearing from both sides.

[32] In conclusion, on this point of the duty of care analysis, it is not plain and obvious on the facts as pleaded in the Amended Statement of Claim and in the context of the legislative scheme that the Plaintiffs will be unable to establish a duty of care. The pleading is not devoid of any chance of success, and accordingly the claim should be allowed to proceed.

(4) Part II of the Anns/Cooper Test: Residual policy concerns

[33] I am not satisfied that the Prothonotary sufficiently considered the second question raised by the *Anns/Cooper* test as to whether there are residual public policy considerations that would negate the imposition of the alleged duty of care. To the extent that he did not, I will do so here, as did this Court in *Gordon* (above, at para 36).

[34] The Defendants submit that the following policy considerations are sufficient to negate the imposition of a duty of care in this case: the prospect of indeterminate liability; the fact that the CRA's decision to issue a warning is a true policy decision; and the fact that section 241 of the *ITA* conflicts with such a duty.

[35] In my view, none of these policy considerations are sufficient to negate the duty of care at this stage without a hearing. All raise arguable points, especially in the context of the clearly evolving law in this area, and accordingly I am not prepared to strike the claim at this time.

[36] With respect to the prospect of indeterminate liability, it is clear from the following discussion of Justice Humpries at paragraph 307 of *Leroux*, above, that the spectre of indeterminate liability and widespread litigation is not necessarily determinative:

> As for the spectre of widespread litigation, the battle for any plaintiff in this situation is a steep uphill one, as Mr. Leroux has found. While taxpayers subjected to an audit constitute a larger class as compared to those subjected wrongfully to criminal investigation as in *Hill*, in order to rely on a duty of care a potential plaintiff must establish the requisite degree of foreseeability and proximity in their particular situation, followed by proven breaches, causation, and damages. Any suit will be rigorously defended with unlimited resources, if the present one is any measure. It is difficult to envision a glut of lawsuits overcoming these onerous burdens. By his own evidence, Mr. Leroux started this action because he was operating under the misapprehension that this was the only way he could get compensation and it would not be hard fought. Those expectations proved to be wrong.

[37] Similarly, in this case, GLGI only impacted a limited number of taxpayers. They were each impacted by a set of facts that set them apart from other taxpayers, as enumerated in the Plaintiffs' Statement of Claim (see above). Therefore, I do not accept a floodgates argument with respect to finding, as the Respondents request, that the action is bereft of any chance of success due to failure at the "policy grounds" prong of *Anns-Cooper*.

[38] With respect to the Respondents' argument that the CRA's decision whether to issue in this case (or not to issue) a warning to taxpayers is a true policy decision and therefore exempt

from tortious claims, it is not plain and obvious to me that the decision to warn is a true policy decision. Rather, it is an arguable issue which merits further exploration: *Imperial Tobacco*, above, at para 91.

[39] Finally, the Respondents argue that a duty to warn would directly contravene the confidentiality obligations in section 241 of the *ITA* and policy relating to this issue, i.e. to avoid issuing warnings when private individuals are involved, both on the "investor" and "participant" sides.

[40] First, I note that the Prothonotary dealt with this issue (Order, pp 16-17). Even if I were to consider it *de novo* here, the existence of a duty on CRA to warn taxpayers about questionable tax schemes in a timely manner, enumerated in section 14 of the *Taxpayer Bill of Rights*, suggests that the duty to warn does not in fact directly contravene the confidentiality obligations, and/or any policy decisions to disclose, flowing out of that section. Further, as the Prothonotary notes, there are exceptions to section 241 that could be found to apply, including the exceptions to the confidentiality provisions provided in subsections 241(3), (3.1), and (4). For example, subsection 241(3) of the *ITA* reads as follows:

> (3) Subsections 241(1) and 241(2) do not apply in respect of
>
> (*a*) criminal proceedings, either by indictment or on summary conviction, that have been commenced by the laying of an information or the preferring of an indictment, under an Act of Parliament; or
>
> (*b*) any legal proceedings relating to the administration or enforcement of this Act, the *Canada Pension Plan*, the Unemployment Insurance Act or the *Employment Insurance Act* or any other Act of Parliament or law of a province that provides for the imposition or collection of a tax or duty.

[41] Certainly, with a carve-out built into the very legislative provision from the *ITA* that the Respondent relies on, and which speaks to the protection of the public, to state that section 241 forecloses the possibility of a finding of proximity, is to put the proverbial cart before the horse.

[42] The basic point is that while this and the other "policy considerations" cited by the Defendants to negate any duty could indeed ultimately negate the imposition of any *prima facie* duty of care at trial, I am not prepared to conclude at this very early stage of the proceedings that the Plaintiffs have a hopeless case, and no chance of success: the Plaintiffs in my view are entitled to have these matters fully and properly considered at a hearing.

V. Conclusion

[43] Based on the above reasons, it is my view that the Prothonotary's Order should stand, and he concluded correctly in finding that the legal issues raised did not leave the taxpayers bereft of any prospect of success. Where I find the Prothonotary to have exercised his discretion on a wrong principle of law, I have conducted my own *de novo* review. It is not clear to me that the Plaintiffs will ultimately succeed in establishing a private law duty of care owed to them by the CRA. However, bearing in mind that at this stage, the pleadings are assumed to be true and must be read generously, and having regard to the evolving nature of the duty of care jurisprudence, it is not plain and obvious that the claim as pleaded is bound to fail for want of a private law duty of care. As such, the Plaintiffs should not be denied the opportunity to argue their case fully: *Taylor*, above, at para 120.

[44] I am supported in my reluctance to strike the claim at this stage by the jurisprudence: *Gordon*, above, at paras 13, 39; *McCreight v Canada (AG)*, 2013 ONCA 483 at paras 62-63; *Taylor*, above, at paras 103, 120; *Imperial Tobacco*, above, at para 47; *Leroux v CRA*, 2012 BCCA 63 at para 41; *Leroux v CRA*, 2010 BCSC 865 at para 56.

[45] Even if I had found that the question was vital to the final issue in the case and reviewed the entire Order *de novo*, I would have arrived at the same result. Despite the fact that the duty of care asserted by the Plaintiffs is a novel one, it is simply not "plain and obvious" that the facts as pled fail to establish the existence of a duty of care by CRA in this case. The proximity and policy issues raise arguable issues to be determined by a court with the benefit of a trial and a complete record. It cannot be said at this stage that the Plaintiffs' claim is hopeless.

JUDGMENT

THIS COURT'S JUDGMENT is that this appeal is dismissed. The Plaintiffs (taxpayers) are awarded costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1352-11
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KATHERINE SZMUTKO, ROB TEMSLAND, ANNA TROWER, DAVID TROWER, MARGARET TROWER, MERLIN TROWER, NORMA TROWER, LYLE ULRICH, MARLISE VITTUR, DAVID WEBSTER, SHEILA WEBSTER, ELEANOR WELSH, GERALD WELSH, LEONARD WEIBE, LORETTA WEIBE, WALTER WILHELMS, GREGORY WOITAS, CHRISTINE YOUNGHUSBAND, JAKE ZAPSHALLA AND KAREN ZATYLNY
v HER MAJESTY THE QUEEN
CANADA REVENUE AGENCY AND
THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 15, 2014

JUDGMENT AND REASONS: DINER J.

DATED: JANUARY 20, 2015

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