Federal Court  Cour fédérale

Date: 20210512

Docket: T-1970-18

Citation: 2021 FC 431

Ottawa, Ontario, May 12, 2021

PRESENT: Madam Justice Walker

BETWEEN:

PAUL LAUZON

Plaintiff

and

CANADA REVENUE AGENCY

Defendant

JUDGMENT AND REASONS

[1] Mr. Lauzon began a claim against the Canada Revenue Agency (the CRA) in November 2018 seeking damages for unjust enrichment. His claim stems from a series of refunds initially assessed in his favour in respect of the 2005, 2006 and 2007 taxation years. During the course of the litigation, the contested refunds have been narrowed to the 2005 and 2006 taxation years (Taxation Years). According to its records, the CRA prepared and issued the refunds in the normal course via its processing agent, Public Services and Procurement Canada (PSPC). Mr. Lauzon states that he did not receive the refunds.

[2] The CRA now moves for summary judgment in its favour pursuant to Rules 213 to 215 of the *Federal Courts Rules*, SOR/98-106 (the Rules) on the basis that: (1) the two-year limitation period established in section 4 of the Ontario *Limitations Act, 2002,* SO 2002, c 24, Sched B (*Limitations Act*) had expired well before Mr. Lauzon started his action in 2018; (2) the equitable defence of *laches* also applies in this case because the CRA has destroyed its records in the ordinary course due to Mr. Lauzon's unreasonable delay; and (3) in any event, Mr. Lauzon's unjust enrichment claim does not raise a genuine issue for trial as PSPC's records indicate that the 2005 and 2006 refund cheques are not outstanding and the Crown has not been enriched. In the alternative, if I determine that there is a genuine issue for trial, the CRA submits that Mr. Lauzon's action should proceed as a summary trial in accordance with Rule 216.

[3] Mr. Lauzon resists each of the CRA's grounds for summary judgment. He submits that (1) his action is not statute-barred because he did not discover the facts underlying his claim until 2017; and (2) he has demonstrated that there is a genuine issue for trial. Mr. Lauzon argues that the CRA's evidence regarding the issuance and mailing of the refund cheques in question is flawed and consists in part of inadmissible hearsay. He also argues that the evidence before the Court that the refund cheques were negotiated and not cancelled is suspect. Mr. Lauzon submits that the Court's assessment of his personal credibility will determine the success of his claim, primarily the *Limitations Act* issue, and that the Court must hear his *viva voce* evidence.

[4] For the reasons set out in some detail in this judgment, I find that Mr. Lauzon began his action after the expiry of the two-year limitation period in section 4 of the *Limitations Act* and

that there is no genuine issue for trial with respect to the merits of Mr. Lauzon's claim. The CRA's motion for summary judgment will be granted.

I. Background

[5] The parties have filed detailed evidence regarding the sequence of events and correspondence between Mr. Lauzon and the CRA concerning the Taxation Years. I will address that evidence in the course of my analysis but the following summary of events provides context for the CRA's motion.

[6] Mr. Lauzon made charitable donations to two Canadian tax shelter programs in each of the Taxation Years, resulting in:

(a) for the 2005 Taxation Year, a refund in the amount of $16,701.90; and

(b) for the 2006 Taxation Year, a refund in the amount of $16,031.28.

[7] According to the CRA's records, Notices of Assessment and refund cheques (the Refund Cheques) were issued to Mr. Lauzon on June 22, 2006 (2005 Taxation Year) and April 17, 2007 (2006 Taxation Year).

[8] Mr. Lauzon states that he did not receive or deposit the Refund Cheques. He also states that, given the sizeable amounts involved, he would remember depositing the Cheques into his bank accounts had he received them.

[9] The CRA issued a Notice of Reassessment for the 2005 Taxation Year on March 17, 2008 denying the tax credits Mr. Lauzon had claimed for charitable donations and notifying him that he had an outstanding balance for the year of $19,577.71.

[10] The CRA issued a Notice of Reassessment for the 2006 Taxation Year on March 11, 2010 again denying the tax credits claimed for charitable donations and notifying Mr. Lauzon of an outstanding account balance for the year of $19,878.77.

[11] The 2005 and 2006 Reassessments assumed Mr. Lauzon had received and cashed the Refund Cheques.

[12] Mr. Lauzon filed Notices of Objection in respect of the 2005 and 2006 Reassessments in June 2008 and October 2010 respectively.

[13] Mr. Lauzon's Notices of Objection were resolved by way of reassessments dated May 8, 2017 (the 2017 Reassessments). The 2017 Reassessments again assumed his receipt of the Refund Cheques and assessed taxes and interest owing by Mr. Lauzon as at May 8, 2017 of: $21,265.85 for the 2005 Taxation Year and $15,412.59 for the 2006 Taxation Year.

[14] On February 14, 2018, Mr. Lauzon filed a service complaint with the CRA explaining he had not received the Refund Cheques. In response, the CRA informed Mr. Lauzon by letter dated March 20, 2018 that its records showed that the refunds for the Taxation Years were paid. The

letter also noted that a CRA agent had sent Undertaking and Indemnity Forms (Forms 535) for lost or stolen Government of Canada cheques to Mr. Lauzon on December 4, 2017.

[15] Mr. Lauzon commenced this action against the CRA on November 14, 2018. Due to the passage of time, Mr. Lauzon is unable to retrieve his bank records to substantiate his position that he did not deposit the Refund Cheques and, for its part, the CRA no longer has copies of the negotiated Refund Cheques.

II. Issues and relief sought

[16] The CRA filed its notice of motion for summary judgment and for an order dismissing Mr. Lauzon's action on July 12, 2019. The hearing of the motion was delayed due to the COVID-19 pandemic and eventually came before me on October 5, 2020.

[17] The CRA relies primarily on two arguments in support of its motion. First, the CRA submits that Mr. Lauzon's action was commenced after the two-year statutory limitation period set forth in section 4 of the *Limitations Act*. The CRA argues that Mr. Lauzon knew or ought to have known in 2006, 2010 or, at the latest, on or just after June 29, 2015, that he had suffered loss or damage due to his non-receipt of the Refund Cheques (s. 5 of the *Limitations Act*). Second, the CRA submits that Mr. Lauzon's evidence in this motion fails to establish any enrichment of the Crown by the amounts of the Refund Cheques because its evidence demonstrates that the Refund Cheques were negotiated, whether by Mr. Lauzon or by a third party. Consequently, Mr. Lauzon cannot establish the first required element of a cause of action in unjust enrichment and his action must fail.

[18] Mr. Lauzon submits that this case is not suitable for summary judgment because there are serious credibility issues in play in the adjudication of both of the CRA's arguments. Mr. Lauzon argues that the Court must hear his *viva voce* evidence explaining his assumption since 2006 that the refunds owed to him for the Taxation Years would only be determined once his Notices of Objection were finally determined. Therefore, he had no knowledge of any loss or damage until some point between March and August 2017 and his action is not statute-barred. Mr. Lauzon also argues that the CRA's evidence, provided via three affidavits from officials at the CRA and PSPC, does not establish that the Refund Cheques were issued, mailed and negotiated. He states that there are material issues in the evidence that should be tested on further cross-examination. In light of the CRA's flawed chain of evidence and his own unequivocal evidence that he did not receive the Refund Cheques, Mr. Lauzon submits that the Court cannot conclude that his case is so doubtful as to reveal no genuine issue for trial.

III. Motions for summary judgment in the Federal Court

[19] The purpose of summary judgment is to allow the Court to summarily dispense with cases which should not proceed to trial because there is no genuine issue to be tried. In *Hryniak v Mauldin*, 2014 SCC 7 (*Hryniak*), the Supreme Court of Canada considered the values underlying the summary judgment process. Although *Hryniak* involved the interpretation of the Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194 (which are worded differently from the *Federal Courts Rules* relating to summary judgment), the principles set out by the Supreme Court are of general application and remind us that the same goals of conserving judicial resources and improving access to justice, while safeguarding the proper disposition of an action, underlie Rules 213 to 215 (*Hryniak* at para 35; see also *Manitoba v Canada*, 2015 FCA 57 at para 11).

[20] The application of Rules 213 to 215 was comprehensively reviewed by Justice Mactavish, then of this Court, in *Milano Pizza Ltd. v 6034799 Canada Inc.*, 2018 FC 1112 at paragraphs 24-41 (*Milano Pizza*). Rule 215(1) provides that the Court shall grant summary judgment where the judge is satisfied that "there is no genuine issue for trial with respect to a claim or defence". The Supreme Court described the circumstances in which a judge can make such a determination (*Hryniak* at para 49):

> [49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[21] The test on a motion for summary judgment is not whether a party cannot possibly succeed at trial; rather, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial (*Milano Pizza* at para 33; *Kaska Dena Council v Canada*, 2018 FC 218 at paras 21, 23 (*Kaska*)). The onus is on the party seeking summary judgment to establish the absence of a genuine issue for trial and that onus carries with it an evidentiary burden (*Collins v Canada*, 2015 FCA 281 at para 71). However, Rule 214 of the Rules requires the responding party to set out specific facts in their response to the motion and to adduce evidence showing that there is a genuine issue for trial (*Canmar Foods Ltd. v TA Foods Ltd.*, 2021 FCA 7 at para 27). In other words, both parties must put their best evidentiary foot forward and the Court is entitled to assume that no new evidence would be presented at trial (*Samson First Nation v Canada*, 2015 FC 836 at para 94; aff'd 2016 FCA 223 at paras 21, 24; *Kaska* at para 23).

[22] It is well established that cases involving serious issues of credibility should not be determined on motions for summary judgment. As Justice Mactavish stated (*Milano Pizza* at para 37):

> [37] The jurisprudence is clear that issues of credibility ought not to be decided on motions for summary judgment. Generally, a judge who hears and observes witnesses giving evidence orally in chief and under cross-examination will be better positioned to assess the witnesses' credibility and to draw the appropriate inferences than a judge who must depend solely on affidavits and documentary evidence: *TPG Technology Consulting Ltd. v. Canada*, 2013 FCA 183 at para. 3, [2013] F.C.J. No. 836.

[23] The fact that serious issues of credibility should only be determined at trial does not preclude the granting of a motion for summary judgment where there is a conflict in the evidence before the motions judge. Rather, the judge must assess whether the issue is in fact one of credibility or is a contested facet of the parties' submissions that requires determination (*Pelletier v Canada*, 2020 FC 1019 at para 68). The overriding principle remains that the process followed must be fair, just and proportionate, and the evidence presented in the motion for summary judgment must enable the Court to find the facts necessary to resolve the dispute.

IV. Analysis

A. Ontario *Limitations Act*

[24] Subsequent to the hearing of this motion, the Federal Court of Appeal (FCA) issued its judgment in *Canada (Attorney General) v Utah*, 2020 FCA 224 (*Utah*), a decision that focusses on the importance of limitation periods and addresses the nature of the required inquiry into a litigant's knowledge of the facts underpinning a claim (*Utah* at para 7). The parties have filed submissions regarding the implications of the decision for my assessment of subsection 5(1) of

the *Limitations Act* and the date Mr. Lauzon knew or ought to have known of the loss or damage he claims in his action.

[25] The parties have not disputed that:

- the Court may grant summary judgment on the basis of an expired limitation period (*Utah* at para 7; *Warner v Canada*, 2019 FC 329 at para 18); and

- the applicable limitation period is that set forth in section 4 of the *Limitations Act*. It is not the six-year period that applies in certain proceedings against the Crown by virtue of section 38 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50.

[26] The parties' disagreement centres on section 5 of the *Limitations Act* and the date that Mr. Lauzon's claim was discoverable. Subsections 5(1) and 5(2) provide that:

Discovery	**Découverte des faits**
5 (1) A claim is discovered on the earlier of,	5 (1) Les faits qui ont donné naissance à la réclamation sont découverts celui des jours suivants qui est antérieur aux autres :
(a) the day on which the person with the claim first knew,	a) le jour où le titulaire du droit de réclamation a appris les faits suivants :
(i) that the injury, loss or damage had occurred,	(i) les préjudices, les pertes ou les dommages sont survenus,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and;

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred

(ii) les préjudices, les pertes ou les dommages ont été causés entièrement ou en partie par un acte ou une omission,

(iii) l'acte ou l'omission est le fait de la personne contre laquelle est faite la réclamation,

(iv) étant donné la nature des préjudices, des pertes ou des dommages, l'introduction d'une instance serait un moyen approprié de tenter d'obtenir réparation;

b) le jour où toute personne raisonnable possédant les mêmes capacités et se trouvant dans la même situation que le titulaire du droit de réclamation aurait dû apprendre les faits visés à l'alinéa a). 2002, chap. 24, annexe B, par. 5 (1).

Présomption

(2) À moins de preuve du contraire, le titulaire du droit de réclamation est présumé

to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. 2002, c. 24, Sched. B, s. 5 (2).	avoir appris les faits visés à l'alinéa (1) a) le jour où a eu lieu l'acte ou l'omission qui a donné naissance à la réclamation. 2002, chap. 24, annexe B, par. 5 (2).

[27] As stated above, the CRA submits that Mr. Lauzon's claim is statute-barred because Mr. Lauzon knew or ought to have known of his loss or damage as early as 2006, if not 2010, and, in any event, by mid-2015. The CRA argues that the loss was discoverable in 2006 when Mr. Lauzon realized he had not received the expected refund for the 2005 Taxation Year. Mr. Lauzon cannot justify the commencement of his claim for unjust enrichment in 2018 by his reliance on a vague explanation received in 2006 from a CRA officer at the general inquiries line that his 2005 Refund Cheque was probably being withheld due to an audit of his charitable donations. In any event, the audits of his 2005 and 2006 charitable donations were clearly complete upon his admitted receipt of the Notices of Reassessment dated March 17, 2008 (2005 Taxation Year) and March 11, 2010 (2006 Taxation Year). At that point, Mr. Lauzon cannot maintain his reliance on the CRA's 2006 advice. Finally, Mr. Lauzon's law firm, DioGuardi Tax Law, was informed in a letter dated June 29, 2015 from the CRA (the Horn Letter) not only that the refunds for the Taxation Years had been issued but also the dates they were issued. As his agent's knowledge is imputed to him, Mr. Lauzon knew of his loss or damage in sufficient detail to bring his claim for unjust enrichment by early July 2015.

[28] Mr. Lauzon argues that the *Limitations Act* issues raised by the CRA cannot be determined fairly without the Court hearing directly from him. He states that the Court needs to assess the credibility of his evidence regarding the 2006 call with the CRA and his continued

reliance, after receiving the Notices of Reassessment for the Taxation Years, on his Objections as the mechanism through which any issue with the Refund Cheques would be resolved.
Mr. Lauzon also argues that the Horn Letter was not brought to his attention and that DioGuardi had not been retained in respect of his disputes with the CRA specific to the Taxation Years.

[29] I have reviewed Mr. Lauzon's August 7, 2019 affidavit and the transcript of his cross-examination by CRA counsel. I agree with Mr. Lauzon that there are material issues of credibility regarding his knowledge of his loss in 2006 and, to a lesser extent, in 2010 and 2012 upon receipt of the Notices of Reassessment for the Taxation Years. If the CRA's *Limitations Act* arguments ended there, I would find that those arguments should not be decided on this motion for summary judgment as a trial judge would be better positioned to assess Mr. Lauzon's credibility (*Milano Pizza* at para 37).

[30] In making this determination, I am mindful of the FCA's statement in *Utah* that conflicting evidence and credibility issues that permeate the merits of the allegations before the Court do not preclude the granting of a motion for summary judgment based on the expiry of a limitation period (*Utah* at para 51). Here, the credibility of Mr. Lauzon's evidence regarding his circumstances and reliance on the CRA's alleged 2006 oral guidance and the lack of clarity in the Notices of Reassessment is directly relevant to the commencement of the two-year limitation period pursuant to section 4 and subsection 5(1) of the *Limitations Act*.

[31] The CRA next argues that Mr. Lauzon knew or ought to have known of the loss or damage caused by his failure to receive the Refund Cheques by early July 2015 when his agent

received the Horn Letter. Therefore, Mr. Lauzon filed his Statement of Claim after the expiry of the limitation period prescribed by section 4. I agree. There are no issues of credibility that require determination in this regard and the CRA's motion for summary judgment must succeed on this basis.

[32] The Horn Letter is included in the record as an exhibit to Mr. Lauzon's affidavit. It is dated June 29, 2015 and stamped received July 2, 2015. The letter is addressed to Dan Horn, c/o DioGuardi Tax Law, at its offices in Mississauga, Ontario. The first line of the Horn letter reads "[t]his is in response to your recent enquiry". The attachment to the letter is a Statement of Account for Mr. Lauzon that begins with an entry dated April 24, 1995 and ends with a current balance as at June 25, 2015. Most notably, the detailed listing of entries relevant to the Refund Cheques are as follows:

Date	**Details**	**Amount**	**Balance**
June 22/2006	2005 Assessment		
	Provincial Tax	2,194.50	
	Federal Tax	2,304.50	
	Refund Interest Paid	63.02 CR	
	Tax Deductions Applied	21,137.88 CR	16,701.90 CR
June 22/2006	Refund Issued	16,701.90	0.00
Apr. 17/2007	2006 Assessment		
	Provincial Tax	1,294.10	
	Federal Tax	229.80	
	Tax Deductions Applied	17,555.18 CR	16,031.28 CR
Apr. 17/2007	Refund Issued	16,031.28	0.00

[33] Mr. Lauzon submits that Mr. Horn was not a lawyer and that there was no evidence that the Horn Letter was brought to Mr. Lauzon's attention. Further, he had not retained DioGuardi to

act in respect of his disputes regarding the Taxation Years. The firm was dealing with the 2008 taxation year (see *Lauzon v Canada*, 2016 FCA 298). Mr. Lauzon argues that DioGuardi had no duty to inform him of the content of the Horn Letter as it related to the Taxation Years.
Mr. Lauzon also relies on his overarching submission that the Taxation Years continued to be under objection and that the CRA had stated in 2006 that his refunds were being withheld until the charitable donation issues were sorted out.

[34] I do not find either submission persuasive. I begin with the Horn Letter. The attached Statement of Account states that a refund in respect of the 2005 Taxation Year was issued to Mr. Lauzon on June 22, 2006 in the amount of $16,701.90. Equally clear is the line stating that a refund was issued to him on April 17, 2017 in the amount of $16, 031.28 for the 2006 Taxation Year. The subsequent entries regarding refund interest charged and the increasing annual account balance reflect and reinforce the CRA's position that the Refund Cheques had been issued and received by Mr. Lauzon.

[35] Unlike the 2008 and 2010 Notices of Reassessment for the Taxation Years which did not refer to the issuance of refunds or to the amounts of the Refund Cheques, I find that the Statement of Account contains information such that a reasonable person in Mr. Lauzon's circumstances would know or ought to have known that the CRA assumed his receipt of the Refund Cheques. Any continued reliance by Mr. Lauzon on his Objections to the CRA's reassessment of the Taxation Years does not displace the provisions of section 5 of the *Limitations Act* (*Utah* at paras 21, 35, 43 and 51).

[36] I turn to Mr. Lauzon's submissions that Mr. Horn was not a lawyer at DioGuardi, the Horn Letter was not brought to his attention, and DioGuardi had no obligation to do so because the firm had not been retained to act for him in respect of 2005 and 2006. First, the fact that Mr. Horn was not a lawyer at the law firm is not determinative. He was employed by the law firm and had carriage of some aspects of Dioguardi's income tax retainer on behalf of Mr. Lauzon. Mr. Horn had been entrusted to obtain information from the CRA regarding Mr. Lauzon that included information setting out his tax account for the Taxation Years. The identity of the individual at the firm to whom the letter was sent does not impact the agency relationship between DioGuardi and Mr. Lauzon. Second, Mr. Lauzon's evidence given on cross-examination is at best equivocal as to whether he received a copy of the letter from DioGuardi in 2015. His response to counsel's repeated questions on this subject was that he did not know if he had received it or not.

[37] Third, the Horn Letter was sent to Mr. Lauzon's solicitors and Mr. Lauzon is deemed to have knowledge of the content of that letter, and the loss or damage to him resulting from his non-receipt of the Refund Cheques, for purposes of paragraph 5(1)(a) of the *Limitations Act* (subs. 12(2) of the *Limitations Act*; see *Ottawa Athletic Club Inc. (Ottawa Athletic Club) v Athletic Club Group Inc.*, 2014 FC 672 at paras 164-175 (*Ottawa Athletic Club*)). In oral submissions, Mr. Lauzon argued that DioGuardi had not been retained in respect of the Taxation Years and, consequently, had no duty to communicate the content of the Horn Letter to him as it relates to those years. He emphasized that the presence of a duty to communicate is required to impute an agent's knowledge to its principal pursuant to subsection 12(2) of the *Limitations Act* (*Ottawa Athletic Club* at para 170).

[38] There is no evidence before me as to the ambit of DioGuardi's retainer for Mr. Lauzon's tax matters. What is clear from the record is that the Horn Letter was sent to the firm in response to its inquiry on behalf of Mr. Lauzon in relation to one or more issues relating to his tax position and/or tax dispute(s) with the CRA. On its face, the requested information in the Statement of Account was relevant to the DioGuardi retainer. As such, the firm had a duty to communicate the information in the Horn Letter to Mr. Lauzon. To the extent he argues that DioGuardi was under no duty to inform him of portions of the Statement of Account and that that specific information cannot be imputed to him, Mr. Lauzon's argument is not supported by the evidence and I find that Mr. Lauzon is deemed to have knowledge of the information set forth in the Statement of Account.

[39] In summary, Mr. Lauzon's action was filed more than two years after he knew or ought to have known of his loss or damage due to his failure to receive and deposit the Refund Cheques. The Horn Letter, appended as an exhibit to Mr. Lauzon's affidavit and received by his agent, informed Mr. Lauzon in straightforward language of the status of the issued refunds for 2005 and 2006 in the CRA's records. By July 2, 2015 or shortly thereafter, Mr. Lauzon ought to have known of the loss or damage attributable to the 2005 and 2006 refunds.

[40] I find that Mr. Lauzon commenced his claim for unjust enrichment after the two-year limitation period in section 4 of the *Limitations Act* expired and the CRA's motion for summary judgment will be granted on this basis.

B. No genuine issue for trial on the merits

[41] The CRA's evidence establishes, on a balance of probabilities, that the Refund Cheques (1) were issued and mailed to Mr. Lauzon in 2006 and 2007 respectively, and (2) are not outstanding and have not been cancelled. Mr. Lauzon's evidence establishes that he has no recollection of receiving the Refund Cheques or of depositing them into any of his bank accounts. However, he has set out no facts and adduced no evidence in his response to this motion that contradicts the CRA's evidence that the Crown has not been enriched. Accordingly, Mr. Lauzon's claim for unjust enrichment fails on the best evidence now available to the parties and the CRA's motion for summary judgment must be granted in accordance with Rule 215(1).

1. The basis of a claim for unjust enrichment

[42] The parties agree that there are three distinct elements of a cause of action in unjust enrichment: (a) an enrichment of the defendant; (b) a corresponding deprivation of the plaintiff; and (c) the absence of a juristic reason for the enrichment (*Kerr v Baranow*, 2011 SCC 10 at para 32).

2. Summary of the parties' positions

[43] The CRA submits that the merits of its motion turn on the first element of Mr. Lauzon's claim. The CRA argues that its evidence establishes that the Crown has not been enriched because the Refund Cheques were issued and mailed in the normal course and have been negotiated, whether by Mr. Lauzon or a third party. Mr. Lauzon has adduced no evidence to the contrary, and the question of any deprivation suffered by Mr. Lauzon is simply not relevant.

[44] Mr. Lauzon disagrees with the CRA's focus on the negotiation of the Refund Cheques. His submissions address whether the CRA has credibly established that the Refund Cheques were issued and mailed. In the absence of evidence supporting these two initial stages, Mr. Lauzon argues that the CRA must have been enriched because the Refund Cheques were never issued and could not have been negotiated.

3. Analysis of the parties' evidence

[45] The CRA relies on four affidavits: (1) an affidavit dated July 9, 2019 from Ms. Wendy Dueck, an Acting Programs Officer, Individual and Trust Accounting Enquiries Section, Individual Returns Directorate of the CRA; (2) a supplementary affidavit from Ms. Dueck dated September 20, 2019; (3) an affidavit dated July 10, 2019 from Mr. Christian Bernier, an Operations Manager, Receiver General and Pension Branch of PSPC; and (4) an affidavit dated July 9, 2019 from Ms. Isabelle Bégin, a Manager at the Winnipeg and Québec Production Centre, Digital Services Branch of PSPC.

[46] Mr. Lauzon relies on his affidavit dated August 7, 2019 (the Lauzon Affidavit).

[47] The affiants were cross-examined by counsel for the opposing party and the transcripts of the cross-examinations are contained in the record.

[48] I will summarize the CRA's chain of evidence and the substance of Mr. Lauzon's affidavit. I will then address the parties' submissions and arguments regarding both the affidavit evidence and certain aspects of the affiants' responses on cross-examination.

[49] Ms. Dueck's evidence focuses on the CRA's records as they relate to Mr. Lauzon's tax accounts for the Taxation Years. She traces Mr. Lauzon's filings in respect of 2005 and 2006 and the information in the CRA's databases that reflect the issuance of Notices of Assessment and Refund Cheques by PSPC for those years, all as mailed to Mr. Lauzon's address on file in Tiverton, Ontario. With reference to printouts or reproductions of the CRA's records and databases that are the extensive exhibits to her affidavit, Ms. Dueck states that:

- The CRA issues notices of assessment to taxpayers if the taxpayer is not owed a refund. PSPC issues notice of assessments and refund cheques when the taxpayer is owed a refund.

- The CRA assessed Mr. Lauzon's 2005 tax return as filed and PSPC issued a Notice of Assessment and Refund Cheque in the amount of $16,701.90 (PRN 4707-28685766) on or about June 22, 2006. The Notice of Assessment and Refund Cheque were sent to Mr. Lauzon at his Tiverton address.

- The CRA assessed Mr. Lauzon's 2006 tax return as filed and PSPC issued a Notice of Assessment and Refund Cheque in the amount of $16,031.28 (PRN 2707-20572500) on or about April 17, 2007. The Notice of Assessment and Refund Cheque was sent to Mr. Lauzon at his Tiverton address.

[50] Mr. Bernier's evidence links the CRA's records to PSPC's process for issuing CRA refund cheques and, more particularly, the personal information and PRN (payment reference

number) associated with the Refund Cheques as they appear in PSPC's records and as referenced in the CRA records:

- PSPC is the federal government department responsible for issuing cheques on behalf of the CRA.

- The CRA submits refund requests to PSPC in a requisition file that contains multiple refund requests and includes each payee's name and address, payment amount and date by which the payee is to receive the refund.

- PSPC's database, the Standard Payment System (SPS), receives the requisition file from the CRA and assigns a unique 12-digit PRN to each cheque. Once assigned, PSPC provides the PRN number to the CRA.

- One of PSPC's production centres prints each refund cheque and associated notice of assessment, places them together in one envelope and releases the filled envelopes to Canada Post for delivery.

- The SPS maintains data regarding negotiated and cancelled cheques for a period of six years at which time the data is destroyed in accordance with the *Destruction of Paid Instruments Regulations, 1996,* SOR/97-238.

- Conversely, cheques issued by PSPC that have not been negotiated or cancelled appear in the SPS on "outstanding" status indefinitely.

- Mr. Bernier spoke with Ms. Dueck who provided to him the PRN numbers, dollar amounts and dates associated with Mr. Lauzon's Refund Cheques. Mr. Bernier

reviewed PSPC's records and confirmed that the PRNs associated with the Refund Cheques do not appear on the SPS outstanding cheque list. In addition, the specific PRNs were contained in requisition files received and processed by PSPC that are listed "COMPLETE" on dates that are consistent with the dates the CRA assessed the Taxation Years and requested the Refund Cheques.

– PSPC would not have destroyed the data associated with the Refund Cheques if they remained on outstanding status in the SPS.

[51] Mr. Bernier concludes that:

> The cheque dates Ms. Dueck provided me for Mr. Lauzon's 2005 and 2006 refunds, correspond with PSPC's "completed dates" for the PRN numbers associated with the 2005 and 2006 refunds.
>
> The PSPC's SPS database does not show the PRNs associated with the 2005 and 2006 refund cheques as "outstanding" which indicates that the cheques were negotiated. Conversely, if the refund cheques were not either negotiated or cancelled, the PRNs would remain coded as "outstanding" as cheques in "outstanding" status are never purged from the SPS.

[52] Ms. Bégin's evidence confirms the procedural mechanics at PSPC that support the evidence provided by Mr. Bernier and speaks to PSPC's practices, procedures and quality control measures for the printing and mailing of notices of assessment and refund cheques on behalf of the CRA. She describes the physical format of notices of assessment and the fact that refund cheques are always attached to the first page of a taxpayer's notice of assessment. Ms. Bégin's affidavit tracks the extraction by PSPC's two production centres of data submitted by the CRA, followed by the printing and mechanical insertion of the notices of assessment and attached refund cheques into envelopes for mailing. She confirms Mr. Bernier's evidence that the

filled envelopes are then delivered to Canada Post for mailing. Ms. Bégin states that she began working at PSPC in 2009 and had spoken to staff members who advised her that the practices and processes she describes in her affidavit have been in effect at PSPC since at least 2005.

[53] Mr. Lauzon's affidavit and exhibits focus understandably on his own circumstances. His evidence does not address or contradict the evidence of any of Ms. Dueck, Mr. Bernier or Ms. Bégin. Mr. Lauzon describes his background and the charitable investments that led to the CRA's audits of his 2005 and 2006 tax returns. He addresses the status of the Refund Cheques and his interactions with the CRA, oral and written:

- Mr. Lauzon states that he did not receive either the Notice of Assessment and Refund Cheque dated June 22, 2006 for the 2005 Taxation Year or the Notice of Assessment and Refund Cheque dated April 17, 2007 for the 2006 Taxation Year.

- Mr. Lauzon reiterates categorically that he did not receive the Refund Cheques nor did he deposit the refund amounts into his bank accounts.

- Mr. Lauzon attaches to his affidavit the 2019 correspondence between his counsel and the Bank of Montréal and the Bank of Nova Scotia that confirm that copies of his bank statements for 2005 and 2006 no longer exist.

- Mr. Lauzon describes his 2006 call to the CRA to ask about his 2005 and 2006 refunds, stating that he spoke with a female officer and that "she advised me that due to the audit of my charitable donations, my tax refunds generated by my

donation claims were probably being withheld". Mr. Lauzon was told that this should be sorted out once the audits were complete.

– Mr. Lauzon states that the resolution of his Notices of Objection in respect of the Taxation Years began in 2014 and culminated in his acceptance of a settlement offer in December 2016 and a settlement letter from the CRA dated March 8, 2017. Mr. Lauzon was expecting the CRA to amend his account statements to reflect the fact that the 2005 and 2006 refunds had not been issued once final Notices of Reassessment for the Taxation Years were issued but this did not happen.

– Mr. Lauzon filed a CRA service complaint on February 14, 2018 explaining his situation. He received a response on March 20, 2018 stating that Forms 535 for the missing refund payments had been issued on December 7, 2017.

[54] Mr. Lauzon challenges the CRA's evidence from Ms. Bégin and Mr. Bernier. Mr. Lauzon submits that Ms. Bégin's evidence regarding PSPC's printing and mailing processes in 2005 is hearsay evidence and should be given little or no weight (Rules 81(1) and 81(2)). Ms. Bégin did not work for PSPC when the Refund Cheques should have been issued and has no personal knowledge of the facts she recounted. She was not the last individual in authority who dealt with the Refund Cheques (*Kovacevic v Canada*, 2003 FCA 293 at paras 16, 22) and the CRA gave no reason why PSPC employees with direct knowledge of the procedures for issuing and mailing CRA refund cheques in 2005 did not provide an affidavit. Further, neither Ms. Bégin nor Mr. Bernier stated that the Refund Cheques were actually mailed to Mr. Lauzon.

[55] I agree with Mr. Lauzon that an affidavit from Ms. Bégin's 2005 predecessor would carry more weight but it does not follow that Ms. Bégin's evidence must be accorded little or no weight. First, in light of the sheer numbers of notices of assessment and refund cheques produced annually by PSPC on behalf of the CRA, it is not reasonable to expect the CRA to track down the PSPC employee who last handled Mr. Lauzon's 2005 and 2006 Notices of Assessment and Refund Cheques. Second, Ms. Bégin provides detailed information regarding the sequencing by PSPC of each CRA requisition received that is logical and comprehensive. Her evidence is confirmed in many respects by Mr. Bernier's description of PSPC's practices. Third, Ms. Bégin made inquiries with her staff who had worked at PSPC since at least 2005 and was advised that the practices and processes she describes had been in effect since at least 2005. Finally, the FCA has stated that where an affiant, by virtue of their responsibilities within a government department is in a position to depose to the matters in question, their evidence is admissible without the necessity of having personal knowledge (*Coldwater First Nation v Canada (Attorney General)*, 2019 FCA 292 at para 43).

[56] Ms. Bégin has been in her position since 2009. She states in her affidavit that she has knowledge of PSPC's practices and procedures for the printing and mailing of notices of assessment and refund cheques on the CRA's behalf. Mr. Lauzon seeks to cast doubt on the reliability of Ms. Bégin's evidence by pointing to one error made in cross-examination as to whether certain mailing records had or had not been destroyed. I have reviewed the transcript of this portion of Ms. Bégin's cross-examination and the subsequent explanation provided by the CRA's counsel in satisfaction of an undertaking, and conclude that Ms. Bégin's error was not material. Her evidence establishes, on a balance of probabilities, PSPC's practices and processes

in 2005 for the issuance and mailing of notices of assessment and refund cheques. The possibility of a significant alteration in the processes described that was not identified to Ms. Bégin by her staff and that would call into question the reliability of her evidence, as confirmed by Mr. Bernier, does not change my conclusion.

[57] Mr. Lauzon also challenges Mr. Bernier's conclusion that the Refund Cheques have been negotiated. He submits that Mr. Bernier cannot state with certainty that the Refund Cheques have not been cancelled. Mr. Lauzon contrasts Mr. Bernier's evidence that PSPC's SPS list of outstanding cheques relies in part on the CRA's records with Ms. Dueck's evidence that the CRA's records are automatically generated and do not have a mechanism to feed information to PSPC.

[58] Mr. Lauzon relies on Ms. Dueck's response to a question on cross-examination. Mr. Lauzon's counsel asked if he was correct in stating that the CRA credits or debits a taxpayer's refund regardless of whether a refund cheque is cashed. He also asked for confirmation that the CRA does not have a feedback system to confirm that a refund cheque is cashed or received. Ms. Dueck confirmed both statements. Mr. Lauzon argues that her confirmation means Mr. Bernier cannot be certain in stating that the Refund Cheques were never cancelled.

[59] I do not agree. Mr. Bernier's evidence regarding the cancellation of issued refund cheques is not impaired by the fact that the CRA does not record either the receipt or negotiation

of refund cheques. Mr. Bernier was asked on cross-examination whether the Refund Cheques could have been stolen or cancelled. He responded:

> It [the SPS list of outstanding cheques] concludes that the information -- because the information is no longer in our system, it means that they [the refund cheques] basically got processed.
>
> If it were to be cancelled, the SPS wouldn't have seen it but a record of the cancellation would have been sent to the CRA financial system, which would then show that the payment is cancelled. And because it's not showing it, I'm under the -- we believe that it's been issued, but I -- yes, I cannot say who cashed it.

[60] Ms. Dueck's evidence did not touch on the interaction between the CRA and PSPC with respect to the cancellation of issued refund cheques. Mr. Bernier's evidence indicates that PSPC does not rely on the CRA for updates regarding the cancellation of refund cheques. Rather, he states that a record of the cancellation would have been sent to the CRA financial system. As the CRA's records do not reflect any cancellation and the Refund Cheques do not appear on the SPS outstanding list, Mr. Bernier's conclusion that the Refund Cheques were negotiated is the most likely outcome.

[61] The Dueck, Bernier and Bégin affidavits and supporting exhibits, when read together, describe an internally consistent record of Mr. Lauzon's interactions with the CRA; his tax accounts and tax filings for the Taxation Years; the CRA's requisitions to PSPC for preparation of the Refund Cheques; PSPC's customary practices for the printing, issuance and mailing of cheques on behalf of the Government of Canada; the quality control measures in place at PSPC; PSPC's records regarding the CRA's requisitions for the Refund Cheques and, critically, the status of the Refund Cheques as at July 10, 2019, the date of Mr. Bernier's affidavit. I note in this regard that the reproductions of the CRA's records attached as many of the exhibits to its

affiants' affidavits are admissible in accordance with subsection 244(9) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (*ITA*).

[62] I find that the CRA's detailed evidence is reliable and establishes that the 2005 and 2006 Notices of Assessment and Refund Cheques were printed and mailed to Mr. Lauzon. He is deemed to have received the Notices of Assessment and Refund Cheques pursuant to subsection 248(7) of the *ITA*. The evidence from Mr. Bernier and Ms. Bégin is sufficient to meet the CRA's evidentiary burden in respect of PSPC's role in general and its processing of the Refund Cheques in this case.

[63] I also find that:

- The evidence specific to Mr. Lauzon and the Refund Cheques provided by Ms. Dueck and Mr. Bernier is compelling. The CRA requisitioned refund cheques payable to Mr. Lauzon from PSPC for the Taxation Years. PSPC processed and completed the CRA requisitions. In the course of its fulfillment of the requisitions, PSPC assigned unique PRNs to the Refund Cheques and the PRNs are used in the CRA and PSPC records. The dates that the CRA requisitioned the Refund Cheques and the dates in the SPS reflecting the preparation of the 2005 and 2006 Notices of Assessment and Refund Cheques by PSPC, together with completion of the printing process and insertion into envelopes described by Ms. Bégin, are consistent.

- The CRA's records demonstrate that it has treated Mr. Lauzon's refunds as issued throughout its correspondence with him, including the 2008 and 2010 Notices of Reassessment and the Horn Letter.

- Building on Mr. Bernier's evidence that PSPC completed the CRA's requisitions, Ms. Bégin's evidence of PSPC's standard practices and processes, while not perfect, establishes on a balance of probabilities that the Refund Cheques once printed were delivered in the normal course to Canada Post for delivery.

- Mr. Bernier's evidence establishes that the Refund Cheques are no longer outstanding and that they have been processed. The CRA's records do not record a cancellation of the Refund Cheques. Therefore, Mr. Bernier's conclusion that they have not been cancelled but were negotiated, whether by Mr. Lauzon or third party, is persuasive.

[64] Mr. Lauzon has not satisfied his evidentiary burden of showing that there is a genuine issue for trial of the merits of his claim pursuant to Rule 214. He has made no allegation that the 2005 and 2006 Notices of Assessment with attached Refund Cheques were sent to the wrong address or that he has encountered difficulties with other CRA documents mailed to his Tiverton address; he states only that he did not receive the Refund Cheques. Mr. Lauzon has adduced no evidence contradicting the CRA's evidence that the Refund Cheques were issued and mailed to him or that the Refund Cheques have been negotiated.

[65] I agree with Mr. Lauzon that the CRA's evidence does not establish whether the Refund Cheques were negotiated by Mr. Lauzon or were stolen and negotiated by a third party. However, the CRA has demonstrated on a balance of probabilities that the Refund Cheques were issued, mailed and cashed with the result that Mr. Lauzon has not established any enrichment of the Crown. Without proof of enrichment, Mr. Lauzon's claim for unjust enrichment can go no further and his action must fail.

V. Costs

[66] At the hearing of this motion, the parties agreed to confer regarding costs. By way of letter dated October 14, 2020, the parties informed the Court that they had been unable to agree on the costs payable to the successful party. The parties proposed a schedule for the provision of costs submissions to the Court following the issuance of this judgment which I have accepted.

JUDGMENT IN T-1970-18

THIS COURT'S JUDGMENT is that:

1. The motion for summary judgment is granted.

2. The Plaintiff's action is dismissed in its entirety.

3. The parties will make costs submissions to the Court in accordance with the following schedule:

   (a) within 10 days of the date of this judgment, the Defendant, the Canada Revenue Agency, will deliver to the Court written submissions regarding costs, such submissions to be no longer than three (3) pages excluding any schedules, exhibits and authorities;

   (b) within 10 days of the date of filing of the Defendant's costs submissions, the Plaintiff, Mr. Paul Lauzon, will deliver to the Court written submissions regarding costs, such submissions to be no longer than three (3) pages excluding any schedules, exhibits and authorities; and

   (c) within five (5) days of the date of filing of the Plaintiff's costs submissions, the Defendant may deliver to the Court written reply costs submissions, such submissions to be no longer than two (2) pages in total.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1970-18
STYLE OF CAUSE:	PAUL LAUZON v CANADA REVENUE AGENCY
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO (THE COURT) AND TORONTO, ONTARIO (THE PARTIES)
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JUDGMENT AND REASONS:	WALKER J.
DATED:	MAY 12, 2021

APPEARANCES:

Jeffrey Radnoff Charles Haworth	FOR THE PLAINTIFF
Nancy Arnold Angela Shen	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Radnoff Law Offices Barristers and Solicitors Toronto, Ontario	FOR THE PLAINTIFF
Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANT