Federal Court of Appeal

Cour d'appel fédérale

Date: 20160113

Docket: A-38-15

Citation: 2016 FCA 7

CORAM: DAWSON J.A.
RYER J.A.
WEBB J.A.

BETWEEN:

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

Appellants

and

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 DOWSWELLL, 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 PLETT, 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

Respondents

Heard at Toronto, Ontario, on November 17, 2015.

Judgment delivered at Ottawa, Ontario, on January 13, 2016.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: RYER J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The issue raised on this appeal is whether, on the facts pled in the plaintiffs' amended statement of claim, it is arguable that the Canada Revenue Agency, and through it the Federal Crown, owe a private law duty of care to the plaintiffs to support an action in negligence for damages. Resolution of this issue will require application of the two-part test first articulated by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, [1977] 2 All E.R. 492, at pages 751-752 A.C., and applied by the Supreme Court of Canada in cases such as *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at paragraphs 30-31. The two-part test is sometimes referred to as the *Cooper-Anns* test.

I. Introduction

[2] Lothar Scheuer and the other plaintiffs (the respondents on this appeal) are taxpayers in Canada who participated in a tax shelter donation program marketed and promoted by the Global Learning Group Inc. (GLGI). For the 2004, 2005 and 2006 taxation years, Mr. Scheuer paid, respectively, $10,000, $60,000 and $10,000 to GLGI (paragraph 20 amended statement of claim). In consequence, in those years GLGI provided Mr. Scheuer with charitable donation tax receipts issued by one or more registered Canadian charities in the amounts of $30,047.24, $420,114.91 and $60,053.44 (paragraph 20 amended statement of claim). Mr. Scheuer filed personal income tax returns for each taxation year. In those returns he claimed charitable donation tax credits based on the receipts that he received from GLGI, which credits were applied to reduce the income tax otherwise payable by Mr. Scheuer in each taxation year.

[3] Subsequently, the Canada Revenue Agency reassessed Mr. Scheuer's income tax returns for the years in question to disallow the GLGI charitable donation credits. For the taxation years in question Mr. Scheuer was obliged to pay income tax in the amounts of $17,623.27, $189,449.81 and $12,134.98, plus interest on the tax arrears (paragraph 22 amended statement of claim).

[4] In consequence, Mr. Scheuer and the other plaintiffs sued, seeking damages suffered "as a result of [the Canada Revenue Agency's] negligence in allowing the GLGI program to be marketed to Canadians with [its] approval" (paragraph 23 amended statement of claim).

II. Proceedings in the Federal Court

[5] The defendants (the appellants on this appeal) moved in the Federal Court for an order striking out the amended statement of claim and dismissing the action pursuant to Rules 221(1)(*a*) and (*c*) of the *Federal Courts Rules*, SOR/98-106. These rules permit a pleading to be struck, with or without leave to amend, on the ground that the pleading discloses no reasonable cause of action, or is scandalous, frivolous or vexatious.

[6] By order dated April 17, 2014, issued in Court File T-1352-11, a prothonotary dismissed the motion to strike, except to the extent that the pleading made reference to the Taxpayer Bill of Rights. Those references were struck on consent on the ground that the Taxpayer Bill of Rights came into effect after the facts giving rise to the action. The Prothonotary also awarded the plaintiffs the costs of the motion, to be fixed and payable forthwith.

[7] In reaching his decision, the Prothonotary relied upon "evidence before the Court that the actions of [the Canada Revenue Agency] involved segregating investors in GLGI who would be treated differently than other taxpayers and developing a policy to treat them differently". Further, the Prothonotary relied upon findings of fact made in *Ficek v. Canada (Attorney General)*, 2013 FC 502, 432 F.T.R. 245, a case involving another investor in GLGI.

[8] The decision of the Prothonotary was appealed. For reasons cited as 2015 FC 74, a judge of the Federal Court dismissed the appeal with costs. Because of the Prothonotary's reliance on *Ficek* and its factual findings, the Judge conducted most of his analysis on a *de novo* basis. In

any event, the Judge concluded that had he reviewed the Prothonotary's order entirely on a *de novo* basis he would have reached the same result.

[9] This is an appeal from the decision of the Federal Court Judge.

III. Issue

[10] The issue raised in this appeal is whether the Judge erred in refusing to strike the amended statement of claim on the ground that it disclosed no reasonable cause of action.

IV. The test on a Rule 221(1)(*a*) motion

[11] The test on a motion to strike a claim as disclosing no cause of action is a stringent one. The moving party must show it is "plain and obvious" that the pleading discloses no cause of action. Put another way, the moving party must show that the claim has no reasonable prospect of success (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paragraph 17).

[12] On such a motion:

i. The allegations of fact in the statement of claim must be accepted as proven, unless patently ridiculous or incapable of proof (*Imperial Tobacco* at paragraph 24; *Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)* (2006), 82 O.R. (3d) 321, 276 D.L.R. (4th) 411 (On. C.A.) at paragraph 8);

ii. A statement of claim should not be struck merely because it is novel (*Imperial Tobacco* at paragraph 21);

iii. A statement of claim must be read generously in favour of the plaintiff, with allowance for drafting deficiencies (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 at page 451.

V. The *Cooper-Anns* test

[13] It is common ground between the parties that the test for determining whether a duty of care exists in a given situation is the *Cooper-Anns* test. However, before applying the test the Court must first determine whether the duty of care asserted by the plaintiff has already been recognized by the law (*Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at paragraph 15). If the duty of care, or an analogous duty of care, has not previously been recognized, then the *Cooper-Anns* test is to be applied.

[14] The first stage of the *Cooper-Anns* test requires consideration of foreseeability, proximity and policy. Two questions arise: First, was the harm that resulted the reasonably foreseeable consequence of the defendant's act? Next, are there reasons why tort liability should not be recognized in the situation at issue? This next step focuses on factors arising from the relationship between the plaintiff and the defendant.

[15] At the first stage, more than mere foreseeability is required. The parties must also be sufficiently proximate. This means that it is just and fair, having regard to the relationship between the parties, to impose a duty of care upon the defendant. Defining the proximity of the

relationship may involve looking at the expectations, representations, reliance and interests involved. That is, one looks at the factors that demonstrate the closeness of the relationship between the plaintiff and the defendant (*Cooper* at paragraphs 30-34). Where what is at issue is the defendant's alleged failure to act, foreseeability alone may not establish a duty of care. Again, in the absence of an overt act, the nature of the relationship must be examined in order to determine whether there is a sufficient nexus between the parties to justify the imposition of a duty of care (*Childs* at paragraph 31).

[16] At the second stage of the *Cooper-Anns* test, the question remains whether there are residual policy considerations, outside the relationship of the parties, that may negate the imposition of a duty of care (*Cooper* at paragraph 30).

[17] Having described the test on a motion to strike and the *Cooper-Anns* test, I move to consider the specific allegations pled against the defendants.

VI. The allegations pled against the defendants in the amended statement of claim

[18] I begin with an obvious caveat: what is relevant are the allegations contained in the amended statement of claim. This is important to note because in their oral and written submissions the plaintiffs made submissions not based upon the pleading as framed. Illustrative of this are paragraphs 6 and 7 of their memorandum of fact and law:

> 6. Although the [actions described in the decision of the Federal Court in *Ficek* occurred after the events in issue], they show what document disclosure will add: bad faith and deliberate delay notwithstanding an absolute view that GLGI was a fraud. Striking before document disclosure is particularly inappropriate where CRA memoranda may again show

> improper motives to get the Plaintiffs "over a barrel", to hide the true intentions behind the CRA's policies, to ignore proper headquarters directions, and to wrongfully and with purpose to delay long after deciding about GLGI falsely creating an "excuse for delay".
>
> 7. If the appeal were allowed, the facts and bad faith evidenced in *Ficek* could be pled by amendment. The Appellants' objection is not that these facts cannot be pled, but rather that they have not yet been. The claim as framed stands on its own, but courts also consider how claims could be amended. [emphasis added]

[19] The facts alleged in the amended statement of claim which, unless patently ridiculous or incapable of proof, must be assumed to be true for the purpose of the motion to strike, may be summarized as follows:

i. The plaintiffs are Canadian taxpayers who participated in a tax shelter donation program approved by the Canada Revenue Agency and marketed by GLGI (paragraph 2);

ii. GLGI marketed a tax shelter referred to as a gifting trust arrangement, whereby the plaintiffs became capital beneficiaries in Global Learning Trust Services Inc. (2004) (the Trust) (paragraphs 7 and 8);

iii. The plaintiffs received educational software from the Trust, which they could, in turn, donate to a participating charity at fair market value, or keep for personal use (paragraph 8);

iv. The plaintiffs each received charitable donation receipts from the charity that received such donations (paragraph 8);

v. The plaintiff Lothar Scheuer paid specified amounts to GLGI in the 2004, 2005 and 2006 taxation years, and received charitable donation receipts (paragraphs 20 and 21);

vi. Mr. Scheuer filed personal income tax returns for the 2004, 2005, 2006 and 2007 years in which he claimed a charitable donation tax credit for each taxation year based upon the charitable donation receipts received from GLGI (paragraphs 20 and 21);

vii. Subsequently, the Canada Revenue Agency reassessed Mr. Scheuer to disallow the claimed donation credits. He is now responsible to make tax payments to the Canada Revenue Agency, including interest on the tax arrears (paragraph 22);

viii. The remaining plaintiffs also participated in the GLGI tax shelter by making specified payments, and they were denied donation tax credits in respect of these payments (paragraphs 25 and following);

ix. GLGI obtained a tax shelter identification number from the Canada Revenue Agency pursuant to subsection 237.1(3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), (paragraph 9);

x. The Canada Revenue Agency failed to properly manage the operational framework established under the *Income Tax Act* to protect taxpayers from promoters such as GLGI (paragraph 146);

xi. The Canada Revenue Agency failed to properly assess the scheme submitted by GLGI in order to obtain a tax shelter number (paragraph 147);

xii. The plaintiffs' tax returns "included the specific information of the donations made based on the tax shelter numbers" issued by the Canada Revenue Agency (paragraph 150);

xiii. GLGI also made annual filings to the Canada Revenue Agency reporting all information required under the *Income Tax Act* concerning individuals who invested in the tax shelter (paragraphs 6 and 151);

xiv. The Canada Revenue Agency "was aware of potential issues surrounding the charitable donations made to GLGI as early as the year 2000" (paragraph 149);

xv. The Canada Revenue Agency took no steps to warn or inform Canadian taxpayers, and in particular the plaintiffs, of its concerns about GLGI (paragraph 149);

xvi. Rather, the tax return of each taxpayer who invested in the tax shelter was assessed separate and apart from the returns of other Canadian taxpayers (paragraph 152);

xvii. The Canada Revenue Agency has continued to allow GLGI to market its program to Canadian taxpayers, knowing that the Agency would not honour any of the tax credits issued (paragraph 155);

xviii. Mr. Scheuer was advised that GLGI was registered as a tax shelter under the *Income Tax Act*, and that it had a tax shelter number (paragraph 13);

xix. Mr. Scheuer relied upon the fact that the Canada Revenue Agency had issued a tax shelter number to GLGI and this was the only reason he contributed to it (paragraph 16);

xx. Mr. Scheuer has suffered substantial health problems associated with the stress of his tax situation (paragraphs 23 and 24); and

xxi. The plaintiffs seek damages from the defendants arising from the failure of the Canada Revenue Agency to properly protect them (paragraphs 148 to 159).

[20] Having reviewed the material facts alleged, I now consider whether the duty or duties of care asserted by the plaintiffs have previously been recognized in law.

VII. Does this action assert one or more previously recognized duties of care?

[21] I begin by considering the nature of the duty or duties of care alleged.

[22] It can be seen that, broadly, two duties of care are asserted to have been owed and breached: first, the Canada Revenue Agency breached a duty of care said to be owed to the plaintiffs when it issued a tax shelter identification number to GLGI. Second, the Canada Revenue Agency breached a duty of care said to be owed to the plaintiffs to warn them of potential issues, including the Canada Revenue Agency's concerns relating to the status of the charitable donation credits that resulted from payments made to GLGI, and its decision not to recognize the legitimacy of such charitable donation credits.

[23] What is not clearly asserted in the amended statement of claim is an allegation that the Canada Revenue Agency breached a duty of good faith and/or breached a duty to assess the plaintiffs' income tax returns on a timely basis. Duties of this sort were referenced in paragraphs 6 and 7 of the respondents' memorandum of fact and law, quoted above. At its highest, the amended statement of claim suggests in a generalized, non-particularized fashion bad faith or delay on the part of the Canada Revenue Agency in that it "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 tax payers and in particular the Plaintiffs of their [*sic*] concerns" while knowing it would not honour any of the tax credits, and the plaintiffs' tax returns were "assessed separate and apart from all other Canadians".

[24] The question now becomes whether any of these alleged duties of care, or analogous duties of care, have been recognized in law?

[25] The Judge dealt with this issue summarily at paragraph 15 of his reasons: "The Prothonotary identified the proper framework for determining a duty of care where it has not been previously recognized in the case law". I see no error in the Judge's conclusion.

[26] In *Cooper*, at paragraph 36, the Supreme Court stated that when a case falls within one of a number of enumerated examples, or an analogous situation, and reasonable foreseeability is established, a *prima facie* duty of care may be posited. Examples given by the Supreme Court that are relevant to the present case include: where the defendant's act foreseeably causes physical harm to the plaintiff or to the plaintiffs' property; negligent misstatement; misfeasance in public office; a duty to warn of the risk of danger; a duty of care owed by municipalities to prospective purchasers of real estate to inspect housing developments without negligence; and, a duty of care to execute a policy of road maintenance in a non-negligent manner.

[27] The plaintiffs argue that this claim falls within or is analogous to: misfeasance in public office; the obligation on municipalities to take care when inspecting housing developments and executing road maintenance; negligent misstatement; negligent performance of a service; duty to warn; and, creating "the impression that GLGI operated under its watch".

[28] In my view, the amended statement of claim fails to properly plead any of the above causes of action. The question then arises whether it pleads a sufficiently analogous cause of action.

[29] I will deal first with the allegations of breach of a duty of care when issuing a tax shelter number and breach of a duty of care to warn Canadian taxpayers, including the plaintiffs, of concerns about the tax shelter.

[30] In my view, there is no category of recognized cases that supports the plaintiffs' assertion that the Canada Revenue Agency and Canada owed a duty of care to all Canadians when issuing tax shelter numbers or a duty to warn all Canadians that participation in a given tax shelter may lead to the denial of the income tax deductions (the charitable tax credits in this case) allegedly available as a result of such participation. The performance of statutory duties generally does not, in and of themselves, give rise to private law duties of care (*Reference Re Broome v. Prince Edward Island*, 2010 SCC 11, [2010] 1 S.C.R. 360, at paragraph 13). Something more must be alleged to bring the claim within one of the above enumerated classes or an analogous one: for example, misfeasance in public office or acting in a manner inconsistent with the proper and valid exercise of the powers conferred upon the Canada Revenue Agency under the *Income Tax Act*.

[31] The suggestions of bad faith or delay described above are non-particularized and so generalized that they do not, as pled, fall within a recognized, or analogous, duty of care. It is, therefore, necessary to assess the pleading using the two-step *Cooper-Anns* test.

VIII. Do the allegations as pled meet the *Cooper-Anns* test?

[32] At this stage of the analysis I put to one side the suggestions of bad faith or delay. As said above, on this point the pleading is non-particularized and over-generalized. These shortcomings

may be remedied through amendment. Thus, I will deal with the two better particularized allegations:

i. Breach of a duty of care when issuing a tax shelter identification number; and,

ii. Breach of a duty of care to warn the plaintiffs of issues and concerns with the GLGI tax shelter.

[33] At the outset, it is important to note that the plaintiffs do not rely "exclusively on the interpretation of the [*Income Tax Act*] to establish the existence of a prima facie duty of care". Rather, they rely upon "a distinct relationship arising in the context of the legislation" (respondents' memorandum of fact and law at paragraphs 3 and 26). In oral argument before this Court, counsel for the plaintiffs advised that all of the allegations relating to this asserted direct and proximate relationship are contained in paragraphs 148, 150, 151 and 152 of the amended statement of claim.

[34] These paragraphs are brief. When shorn of the impermissible reference to the Taxpayer Bill of Rights they read as follows:

> 148. The need for tax payers to be informed as quickly as possible of any schemes which would have an adverse economic impact is one of the cornerstones of the [Income Tax Act].
>
> […]
>
> 150. The duty of care owed by [Canada Revenue Agency] to the Plaintiffs became even greater in proximity when the Plaintiffs filed their returns which included the specific information of the donations made based on the tax shelter numbers issued by [Canada Revenue Agency].
>
> 151. This duty was further reinforced when [Canada Revenue Agency] received the filing by the GLGI promoters as required under section 237.1(4) of the Act. Section 237.1(4) of the Act requires that

> promoters report all sales of their arrangements to the [Canada Revenue Agency].
>
> 152. The Plaintiffs state that the proximity between [Canada Revenue Agency] and the Plaintiffs, after [Canada Revenue Agency] received the Plaintiffs' initial claim was close and direct and on an individual basis. Each individual return was assessed separate and apart from all other Canadians. The assessment created a direct relationship between [Canada Revenue Agency] and the individual Plaintiffs that it would only be fair and reasonable to expect a [*prima facie*] duty of care. Based on all the information available to [Canada Revenue Agency] it is reasonable to expect that [Canada Revenue Agency] would have notified the Plaintiffs immediately that there were concerns about their donations under GLGI program.

[35] The Judge conducted his proximity analysis *de novo*, finding that the legislative scheme was not determinative in this case (reasons, paragraph 22) and that the matters enumerated at paragraph 26 of his reasons "may be sufficient to establish proximity by interaction".

[36] I need not consider whether the Judge erred in finding that the allegations contained in the amended statement of claim were sufficient at law, for the purpose of a motion to strike, to assert a *prima facie* duty of care arising from "proximity by interaction". This is because, in my respectful view, the Judge erred in law by failing to give sufficient consideration to the relevant provisions of the *Income Tax Act*. I reach this conclusion for the following reasons.

[37] For the purpose of the alleged duty of care owed when issuing a tax shelter identification number, the relevant provision is section 237.1 of the *Income Tax Act*. In brief, the provision prohibits any person from selling, issuing or accepting consideration in respect of a tax shelter unless the Minister of National Revenue has issued an identification number for the tax shelter (subsection 237.1(4)). In addition, it prohibits a taxpayer from claiming a deduction or credit in

respect of a tax shelter unless the taxpayer files with the Minister a prescribed form containing prescribed information, including the identification number for the tax shelter (subsection 237.1(6)).

[38] A promoter shall apply to the Minister in prescribed form for a tax shelter identification number (subsection 237.1(2)). Issuance of a tax shelter number is not discretionary. On receipt of an application under subsection 237.1(2) "together with prescribed information and an undertaking satisfactory to the Minister that books and records in respect of the tax shelter will be kept and retained at a place in Canada that is satisfactory to the Minister, the Minister shall issue an identification number for the tax shelter" [underlining added] (subsection 237.1(3), as in force at the relevant time).

[39] Pursuant to paragraph 237.1(5)(*c*) of the *Income Tax Act*, every promoter of a tax shelter must prominently display "on every written statement made after 1995 […] that refers either directly or indirectly and either expressly or impliedly to the issuance by the Canada Revenue Agency of an identification number for the tax shelter" and on the copies of the information returns sent to each investor pursuant to subsection 237.1(7.3), the following warning when the return is written wholly or partly in English:

> The identification number issued for this tax shelter shall be included in any income tax return filed by the investor. Issuance of the identification number is for administrative purposes only and does not in any way confirm the entitlement of an investor to claim any tax benefits associated with the tax shelter. [emphasis added]

[40] Returning to the application of the *Cooper-Anns* test, at the second part of the first stage of the test, a court is to ask whether, notwithstanding the proximity between the parties, there are

reasons such that tort liability should not be recognized. Had the Judge considered the legislative regime at this stage of the analysis, he would have concluded that no tort liability can, or should, be imposed upon the Minister for simply issuing a tax shelter identification number because, in so acting, the Minister exercises no discretion. Once satisfied that the prescribed information has been provided, that the undertaking to keep the books and records is satisfactory and that the books and records will be kept and retained at a satisfactory place, the Minister must issue the identification number. No duty of care can arise from the issuance of an identification number in this circumstance.

[41] This leaves for consideration the alleged duty of care to warn the plaintiffs. The Judge found the parties to be in a sufficiently proximate relationship. Assuming, without deciding that this finding was correct, I move to the second step of the *Cooper-Anns* analysis and the question of whether there are residual policy considerations outside the relationship between the parties that negates imposition of a duty of care.

[42] *Cooper* provides guidance about the nature of residual policy concerns that may negate the existence of a duty of care. In *Cooper*, an investor alleged that the Registrar of Mortgage Brokers of British Columbia was liable in negligence for failing to oversee the conduct of an investment company licensed by the Registrar. At the first step of the *Cooper-Anns* test, the Supreme Court found insufficient proximity to ground a duty of care. The Court, however, went on to hold that even if a *prima facie* duty of care had been established at the first stage, it would have been negated at the second stage for three “overriding policy reasons”.

[43] One reason, discussed at paragraph 55 of the Court's reasons, was the impact of such a duty of care upon taxpayers. Together, the Chief Justice and Justice Major wrote:

> Finally, we must consider the impact of a duty of care on the taxpayers, who did not agree to assume the risk of private loss to persons in the situation of the investors. <u>To impose a duty of care in these circumstances would be to effectively create an insurance scheme for investors at great cost to the taxpaying public</u>. There is no indication that the Legislature intended that result. [emphasis added]

[44] In my view, this policy consideration applies to a duty of care to warn against investment in an improvident or suspect tax shelter. The written warning tax shelter promoters are mandated by paragraph 237.1(3)(*c*) of the *Income Tax Act* to display in connection with use of a tax shelter identification number is consistent with Parliament's intent that taxpayers should participate in a tax shelter at their own peril, not at the peril of Canadian taxpayers generally. Moreover, at paragraph 8 of the amended statement of claim, the plaintiffs acknowledge that they received independent legal opinions, opinions from accountants and valuation appraisals in respect of the tax shelter. The issuers of such opinions, who benefited financially from the provision of their professional advice, are better placed to indemnify the plaintiffs in the event of negligence in the exercise of their professional responsibilities.

[45] It follows from this analysis that I would strike out the amended statement of claim for failing to assert a cognizable cause of action.

[46] The above conclusions concerning a duty to warn reflect that the performance of statutory duties does not generally give rise to private law duties of care. However, liability may attach if public officials act in a manner inconsistent with the proper and valid exercise of their statutory duties, in bad faith or in some other improper fashion. As discussed above, the amended

statement of claim suggests in a non-particularized and over-generalized fashion bad faith or delay. As liability may attach for such misconduct, the plaintiffs ought to be given leave to further amend their pleading in a manner consistent with these reasons.

IX. Conclusion

[47] For these reasons, I would allow the appeal with costs, and set aside the judgment of the Federal Court. Pronouncing the judgment the Federal Court ought to have pronounced, I would strike out the amended statement of claim with leave to amend in a manner consistent with these reasons and order the respondents to pay to the appellants the costs of the motions in the Federal Court before the Prothonotary and the Judge.

"Eleanor R. Dawson"
J.A.

"I agree.
C. Michael Ryer J.A."

"I agree.
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-38-15
STYLE OF CAUSE:	HER MAJESTY THE QUEEN AND CANADA REVENUE AGENCY AND THE ATTORNEY GENERAL OF CANADA v. LOTHAR SCHEUER, ET AL.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 17, 2015
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	RYER J.A. WEBB J.A.
DATED:	JANUARY 13, 2016

APPEARANCES:

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