CRA - Duty of Care towards Taxpayers?

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Does the CRA owe a Duty of Care to Taxpayers? A duty to warn?

Scheuer v Canada, 2015 FC 74

[See CanLIIConnnects commentary** HERE**]

The plaintiffs, a group of Canadian taxpayers who participated in a tax donation program by Global Learning Group, have brought an action against the Canada Revenue Agency. They allege a breach of the CRA's duty of care for failing to warn them in a timely fashion of the potential consequences of participating in the donation scheme.

The Defendants' motion to dismiss was dismissed by a Prothonotary, and they appealed that decision to the Federal Court. The Federal Court, agreeing with the Prothonotary that it was not plain and obvious that the claim was bereft of any chance of success and dismissed the government's appeal. The Court held that the facts pleaded are sufficient to ground a *prima facie* duty of care, and nothing in the act foreclosed such a duty. Also, there were no policy reasons to foreclose such a duty.

The FC held that, generally, regulators have been held to owe a duty of care where: "(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" (para 27).

The FC analyzed the Anns and Cooper (*Anns v Merton London Borough Council*, [1978] AC 728 [Anns]; *Cooper v Hobart*, 2001 SCC 79 [*Cooper*]) factors for establishing whether a duty of care exists:

- A prima facie duty of care exists if, on the facts, foreseeability and proximity exist, and in the case of a government actor the duty is explicit or implicit from the statutory scheme OR from the interactions between the claimant and the government;
- If a prima facie duty exists, are there policy reasons why the duty ought not to be imposed.

In addressing this test the court looked at the interactions between taxpayers as members of a tax shelter and the CRA, keeping in mind that on a motion to strike any reasonable prospect of establishing proximity is sufficient: *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42*, at para 47.* "Proximity", for duty of care analysis, does not refer to physical proximity. Rather it is a description of a relationship that is sufficiently close and direct such that it is both fair and reasonable to require the defendant to conduct his/her affairs in a manner that is mindful of the plaintiff's legitimate interests (para 24), considering:

> [24] [...] 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.
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> [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.

The court identified a list of claims that are sufficient such that proximity can be found (para 26):

- 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).

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