Federal Court  Cour fédérale

Date: 20130604

Dockets: T-473-06
T-474-06

Citation: 2013 FC 597

BETWEEN:

Docket: T-473-06

ALLAN JAY GORDON

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

Docket: T-474-06

AND BETWEEN:

JAMES A. DEACUR AND ASSOCIATES LTD. AND JAMES ALLAN DEACUR

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER

HUGHES J.

[1] The Defendant in each of these two actions, Her Majesty the Queen in Right of Canada (the Crown) has brought an appeal, by way of a motion, from a decision of Prothonotary Aalto wherein, among other things, he refused to strike certain portions of the Amended Statement of Claim in each of these two actions. His decision is dated October 26, 2012, and the Reasons are cited as 2012 FC 1247. The Reasons were supplemented by a transcript of a special sitting before Prothonotary Aalto dated March 13, 2013, however the parties are agreed that what is contained in the transcript is irrelevant to the issues before me.

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

[3] These actions were both commenced in 2006 and deal with activities based on an investigations and other activity conducted by the predecessor of the Canada Revenue Agency (CRA) conducted in the period between 1993 and 1997. The facts were summarized by Prothonotary Aalto at paragraphs 2 to 6 of his Reasons:

> *[2] Not only are these actions over six years old, the facts giving rise to the actions occurred in December, 1997 which in turn was based on an investigation carried out by the predecessor of Canada Revenue Agency (CRA) between 1993 and 1997 relating to Research and Development tax credits (RD's). The individual Plaintiffs are chartered accountants and the corporate Plaintiff an accounting firm. The Plaintiffs had developed a methodology (the Deacur Methodology) for claiming RD credits on behalf of clients. In 1997 numerous fraud related charges were laid against Mr. Deacur and Mr. Gordon, and the corporation. The criminal cases against them carried on for almost seven years until the charges were stayed in*

September, 2004 at the request of the Crown. This action was commenced in 2006 and has not proceeded very far except that production is underway. No discovery has yet taken place. Suffice it to say that part of the delay is related to many logistical issues which have arisen in the course of production.

[3] While the Statements of Claim (the Claims) in each action are dressed up with several causes of action as described below, the case in its simplest form is that CRA improperly concluded that the actions of the Plaintiffs in using the Deacur Methodology in filing RD's for their clients amounted to fraud. As a result the Crown pursued criminal charges against the Plaintiffs which were ultimately dropped after many long years. The actions of the Crown, so claim the Plaintiffs, amount to misfeasance, abuse of authority, negligence and engaging in a fraudulent scheme against the Plaintiffs for which they seek compensation. The compensation relates to loss of income, loss of clients, together with general and punitive damages. While the lengthy Claims refer to much more, this brief description encapsulates the nature of the Claims.

[4] The Defendant now seeks to strike substantial portions of the Claims and argue that the motion has been brought at this juncture in the proceedings because of a "seismic change in the landscape" in the last few years arising from new case law from the Supreme Court of Canada and from the Court of Appeal for Ontario. This case law, it is argued, undermines or completely negates many of the causes of action alleged in the Claims.

[5] The Claims are not identical but are substantially similar. Deacur and his company are represented by counsel and have provided the Court with an amended statement of claim in an effort to reflect some of the challenges of the Defendant to the various causes of action. Gordon, who appears on his own behalf, has not altered his Claim in response to this motion and very forcefully argued why all of the causes of action are supportable. Although, to be fair, Gordon concedes that what appears to be a cause of action is really some factual background to support the cause of action. The Claim is very detailed and contains much factual background.

[6] In any event, the Crown has brought this broad motion on a wide range of issues. The Crown's view is that if these causes of action are struck then production will not be as extensive and the action should move faster towards trial. Trial time will also be shortened as the parties have indicated that the current estimate for trial is in excess of 100 days.

[4] In his Order, Prothonotary Aalto struck out some of the claims without leave to amend; other claims were struck out, but with leave to amend. The balance of the motion to strike other claims was dismissed. The Crown is appealing in respect of two of the claims that were not struck out; one is "intentional interference with contractual relations"; the other is "negligence" as against the CRA.

[5] It is important to determine exactly what pleadings were before Prothonotary Aalto. They are referred to generally by the Prothonotary at paragraphs 3 to 6 of his reasons above, as "the Claims". In discussions with Counsel and Mr. Gordon at the hearing before me, it appears that the pleadings at issue were the Amended Statement of Claim of the Plaintiffs James A. Deacur and Associates Ltd., and James Allan Deacur (collectively Deacur) in Court File T-474-06 dated May 24, 2006; and the Amended Statement of Claim of Allan Jay Gordon in Court File T-473-06; also dated May 24, 2006. A draft of a further Amended Statement of Claim on behalf of Deacur was also said to be before the Prothonotary. A copy was provided to me but it is not in the Record so I will have no regard to it. At that time, both Deacur and Gordon were represented by the same solicitor. Deacur continues to be represented by that solicitor; Gordon is self-represented. It appears that both Statements of Claim had been amended by the Plaintiffs following initial discussions with Counsel for the Crown in order to meet at least some of the concerns raised by the Crown.

[6] The Crown has filed a Defence to the Amended Statement of Claim in each action.

[7] Gordon had filed an Amended and Further Amended Statement of Claim dated November 26, 2012 in action T-473-06 as a self-represented litigant. This pleading was not before

Prothonotary Aalto and was filed after he made the Order at issue here, apparently in an attempt by Gordon to comply with that Order, as well as to add further "particularization". I will not consider this Further Amended Statement of Claim, as it was not before the Prothonotary.

[8] Given that the Crown's motion before me focused on two "issues"; namely, intentional interference with contractual relations, and negligence; rather than any specific paragraphs or portions of the Amended Statement of Claim in either action - and the Plaintiffs responded in a similar vein - I will direct my reasoning and Order in the same manner.

ISSUES

[9] The issues before me are:

1. What is the standard by which the Prothonotary's decision is to be considered on this appeal?

2. Given the appropriate standard, should that Order stand, or should this Court set it aside or make a different Order?

ISSUE #1: What is the standard by which the Prothonotary's decision is to be considered on this appeal?

[10] There are two hurdles that the Crown must overcome in a motion such as this. The first is in respect of an Order made by a Prothonotary that is not dispositive of an action or issue in an action. The jurisprudence is summarized in *Merck & Co v Apotex Inc* [2004] 2 FCR 459 at paragraph 19, where Decary JA, for the majority, wrote:

> *Discretionary orders of Prothonotaries ought not to be disturbed on appeal to a judge unless:*
>
> *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*

[11] Where a Prothonotary has struck out an action or an issue, this is a vital matter and must be considered by a judge on a *de novo* basis; however, where the Prothonotary did not strike out an action or issue, the matter is not vital to an issue since the matter surmises, for determination at trial or at some pre-trial process, deference is afforded to the Prothonotary's decision except where the Prothonotary proceeded on a wrong principle or misapprehended the facts. [e.g. *Merck & Co., Inc. v. Apotex Inc.*, 2012 FC 454 at para 9]

[12] The second hurdle is that respecting the circumstances in which a Court should or should not strike out an action or issue on a motion to strike. This question has been considered by the Supreme Court of Canada on several occasions, the most recent being *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42. The judgment of this Court was delivered by the Chief Justice. She wrote at paragraphs 17, 21 and 25:

> *17 The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. Supreme Court Rules. This Court has reiterated the test on many occasions. 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: Odhavji Estate v. Woodhouse, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that*

the claim has no reasonable prospect of [page67] success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, Syl Apps Secure Treatment Centre v. B.D., 2007 SCC 38, [2007] 3 S.C.R. 83; Odhavji Estate; Hunt; Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735.

. . .

21 Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before Donoghue v. Stevenson, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised [page68] on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before Hedley Byrne & Co. v. Heller & Partners, Ltd., [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in Donoghue v. Stevenson. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

. . .

25 Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way - in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in the context of the [page70] law and the litigation process, the claim has no reasonable chance of succeeding.

[13] I distil from these comments that a Court should be cautious before striking out a claim on the basis that it fails to disclose a cause of action, on a preliminary motion to strike, before the Court is sufficiently seized with all the relevant facts and arguments.

[14] I add further that the Court will not, as a general rule, strike out a claim for failure to disclose a cause of action where a defence has been filed. (e.g. *MacLennan v Risley Manufacturing Ltd*, 2005 FC 363). Here, the Crown has filed a defence in each of these two actions. The Crown argues that it may, nonetheless, maintain this motion, as Rule 221 of this Court permits such a motion at any time, and that this motion is based on a correct interpretation of legal principles and not on facts or particularization of facts that may or may not be contained in the pleadings.

[15] I find that, nonetheless, the Crown faces a formidable task in persuading this Court that the portions of the Order of Prothonotary Aalto, where he refused to strike out two claims at this stage of the proceedings, ought to be reversed. Where the matter rests simply on legal principles, I will consider the matter *de novo*; but if the matter is factual or mixed fact and law, the Prothonotary's decision will be given deference.

ISSUE# 2: Given the appropriate standard, should that Order stand, or should this Court set it aside or make a different Order?

a) Intentional Interference with Contractual Relations

[16] The parties do not dispute that the Prothonotary correctly set out the elements required to prove a cause of action respecting the tort of intentional interference at paragraph 66 of his Reasons:

> *[66] The essential elements of this tort are:*
>
> *1. Existence of a valid business relationship or business expectancy between a plaintiff and another party;*
>
> *2. The defendant has knowledge of the business relationship;*
>
> *3. Intentional interference which induces or causes a termination of the business relationship or expectancy;*
>
> *4. The interference must be by unlawful means;*
>
> *5. The interference must be the proximate cause of the termination of the business relationship; and,*
>
> *6. There is a resultant loss to the plaintiff.*
>
> *[see, for example, 671122 Ontario Ltd. v. Sagaz Industries Canada Inc. [1998] O.J. No. 121 (C.A.)]*

[17] The Prothonotary described this portion of the Plaintiffs' actions as "more tenuous" at paragraph 64 of his Reasons, and disposed of the matter by allowing the claim to remain. He wrote at paragraph 67 to 69:

> *[67] In this case several of these elements can be imputed even if not pleaded directly. For example, the contract is the business relationship between the Plaintiffs and their clients of which the Defendant would have had knowledge by virtue of the CRA investigation. The harm is the alleged loss of the clients and fees which would have been earned. The investigation and the manner it was carried out which is described in detail in the Claim, and must be accepted as true on this motion, is the proximate cause of the interference with accountant/client relationship. On this latter point, the Plaintiffs argue that the reading of the "rights" was part and parcel of the interference.*
>
> *[68] Gordon argues that the elements of the cause of action are all pleaded. In particular, he argues that the CRA officials did not administer the ITA properly and instead of reviewing the individual tax returns in accordance with the ITA they pursued criminal charges and by so doing they deliberately set about to destroy the*

> *business of the Plaintiffs (see paragraphs 156 – 171 of Gordon's Memorandum of fact and Law). In furtherance of this scheme, CRA officials, who are named in the claim are alleged to have made false statements knowing they were false which resulted in Gordon losing his clients. Further, it is alleged that CRA officials threatened clients with fraud charges if they did not cooperate.*
>
> *[69] In all, there is sufficient facts pleaded to ground a cause of action in interference with contractual relations when the Claim is read in its totality without parsing each paragraph as a stand alone allegation. Further, it must be remembered that the Crown has already pleaded to this cause of action and since the inception of the claim there has been no "seismic" change in the law.*

[18] The Crown's Counsel argued before me that this portion of the Plaintiffs' claims was, in reality, a collateral attack upon the assessments made by the CRA respecting research and development claims (SR&ED) of various clients of the Plaintiffs. Counsel argued that section 152(8) of the *Income Tax Act*, 1985, RSC, c.1 (5th Supp) as amended, stipulates that, subject to being varied or vacated on an objection or an appeal, and subject to reassessment, is deemed to be valid. Counsel cites decisions such as *Roitman v R*, 2006 FCA 266 and *Canada v Addison & Leyen Ltd*, 2007 SCC 33, to argue that a collateral attack upon an assessment cannot be made by way of an action initiated against the Crown.

[19] The basis of the claim made by the Plaintiffs in this regard can be illustrated with reference to paragraphs 22, 45 to 47 and 55 to 57 (JAD refers to the Plaintiff Deacur and Associates) of the Gordon Amended Statement of Claim:

> *22. During this period, approximately two hundred R&D based claims were prepared and submitted by JAD on behalf of its clients. Because of the high value of the tax incentives, JAD provided its services on a contingency basis, and expected to be paid out of the tax benefit realized by its clients. The average anticipated revenue to*

JAD from each filing was in excess of $10,000.00. This revenue stream was also expected to be continuous for the life of the R&D program, such that the client's filings would result in a total profit of $1,050,000 for each year of the life of the incentive program.

. . .

45. Northey began investigating JAD methodologies in December 1995. As noted previously, Northey was rated at an AU2 level and should not have been in charge of the investigation of an AU4 case. Northey knew or ought to have known that she was not capable of handling the investigation.

46. Northey never provided notice to JAD that it was being investigated. CRA policy, written by Ron Moore, obligates investigators to provide a 30-day letter". ~~At the preliminary hearing Northey testified that a "30 day letter" was not required in this case. However, Ron Moore testified at the preliminary hearing that he was the author of the "30 day letter" policy, and that such a~~ A notice letter was required in the JAD case and, indeed, all cases. Northey's failure to provide such a letter constitutes a breach of CRA policy, as well as a breach of the principles of fairness and natural justice.

47. Northey's theory of the case included the premise that only R&D wages and management fees actually paid during the fiscal period that was the subject of the claim could be claimed~~. Northey gave sworn evidence at the preliminary hearing in the Criminal Case that her investigation had proceeded based on that underlying assumption~~. However, such a requirement would have been contrary to the legislation and also contrary to generally accepted accounting principles. ~~In fact, handwritten notes made by Praulins of the Budget Plan tabled in the House of Commons, who was being updated on the Deacur case, indicated that the~~ The Management fee amount did not have to have been paid in order to form the subject of a claim. Northey therefore knew or ought to have known that the fundamental basis for her investigation was unsupportable In spite of this, Northey proceeded, and Praulins allowed her to proceed, with a baseless investigation. A qualified lead investigator would have known that this theory was an unacceptable basis for pursuing an investigation.

. . .

55. In early 1996 SI investigators under Northey's direction commenced interviewing many of JAD's clients and employees. In the course of these interviews, Northey or investigators acting under

> *her direction intentionally conveyed to the clients and employees that JAD's practices were fraudulent. In fact, some of JAD's accountants were not only interviewed but were also 'read their rights' in the presence of clients. This was calculated to leave the unmistakable impression that not only JAD but also its individual employees were frauds and criminals. These actions scared off clients and employees, drastically reducing the number of both, and Northey knew or ought to have known that pre-judging the outcome of the investigation and advertising that outcome to clients and employees would have exactly that effect. This oppressive conduct had no role in furthering the investigation, but rather served exclusively to defame Gordon and JAD in front of employees and clients.*
>
> *56. Further, although clients were advised that JAD methodologies were fraudulent, they were not instructed as to which specific activities were fraudulent and which were not. The result was that many clients ceased making applications under the R&D system altogether.*
>
> *57. Similarly, during the course of her investigation Northey interviewed and questioned auditors who had been processing JAD submitted claims. In so doing Northey clearly and intentionally conveyed to the auditors that the JAD methodology was illegal. In so doing she begged the outcome of the investigation, and converted it from an investigation into an internal propaganda exercise. As a direct result of this misfeasance, and in reliance on Northey's opinions, front line auditors began denying JAD claims without adequate review, contrary to law, and resulting in many valid claims being denied.*

[20] Plaintiffs' Counsel and Gordon argue that the Crown has mischaracterized their argument. They say that they are not seeking to attack the assessments; rather, their claim rests in the manner in which the CRA conducted investigations into their clients' businesses and that word of such investigations may have precluded potential clients from dealing with them. The situation, they say, is like those considered by the Courts in *Leroux v Canada (Revenue Agency)*, 2012 BCCA 63 and *Ereiser v R*, 2013 FCA 20, in which latter case Sharlow, JA, for the Court, in dealing with a motion to strike wrote at paragraphs 16 and 38:

> *16 The decision of a judge to grant or refuse a motion to strike is discretionary. This Court will defer to such a decision on appeal in the absence of an error of law, a misapprehension of the facts, a failure to give appropriate weight to all relevant factors, or an obvious injustice: see, for example, Collins v. Canada, 2011 FCA 140 at paragraph 12, Domtar Inc. v. Canada, 2009 FCA 218 at paragraph 24, Apotex Inc. v. Canada (Governor in Council), 2007 FCA 374 at paragraph 15, Elders Grain Co. v. M.V. Ralph Misener (The), 2005 FCA 139, [2005] 3 F.C.R. 367 at paragraph 13, Mayne Pharma (Canada) Inc. v. Aventis Pharma Inc., 2005 FCA 50 at paragraph 9.*
>
> . . .
>
> *38 It may be that in this case, the reassessments under appeal will be found to be valid and correct. In that case, they will represent a correct statement of Mr. Ereiser's statutory obligations under the Income Tax Act, and they will not be vacated as part of the statutory appeal process for income tax appeals. However, they will be vacated if they are found to be invalid or entirely incorrect. If they are found to be incorrect in part, they will be vacated and referred back to the Minister for reassessment. But regardless of the outcome of Mr. Ereiser's income tax appeal, it will remain open to him to seek a remedy in the Federal Court or the superior court of a province, depending upon the circumstances, if he has a tort claim or an administrative law claim arising from the wrongful conduct of one or more tax officials.*

[21] At this stage of the proceedings, I do not view the Plaintiffs' claim for intentional interference with contractual relations as seeking to reopen or collaterally attack tax assessments made upon their customers or potential customers. I view the claim as being one wherein the CRA investigations are alleged to have frightened off customers and potential customers of the Plaintiffs, which customers would otherwise have used the Plaintiffs' services and paid them a fee for so doing. I cannot, at this stage, find that the claim is one that ought to be struck out.

b) Negligence as Against the CRA

[22] Counsel for the Crown argues that the claim in negligence made against the Crown is "doomed" since there is no duty of care owed by the Crown to the Plaintiffs.

[23] Both parties agree that a cause of action in respect of negligence in these circumstances is to be examined on the basis of what is described as the *Anns/Cooper* test. That test originated in the House of Lords decision of *Anns v Merton London Borough Council*, [1978] AC 728 and was further developed by the Supreme Court of Canada in *Cooper v Hobart*, [2001], 3 SCR 537. The test may be succinctly stated as a two-stage test where, if the answer to the first question is yes, then the Court must move on to consider the second question; but, if the answer to the first question is no, then there is no need to consider the second question. The questions are:

1. Is there a sufficient proximity between the party alleged to have been negligent and the party alleged to have been injured so as to create a duty of care? If the answer is yes, then:

2. Are there policy considerations which would negate the creation of a duty of care in the circumstances of the case?

[24] As to the first question, McLachlin CJ and Major J for the Supreme Court in *Cooper* wrote at paragraph 35:

> *35 The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the*

> *case. One searches in vain for a single unifying characteristic. As stated by McLachlin J. (as she then was) in Canadian National Railway Co. v. Norsk Pacific Steamship Co., [1992] 1 S.C.R. 1021, at p. 1151: "[p]roximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (cited with approval in Hercules Managements, supra, at para. 23). Lord Goff made the same point in Davis v. Radcliffe, [1990] 2 All E.R. 536 (P.C.), at p. 540:*
>
> > *. . . it is not desirable, at least in the present stage of development of the law, to attempt to state in broad general propositions the circumstances in which such proximity may or may not be held to exist. On the contrary, following the expression of opinion by Brennan J in Sutherland Shire Council v Heyman (1985) 60 ALR 1 at 43-44, it is considered preferable that 'the law should develop categories of negligence incrementally and by analogy with established categories'.*

[25] As to the second question, they wrote at paragraph 37:

> *37 This brings us to the second stage of the Anns test. As the majority of this Court held in Norsk, at p. 1155, residual policy considerations fall to be considered here. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized? Following this approach, this Court declined to find liability in Hercules Managements, supra, on the ground that to recognize a duty of care would raise the spectre of liability to an indeterminate class of people.*

[26] The Prothonotary set out this test as paragraph 97 of his Reasons and concluded his Reasons in respect of this negligence issue at paragraph 105:

> *[97] The Crown argues at length that no negligence against the Crown for the manner in which it carried out the investigation can be asserted based on the allegations in the Claim. The Crown argues that no "duty" is pleaded and the tests as set out in the well known cases of Anns v. Merton London Borough Council, [1978] A.C. 728 (H.L.) and Cooper v. Hobart, 2001 SCC 27 (the Anns/Cooper Test) are not met. The Anns/Cooper analysis requires a consideration at the first stage of the forseeability of harm and the proximity of the parties which would give rise to a duty of care. If part one is not met then under part two the court should consider whether there are policy considerations which may give rise to a duty of care.*
>
> . . .
>
> *[105] Thus, in my view, the first part of the Anns/Cooper Tests has been met (forseeability and proximity) and therefore there is no need to consider the policy considerations of part two.*

[27] Counsel for the Crown submits, and I agree, that the Prothonotary got it wrong. He erred in saying at paragraph 97 that if the answer to question 1 is no, then the Court should consider question 2. He also erred in saying at paragraph 105 that if the answer to question 1 is yes, there is no need to answer question 2. The correct view of the law is that, if the answer to question 1 (is there a duty) is yes, then the Court must consider question 2 (is there public policy negating the duty).

[28] In respect of question 1 - whether there was a duty - the Prothonotary found that based on the allegations in the pleadings, there was a duty. He wrote at paragraphs 101 to 104:

> *[101] In dealing with this issue, as with the others, the allegations in the Claim must be accepted as true. The Claim does set out*

> *conduct which could be construed as negligence in the descriptions of how various of the CRA officials conducted the investigation. It asserts negligence in the failure to appoint a competent investigator, negligent supervision of those conducting the investigation, negligent investigation etc. [see, for example, paragraphs 37, 43, 45, 46, 47 and 68 among several others in the Deacur Claim, which paragraphs are adopted by Gordon]. Did they owe a private law duty of care to the Plaintiffs? In my view, at this juncture of the proceeding the allegations are not bereft of any chance of success and should not be struck.*
>
> *[102] The Plaintiffs were specifically targeted by CRA for criminal investigation. Notably, in Hill v. Hamilton-Wentworth Regional Police Board, 2007 SCC 41, the Court noted:*
>
> > *. . . the targeted suspect has a critical personal interest in the conduct of the investigation. At stake are his freedom, his reputation and how he may spend a good portion of his life. These high interests support a finding of a proximate relationship giving rise to a duty of care. [para. 34]*
>
> *[103] These Plaintiffs are in exactly the same situation. They had a critical interest in the conduct of the investigation, their personal freedom was at stake as well as their reputations. It can hardly be said that the Claims are bereft of any likelihood that there is no proximate relationship giving rise to a duty of care. Elder and Edwards and other cases cited by the Crown are very different on their facts and do not revolve around a criminal investigation of the type initiated in this case.*
>
> *[104] It is clearly pleaded that the CRA officials knew that there investigation would have an affect on the Plaintiffs in their business and reputation. Gordon also points to a document entitled the Taxpayer Bill of Rights as creating a duty of care. As this is a motion to strike, extraneous evidence is not generally admissible. While Gordon may choose to raise this at trial, for purposes of this motion, the Court has not considered this document. The approach set out in Hill sufficiently establishes the proximity necessary to permit the negligence claim to stand. There are other cases referred to by the parties which have been considered but for the purposes of disposing of this issue the cases referred to are sufficient.*

[29] The Prothonotary should have then considered question 2 respecting public policy. He did not.

[30] Counsel for the Crown argues that the *Income Tax Act* does not create a duty as between the CRA and the Plaintiffs. I agree; no statutory duty is established in the circumstances of this case. Counsel for Deacur argues that there is a private law duty of care, possibly previously unrecognized, that exists apart from any statutory duty and points to the Supreme Court of Canada decision in *Hill v Hamilton-Wentworth Regional Police Services Board*, [2007], 3 SCR 129, particularly at paragraph 70, where the Court suggested that standards imposed by a statute (Police Services Act) while not creating a duty, may prove instructive in establishing a non-statutory duty of care owed by public officials such as police officers.

[31] Crown Counsel has drawn the attention of the Court to a recent decision of the British Columbia Supreme Court in *Leighton v Canada (Attorney General),* 2012 BCSC 961, where the Court, Fisher J, canvassed most of the current authorities and applied the *Anns/Cooper* test specifically. I am unaware as to any appeal in respect to allegations of negligence made by a taxpayer against the CRA. Justice Fisher wrote at paragraphs 54 to 58:

> *54 These cases demonstrate that proximity is not established where statutory duties are owed to the public. The income tax system relies on self reporting by taxpayers and the Income Tax Act gives the Minister and his delegates broad powers in supervising the scheme of assessing and auditing taxpayers. CRA and taxpayers have opposing interests. The relationship is not one where CRA auditors should be responsible for protecting taxpayers from losses arising from their assessments. In these circumstances, policy considerations would militate against a finding of proximity between CRA and individual taxpayers: see 783783 Alberta Ltd. at paras. 45-46; Syl Apps Secure Treatment Centre v. B.D., 2007 SCC 38 at para. 32.*
>
> *55 In Leroux, the question was whether negligence in the course of the administration or enforcement of the Income Tax Act and the Excise Tax Act could give rise to a private law remedy. The*

> *chambers judge refused to strike the claim under Rule 9-5(1)(a) and the Court of Appeal was not persuaded that he was "plainly wrong" to leave the question of whether there was proximity sufficient to establish a prima facie duty of care for consideration following a trial. However, there were material facts pleaded and the court directed that the pleading be reformulated in a further amended statement of claim.*
>
> *56 I do not consider that Leroux prevents me from assessing this pleading and this potential amendment to the pleading and determining whether it discloses a reasonable claim. Neither Canus, Jones nor 783783 Alberta Ltd. were considered. Moreover, this case involves consideration of a duty of care, not to a taxpayer directly but indirectly to the shareholder of a corporate taxpayer.*
>
> *57 In my view, there is simply no basis to establish any proximity of relationship in these circumstances. I agree with the submissions of the defendants that it is plain and obvious that no proximity exists between the CRA and its employees and Mr. Leighton, and therefore there can be no private law duty of care.*
>
> *58 It is not necessary to consider the second stage of the Anns-Cooper test. However, it is my view that there are residual policy considerations that would militate against recognizing a duty of care in this case, one example being that the effect of recognizing a duty of care would conflict with the CRA's broad duties under the Income Tax Act to ensure that all taxes lawfully owing are correctly assessed and collected.*

[32] Counsel for the Crown also relies on the decision of Patterson J of the Ottawa Superior Court of Justice in *McCreight v Canada (Attorney General)*, 2012 ONSC 1983. That case dealt with a claim by members of an accounting firm against the CRA in respect of audits conducted upon several of their clients. The case is not too dissimilar to the one before me. Patterson J wrote at paragraph 85:

> *85 In the present case, there is no recognized cause of action for negligent misrepresentation by a CRA investigator. There is no legal duty of care on a CRA investigator. The imposition of such a duty would be inconsistent with the scheme of the Income Tax Act which*

> *expressly provides that taxpayers cannot, for example, rely on errors or omissions. Also, there is no special relationship between the CRA investigators and McCreight and Skinner.*

[33] I am advised that an appeal has been taken, and the matter has been argued before the Court of Appeal. A decision has not yet been rendered.

[34] Plaintiffs' Counsel and Gordon argue that theirs is not a case where they are alleging negligence in respect of any audit upon them. They are alleging negligence in respect of investigations, which may or may not include audits - allegedly conducted negligently - respecting their customers and potential customers.

[35] At this state of these actions, I cannot say that the Plaintiffs' claim in respect of question 1 of the *Anns/Cooper* test has no reasonable prospect of success. In this respect, I agree with, as well as give deference to, the decision of the Prothonotary.

[36] The Prothonotary should have, but did not, consider the second question raised by the *Anns/Cooper* test as to whether there is public policy that would exclude a duty of care. I will.

[37] Counsel for the Crown's argument in respect of this question is more or less a repetition of the argument in respect of the first question. Counsel argues that the *Income Tax Act* creates no statutory duty. I agree. Counsel argues that *Hill* does not establish that there is a private duty.

[38] In *Leighton*, supra, Fisher J, in *obiter*, found that there were policy considerations that would militate against recognizing a duty of care. I have previously set out paragraph 58 of the Reasons in this regard.

[39] I recognize that the allegations of negligence and application of the *Anns/Cooper* test - even at this stage - may seem tenuous. I am reluctant, however, to strike the claim at this time. The case law is clearly evolving in this area, and the last word has yet to be written by an appellate court. The continuation of this claim at this stage of the proceedings is not unduly burdensome. The matter is proceeding in any event, and the relevant facts will have to be established and considered in dealing with other of the claims. I decline to strike this claim at this stage of the actions.

CONCLUSION AND COSTS

[40] As a result, I will dismiss the two appeals. It should be made clear that there may be an appropriate opportunity at a later stage in these actions, or at trial, to reconsider these matters. My decision does not preclude such a re-consideration. However, this should not be viewed as an invitation to revisit the matters until an appropriate factual basis is established, and possibly one or more appellate courts have ruled on the cases put before me as authorities.

[41] As to costs, I note that Prothonotary Aalto, at paragraph 107 of his Reasons, advised that each party should bear its own costs. This was appropriate, as success before him was divided. I do not propose to change that Order. My Order will deal only with costs related to this appeal.

[42] Each of the Plaintiffs was successful and is entitled to costs. The Plaintiff Gordon is self-represented, and therefore is entitled to reasonable disbursements. I estimate that those disbursements are in the order of $500.00, and fix them at that amount. The Plaintiffs Deacur, collectively, were successful, and were represented by Counsel. This appeal was more difficult than most, and is deserving of an award of costs higher than the usual modest amounts provided for in our Rules. I fix the costs of Deacur at $5,000.00.

"Roger T. Hughes"
Judge

Toronto, Ontario
June 4, 2013

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-473-06 T-474-16
STYLE OF CAUSE:	**T-473-06**: ALLAN JAY GORDON v HER MAJESTY THE QUEEN IN RIGHT OF CANADA **T-474-06**: JAMES A. DEACUR AND ASSOCIATES LTD. AND JAMES ALLAN DECAUR v HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 28, 2013
REASONS FOR ORDER:	HUGHES J.
DATED:	June 4, 2013

T-473-06 - APPEARANCES:

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