CITATION: Deluca v. Canada, 2016 ONSC 3865
COURT FILE NO.: CV-15-531808
DATE: 20160620

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: FRANK DELUCA, Plaintiff

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA, DAVID DUFF and KATHLEEN STURKENBOOM, Defendants

BEFORE: S. F. Dunphy, J.

COUNSEL: *Paul H. Starkman*, for the Plaintiff

Nancy Arnold and Angela Shen, for the Defendants

HEARD: June 2, 2016

ENDORSEMENT

[1] The plaintiff participated in a charitable donation tax shelter for three taxation years on the recommendation of some colleagues. As a result, he claimed and received very substantial tax refunds. Canada Revenue Agency audited the schemes and ultimately disallowed the deductions claimed by the plaintiff, requiring the plaintiff to return the refunds received plus interest.

[2] The plaintiff did not donate money to a registered charity but instead acquired "TradeBux" through a barter network that was part of the scheme and donated these to an affiliated but registered charity.

[3] The plaintiff is concurrently appealing the disallowance of his charitable deductions through the Tax Court of Canada. In addition, he brought this claim in Superior Court alleging that CRA and certain of its employees owed him a duty to police registration of the charity associated with the scheme. It is claimed that CRA knew or ought to have known of the reasons that later resulted in the cancellation of the registration of the affiliated charity well prior to the plaintiff's decision to participate in the scheme. If CRA cancelled the registration of the charity affiliated with the tax shelter scheme when they first came into possession of the knowledge or warned the public of it, he might have avoided participation in it.

[4] For the reasons that follow, I am allowing the defendants' motion to strike this statement of claim pursuant to Rule 21.01(1)(b) of the *Rules of Civil Procedure*. The damages the plaintiff

claims to have suffered all arise from his participation in the barter program and not from the charitable registration of the charity in question. He sought to convert "TradeBux" acquired as part of the scheme into real cash tax refunds. There is no duty to warn taxpayers away from participating in tax shelter schemes that prove unsuccessful. The imposition of such a duty would indirectly confer the benefit of the disallowed tax scheme through the back door of the tort system. The statement of claim is also an abuse of process in that it advances spurious personal claims against public officials in the course of their duties without having alleged a proper factual foundation for doing so. This claim has no reasonable chance of success and ought to be dismissed.

Overview and factual background

[5] This being a motion under Rule 21.0(1)(b) of the *Rules of Civil Procedure*, no evidence is admissible on the hearing and the allegations in the statement of claim are to be taken as true unless incapable of proof. Bald allegations, speculation or the pleading of legal conclusions unsupported by relevant pleadings of fact are all instances of allegations that are incapable of proof: *Grenon v. Canada Revenue Agency*, 2016 ABQB 260 at para. 32. While the rule has been recognized as a "valuable housekeeping measure" permitting the weeding out of hopeless claims before more time, energy and resources are expended upon them by both sides, it is a tool that the Supreme Court of Canada has said must be used with caution: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (CanLII), [2011] 3 S.C.R. 45, at para. 19 and 21. Pardue J.A. has recently commented that "the approach must be generous, erring on the side of allowing a novel, but arguable, claim to proceed … claimants must clearly plead all facts on which they intend to rely, as those facts are the basis on which the possibility of success will be evaluated": *Paton Estate v. Ontario Lottery and Gaming Corporation (Fallsview Casino Resort and OLG Casino Brantford)*, 2016 ONCA 458 (CanLII) at para. 12.

[6] There is one allegation in the statement of claim that has been removed on consent following a request to admit made by the defendants. This relates to an allegation that the plaintiff had been assessed with penalties by CRA. In fact, the plaintiff was in error as no penalties were assessed. That allegation has been withdrawn and will not be considered further. In consequence of this admission, the plaintiff has consented to dismissing the claim as against Ms. Sturkenboom.

(i) The Charitable Scheme

[7] The following is a summary of the factual allegations as contained in the statement of claim.

[8] In 2007, the plaintiff was advised of an "excellent opportunity" to make a charitable gift and receive a charitable receipt by making a donation to "Liberty Wellness Initiate Foundation" (or "LWIF") through a colleague. He was referred to and consulted an accountant who was familiar with LWIF. He also verified that LWIF was a CRA-registered charity in good standing.

[9] The "excellent opportunity" that he was participated in had the following steps:

a. He applied for membership in "Universal Barter Group Inc." and paid a fee to do so,

b. He applied for a loan from and made a cash payment of pre-paid loan interest to "Barter World Canada Inc.";

c. The loans were evidenced by long term promissory notes but interest was pre-paid in cash to Barter World Canada;

d. He received "TradeBux" with proceeds of the loan and used these to make charitable donations to LWIF;

e. He could earn TradeBux to repay his loans through referrals and completing surveys on-line; and

f. Universal Barter handled the administration of the program while Barter World Canada provided the loan funds.

[10] The plaintiff claims to have done due diligence on LWIF and sought independent accounting advice. He understood that TradeBux could be used to make charitable donations or be used personally. He also understood that TradeBux had a market value that varied similar to currencies and stocks. He made deductions from his tax returns in 2007, 2008 and 2009 based upon the value attributed to the TradeBux by the promoter and certified by the charity, LWIF. In 2007, his 130,000 donated TradeBux were valued at $110,500 in this fashion.

[11] CRA did not cancel the LWIF charitable registration until April 2010. It is alleged that CRA was aware of that Mr. Singh was the controlling mind of Barter World Canada and Universal Barter and was in possession of sufficient evidence "to have at least revoked the charity licenses and to have laid criminal charges against David Singh and his associates". What that information is and what charges could have been laid is not specified in the pleading.

[12] When CRA issued notices of reassessment of his 2007 and 2008 taxation years, the plaintiff consulted his accountant and Universal Barter and followed the template provided to him in responding to CRA.

(ii) The pleaded causes of action

[13] The claim alleges that the defendants failed to take prompt actions to warn the public about Singh and LWIF's charity and the risk in dealing with them until April 2010. The negligence of the defendants in failing to revoke the charitable registration of LWIF "caused him to make charity donations for the 2007, 2008 and 2009 taxation years which are now challenged retroactively by CRA".

[14] It is alleged that CRA knew or ought to have known between 2004 and 2006 that LWIF "had issues and should have been promptly investigated and/or pursued through administrative,

criminal measures and/or revoking the charity's registration". This failure resulted in the plaintiff facing a denial of charitable donations.

[15] The actions of the defendants in relation to the failure to investigate, deny a license or revoke a license are pleaded to constitute gross negligence and a breach of a public and private law duty of care.

[16] In addition to the negligence claim, claims under s. 15 of the Charter are advanced.

Issues to be decided

[17] The following issues are raised by this motion for determination:

a. Are any of the pleaded claims within the exclusive jurisdiction of the Tax Court of Canada pursuant to s. 12 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2?

b. Should the Charter claim be struck as being bald and unable to be sustained?

c. Do the defendants owe a duty of care to the plaintiff?

d. Have the individual defendants been properly named?

Analysis and Discussion

(i) Exclusive jurisdiction of Tax Court of Canada

[18] Section 12(1) of the *Tax Court of Canada Act* provides that the Tax Court "has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under…the *Income Tax Act*". This case is not, on its face at least, an appeal of a matter arising under the *ITA*. However, the Supreme Court of Canada has recognized that, in establishing the Tax Court, Parliament has set up a complex structure to deal with a multitude of tax-related claims and that the "integrity and efficacy of the system of appeals should be preserved": *Canada v. Addison & Leyen Ltd.*, [2007] 2 SCR 793, 2007 SCC 33 (CanLII). The question therefore arises as to whether this claim can be characterized as collateral attack by the plaintiff on the reassessment by CRA of his tax return.

[19] While this case is not a matter of judicial review as was the case in *Addison & Leyen*, I am of the view that the same principles and the same level of caution should apply. The plaintiff in this case has pending appeals of the reassessment of his tax returns that disallowed the deductions claimed. Should he be successful on those appeals, the entire foundation of his tort and other claims before this court would disappear. The merits of his pending appeals are not merely incidental to this claim – they *are* his claim. Parliament has established the Tax Court as having exclusive jurisdiction to determine plaintiff's disputed tax liability.

[20] The defendants submit that the plaintiff's claim can *only* proceed if he is unsuccessful in defending the deductions taken on his tax returns. Should the plaintiff's appeals be unsuccessful

and the theories of liability advanced in this claim be upheld, the "damages" claimed are the economic value of the deductions that, *ex hypothesi*, he will have been found not to be entitled to under the *ITA*. Since the loss arising from the various tort claims made is the very inability to claim a benefit (a tax deduction) that he is not eligible to claim by law, the defendants submit that the plaintiff has pleaded no actual loss and thus cannot sustain a tort claim.

[21] But for the disallowed (but appealed) tax deduction, the plaintiff accomplished all that he set out to accomplish by participating in the scheme. The only thing he takes issue with is the failure of the scheme to have accomplished the desired tax goal. He intended to participate in the barter scheme and he has pleaded that he could have done any number of things with the TradeBux that he earned or purchased. It was his own decision to donate them to a charity after having conducted his own due diligence into it. The issue in the plaintiff's tax appeals is the disputed value of the plaintiff's in-kind donation of TradeBux and not the continued registration of the charity.

[22] The defendants' submission has a great deal of merit. The symmetry between the claim made and the failure to qualify for the claimed benefit under the ITA is not, however, perfect. The plaintiff's alleged damages arising from the fateful decision to make this particular charitable deduction are not entirely limited to the lost deduction. The plaintiff paid a sum of money to join Barter World Canada Inc. and "borrowed" money from Barter World for each of the three tax years in which he participated in the program. He has pleaded that he would not have participated in the scheme at all but for the end goal of donating the proceeds (TradeBux) to an affiliated registered charity and he would have been warned off either by a cancellation of the charitable registration of the subject charity or an explicit warning.

[23] Whether the plaintiff can establish the chain of causation pleaded in fact is another matter. He has at least pleaded *some* damages that are independent of the failure to qualify for the benefit of the tax deduction. It cannot be said that the damages claimed are exactly co-extensive with the disallowed deduction although the correlation is very close.

[24] In my view, the plaintiff cannot plead by way of tort damages as against the Crown in right of Canada the value of the very benefit he is ineligible to receive from the same Crown in right of Canada by the terms of a statute of Parliament (in this case, the *ITA*).

[25] I would strike out from the plea of general damages any amount that is indirectly calibrated from the value of the lost tax deduction. Damages that are independent of the lost benefit are not subject to the same objection. At least *some* elements of the claimed damages appear to be independent although the claim is too vaguely pleaded to be more precise. I cannot strike the entire claim on the basis of s. 12 of the *Tax Court of Canada Act*. I do strike so much of the damages claim as is measured by reference to the plaintiff's inability to receive the claimed tax benefit.

(ii) Charter claim

[26] Given the withdrawal by the plaintiff of the claim of having been assessed a penalty by CRA, the only remaining Charter claim in the statement of claim is in paragraph 87 that "the

Defendants improperly targeted the Plaintiff as a "test case" as part of the Defendants' scheme to end charitable donations of gifts in kind and subjected the Plaintiff to unequal treatment in violation of section 15 of the Charter".

[27] In my view, this attempt to mount a civil claim, presumably under s. 24(1) of the *Canadian Charter of Rights and Freedoms*, is so bald and devoid of particulars as to be untenable.

[28] The analysis to be applied in assessing a claim under s. 15(1) of the Charter is the two-step process summarized in *Withler v. Canada (Attorney General*), [2011] 1 SCR 396, 2011 SCC 12 (CanLII) in the following manner (at para. 30):

> "The jurisprudence establishes a two-part test for assessing a s. 15(1) claim: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?"

[29] The alleged discriminatory enforcement in this case is denial of the benefit of a deduction from income for the value of gifts in kind to a registered charity. In order to assess whether denial of such a benefit is discriminatory, facts sufficient to assess the object of the allegedly discriminatory measure in the context of the broader legislative scheme must be pleaded so as to permit the court to assess whether the impugned measure perpetuates disadvantage or stereotypes the claimant group contrary to s. 15(1) of the Charter: *Withler* at para. 3.

[30] It cannot be concluded from the facts pleaded that taxpayers making donations in kind through a barter network are members of an enumerated or analogous group under s. 15(1) of the Charter. No facts are pleaded sufficient to conclude that the personal choice of taxpayers to make such a donation represents an expression of an intrinsic *personal characteristic* of the taxpayer that is being singled out for discrimination. The pleaded claim is bald and entirely untenable.

[31] Paragraph 87 of the statement of claim should be struck in its entirety. The Charter's role as a bulwark of fundamental freedoms in Canadian society can only be weakened by suffering frivolous claims such as this to persist when challenged.

[32] There are no facts pleaded from which it can be inferred that this claim might potentially be amended back into life. I would not grant leave to amend. .

(iii) Duty of care owed to plaintiff

[33] The defendants submit that none of the tort claims pleaded against them is tenable because they owed no duty of care to the plaintiff.

[34] The core of the plaintiff's claim against the defendants arises from alleged negligence either in registering LWIF or in failing to investigate and revoke the charitable registration of LWIF promptly upon becoming aware of the various facts the defendants are alleged to have

been aware of in relation to Mr. Singh. Mr. Singh is alleged to be connected to LWIF and Barter World. In this regard it is pleaded:

a. That "charities controlled by Singh were known to be a problem" by CRA due to, inter alia, a Toronto Star article in 2007 (para. 72);

b. That the defendants failed to take steps to warn the public about Mr. Singh or LWIF until April 2010 (para. 72);

c. That the defendants had a public law statutory duty to ensure the CRA performed proper charity screenings prior to registration and on an on-going basis thereafter (para. 73);

d. That the defendants were "grossly negligent in their registering, auditing, regulatory and criminal oversight of Singh's charities" (para. 74);

e. The defendants owed a "public and private law duty of care to have promptly revoked LWIF's registration in 2006 or 2007" (para. 77);

f. If the defendants had acted promptly and revoked LWIF's charitable status "the plaintiff and thousands of other taxpayers would not face the denial of charitable donations in the 2007, 2008 and 2009 taxation years" (para. 79); and

g. The defendants "owed a public duty of care which was breached with the charity license of LWIF was not investigated, denied a license in the first instance and/or revoked promptly and prior to April 2010"(para. 84).

[35] The plaintiff's factum on this motion sought to argue that the statement of claim can be construed as advancing a claim of negligent misrepresentation. The moving party defendants took exception to the plaintiff seeking to plead by way of factum matters that were not actually pleaded in the statement of claim. I agree.

[36] If the statement of claim is to be read as making a claim for negligent misrepresentation, it contains precious few straws from which to attempt to construct such a claim. Paragraph 75 of the statement of claim alleges the plaintiff consulted CRA's web site "for confirmation that his colleague's recommendations were valid and viable" and discovered "no evidence available that there were any issues with the charities and associated legal entities". Paragraph 9 pleads that the web site search revealed that LWIF "was a CRA registered charity in good standing". None of these statements is alleged to have been untrue when made.

[37] The components of a viable negligent misrepresentation claim are (1) the existence of a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making the misrepresentation; (4) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and (5) the reliance must have been

detrimental to the representee in the sense that damages resulted: *Queen v. Cognos Inc.*, [1993] 1 SCR 87, 1993 CanLII 146 (SCC).

[38] No basis for alleging a "special relationship" is pleaded. No representation beyond the fact of LWIF being a registered charity is alleged and that fact is not alleged to be incorrect. LWIF *was* a registered charity in the years in question – the pleaded fact is that the registration was revoked in 2010 after the plaintiff had made all of his donations. The reliance placed upon the representation alleged – the making of a charitable donation – is quite unconnected with the representation. The issue that arose in this case was the disallowance of the value claimed for the donation in kind of TradeBux. There is no allegation that the registration was invalid for the relevant tax years in which a donation was made – the complaint is that the claimed *value* of donations made was rejected, not the capacity to make the donation. There is simply no basis to allege negligent misrepresentation on the pleaded facts.

[39] Were the claim to be generously read to incorporate a negligent misrepresentation claim, such claim would in any event have been struck as being untenable. I do not consider it necessary to address this non-pleaded claim further.

[40] I turn now to consider whether the claimed duty of care in relation to the registration or revocation of the registration of LWIF can be maintained.

[41] The plaintiff has claimed rather indiscriminately the existence of both public law and private law duties of care. If by public law duty of care the plaintiff would invoke for his own private benefit duties owed to the public at large, he has no standing to assert such a claim and it must be struck: *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. The question of whether the Crown or its agencies exercising statutory or other duties can nevertheless owe a private law duty of care is another matter entirely. That analysis requires a consideration of the common law principles of negligence where breach of statutory duties may be an element in establishing a private duty of care.

Recognized categories of duty of care

[42] I first consider whether the claimed duty of care can fit within any recognized duty of care or whether it is analogous to a recognized duty. If the case falls within one of the categories where a duty of care has already been recognized at law, a *prima facie* duty may be posited on that ground: *Cooper v. Hobart*, 2001 SCC 79, at para. 36.

[43] I find that this case does not fall within any of the established categories where a duty of care has been recognized: *Scheuer v. Canada*, 2016 FCA 7 at para. 30; *Canus Fisheries Ltd. v. Canada (Customs and Revenue Agency)*, 2005 NSSC 283 at para. 61.

[44] The plaintiff in this case relied upon *McCreight v. Canada (Attorney General)*, 2013 ONCA 483, where the plaintiff sought to sue CRA and its investigators in connection with what was alleged to be a negligent investigation leading to fraud and conspiracy charges being brought under the ITA. Pepall J.A. found that given the recognition by the Supreme Court of Canada of a duty of care in some circumstances being owed by police officers to their suspects that it was

"not plain and obvious that a CRA investigator owes no such duty when operating under ITA provisions that attract criminal sanctions and under the Criminal Code" (at para. 61). The proposed duty of care in *McCreight* was clearly analogous to a recognized duty of care (owed by police officers to suspects) and cannot be looked to as support for a broader duty of care in as clearly an administrative role as the registration of charitable organizations.

Anns/Cooper test

[45] Where the claimed duty of care falls outside any previously recognized categories, the question of whether it ought to be recognized is to be determined through the application of what has become known as the "*Anns/Cooper*" test described in *Cooper*. This two-part test requires assessing in the first stage whether the loss caused was reasonably foreseeable in the context of a proximate relationship. The second stage of the analysis involves considering whether, notwithstanding proximity, the claimed tort duty ought not to be recognized by reason of policy considerations beyond the relationship between the parties to the litigation.

Foreseeability and proximity

[46] On what basis can the plaintiff allege that there is a link of foreseeability to connect his decision to donate in kind TradeBux and the registration of LWIF as a charitable organization under the ITA?

[47] There is no allegation that the 2010 de-registration of the charity in this case had any impact whatsoever upon the validity of the deductions claimed in 2007-2009. It is not the charitable registration of LWIF that is at issue in the plaintiff's tax appeals, it is the value of the TradeBux that he donated to it. The value of TradeBux that the plaintiff chose to acquire and donate is quite unrelated to the matter of whether LWIF was a registered charity.

[48] In *Canus*, S.M. Hood J. undertook a detailed analysis of whether a taxpayer can claim to be owed a duty of care by CRA in the context of an allegedly negligent audit. In a very careful analysis with which I agree, S.M. Hood J. rejected the existence of the claimed duty. In my view, the present fact situation is no different and I would reject the claimed duty in this case for the persuasive reasons given in *Canus*.

[49] I cannot find that the loss of the value of a tax deduction stemming from a questioned (and questionable) in-kind donation is a foreseeable consequence of failing to police the registration of charitable organizations as alleged.

[50] What then of proximity?

[51] The requirement of proximity requires that the "circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs": *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 SCR 165, 1997 CanLII 345 (SCC) (at para. 24).

[52] The plaintiff cannot point to the existence of a statutory duty in the *ITA* from which the necessary degree of proximity might be inferred. The plaintiff has directed me to no provisions of the *ITA* from which an intention to protect taxpayers from the consequences of dealing with charities can be inferred. To the contrary, the ITA appears if anything to negate such a duty. Where charities are associated with tax shelters (as was the case here), section 237.1(5)(c) of the *ITA* requires that promoters of "gifting arrangements" provide a tax shelter identification number along with the following caveat: "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". Such a required warning is not consistent with CRA having been delegated a general duty to taxpayers in relation to the registered status of organizations.

[53] The *ITA* is a fiscal statute designed to raise revenue for public purposes and distribute the burden of doing so in a manner that Parliament has determined is fair. The purpose of issuing charitable registrations or tax shelter identification numbers cannot be said to be to protect the plaintiff from charities associated with such unscrupulous characters as Mr. Singh is alleged by the statement of claim to have been. The purpose is to protect the tax base administered by CRA. The *ITA* cannot be construed to impose a duty on the Minister or his or her officials to administer the registration and supervision of registered charities in order to protect taxpayers from the risk of dealing with them: *Cooper* at para. 49-50.

[54] The plaintiff submits that it is not plain and obvious that its claim cannot succeed. He cites the case of *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, 74 O.R. (2d) 225 (Div. Ct.) as an instance where a duty to warn was found to apply to a public official.

[55] In *Doe*, a victim of sexual assault alleged that the police owed her a duty to warn in connection with an investigation of a series of sexual assaults in a particular area that placed her at unique risk. The *Police Act*, R.S.O. 1980, c. 381 imposed a specific duty upon police officers who were charged with the duty of "preserving the peace, preventing robberies and other crimes and offences…and apprehending offenders". It was held that the pleaded facts contained the necessary facts to infer both foreseeability of risk and the necessary degree of proximity.

[56] There is a world of difference between *Doe* where the existence of a specific statutory duty to protect was coupled with a very specific, identified risk to the plaintiff and the present case where a much more general duty to police registered charities is alleged in the absence of an identified statutory duty and for the benefit of taxpayers generally rather than the plaintiff as a member of known, identified class.

[57] Applying the *Hercules* test of proximity, it cannot be said that the ITA imposes a duty upon the Minister to be mindful of donor's interests when going about the task of registering charities. It is not the interests of charitable donors that the Minister is protecting. Rather, the goal of the Minister is to ensure the protection of the tax base from potential erosion by charities that fail to meet the recognized criteria.

[58] I find that the relationship between the plaintiff and the defendants lacks the elements of foreseeability of harm and proximity necessary to sustain the claimed duty of care. If I am wrong in so holding, are there valid policy grounds for rejecting the claimed duty of care? In my view there are.

[59] The pleading admits that the plaintiff participated in a registered tax shelter (statement of claim, paragraph 57). The plaintiff "verified with his accountant that all paperwork appeared to be valid and consistent with applicable legislation when Deluca entered into the contracts" and sought the advice of the promoters of the tax shelter when responding to inquiries from CRA. I adopt the reasoning of the Dawson J.A. in the quite analogous case of *Scheuer* (at para. 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 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 provisions of their professional advice, are better placed to indemnify the plaintiffs in the event of negligence in the exercise of their professional responsibilities."

[60] There are two conflicting interests at play in this case. On the one hand, there is the interest of the taxpayer denied a benefit that would reduce his individual tax burden in the allegedly mistaken belief in the efficacy of a tax shelter scheme. On the other, there is the interest of the taxpayers at large in distributing the burden of taxation across all taxpayers in a manner that Parliament has determined is fair and reasonable. I would reject the claimed duty of care for the reasons expressed by S.M. Hood J. in *Canus* at para. 102-106 and by the Court in *Cooper* at paras. 53-55.

[61] Two consequences would emerge from recognizing the claimed duty of care, both of them inimical to public policy.

[62] Firstly, the taxpayers would become exposed to potentially unlimited liability at the instance of parties that public officials are at best ill-suited to police to the detriment of taxpayers and the public at large. Tax returns are filed four months *after* the end of a tax year. Tens of millions are filed every year. Most are necessarily assessed automatically as filed in our self-assessment system subject to possible re-assessment in later years. The promoters and professionals who peddle tax shelter products for profit and the taxpayers who purchase them are better able to assess and allocate the risk of these products failing to perform than public officials assessing millions of tax returns in a self-reporting system months or years after the fact. Taxpayers, advisors and promoters can control the amount placed "at risk" in such transactions.

[63] Secondly, the effect of imposing such liability would have the perverse effect of indirectly validating the very schemes that the *ITA* disallows. Imposing tort liability in any way measured in relation to the disallowed tax benefit would simply confer the illicit benefit indirectly instead of directly. Where the benefit is one that the law disallows, conferring it through the back-door of tort law would defeat the intent of Parliament in disallowing the benefit in the first place thereby placing the tax base indirectly at risk to the detriment of taxpayers at large.

[64] Tax shelters are an instance where the private good competes directly with the public good. The risk of such schemes running afoul of the law ought properly to rest with the promoters, advisors and, yes, consumers of them. Nobody is required to claim potentially dubious deductions on their tax return – the risk of such deductions being disallowed ought most efficiently to rest with those seeking to benefit from the scheme rather than with taxpayers at large. Avoidance of the risk is simplicity incarnate: don't make the deduction unless prepared to deal with the consequences of disallowance.

[65] I would disallow the claimed duty of care as a matter of public policy.

[66] I find that it is plain and obvious that the alleged duty of care in relation to the registration of charitable organizations cannot succeed on either of the two branches of the *Anns/Cooper* test.

(iv) Claims against individual defendants

[67] The plaintiff has named two CRA employees as individual defendants. Ms. Sturkenboom is alleged to have negligently reviewed the plaintiff's Notice of Objection and assessed penalties. Mr. Duff is alleged to have owed the plaintiff a duty of care in relation to the registration and monitoring of the on-going registration of charities.

[68] The practice of joining employees in tort claims made against their employer is a potentially noxious one unless the very specific grounds for demonstrating an independent tort against the employee are present and clearly pleaded. Adding parties to a statement of claim without reasonable grounds for the purpose of obtaining discovery rights or simply to apply additional pressure to settle claims is an abuse of process. I find that the naming of the two individuals in this case was plainly an abuse of process in the sense described.

[69] The plaintiff consented to the dismissal of the claim as against Ms. Sturkenboom on the basis of the Request to Admit. The claim against Ms. Sturkenboom is therefore dismissed.

[70] While the plaintiff has not consented to dismissing the claim as against Mr. Duff, I find that this claim must also be dismissed. There can be no basis in law to assert that Mr. Duff owed an *independent* duty to the plaintiff in his own right in relation to the monitoring of charities and charitable programs. No independent conduct separate and apart from fulfilling his duties as an employee is alleged. No foundation for a claim against the employee independent of the claim against the employer has been pleaded.

[71] The plaintiff suggests that a misfeasance claim against public officers can be maintained where they engage in deliberate and unlawful conduct that he or she is aware will likely cause harm to the plaintiff. While the plaintiff has correctly described the tort of misfeasance in his factum, no such claim is pleaded in the statement of claim nor could such a claim be maintained based on the *facts* as pleaded.

[72] It has not been pleaded – nor was it argued – that merely registering charities connected to Mr. Singh or failing to investigate or revoke such registrations was in and of itself an "unlawful" act, still less a deliberately unlawful act of sufficient gravity to invoke the tort of misfeasance. Whether pleaded in the statement of claim or the factum, the misfeasance allegation is untenable in any event.

[73] The claim against Mr. Duff is plainly abusive and should be struck without leave to amend. I so order.

Disposition

[74] For the foregoing reasons, this motion is allowed and the statement of claim shall be ordered struck pursuant to 21.01(1)(b) of the Rules of Civil Procedure without leave to amend. The claim is accordingly dismissed.

[75] The defendants have been successful on this motion and are entitled to their costs. If the parties are unable to settle the matter of costs, I direct the defendants to provide me with their outline of costs and submissions (the latter limited to five pages) within thirty days of the date of release of these reasons. Given the time of year, the plaintiff may take a further thirty days to respond with similar restrictions (submissions limited to five pages excluding outline). Submissions may be made electronically through my assistant and cases readily available on line need not be attached.

S. F. Dunphy, J.

Date: June 20, 2016