Date: 20100204

Docket: T-198-09

Citation: 2010 FC 117

Ottawa, Ontario, February 4, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

ANDREW P. VERDICCHIO

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

[1] This concerns an appeal by Mr. Andrew P. Verdicchio (the "Plaintiff") from an order dated July 31, 2009 of Prothonotary Morneau striking out the Plaintiff's Amended Statement of Claim, without leave to amend and without costs, on the basis that the core object of the Plaintiff's claim is a matter arising under the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) over which the Tax Court of Canada has exclusive jurisdiction.

[2] Both parties agree that the questions raised in the motion are vital to the final issue of the Plaintiff's case, and that consequently I should proceed in this appeal on a *de novo* basis following the principles set out in *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (FCA), [1993

F.C.J. No. 103 (QL) and *Merck & Co. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459 (FCA), [2003] F.C.J. No. 1925 (QL). I will consequently proceed accordingly.

[3] The leading authority on motions to strike out a statement of claim is *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, and the basic principle set out in that case (at page 980) is that a motion to strike out a statement of claim cannot be granted unless it is plain and obvious that the claim cannot succeed.

Background

[4] The Plaintiff suffers from a medical condition relating to his back which he asserts entitles him to a tax credit under the *Income Tax Act*. The Plaintiff wishes to transfer this tax credit to his mother since he has no taxes on which to apply such credit. The tax credit was denied by the Canada Revenue Agency (the "CRA"). The Plaintiff appealed this Decision of the CRA to the Tax Court of Canada for the 2004 taxation year.

[5] However, on August 1, 2007, the Tax Court of Canada dismissed the Plaintiff's appeal on the basis of a motion brought by the Crown arguing that the Tax Court of Canada had no jurisdiction over the case since no tax was assessed against the Plaintiff under the notice of assessment issued to him for the 2004 taxation year.

[6] The Plaintiff did not appeal this decision of the Tax Court of Canada to the Federal Court of Appeal.

[7] One year and a half after this Tax Court of Canada decision, on February 5, 2009, the Plaintiff submitted the Statement of Claim in this case. The Statement of Claim, as amended and restated, alleges that an employee of the CRA had falsified records and had concealed such falsification in order to deny the Plaintiff the tax credit relating to his impairment. The Statement of Claim also challenges the qualifications of CRA employees to evaluate the Plaintiff's medical condition and the process by which the denial of the Plaintiff's impairment was reached. The Plaintiff asserts that the CRA and its employees breached their alleged fiduciary duty to act fairly and in good faith and in compliance with the *Income Tax Act* and the *Canadian Charter of Rights and Freedoms* (the "Charter") in denying his claim for a tax credit.

[8] The Statement of Claim also contains a bald allegation that subsections 118.3(4) and 118.4(1) of the *Income Tax Act* are unconstitutional in application and effect. However no constitutional declaration is sought in this regard in the relief requested. Subsection 118.3(4) allows the Minister of National Revenue to request information with respect to impairment when a claim on this basis is made under the *Income Tax Act*, while subsection 118.4(1) defines the types of impairments giving rise to a claim under the *Income Tax Act*.

[9] The Plaintiff asserts that as a direct consequence of the falsification of his record by an employee of the CRA, he was denied the tax credit for his impairment, as well as the benefit of transferring the unused portion of this credit to his mother.

[10] Consequently, the Plaintiff seeks compensation as a result of the alleged moral prejudice resulting from the alleged wrongdoings of the CRA and its employees in denying his claim for a tax credit related to his impairment. As relief, the Plaintiff seeks letters of apology, moral damages, and the annulment of any and "all claims for taxes payable against the Plaintiff's mother, who is the legal and rightful beneficiary of the disability tax credits transferred by the Plaintiff for the years 2003, 2004, 2005, 2006, and 2007" (Statement of Claim *in fine*).

Position of the Parties

[11] The Defendant submits that the Amended Statement of Claim does not disclose a reasonable cause of action. The Defendant further submits that the Plaintiff's action in the Federal Court is essentially a matter arising under the *Income Tax Act*, and that consequently the Tax Court of Canada has exclusive jurisdiction pursuant to section 12 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2. Thus the Amended Statement of Claim ought to be struck out on the basis of want of jurisdiction of the Federal Court. The pertinent provisions of subsection 12(1) of the *Tax Court of Canada Act* read as follows:

12. (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under […] the *Income Tax Act*, […] when references or appeals to the Court are provided for in those Acts.	12. (1) La Cour a compétence exclusive pour entendre les renvois et les appels portés devant elle sur les questions découlant de l'application […] de la *Loi de l'impôt sur le revenu*, […] dans la mesure où ces lois prévoient un droit de renvoi ou d'appel devant elle.

[12] The Plaintiff principally argues that the Statement of Claim seeks remedies from the Federal Court for the violation or impairment of his Charter rights and breaches of fiduciary duties by the CRA and its employees. Consequently, the Plaintiff argues that the Federal Court has jurisdiction in this case since the exclusive jurisdiction of the Tax Court of Canada in matters relating to the *Income Tax Act* is not at issue.

[13] The Plaintiff also raises a procedural matter, arguing that since the Defendant had submitted a prior motion to strike a part of the Statement of Claim in this case and did not raise the jurisdictional issue in that prior motion, it is now precluded by paragraphs 208(a) and (d) of the *Federal Court Rules* (the "Rules") to raise this issue in a new motion to strike pursuant to paragraph 221(1)(a) of the Rules.

[14] Finally the Plaintiff asserts that Prothonotary Morneau was biased against him.

Analysis

[15] It is appropriate to first deal with the Plaintiff's allegation of reasonable apprehension of bias. This allegation is largely based on the fact that the Plaintiff disagrees with Prothonotary Morneau's various orders in this case. This is not a valid foundation to sustain an allegation of a reasonable apprehension of bias.

[16] Dealing with the procedural issue raised by the Plaintiff, paragraphs 208(a) and (b) and 221(1)(a) of the Rules read as follows:

208**.** A party who has been served with a statement of claim and who brings a motion to object to	208**.** Ne constitue pas en soi une reconnaissance de la compétence de la Cour la présentation par une partie :
(*a*) any irregularity in the commencement of the action, […] or	*a*) d'une requête soulevant une irrégularité relative à l'introduction de l'action; […]
(*d*) the jurisdiction of the Court,	*d*) d'une requête contestant la compétence de la Cour.
does not thereby attorn to the jurisdiction of the Court.	
221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas
(*a*) discloses no reasonable cause of action or defence, as the case may be, […]	*a*) qu'il ne révèle aucune cause d'action ou de défense valable;:[…]

[17] In this case, the Defendant had previously sought particulars from the Plaintiff, and had also sought that certain allegations in the original Statement of Claim dealing with legal arguments be struck out. This had resulted in an Order dated April 16, 2009 from Prothonotary Tabib which acknowledged the consent of the Plaintiff to submit the required particulars and which dismissed the motion to strike out that part of the Statement of Claim entitled "Legal Grounds". It was shortly after receiving the Amended Statement of Claim incorporating the required particulars that the Defendant submitted the motion to strike out the entire Statement of Claim, which motion was eventually granted by Prothonotary Morneau.

[18] A motion to strike under paragraph 221(1)(a) of the Rules is a proper procedure to challenge a want of jurisdiction of the Federal Court over the subject matter of a claim: *Siksika Nation v. Siksika Nation (Council)*, 2003 FCT 708, [2003] F.C.J. No. 911 (QL) at paras. 8 to 12.

[19] The authority to strike out pleadings pursuant to paragraph 221(1) of the Rules is a discretionary power in the exercise of which it is relevant to consider how much time has passed between the closing of pleadings and when the motion to strike the pleadings was brought, and whether any defects in the pleadings can be corrected through amendments: *Dene Tsaa First Nation v. Canada*, 2002 FCA 117, [2002] F.C.J. No. 427 (QL) at para. 6. The case law has moreover stated that when the motion to strike is sought pursuant to paragraph 221(1)(a) of the Rules on the basis that no reasonable cause of action is shown, that motion can be brought at any stage of the proceedings: *Dene Tsaa First Nation v. Canada*, 2001 FCT 820, [2001] F.C.J. No. 1177 (QL) at para. 4; *Safilo Canada Inc. v. Contour Optik Inc*. 2005 FC 278, [2005] F.C.J. No. 384 (QL) at para. 21. This approach allowing the motion to be brought at any stage of the proceedings is particularly logical in the circumstances where a lack of jurisdiction of the Court to hear the matter is at issue. However, costs consequences may flow from tardiness in making such a motion.

[20] In light of the above, I find that the Defendant was not precluded from submitting its motion.

[21] Dealing with the merits of the motion to strike, and taking into account that a question of jurisdiction is raised, it is first useful to characterize the essential nature of the claim. I note that, in

pith and substance, the Plaintiff is seeking redress from the refusal of the CRA to recognize his impairment for the purposes of a tax credit under the *Income Tax Act* by means of an action in damages raising Charter and other issues.

[22] In such circumstances, the case falls squarely under the principles set out by the Federal Court of Appeal in *Roitman v. Canada*, 2006 FCA 266, [2006] F.C.J. No. 1177 (QL), application for leave to appeal to the S.C.C. denied [2006] S.C.C.A. No. 353 (QL), ("*Roitman*").

[23] In *Roitman*, the Plaintiff and the federal tax authorities had settled a claim related to certain expenses which had been disallowed for taxation purposes. The Plaintiff in that case subsequently submitted a statement of claim in the Federal Court seeking damages against the federal Crown based on allegations that the Crown had engaged in deliberate conduct to deny him the benefit of the law, and seeking damages for misfeasance in public office, special damages for defending the proposed income tax assessments and in prosecuting the civil income tax appeal, as well as punitive, exemplary and aggravated damages. After filing its Statement of Defence, the Crown successfully moved to strike out the Statement of Claim pursuant to section 221 of the Rules on the basis that the matter at issue was exclusively within the jurisdiction of the Tax Court of Canada.

[24] The Federal Court of Appeal noted in *Roitman*, at para. 16, that a statement of claim must be read in context in order to determine if it is or not a disguised attempt to reach the Federal Court in circumstances which would not normally be allowed:

> A statement of claim is not to be blindly read at its face meaning. The judge has to look beyond the words used, the facts alleged and

> the remedy sought and ensure himself that the statement of claim is not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court. To paraphrase statements recently made by the Supreme Court of Canada in *Vaughan v. Canada*, [2005] 1 R.C.S. 146 at paragraph 11, and applied by this Court in *Prentice v. Canada (Royal Canadian Mountain Police)*, [2005] F.C.J. No. 1954, 2005 FCA 395, at paragraph 24, leave to appeal denied by the Supreme Court of Canada, [2006] S.C.C.A. No. 26, May 19, 2006, SCC 31295, a plaintiff is not allowed to frame his action, with a degree of artificiality, in the tort of negligence to circumvent the application of a statute.

[25] In paragraphs 20 and 21 of *Roitman*, the Federal Court of Appeal clearly sets out the jurisdictional confines between the Federal Court and the Tax Court of Canada:

> 20 It is settled law that the Federal Court does not have jurisdiction to award damages or grant any other relief that is sought on the basis of an invalid reassessment of tax unless the reassessment has been overturned by the Tax Court. To do so would be to permit a collateral attack on the correctness of an assessment. (See *M.N.R v. Parsons*, 84 D.T.C. 6345 (F.C.A.) at p. 6346; *Khan v. M.N.R.*, 85 D.T.C. 5140 (F.C.A.); *Optical Recordings Corp. v. Canada*, [1991] 1 F.C. 309 (C.A.), at pp. 320-321; *Bechtold Resources Limited v. M.N.R.* 86 D.T.C. 6065 (F.C.T.D) at p. 6067; *A.G. Canada v. Webster* (2003), 2003 D.T.C. 5701 (F.C.A.); *Walker v. Canada*, [2005] F.C.J. No. 1952, 2005 FCA 393; *Sokolowska v. The Queen*, [2005] F.C.J. No. 108, 2005 FCA 29; *Walsh v. Canada (M.N.R.)*, [2006] F.C.J. No. 54, 2006 FC 56; *Henckendorn v. Canada*, [2005] F.C.J. No. 1006, 2005 FC 802; *Angell v. Canada (M.N.R.)*, [2005] F.C.J. No. 1014, 2005 CF 782.)
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> 21 It is also settled law that the Tax Court of Canada does not have jurisdiction to set aside an assessment on the basis of abuse of process or abuse of power (see *Main Rehabilitation Co. Ltd. v. The Queen*, [2004] F.C.J. No. 2030, 2004 FCA 403, at paragraph 6; *Obonsawin v. The Queen*, 2004 G.T.C. 131 (T.C.C.); *Burrows v. Canada*, [2005] T.C.J. No. 614, 2005 TCC 761; *Hardtke v. Canada*, [2005] T.C.J. No. 188, 2005 TCC 263).

[26] The Federal Court of Appeal recently expanded on *Roitman* in the case of *Domtar v. Canada*, 2009 FCA 218, [2009] F.C.J. No. 819. In that case, Domtar had submitted a claim in the Federal Court seeking a declaration that section 18 of the *Softwood Lumber Products Export Charge Act*, 2006, S.C. 2006, c.13 was unconstitutional, and requiring the Crown to repay approximately $37 million which Domtar had paid pursuant to that provision. The Federal Court of Appeal found in that case (at para. 30) that the essential nature of Domtar's claim was for a refund of money paid under the concerned provision of that act. Though the claim was based on a constitutional challenge, this was found not to affect the jurisdiction of the Tax Court of Canada over the dispute. The Court stated (at paras. 38-39) that the Tax Court of Canada could determine the lawfulness of an assessment challenged on constitutional grounds, whether these grounds involve the Charter or the constitutional division of powers. Consequently, the Tax Court of Canada was found to have exclusive jurisdiction to entertain Domtar's claim.

[27] Moreover, the Supreme Court of Canada in *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 S.C.R. 793, has cautioned against the use of judicial review in the Federal Court to deal with taxation matters which should properly be adjudicated in the Tax Court of Canada. In my view, the comments of the Supreme Court of Canada at paragraph 11 of that decision also apply to claims for compensation or restitution in the Federal Court:

> Reviewing courts should be very cautious in authorizing judicial review in such circumstances. The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and

> the jurisdiction of the Tax Court. Judicial review should remain a remedy of last resort in this context.

[28] In this case paragraph 118.3(1) of the *Income Tax Act* provides that an individual may claim a tax credit related to impairment in certain defined circumstances. Paragraph 118.3(2) of that Act further provides that, in certain circumstances and on certain conditions, the unused portion of the tax credit of a person with impairment may be transferred to another individual, including the person's mother, who supports the person with the impairment.

[29] In the Plaintiff's case, the Crown successfully argued before the Tax Court of Canada that since he had no taxes assessed against him, that court had no jurisdiction to adjudicate the decision of the CRA to refuse his claim to the tax credit. The principle that the Tax Court of Canada has no jurisdiction over nil assessments flows from a long line of judicial precedent, and was recently clearly reaffirmed by the Federal Court of Appeal in *Interior Savings Credit Union v. Canada*, 2007 FCA 151, [2007] F.C.J.No.526 (QL), and in *Ding v. Canada*, 2009 FCA 355, [2009] F.C.J. No. 1564 (QL).

[30] The Plaintiff in this case is seeking to have his claim to a tax credit adjudicated in the Federal Court through a statement of claim seeking damages. The fundamental issue here is if the lack of jurisdiction of the Tax Court of Canada over nil assessments confers a jurisdiction to the Federal Court to adjudicate nil assessments in lieu thereof through a statement of claim or otherwise. I find that it does not. The approach taken by the Plaintiff is an attempt to circumvent a long line of judicial authority holding that nil assessments are not subject to appeal. Though from a

policy perspective one can question the appropriateness of restricting an appeal in circumstances such as these, this is a matter for Parliament and not this Court.

[31] I agree with Prothonotary Morneau that the essential purpose of the Statement of Claim is to secure redress from the refusal of the CRA to recognize the Plaintiff's incapacity for the purposes of a tax credit under the *Income Tax Act*. Consequently, I am of the view that the Federal Court has no jurisdiction over this case.

[32] Consequently, the appeal of the decision of Prothonotary Morneau is dismissed and the Statement of Claim is consequently struck out in its entirety, without leave to amend.

[33] In light of the particular circumstances of this case, I exercise my discretionary powers under section 400 of the Rules and make no award as to costs.

ORDER

THIS COURT ORDERS that the appeal is dismissed and the Statement of claim in this case is struck out in its entirety, without leave to amend. No costs are awarded.

"Robert M. Mainville"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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