

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Leroux v. Canada Revenue Agency*,
2010 BCSC 865

Date: 20100707
Docket: 0628510
Registry: Prince George

Between:

**Irvin Leroux and Irvin Leroux carrying on business as
Leroux Holdings and also as
Irvin's Park & Campground**

Plaintiff

And

Canada Revenue Agency

Defendant

Before: The Honourable Mr. Justice Preston

(In Chambers)

Reasons for Judgment

Counsel for the Plaintiff:

Paul E. Jaffe

Counsel for the Defendant:

David Jacyk
& Elizabeth McDonald

Place and Date of Trial:

Prince George, B.C.
March 24-26, 2010

Place and Date of Judgment:

Prince George, B.C.
July 07, 2010

[1] This is an application by the defendant Canada Revenue Agency (“CRA”) to strike out the amended statement of claim of the plaintiff under Rule 19(24) of the *Supreme Court Rules* and as an abuse of process.

[2] In a lengthy amended statement of claim, the plaintiff, Irvin Leroux, a businessman, describes a series of Kafkaesque events that spanned approximately 13 years. His basic allegations are that the defendant CRA conducted a prolonged sequence of audits, assessments, reassessments, and collection procedures relating to both Income Tax and Goods and Services Tax that caused his substantial business empire to collapse and impoverished him.

Overview

[3] I will review the events as pleaded by the plaintiff.

[4] The first event in this long history is said to have taken place on October 15, 1996. At that time, two employees of CRA came to Mr. Leroux’s home and asked him for copies of documents relating to his business affairs. He provided them with the copies but when asked for the originals, Mr. Leroux said that they could make copies of them but he would not give up the originals. The employees agreed. He left the home to go about his business affairs leaving the employees at his home to make copies of the original documents. They took the originals after he left.

[5] They refused to return them.

[6] In early December 1996, one of the employees informed him that a significant portion of his documents had been shredded. Other documents necessary for the audit of Mr. Leroux’s affairs had been lost.

[7] The employee then told Mr. Leroux that it was his responsibility to provide copies of all documents necessary for the audit.

[8] The Agency then audited Mr. Leroux’s business affairs and denied significant deductions because of the lost documents.

[9] That was only one of many incidents.

[10] Mr. Leroux was taken through audit processes both for GST and income tax. He was reassessed. He appealed the reassessment to the Tax Court of Canada. The proceedings in that court were finally resolved by consent orders.

[11] During the course of these events, CRA filed administrative certificates of indebtedness against Mr. Leroux's properties and subjected him to collection procedures. When he sought to refinance by putting up cash deposits as security for the full amount of his indebtedness, CRA either ignored or denied his requests.

[12] Mr. Leroux was ruined financially and lost his properties.

[13] Mr. Leroux's action claims damages for misfeasance in public office. He also claims damages for negligence on the part of the defendant's employees and negligent supervision on the part of the defendant.

[14] Mr. Leroux's amended statement of claim seeks remedies under the *Charter of Rights and Freedoms*: under s. 15 for differing treatment of Mr. Leroux as a GST debtor from that accorded him as an income tax debtor and under s. 7 for breaches of his right to security of the person and right to liberty. He says his physical and psychological integrity were adversely affected.

[15] Mr. Leroux also pleads the *Canadian Bill of Rights*, S.C. 1960, c. 44, and contends that CRA interfered with his right to enjoyment of property and the right not to be deprived of it except by process of law.

This Application

[16] CRA's primary focus on this application is to have Mr. Leroux's amended statement of claim struck out as a collateral attack on the proceedings in the Tax Court of Canada and the Federal Court of Canada (respectively the "Tax Court" and the "Federal Court"). CRA submits that the Tax Court, the Court exercising exclusive original jurisdiction over matters arising under the *Income Tax Act*, R.S.C. 1985 c.1 (5th Supp.) [ITA] and the *Excise Tax Act*, R.S.C. 1985, c. E-15 [ETA], has

dealt with the issues between the plaintiff and the defendant. CRA says that some paragraphs of the amended statement of claim are, impliedly or expressly, claims that the result in the Tax Court was wrong or unfair.

[17] Further, CRA says, no application was made by Mr. Leroux to the Federal Court to set aside the certification of the income tax debt and its registration against his properties obtained by CRA in that Court. Nor did Mr. Leroux seek a stay of execution in that Court.

[18] CRA submits that the doctrine prohibiting collateral attack on regular proceedings in other courts requires that claims offending the doctrine be struck out at this stage of the proceeding as an abuse of the process of this Court. Further, in CRA's submission, because Mr. Leroux did not pursue any of the avenues of judicial review or appeal available to him at many stages of the Tax Court proceedings against him, he is foreclosed from doing so in this action by the doctrine prohibiting collateral attack.

[19] CRA also contends that Mr. Leroux's claim or parts of it disclose no reasonable cause of action. It contends that no duty of care is owed to Mr. Leroux and that breach of privacy claims are not pleaded with sufficient specificity.

The Amended Statement of Claim

[20] The amended statement of claim that is the subject of this application is 39 pages in length. The first 81 paragraphs set out the facts alleged by the plaintiff. Insofar as the defendant's application is based upon Rule 19(24), those factual allegations are to be taken as true: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, at para. 15. Paragraphs 82 and 83 allege misfeasance in public office by the employees of the defendant. The paragraphs allege bad faith, intentionally incorrect advice, wrongful seizure of documents, intentional destruction of documents, extortion, intentional interference with the plaintiff's business affairs, improper breaches of the plaintiff's privacy interests by disclosure of the plaintiff's affairs to third parties, deliberately failing to accept reasonable security in breach of a

statutory duty, intentional delay of refund payments, proceeding under legislation that is unconstitutional, and delaying compliance with a judgment of the Tax Court. All of the actions complained of in those two paragraphs are alleged to have been done for malicious purposes and with the intent to cause loss to the plaintiff.

[21] Paragraphs 84 to 87 plead negligent supervision by CRA of its employees.

[22] Paragraphs 88 and 89 plead acts of negligence on the part of CRA employees arising out of many of the same acts complained of in paragraph 82.

[23] Paragraphs 91 and 92 allege a duty of care on the part of CRA and its employees.

[24] Paragraphs 93 to 110 allege a breach of the plaintiff's rights under s. 7 and 15 of the *Charter*.

[25] Paragraphs 128 to 134 allege breaches of the plaintiff's rights under s. 1(a) of the *Bill of Rights*.

[26] Paragraph 135 specifies the damages suffered by the plaintiff and paragraph 136 sets out the legislation relied upon by the plaintiff.

Collateral Attack

[27] A collateral attack involves a challenge to the correctness or validity of a decision in previous independent proceedings. The case authority requires that, when applying the doctrine, a court must look behind the cause of action pled to determine whether, in pith and substance, the action calls into question the validity of the previous decision. If it does, it must be struck as an abuse of process.

[28] The rule against collateral attack was articulated by the Supreme Court of Canada in *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at 599:

It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally—and a

collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

[29] In *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 71 the Supreme Court stated:

[71] ...The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review)...

[30] A collateral attack refers to challenging the correctness of a judgment through subsequent independent proceedings. The attack is collateral to the initial judgment that was accepted and not appealed. In *TeleZone Inc. v. Attorney General (Canada)*, 2008 ONCA 892 at para. 98, the Ontario Court of Appeal adopted the view of the motions judge that the collateral attack doctrine applies when a litigant seeks to challenge the legal force of a prior court order, or judicial or quasi-judicial decision of an administrative tribunal, in subsequent proceedings. A claim should only be struck as a collateral attack if it seeks to affect a decision's legal validity. There is no collateral attack where, based on a review of the pleadings and the record, the plaintiff is not seeking to challenge or undermine the decision but rather to claim damages in tort or contract.

Tax Court Cases

[31] Under s. 165 the *ITA*, a taxpayer who believes that the Minister has not assessed him properly must file a Notice of Objection to that assessment with the Minister under. The Minister is then required to reconsider the assessment under s. 165(3) of the *ITA* and may vacate, confirm or vary the assessment or reassess the taxpayer. Upon the Minister confirming or varying the reassessment or further reassessing the taxpayer, or upon the expiration of 90 days, the taxpayer may appeal the assessment to the Tax Court of Canada, under s. 169 of the *ITA*.

Subsection 152(8) of the *ITA* deems an assessment to be valid and binding unless varied or vacated in accordance with the appeal process under the *ITA*. This provision and the statutory appeal scheme illustrate Parliament's intention to preclude review of the validity of tax assessments by the provincial superior courts. However, the case law illustrates that actions are not precluded if they do not go to the validity of the assessment.

[32] In *Canada v. Roitman*, 2006 FCA 266 (leave to appeal dismissed [2006] S.C.C.A. No. 353 (QL)), the Court concluded that where an action necessarily involves invalidation or reassessment of a tax assessment, the Tax Court of Canada has exclusive jurisdiction. In that case, the action, although framed as an action for damages or misfeasance of public office, in reality sought damages on the basis of an invalid reassessment resulting from a wrong interpretation of the law. The very legality of the reassessment, which was not appealed, was at issue and accordingly the pleadings were struck as an abuse of process. The Court stated:

[16] 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. ... 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.

...

[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. ...

[33] The conclusion reached in *Roitman* was similar to that reached by the Court of Appeal of British Columbia in *Smith et al. v. Canada (Attorney General) et al.*, 2006 BCCA 237, where a taxpayer had brought a class action in the Supreme Court of British Columbia against the Queen in Right of Canada, the Minister of National Revenue, Canada Customs and Revenue Agency and others. The essence of the claim was that truck drivers should be allowed deductions for meals at the rates the federal government pays its employees when they travel on business. In dismissing

the claim as disclosing no reasonable cause of action, Mr. Justice Donald concluded:

[10] The appellants also plead other causes of action: negligence; breach of fiduciary duty; unjust enrichment; breach of trust; and, as added by appellants' counsel in argument on appeal, abuse of public office, although that does not appear in the pleadings.

[11] The causes of action all have a common element: they allege that the respondents acted wrongfully toward the appellants in the rule-making and administration of the tax scheme regarding their meal expenses. This is, in reality, a challenge to the assessments by the Canada Revenue Agency. Since the *Income Tax Act* provides administrative remedies for disputes regarding income tax assessments, the issues lie outside the jurisdiction of the Supreme Court.

[34] Despite the exclusive jurisdiction of the Tax Court over the validity of tax assessments, courts have recognized the limited jurisdiction of the Tax Court. The Federal Court of Appeal acknowledged the limited jurisdiction of the Tax Court in *Main Rehabilitation Co. v. Canada*, 2004 FCA 403. The Court noted that courts have consistently held that the actions of CRA (then the "CCRA") cannot be taken into account in an appeal against assessments because the issue in an appeal is the validity of the assessment and not the process by which it is established. In other words, the question is not whether CRA officials exercised their powers properly, but whether the amounts assessed can be shown to be properly owing under the *ITA*.

[35] In *Swift v. Canada*, 2004 FCA 316, the taxpayers appealed assessments for GST and income tax to the Tax Court of Canada but the appeals were discontinued by the taxpayer through his trustee in bankruptcy. The taxpayer brought a motion to have the Tax Court set aside the discontinuance, alleging fraud by the employees of CRA, the motion was dismissed and so was the appeal therefrom. The taxpayer then filed a statement of claim in Federal Court alleging that the tax assessments against him were fraudulent and claimed damages. The Federal Court judge struck out the statement of claim on the basis that, as the issues had been previously litigated and decided by the Tax Court, the Federal Court lacked the jurisdiction to entertain challenges of assessments of tax liability. Accordingly, the statement of claim was frivolous and vexatious. The taxpayer appealed and the appeal was

allowed. Although the taxpayer's claim labelled the assessments as fraudulent, it did not seek to set aside the assessments and was in essence a claim for damages for fraudulent actions on the part of CRA officials. A claim for damages had not been previously decided by the Tax Court.

[36] On an application to strike out the statement of claim based on abuse of process, the court must look beyond the cause of action alleged and the remedy sought, and determine whether the statement of claim is in pith and substance an action questioning the validity of the tax assessments. If the action does not question the lawfulness of the assessment or if questioning the lawfulness of the decision is not a pre-requisite to the damages sought, because the Tax Court does not have the jurisdiction to determine tort liability, then bringing an action in the provincial superior courts is not a collateral attack on the tax assessment.

Are Plaintiffs Required to Exhaust Appeals as a Pre-requisite to an Action in Tort?

[37] The provincial superior courts, as courts of general jurisdiction, have the *prima facie* power to decide every type of case, provided the statement of claim discloses a reasonable cause of action. Only a clear and explicit limitation will curtail the power of a superior court to decide a particular type of case. For example, a statutory remedial scheme or an arbitration clause may remove the jurisdiction of the superior court.

[38] There are two competing lines of authority as to whether judicial review is a pre-requisite to the jurisdiction of the provincial superior courts to hear subject matter over which it shares concurrent jurisdiction with the Federal Court.

[39] The first line of authority, reflected in the decision in *TeleZone*, is that judicial review is not a pre-requisite to a right of action for damages in provincial superior courts. Section 18 of the *Federal Courts Act*, R.S.C. 1985 c. F-7 [FCA] does not limit the right to bring an action in contract or tort in the superior court. Accordingly, a judgment may be properly rendered if a court has the power to adjudicate the type of controversy contained in the statement of claim: *Telezone*, at para. 110. Section

17 of the *FCA* complements s. 21 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 [*CLPA*]; both statutes confer concurrent jurisdiction on the provincial superior courts and the Federal Court where claims are made against the Crown other than those in which the Federal Court has been given exclusive jurisdiction. Section 18 deals with prerogative writs and relief against a board, commission or other tribunal. Relief by way of damages is not a form of relief contemplated by that section and as a result s. 18 does not constitute a bar or a condition precedent to the jurisdiction of the provincial superior courts over a claim for damages in tort against the Crown: *Telezone*, at para. 95. If Parliament had intended to so limit the jurisdiction of superior courts or to make judicial review a pre-requisite to an action in tort for damages, it would have done so expressly: *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, 2009 ONCA 326 at para. 30.

[40] The competing line of authority is reflected in the case of *Canada v. Grenier*, 2005 FCA 348, where the Federal Court held that a litigant who seeks to impugn a federal agency's decision is not free to choose between a judicial review proceeding and an action in damages; he or she must proceed by judicial review in order to have the decision invalidated. The Court was of the view that to accept that the lawfulness of the decisions of federal agencies can be reviewed through an action in damages is to allow a remedy under s. 17 of the *FCA*, which would disregard or deny the intention clearly expressed by Parliament in ss. 18(3), that the remedy must be exercised only by way of an application for judicial review. It would also judicially reintroduce the division of jurisdictions between the Federal Court and the provincial courts and thus it would revive the old problem, that harmonization of disparities in judicial decisions had to be achieved at the level of the Supreme Court of Canada: *Grenier*, at paras. 24-26.

[41] The Court in *Grenier*, at para. 31, went on to say that to allow decisions of federal agencies to be reviewed through an action in damages would promote indirect challenges:

[31] The principle of the finality of decisions likewise requires that in the public interest, the possibilities for indirect challenges of an administrative

decision be limited and circumscribed, especially when Parliament has opted for a procedure for direct challenge of the decision within defined parameters.

[42] The Court quoted, at para. 32, from *Berhad v. Canada*, 2005 FCA 267 at para. 66, where the Court held:

[66] In my view, the same principle applies when the attack on the decision, as in this instance, takes the form of an action for damages flowing from the decision rather than an application for judicial review of the decision. To suggest otherwise would be to increase the likelihood of attempted collateral attacks as a means of circumventing the deference which often results from a pragmatic and functional analysis.
[Emphasis in original]

[43] The decision in *Grenier* was followed by the Federal Court of Appeal in *Canada v. Manuge*, 2009 FCA 29. However, I note the Court stated, at paras. 58 and 59:

[58] It is possible that a perfectly lawful administrative decision or activity may be carried out in a negligent or abusive manner, thus giving rise to liability on the part of the federal administration. In other words, even though a decision or an activity is lawful, its execution may be negligent or wrongful. In such a case, bringing an action in liability based not on the lawfulness of the decision or activity, but on its negligent performance, is appropriate. In those circumstances, the Federal Court shares its jurisdiction *ratione materiae* with the provincial Superior Courts... [Emphasis added.]

[59] However, when the challenge concerns the very lawfulness of the decision or administrative activity, as a general rule, Parliament intended that priority be given to the issue for reasons of public interest so that doubts may be eliminated and decisions or government policies may be enforced or amended if they turned out to be illegal...

[44] With respect to *TeleZone*, the Court in *Manuge* noted, at para. 84:

[84] Finally, the Court of Appeal for Ontario considered whether the Superior Court had jurisdiction to hear actions in damages instituted by litigants. Of course the Superior Court has this jurisdiction, and no one questions that. However, what must be asked is whether a litigant may at his or her own choice, challenge the *lawfulness* of a decision by means of an action when the unlawfulness of that decision is, in whole or in part, a pre-requisite (*sine qua non*) to a remedy in damages. In my opinion, sections 18 and 28 of the Act, the rationale for and legislative history of the Act itself and the objectives sought by Parliament unequivocally answer this question in the negative.
[emphasis in original]

[45] In *Canada (Attorney General) v. Genge*, 2007 NLCA 60, the Newfoundland Court of Appeal accepted that the rationale for insisting upon judicial review as the first step in appropriate cases, arises from the rule against collateral attack of official decisions citing at para. 30, *R. v. Litchfield*, [1993] 4 S.C.R. 333, where the Supreme Court of Canada had explained the rule against collateral attack as follows at 349:

... The rationale behind the rule is powerful: the rule seeks to maintain the rule of law and to preserve the repute of the administration of justice. To allow parties to govern their affairs according to their perception of matters such as the jurisdiction of the court issuing the order would result in uncertainty. Further, 'the orderly and functional administration of justice' requires that court orders be considered final and binding unless they are reversed on appeal (*R. v. Pastro* (1988), 42 C.C.C. (3d) 485 (Sask. C.A.), at p. 497).

[46] On the issue of the requirement that judicial review be proceeded with in the Federal Court as a pre-requisite to an action in the provincial superior courts in all cases, the Court said in *Genge*, at para. 34:

As noted previously, these two grounds of appeal raise the key question of law in the present case. The appellant asks this Court to adopt the approach of Letourneau J.A. in *Grenier*. The facts determine the true nature of an action: see *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, at para 93. On the facts of *Grenier*, Letourneau J.A. concluded the claim should properly be characterized as in essence a challenge to the authority of the warden to issue a segregation order in the circumstances. If the reasoning employed should be interpreted as going further and deciding that, as a matter of law, in every tort action regarding federal administrative action, judicial review is a prerequisite for the superior court of a province to have jurisdiction, however the essence of the claim should be properly characterized, I must respectfully disagree. I prefer the reasoning of *Keeping, Oak Island International Group Ltd.* [2003 NLCA 21], *Horseman* [*Horseman v. Horse Lake First Nation* [2005, ABCA 15] and *Alford* [*Alford v. Canada*, (1997), 31 B.C.L.R. (3d) 228]. I do not interpret s. 18 of the *Federal Courts Act* as limiting the concurrent jurisdiction provided to the superior courts of the provinces by s. 21 of the *Crown Liability and Proceedings Act* or as requiring judicial review in the Federal Court as a prerequisite for the statutory right of action created by s. 3 of that *Act*. If Parliament had intended to so limit the jurisdiction of superior courts or to make judicial review a prerequisite to an action in tort for damages, I would expect Parliament to have done so expressly.

[47] In the result, the Court in *Genge* followed *TeleZone*. It concluded that allowing a tort action without successful judicial review would not offend the rationale against collateral action where the primary thrust of the claim was to obtain a

remedy for unauthorized action rather than to indirectly attack the validity of a federal officer's decision. The Court concluded:

[40] ... Speaking generally, each case must be considered on its merits to determine whether in essence the pleadings amount to a disguised attempt to collaterally attack administrative action of a federal official rather than proceeding by judicial review or whether their true substance must be properly characterized as a legitimate claim for damages in tort. As this Court noted in *Keeping v. Canada*, the adequacy of judicial review as a remedy will be an important factor in that analysis.

[48] *TeleZone* and *Manuge* were heard together on appeal in the Supreme Court of Canada in January 2010. The judgment of the Court has yet to be released. However, the two lines of authority emerge from different factual situations. In both *Grenier* and *Manuge* the thrust of the claim, in essence, was a challenge to the validity of the decision itself, whereas the plaintiffs in *TeleZone* did not challenge the administrative decisions but rather sought damages. The same distinction arises in tax cases. Where the plaintiff's action advances a legitimate claim that does not call into question the validity of the prior decision, it is not a collateral attack. Furthermore, in *Grenier* the issues raised and the remedy sought could have been addressed in the statutory review process, whereas the Federal Courts do not have the jurisdiction to award the damages sought in *TeleZone*. Similarly, the Tax Court does not have the jurisdiction to award damages based on the actions of CRA officials.

[49] If a plaintiff seeks to challenge the validity of a decision of the Tax Court he or she must do so first through an appeal to that Court, or through judicial review in the Federal Court, before he can bring an action for damages in a provincial superior court based on the invalidity of that decision. However, where the plaintiff's claim does not challenge the validity of the decision, where the review process will not address the issues the plaintiff seeks to litigate and where the review process will not grant the plaintiff the remedy sought, requiring judicial review as a pre-requisite does not serve the policy interests that underlie the rule against collateral attack.

[50] The B.C. courts have followed the decision in *TeleZone* in drawing a distinction between cases which challenge the validity of a decision and those that

do not: *Los Angeles Salad Co. v. Canadian Food Inspection Agency*, 2009 BCSC 109; *Drader v. Boyes*, 2009 BCSC 1185; *Shuswap Lake Utilities Ltd. v. British Columbia (Comptroller of Water Rights)*, 2008 BCCA 176; *Alford v. Canada (Attorney General)* (1997), 31 B.C.L.R. (3d) 228 (S.C.).

[51] The Court in *TeleZone* also held that a collateral attack may be raised as a defence and does not go to jurisdiction: *TeleZone* at para. 96. In *Bacich v. Braithwaite*, 1999 NSCA 77, the majority viewed the application of the doctrine of collateral attack as a matter of judicial discretion and stated, at para. 59: “[t]he collateral attack doctrine is concerned with ensuring finality, preserving the integrity of decision-making processes and requiring parties to pursue the most appropriate avenue of challenge.” The Court held that the most appropriate avenue of challenge was the civil proceeding which was more comprehensive than a judicial review. The majority refused to apply the doctrine of collateral attack on the basis that it was not obvious at such an early stage of the proceeding that it was a collateral attack. The Court concluded that the matter was best left to the trial judge or another judge after a full review of the relevant material. Accordingly, a refusal to strike out the plaintiff’s pleadings on the basis of abuse of process, does not preclude the defendants in this case from raising collateral attack as a defence at trial if it transpires that a challenge to the lawfulness of the CRA decision is a pre-requisite to a remedy in damages.

Conclusion

[52] A collateral attack involves a challenge to the correctness or validity of a decision in subsequent independent proceedings. If the action does not seek to affect a decision’s legal validity it should not be struck as a collateral attack.

[53] The Court should not allow a plaintiff to disguise their collateral attack by framing their action in tort. The Court should look behind the cause of action pled to determine whether, in pith and substance, the action calls into question the validity of the decision. If it does, it must be struck as an abuse of process.

[54] This action is based on the conduct of CRA officials and raises issues distinct from those that would have been addressed in the statutory review process which concerned itself with the validity of the assessments. Further, the statutory review process under the *ITA* would not have provided the plaintiff with the remedy he seeks. On the information before this Court at this stage, the plaintiff's action does not raise a collateral attack on the validity of the earlier proceedings.

No Reasonable Cause of Action

[55] The test for dismissing a petition under Rule 19(24)(a) is whether, assuming the facts alleged in the pleadings are true, it is plain and obvious that the petition discloses no reasonable cause of action. The test, and the standard for its application, was described by the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980.

Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia *Rules of Court* is the same as the one that governs an application under R.S.C.O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

[56] Tort actions for damages arising in negligence and breach of statutory duty are maintainable in this Court. The facts pleaded in the amended statement of claim are sufficient to support those claims. The existence of a duty in tort on the part of CRA is an arguable issue. The pleading defects alleged by the defendant, particularly those relating to breach of privacy, may be cured by particulars. With the exception of the pleadings invoking the *Charter* and *Bill of Rights*, to which I will now turn, the application to strike out Mr. Leroux's amended statement of claim fails.

The Charter and Bill of Rights pleadings

Collateral Attack

[57] The plaintiff asserts that because he was liable for GST he was not entitled to a statutory stay of collection proceedings under the *ETA* pending a final determination of the validity of his tax reassessment. He asserts that the defendant took collection action against him before the Tax Court determined that the reassessment was invalid and as a result he suffered losses. The plaintiff alleges that the lack of a statutory stay violated his rights under s. 7 and s. 15(1) of the *Charter* and 1(a) of the *Bill of Rights*.

[58] The reasoning in *Roitman* was recently expanded on by the Federal Court of Appeal in *Canada v. Domtar Inc.* 2009 FCA 218. Domtar sought a declaration in the Federal Court that section 18 of the *Softwood Lumber Products Export Charge Act 2006*, S.C. 2006, c. 13, was unconstitutional and sought repayment from the Crown of the money it had paid pursuant to that provision. The Federal Court of Appeal concluded that the essential nature of Domtar's claim was for a refund of money paid under a provision of that Act. The fact that the claim was based on a constitutional challenge was found not to affect the jurisdiction of the Tax Court of Canada over the dispute. The Court held that the Tax Court of Canada could determine the lawfulness of an assessment challenged on constitutional grounds, whether those grounds involved the *Charter* or the constitutional division of powers: *Domtar*, paras. 38-39. Accordingly, the Tax Court was found to have exclusive jurisdiction to entertain Domtar's claim.

[59] Section 12 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, [TCCA] sets out the Court's jurisdiction 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 *Air Travellers Security Charge Act*, the *Canada Pension Plan*, the *Cultural Property Export and Import Act*, Part V.1 of the *Customs Act*, the *Employment Insurance Act*, the *Excise Act, 2001*, Part IX of the *Excise Tax Act*, the *Income Tax Act*, the *Old Age Security Act*, the *Petroleum and Gas Revenue Tax Act* and the *Softwood Lumber Products Export Charge Act*,

2006 when references or appeals to the Court are provided for in those Acts.
[Emphasis added]

[60] Furthermore, the Supreme Court of Canada in *Canada v. Addison & Leyer Ltd.*, 2007 SCC 33 at para. 10-11, although in the context of judicial review, cautioned courts about interfering with the specialized jurisdiction of the Tax Court:

[10] ... Moreover, in the case at bar, the allegations of fact in the statement of claim do not disclose any reason why it would have been impossible to deal with the tax liability issues relating to either the underlying tax assessment against York or the assessments against the respondents through the regular appeal process.

[11] 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.

[61] Pursuant to the *TCCA* and the Federal Court of Appeal's decision in *Domtar*, the Tax Court of Canada has jurisdiction over the matters raised by the plaintiff. The plaintiff's *Charter* and *Bill of Rights* claims seek redress for collection actions taken pursuant to an invalid tax assessment, an issue falling within the exclusive jurisdiction of the Tax Court. There is no reason why these claims could not have properly been brought before the Tax Court through the review process provided. For this Court to grant relief on this basis would be to permit a collateral attack on the reassessment decision of the Tax Court.

- *Section 15 (1) of the Charter*

[62] The plaintiff claims that because GST debtors are not entitled to a statutory stay of collection activities, they are treated differently from other debtors, and that this is a violation of s. 15(1) of the *Charter* which requires that

15. (1) Every individual is equal before and under the law and has the right to equal benefit of the law without discrimination

[63] Section 15(1) does not apply to all distinctions in legislation. The focus of s. 15(1) is on preventing governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping.

[64] In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, the Supreme Court of Canada established a two-part test for showing discrimination under s. 15(1): (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? The first step was considered by the Supreme Court of Canada in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, which articulated that concept, at para. 13, as follows:

[13] What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 — race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.

[65] It is clear that a distinction between persons who owe GST and persons owing income tax are not grounds analogous to the enumerated ground contemplated in s.15. They are not immutable or constructively immutable nor do they often serve as the basis for stereotypical decision making. It is therefore plain and obvious that the claim under s. 15(1) cannot succeed and should be struck out pursuant to Rule 19(24)(a).

- Section 7 of the Charter

[66] The plaintiff asserts that the lack of a stay of collection activities deprived him of his right to security of the person and right to liberty otherwise than in accordance with the principles of fundamental justice. The jurisprudence makes it plain that the plaintiff cannot rely on s. 7 of the *Charter* in these circumstances.

[67] Section 7 does not protect the kind of economic interests or the impacts arising from them that are alleged in the amended statement of claim. In *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, the Supreme Court of Canada described the distinction as follows at para. 45:

[45] ... The right to life, liberty and security of the person encompasses fundamental life choices, not pure economic interests. As La Forest J. explained in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66:

... the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.

[68] In *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 the Supreme Court concluded at para. 86, that the stigma suffered by Mr. Blencoe while awaiting trial of a human rights complaint against him, which hindered him from pursuing his chosen profession as a politician, did not engage his rights under s. 7:

[86 ... The prejudice to the respondent in this case . . . is essentially confined to his personal hardship. He is not “employable” as a politician, he and his family have moved residences twice, his financial resources are depleted, and he has suffered physically and psychologically. However, the state has not interfered with the respondent and his family’s ability to make essential life choices. To accept that the prejudice suffered by the respondent in this case amounts to state interference with his security of the person would be to stretch the meaning of this right.

[69] Furthermore, the right to a stay of collection in these circumstances is not a principle of fundamental justice. In *R. v. Malmo-Levine*, 2003 SCC 74, the Supreme Court of Canada set out the test for principles of fundamental justice, at para. 113:

[113] In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

[70] Finally, even if the right to a stay of collection were a principle of fundamental justice, the plaintiff was not deprived of that right. The plaintiff could have sought a judicial stay of proceedings. In *Canada (Minister of National Revenue) v. Swiftsure Taxi Co. Ltd.*, 2005 FCA 136, the Court concluded that a judicial stay of collection activity was available even where the statutory stay was not.

- *Section 1(a) of the Bill of Rights*

[71] The *Bill of Rights* is a federal statute that renders inoperative federal legislation inconsistent with its protections. It protects rights that existed when the *Bill of Rights* was enacted, in 1960. Section 1(a) contains the right not to be deprived of the enjoyment of property except by due process of law.

[72] As noted above, the plaintiff could have sought a judicial stay of the collection activity and did not. His failure to avail himself of the procedures for due process under the law prevents a conclusion that he was deprived of property other than by due process of law.

Conclusion with respect to the Charter and Bill of Rights

[73] The plaintiff is seeking relief relating to the collection of federal taxes. Matters arising under the *ITA* and *ETA* are within the exclusive jurisdiction of the Tax Court. Unlike negligence claims for damages, the jurisdiction of the Tax Court includes the jurisdiction to hear constitutional challenges. Accordingly, these issues could and should properly have been raised on appeal to the Tax Court. To permit the plaintiff to raise them now would amount to a collateral attack and should be struck out as an abuse of process pursuant to Rule 19(24)(d).

[74] In the alternative, it is plain and obvious on the merits of the claims that neither the *Charter* nor the *Bill of Rights* apply in the circumstances and that those claims cannot succeed. Therefore, these claims should be struck as disclosing no reasonable cause of action pursuant to Rule 19(24)(a).

Result

[75] The defendant's application to strike out the plaintiff's amended statement of claim is dismissed except for the portions of the amended statement of claim relating to alleged breaches of sections 7 and 15 of the *Charter* and s. 1(a) of the *Bill of Rights*. The paragraphs containing the claims that cannot be maintained are paragraph 82(n) and paragraphs 93 – 134 and G to J under the claims.

Costs

[76] The time consumed by argument related to the *Charter* and *Bill of Rights* issues was only a very small part of the overall time taken to deal with the application. The plaintiff was substantially successful and is entitled to his costs. Given the complexity of the matter those costs are to be assessed on at scale 4.

“B.M. Preston J.”

The Honourable Mr. Justice Preston