

CANADA / JUDGMENT

Canada (Attorney General) v. Scow

2022 BCCA 275

COURT

British Columbia Court of Appeal

DECIDED

5 August 2022

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2022 BCCA 275 Canada (Attorney General) v. Scow

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Canada (Attorney General) v. Scow,

2022 BCCA 275

Date: 20220805

Docket: CA47656

Between:

The Attorney General of Canada

Appellant

(Defendant)

And

Daniel Scow in his personal capacity and in his capacity as

Executor of the Estate of Bill Scow

Respondent

(Plaintiff)

Before:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Voith

The Honourable Mr. Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated

July 5, 2021 (Scow v. The Attorney General of Canada, 2021 BCSC 1110, Vancouver Registry Docket S178135).

Counsel for the Appellant,

appearing via videoconference:

T. Henderson

J.M. Hansen

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appearing via videoconference:

S. Hern, Q.C.

K. Smith

Place and Date of Hearing:

Vancouver, British Columbia

February 7, 2022

Place and Date of Judgment:

Vancouver, British Columbia

August 5, 2022

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Mr. Justice Voith

The Honourable Mr. Justice Marchand

Summary:

The plaintiff, an Indigenous person, brought a proposed class proceeding consisting of two Claims. In Claim 1, the respondent seeks a declaration that the Income Tax Act, insofar as it permits the Crown to levy or retain taxes in violation of s. 87 of the Indian Act, is unconstitutional. In Claim 2, the respondent asserts that he and his now deceased brother were improperly assessed and paid tax on income he says is exempt under s. 87 of the Indian Act. He seeks damages or, in the alternative, restitution in an amount equal to the tax improperly assessed. The appellant, Attorney General of Canada ("AGC") sought to have the claims struck as disclosing no reasonable cause of action, arguing the claims fall within the exclusive jurisdiction

of the Tax Court of Canada. The chambers judge declined to strike the pleadings as a whole and declined to strike Claim 2, leaving Claim 1 to stand. On appeal, the AGC alleges the chambers judge erred in law in his assessment of the Tax Court's jurisdiction and erred in failing to strike Claim 2. Held: Appeal allowed. It is plain and obvious that Claim 2 discloses no reasonable cause of action because, as currently framed, it raises issues that are within the exclusive jurisdiction of the Tax Court.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

- [1] The Attorney General of Canada ("Canada") appeals an order dismissing its application to strike the plaintiff's Amended Notice of Civil Claim ("ANOC") on grounds that it discloses no reasonable claim.
- [2] The claim--a proposed class proceeding--consists of two components; what the parties have referred to throughout the litigation as Claim 1 and Claim 2.
- [3] By Claim 1, Daniel Scow, the proposed representative plaintiff (the "plaintiff"), seeks a broadly framed declaration that to the extent the Income Tax Act, R.S.C., 1985 c. 1 (5th Supp.) ("ITA") permits the Crown to levy and/or retain taxes in violation of s. 87 of the Indian Act, R.S.C. 1985, c. I-5 ("IA"), it is unconstitutional and therefore of no force and effect.
- [4] By Claim 2, the plaintiff asserts on his own behalf and as executor of the estate of his brother, Bill Scow, that they have improperly been assessed tax on income earned from on-reserve fishing operations. It is common ground that, pursuant to s. 87 of the IA, income earned by an Indian (as that term is used in the IA) from employment or a business situated on a reserve is exempt from taxation. The plaintiff seeks damages in an amount equal to the tax improperly assessed. In the alternative, they seek restitution of the tax improperly assessed. In addition, they seek special damages arising from the conduct of collection officers who took steps to recover improperly assessed taxes.
- [5] In the court below, Canada sought an order striking the claim in its entirety. On appeal, Canada modified its position. It now seeks an order striking only Claim 2 from the ANOC on grounds that an action challenging the correctness of a tax assessment and seeking the recovery of improperly assessed tax falls within the exclusive jurisdiction of the Tax Court of Canada (the "Tax Court"). Absent subject matter jurisdiction, Canada says the claim has no reasonable prospect of success.
- [6] For the reasons that follow, I would allow the appeal and strike Claim 2 from the ANOC.

II. Background

1. Overview

- [7] The plaintiff is a status Indian and member of the We Wai Kai band. He grew up on reserve and has spent his life fishing in the Strait of Georgia, the Johnstone Strait and in the waters west and north of Vancouver Island. During the taxation years in issue, he operated a small-scale fishing business as a sole proprietor from Quinsam Reserve #12.
- [8] Bill Scow was also a status Indian and member of the We Wai Kai band. He spent his life fishing in the same waters and operated a similar small-scale fishing business as a sole proprietor from Quinsam Reserve #12. Bill Scow died on May 28, 2018, after the claim was filed.
- [9] The plaintiffs seek to bring the action on behalf of all Indians who claim to have had their on-reserve property or income unlawfully taxed.
- [10] Daniel Scow alleges that since 2001 he and his brother have been the subject of incorrect assessments based on income exempt from taxation pursuant to s. 87 of the IA. Bill Scow filed objections to his 2001 and 2002 tax assessments. Daniel Scow filed an objection to his 2003 assessment. The plaintiff pleads that in 2016 a determination was made that their fishing income was the personal property of an Indian on reserve and exempt from taxation. Canada advises that, in response to the objections filed in years between 2001 and 2003, the Minister of National Revenue ("the Minister") confirmed the assessments. The Scow brothers filed notices of appeal in the Tax Court. Canada says that the parties reached a settlement of these appeals in 2016. On this point, I accept, as true, the facts pleaded in the ANOCC.
- [11] The plaintiff asserts that from 2004 to roughly 2012, the brothers earned income from fishing that had sufficient connecting factors to the reserve to be classified as the personal property of an Indian on a reserve and exempt from taxation. They did not, however, file objections with respect to the tax assessments sent to them during these years.
- [12] The claim was filed on August 30, 2017. The ANOCC was filed on November 18, 2019.

2. Legislative Context

- [13] The statutory provisions relevant to the determination of this appeal are set out in the Appendix of Provisions.
- [14] Section 87 of the IA exempts from taxation the personal property of an Indian situated on a reserve. In *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 41 [Nowegijick], the Court held that a tax in respect of wages is a tax in respect of personal property. Accordingly, the effect of s. 87 is not only to exempt what can properly be described as direct taxation on property; it also exempts from taxation income earned by an Indian from employment or a business situated on a reserve.

- [15] Importantly, while the IA exempts from taxation income earned by an Indian on a reserve, it does not otherwise exempt Indians from the application of the ITA. The Minister is responsible for determining whether an exemption under s. 87 of the IA applies. As noted below, the Tax Court has been given the exclusive jurisdiction to determine the correctness of a tax assessment.
- [16] Section 87 of the IA has been incorporated into ss. 81(1)(a) of the ITA which provides that a taxpayer's income shall not include any amount that is declared to be exempt from income tax by any other enactment of Parliament.
- [17] Subsection 152(8) of the ITA provides that, subject to being varied or vacated on an objection or appeal, a tax assessment shall be deemed to be valid and binding notwithstanding any error, defect, or omission in the assessment.
- [18] Sections 165, 166.1, 166.2, and 167 of the ITA prescribe the procedure and limitation periods a taxpayer must observe in challenging an assessment made under the Act.
- [19] Briefly, where a taxpayer objects to an assessment of income tax, a notice of objection must be served on the Minister on or before the later of the day that is one year after the taxpayer's filing due date for the year and the day that is 90 days after the day upon which the notice of assessment was sent. The taxpayer may, in certain circumstances, apply to the Minister or to the Tax Court for an extension of the time within which an objection to the assessment must be filed, but no extension shall be granted unless the application was made within one year after the expiration of the time otherwise limited by the ITA for serving a notice of objection.
- [20] If, following the notice of objection, the assessment is confirmed by the Minister, the taxpayer may, within 90 days of the confirmation, appeal to the Tax Court to have the assessment vacated or varied. The Tax Court may grant an extension of time to appeal, but no extension shall be granted unless the application is made within one year after the expiration of the limitation period for the institution of an appeal.
- [21] As the Scow brothers did not file objections to their tax assessments from 2004 to 2012, they are, by virtue of these limitation provisions, time-barred from doing so now.
- [22] Section 12 of the Tax Court of Canada Act, R.S.C., 1985, c. T-2 ("TCCA") provides that the Tax Court has exclusive original jurisdiction to hear and determine appeals to the Court on matters arising under a variety of federal enactments, including the ITA. The IA is not one of the statutes in respect of which jurisdiction has been granted to the Tax Court pursuant to s. 12. The jurisdiction of the Tax Court to address the application of s. 87 of the IA stems from ss. 81(1)(a) of the ITA which, as previously noted, provides that income exempted by another Act of Parliament is not to be included in income for the purposes of the ITA.
- [23] The Tax Court also has exclusive original jurisdiction to hear and determine applications for extensions of time under ss. 166.2 and 167 of the ITA.

[24] Rule 9-5(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 provides that at any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading on the ground that it discloses no reasonable claim.

3. The Pleading

[25] As the declaration of invalidity that lies at the core of Claim 1, is not the direct focus of this appeal, I will say little about this aspect of the pleading. Suffice it to say that, although framed in the broadest of terms, the plaintiff's constitutional attack appears to be focused on the limitation periods set out in the ITA. Although not clearly pleaded, the plaintiff appears to allege that limitation periods governing the service of a notice of objection and the filing of an appeal are unconstitutional as applied to Indigenous taxpayers.

[26] The brothers plead in Claim 2 that they were "improperly assessed" tax and interest for the years 2004 to 2011. They assert that the income they earned as fishers was exempt from taxation pursuant to s. 87 of the IA. As noted above, they seek damages in an amount equal to the total tax improperly assessed or, in the alternative, restitution of the tax improperly assessed.

[27] Canada has not yet filed a response to the ANOCC.

4. The Application to Strike

[28] Canada conceded the obvious on the application to strike--that with respect to Claim 1, it was not plain and obvious that the Supreme Court of British Columbia had no jurisdiction to determine the constitutionality of the impugned provisions.

[29] At the same time, Canada argued that the merits of the assessments in issue--what it described as the foundation of the claim--was within the exclusive jurisdiction of the Tax Court. Relying on well-established authority, Canada argued that where it is plain and obvious that a claim does not fall within the jurisdiction of the court in which it is filed, it should be struck as having no reasonable prospect of success: *Canada v. Roitman*, 2006 F.C.A. 266, 5 T.C.C. 142 at para. 16, leave to appeal ref'd [2006] S.C.C.A. No. 353 [Roitman].

[30] Canada argued that Claim 1 was so "completely interwoven" with the allegations underlying Claim 2 that the entire claim should be struck.

[31] Canada sought to distinguish *Leroux v. Canada Revenue Agency*, 2012 BCCA 63 [Leroux]. In *Leroux*, a taxpayer brought a claim against the Canada Revenue Agency ("CRA") for damages founded on tort claims, including misfeasance in public office and negligence. The CRA brought an application to strike the claim as disclosing no reasonable cause of action arguing that it could not be addressed without determining the correctness of the tax assessments--a matter falling within the exclusive jurisdiction of the Tax Court. The chambers judge disagreed and dismissed the application to strike.

- [32] CRA's appeal was dismissed. The Court noted that the correct approach in determining whether a court has jurisdiction to entertain a claim is to identify its essential nature based on a realistic appreciation of the practical result sought by the claimant: Roitman at para. 16; Canada v. Domtar Inc., 2009 FCA 218, [2009] 6 T.C.C. 61 at paras. 28-31 [Domtar]. Having identified the essential nature of the claim, the task of the court was to determine whether it was plain and obvious that the taxpayer was asking the Supreme Court of British Columbia to intrude on the exclusive jurisdiction of the Tax Court.
- [33] In Domtar, the claim was struck because it was, in essence, a challenge to the correctness of an income tax assessment. Although a declaration of constitutional invalidity had also been sought in Domtar, the principal objective of the taxpayer in advancing the claim was to obtain a refund of money paid under the impugned provision of the taxing statute. In Leroux, by contrast, the taxpayer was content not to dispute the validity of the tax assessments, either directly or indirectly, in advancing his tort claims. As I will explain, this is an important distinction with implications for the resolution of this appeal.
- [34] Unlike the taxpayer in Leroux, Canada argued that the plaintiff in this case is intent upon challenging the validity of the assessments to the end of obtaining damages or restitution for himself and for the proposed class equal to the amount of the tax improperly assessed--in other words, he seeks recompense for taxes inaccurately assessed. In these circumstances, Canada submitted that it was plain and obvious the essence of the claim raised matters falling within the exclusive jurisdiction of the Tax Court.
- [35] Canada also submitted that if its position the two claims were inextricably entwined did not gain purchase, it was open to the court, acting on its own motion, to strike Claim 2 from the ANOCC and let Claim 1 stand. On this point, Canada noted that Claim 2--the improper inclusion of income in the tax assessments contrary to s. 87 of the IA--could not succeed because it raised matters falling within the exclusive jurisdiction of the Tax Court. Canada submitted that the limitation period for filing a notice of objection had expired and the assessments were, by operation of ss. 152(8) of the ITA, deemed to be valid and binding. In support of its position, Canada relied, amongst other authorities, on Smith et al v. Canada (Attorney General), 2006 BCCA 237 at para. 11 [Smith], and Foote v. Canada (Attorney General), 2011 BCSC 1062 [Foote].
- [36] The plaintiff argued on the application to strike that the claim was not, in essence, a challenge to the correctness of the tax assessments. The plaintiff argued that it was "irrefutable" that the assessments violated s. 87 of the IA.
- [37] Rather, the plaintiff argued that the claim concerned the constitutional validity of the ITA provisions that allowed these incorrect assessments to happen. More specifically, the plaintiff argued that the Crown cannot breach the protection afforded by s. 87--and the long-standing constitutional obligations upon which that provision rests--and then purport to immunize itself from such unlawful conduct through the enactment of statutory limitation periods. In support of his position on this point, the plaintiff relied on Amax Potash Ltd. v.

Government of Saskatchewan, [1977] 2 S.C.R. 576 at 590 and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 at 131.

- [38] The plaintiff emphasized the well-established proposition that any derogation from the jurisdiction of a provincial superior court requires clear and explicit statutory language: *Canada (Attorney General) v. TeleZone Inc.*, [2010] 3 S.C.R. 585, 2010 SCC 62 at para. 42 [TeleZone].
- [39] The plaintiff noted the right of taxpayers to restitution for payments made pursuant to ultra vires legislation: *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] 1 S.C.R. 3, 2007 SCC 1 [Kingstreet]. He also argued that the equitable remedies sought in the ANOCC could not be granted by the Tax Court.
- [40] The plaintiff submitted it was highly unlikely the Tax Court would agree to hear the claim on its merits because the time for filing an objection to the notice of assessment had expired and could not be extended given the limitation periods set out in the ITA. In support of its position, the plaintiff relied on a series of judgments issued by the Tax Court and Federal Court of Appeal in *Horseman v. The Queen*, 2016 FCA 252 [Horseman 2016], *Horseman v. The Queen*, 2017 TCC 198 [Horseman 2017], and *Horseman v. The Queen*, 2018 FCA 119 [Horseman 2018].
- [41] In *Horseman*, a taxpayer sought to challenge in the Federal Court what he considered to be the wrongful assessment of GST under the Excise Tax Act, R.S.C. 1985, c. E-15 ("ETA"). He sought a declaration that a Requirement to Pay issued by the Minister was null and void as being contrary to the IA, Treaty 8, and s. 35 of the Constitution Act, 1982, and damages for the amounts seized under the Requirement to Pay.
- [42] The taxpayer's claim was struck without leave to amend on grounds that it disclosed no reasonable cause of action as the correctness of the assessment was a matter falling within the exclusive jurisdiction of the Tax Court.
- [43] On appeal, the Federal Court of Appeal confirmed the proposition stated in *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at para. 82 [JP Morgan], that a challenge to the correctness of a tax assessment falls squarely within the jurisdiction of the Tax Court: *Horseman 2016* at para. 4. The Court applied the direction in *Roitman* (at para. 16) to "look beyond the words used, the facts alleged, and the remedies sought" to satisfy itself that the claim is not a disguised attempt to do indirectly what can be done directly in another, more appropriate forum. Having done so, the Court declined to intervene with the finding made below that the "essential character" of the taxpayer's claim amounted to an indirect challenge to the validity of his tax assessment. The Court noted that even though the taxpayer's claim was cast as claim for damages, the only damages sought were--as in this case--recompense for the payment of monies flowing from what the taxpayer submitted was an incorrect assessment (at para. 6). In these circumstances, the Court concluded that the claim, as pleaded, was nothing but a challenge to the validity of the tax assessment. The Court concluded that it was plain and obvious that the Tax Court had

exclusive jurisdiction over the essential character of the taxpayer's claim:

7. Pursuant to section 19.2 of the Tax Court of Canada Act, R.S.C. 1985, c. T-2, the Tax Court has jurisdiction to consider the constitutional validity, applicability or operability of an Act of Parliament or its regulations and can issue consequential remedies if a notice of constitutional question is properly served: see *Guindon v Canada*, 2015 SCC 41; *Grenon v Canada*, 2016 FCA 4. It is also well established that the Tax Court has jurisdiction to consider claims under s. 87 of the Indian Act with respect to the applicability of tax requirements, and issues involving the application of Treaty 8 and whether it contains a tax exemption: see, for ex., *Bastien (Succession de) v R*, 2011 SCC 38; *Pictou v R*, 2003 FCA 9. Such assertions are properly tested in the Tax Court, and the case law relied on by the appellant does not support the contrary proposition. If anything, many of the cases cited by the appellant confirm that questions related to the validity of tax assessments must be adjudicated by the Tax Court, irrespective of how the claim is framed. Indeed, the Supreme Court has noted the importance of maintaining the integrity and efficacy of the system of tax assessments and appeals, as well as Parliament's intent to set up a complex structure to deal with a multitude of tax-related claims whose structure relies on an independent and specialized court: see *Canada v Addison & Leyen Ltd.*, 2007 SCC 33, at para 11).

[Emphasis added.]

- [44] Mr. Horseman then filed an application in the Tax Court for an extension of time to file a notice of appeal from the impugned assessment. In *Horseman 2017*, the judge hearing the motion held (at para. 22) that the limitation periods set out in the ETA apply where a constitutional challenge to the validity of legislation is raised in the context of a private claim in which personal remedies are sought. The application was dismissed as the taxpayer had not filed a valid objection to the assessment--a statutory prerequisite for an appeal to the Tax Court--and the time for taking such a step had passed.
- [45] In *Horseman 2018*, an appeal from the refusal of the taxpayer's application to extend time was dismissed. Writing for the Court, Stratas J.A. said this:
4. In private, personal claims such as this, procedural and jurisdictional provisions apply and must be obeyed even where the constitutional rights and treaty rights of Indigenous peoples are asserted: *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245; *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372 at para. 13; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623 at para. 134. This case law is a subset of a larger body of case law requiring that those asserting personal, private claims founded upon constitutional rights must still comply with statutory limitation periods and other procedural and jurisdictional requirements: see, e.g., *Mills v. The Queen*, [1986] 1 S.C.R. 863 at page 953; *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181; *St. Onge v. Canada*, 2001 FCA 308, 288 N.R. 3; *Newman v. Canada*, 2016 FCA 213, 406 D.L.R. (4th) 602 and the many cases cited therein.

5. The appellant notes that the exemption from taxation contained in subsection 87(1) of the Indian Act, R.S.C. 1985, c. I-5 opens with the words "[n]otwithstanding any other Act of Parliament...". He submits that this means that the procedural and jurisdictional requirements in the Excise Tax Act do not apply.
 6. We disagree. The opening words of section 87 prevent other Acts of Parliament imposing taxes contrary to the substantive exemption granted by section 87. They do not displace procedural and jurisdictional requirements such as where, when and how a proceeding is to be brought.
- [46] Finally, the plaintiff argued in the court below that neither the Tax Court nor the Federal Court of Appeal in the Horseman proceedings mentioned *Johnston v. The Queen*, 2009 TCC 327 [Johnston]. In *Johnston*, applications to extend time within which to appeal from assessments said to have been made in violation of s. 87 of the IA were dismissed. Webb J. (as he then was) held that the jurisdiction of the Tax Court is limited to appeals under the ITA that are filed within the time set out in ss. 169(1) or, where an extension is sought, within the time set out in ss.167(5)--one year from the end of the appeal period.
- [47] In disposing of the applications, the judge observed, in obiter, that where a taxpayer who wishes to challenge an assessment on grounds that it improperly includes income exempted by s. 87 of the IA but has failed to file an appeal or an extension of time within limitation period set out in the Act, the taxpayer loses only the right to have the matter determined by the Tax Court (at para. 61). The judge in *Johnston* identified two circumstances in which the Federal Court also appeared to have jurisdiction to hear claims grounded in an objection that income exempted by virtue of s. 87 of the IA was incorrectly included in a taxpayer's income. The first is where the issue is framed as the determination of a question of law under the Federal Court Rules. The second is when the taxpayer seeks a declaration that they have been denied an exemption provided by s. 87 of the IA. The plaintiff relied on *Johnston* as support for the proposition that the objections grounding Claim 2 could be determined by a provincial superior court.
5. Reasons for Judgment
- [48] In reasons for judgment ("RFJ") indexed as 2021 BCSC 1110, the judge summarized the positions of the parties on the categorization of the claim. He noted that the parties invited him to view the claim from "different elevations". Canada argued that the claim was, in its essence, a dispute over individual tax assessments and, specifically, whether the s. 87 exemption should have been applied to the taxation years in question. The plaintiff contended that the main issue was not the propriety of individual tax assessments, but the constitutionality of the scheme set out in the ITA (RFJ at paras. 16-18).
- [49] The judge reviewed the Horseman decisions. He considered that "the Tax Court indirectly confirmed in that case that it will not, and cannot, consider the constitutionality of the ITA, and its limitation provisions in particular, where the assessment in question falls outside the limitation period itself: it lacks the jurisdiction to do so" [emphasis added]. Given his

interpretation of the likely reach of the Horseman trilogy, the judge concluded that granting Canada's strike application would have the effect of defeating the claim (RFJ at paras. 52-54; 74). He noted the plaintiff's position that the effect of the trilogy, as applied to this case, is to create a "Kafkaesque circle" in which neither the Federal Court nor the Tax Court will take jurisdiction to determine whether income had been included in the assessment contrary to s. 87--the Federal Court because jurisdiction to consider the propriety of an assessment falls within the exclusive jurisdiction of the Tax Court, and the Tax Court because service of a notice of objection is now statute barred (RFJ at paras. 31-41; 54).

- [50] The judge reviewed, in unobjectionable terms, the test to be applied on an application to strike the whole or any part of a pleading (RFJ at paras. 42-48). He noted that a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action.
- [51] Citing *TeleZone* at para. 36, the judge noted that the Supreme Court of British Columbia has original jurisdiction to deal with all matters not expressly carved out by statute to other statutory courts.
- [52] The judge concluded that it was not plain and obvious that the claims were bound to fail because the Supreme Court of British Columbia lacked jurisdiction to determine the matter (RFJ at para. 49).
- [53] Relying on *Johnston*, the judge reasoned that if the Federal Court has jurisdiction to hear claims in relation to the application of s. 87 to an assessment, so, too, does a provincial superior court. He found "considerable reassurance" in the *Johnston* decision (RFJ at paras. 55-56).
- [54] The judge also considered that *British Columbia Investment Management Corporation v. Canada (Attorney General)*, 2016 BCSC 1803, aff'd 2018 BCCA 47, aff'd [2019] 4 S.C.R. 559, 2019 SCC 63 [bcIMC BCSC], [bcIMC BCCA], [bcIMC SCC], a case I will address in greater detail below, supported his conclusion that the Supreme Court has jurisdiction to determine all aspects of the claim, including the invalidity of the assessments having regard to the exemption provided in s. 87 (RFJ at paras. 58-66).
- [55] Despite being invited to do so by the parties, the judge did not expressly resolve the essential character of the claim as a whole. As he explained:
 - 68. It would be inappropriate for this Court, however, to make that determination at this preliminary strike application, where the facts alleged must be assumed to be true: facts that speak both with respect to the Scow individuals and to Indigenous people generally. Had the defendants brought a jurisdictional challenge or an application for summary trial or summary judgment, it might have been appropriate to make that final determination. Here, however, the issue presented by the defendants to the Court is more narrow: is the plaintiff's claim bound to fail? Specifically, is the plaintiff's argument that the essential character of his claim is sufficiently different from an indirect challenge to his personal tax assessments

plainly and obviously bound to fail? It is not. Nor, based on the authorities surveyed, is it clear that the claim is bound to fail on jurisdictional grounds, such that this Court clearly lacks jurisdiction over this dispute.

[Emphasis added.]

[56] The judge then turned to Canada's alternative submission--that the Court should, acting on its own motion, at least strike Claim 2 which seeks the repayment of improperly assessed and collected taxes. He declined to grant this relief for the brief reasons that follow:

69. Again, it is not plain and obvious that this Court does not have jurisdiction to hear that claim, or that the Tax Court has exclusive jurisdiction. Further, as in *British Columbia Investment Management Corporation*, the interwoven nature of Claim 1 and Claim 2 itself resists a strike application.

[57] In a footnote, the judge noted that the original claim consisted only of Claim 2. He acknowledged that Claim 2, standing alone, was "much closer to the core of the Tax Court jurisdiction of tax assessments". He concluded that had the claim not been amended to include Claim 1, it would have been more vulnerable to a strike application based on the governing jurisprudence.

6. Grounds of Appeal

[58] Canada advanced two overlapping grounds of appeal which can be distilled to this: Did the chambers judge err in law in his assessment of the Tax Court's jurisdiction and thereby err in failing to conclude that Claim 2 discloses no reasonable cause of action?

[59] There are, to my mind, three fundamental building blocks to Canada's argument.

[60] First, Canada notes that Claim 2 does not challenge the Minister's authority to assess the plaintiff's taxes. Rather, the plaintiff challenges the correctness of that assessment and, relying on s. 87 of the IA, says that on the pleaded facts and applicable law the assessment is simply wrong. As such, Canada submits that Claim 2 is a challenge to the correctness tax assessments--a matter falling squarely within the exclusive jurisdiction of the Tax Court.

[61] Second, Canada submits that critical facts pleaded by the plaintiff--most particularly, that the assessment improperly includes income exempted by s. 87--are not facts but conclusions of law. As Canada notes, the IA exempts income earned by an Indian on a reserve from taxation but does not otherwise exempt Indians from the application of the ITA: *Nowegijick* at 36. Canada submits it is for the Minister to determine whether income is exempt by virtue of the application of s. 87. In support of its position on this point, Canada relies on *Scott v. Canada (Attorney General)*, 2017 BCCA 422 at para. 46 for the proposition that on an application to strike all or part of a claim, the Court is not required to treat assertions of law made in the claim as correct, nor is it bound to accept as accurate a claimant's assertions respecting the legal significance of facts.

- [62] In the same vein, Canada submits that a court hearing an application to strike all or part of a claim cannot accept as true the assertion of a fact that is contrary to the terms of a statute. In this case, ss. 152(8) of the ITA provides that an assessment shall, subject to being varied or vacated on an objection or appeal, be deemed to be valid and binding. Canada says acceptance of the plaintiff's assertion that it is irrefutable the Minister erred in determining the income in issue was not exempt from taxation pursuant to s. 87 cannot be reconciled with the operation of this provision.
- [63] The point is a significant one. If Canada is correct, the declaration of invalidity the plaintiff seeks in Claim 1 would not serve to invalidate the assessments on the merits. This, Canada argues, distinguishes the case at bar from *bcIMC*. In *bcIMC*, the British Columbia Investment Management Corporation sought declarations that its operations were immune from GST and HST under the ETA. As in *Canadian Pacific Railway Company v. Canada*, 2012 FC 1030, *aff'd* 2013 FC 161, [*Canadian Pacific Railway*], the issue in *bcIMC* was not the correctness of the assessment but the ability of Canada to assess the tax against *bcIMC* in the first place. If *bcIMC* obtained a declaration of constitutional immunity, the correctness of the tax assessments would not arise because there was no legal authority to make them. By contrast, Canada submits there is no allegation in this case that the Minister does not have the legal authority to determine whether a s. 87 exemption applies to a tax assessment. The plaintiff pleads that the assessments are "improper" not because they were made in the absence of authority, but because they are wrong.
- [64] In short, Canada asserts that the addition of Claim 1 in the ANOCC does not alter the reality that the Tax Court has exclusive jurisdiction with respect to Claim 2 or that this claim necessarily involves determination of the correctness of the Minister's assessment.
- [65] Third, Canada invites this Court to interpret the reach of the *Horseman* trilogy and conclude that neither the Tax Court nor the Federal Court has foreclosed the granting of an extension of time that goes beyond what is contemplated by the ITA where the constitutional validity of the limited provisions are themselves the subject of the proposed attack. Canada submits that the Tax Court did not consider this issue in *Horseman*.
- [66] In response, the plaintiff submits that "the section 87 exemption, when breached by the Crown by wrongly imposed tax cannot be immunized from challenge by the limitation periods enacted in the Income Tax Act" [emphasis added]. The plaintiff submits that if the impugned limitation periods are unconstitutional, "it flows as a matter of logic and principle that taxes collected and retained pursuant to that ultra vires legislation must be returned as a matter of equity, or their retention otherwise be a basis for compensation." The plaintiff acknowledges that success on Claim 2 is predicated on success on Claim 1.
- [67] The plaintiff also argues that Canada has, on appeal, pivoted from the position it advanced in the court below that the two claims were so inextricably linked that the whole of the ANOCC had to be struck. Canada now argues that only Claim 2 should be struck. The plaintiff says that, properly characterized, the appeal is from an order dismissing the application on

grounds that it was not plain and obvious Claim 2 could be severed from Claim 1. The plaintiff says the appeal challenges an exercise of discretion to which a deferential standard of review applies. He submits the chambers judge made no reviewable error in concluding that the link between the two claims militated in favour of dismissing Canada's strike application.

- [68] Further, the plaintiff submits that the chambers judge did not err in concluding that it was not plain and obvious the Supreme Court lacked jurisdiction to entertain the claim. The plaintiff argued, as he did in the court below, that Claim 2 seeks equitable relief that cannot be granted by the Tax Court.
- [69] As I understand the plaintiff's submission, he does not suggest that if it is plain and obvious the Supreme Court has no jurisdiction in relation to Claim 2, it should nevertheless assume jurisdiction in relation to that claim because of the connection between Claim 1 and Claim 2. Rather, he insists that the Supreme Court is not being asked in Claim 2 to overturn or reissue any tax assessments. Instead, he argues that "Claim 2 is an equitable cause of action and as such it is not seeking to do anything in relation to the assessments themselves, but rather would use the assessments as a yardstick for calculating the appropriate equitable remedy." He submits that if the Supreme Court were to make an award of equitable damages or grant restitution, "Canada will retain the tax money wrongfully collected, but would nevertheless be liable to a Supreme Court award of damages or restitution calculated in reference to the amount of the assessments, or some other amount."
- [70] The plaintiff further submits that the judge's understanding of the likely impact of the Horseman trilogy on this case (if Claim 2 was struck) was not dispositive of the application. In any event, the judge was not categorical as to the effect of the Horseman decisions on this case and committed no reviewable error in his interpretation of the reach of these decisions.

III. Analysis

1. Governing Principles

- [71] There are, in my view, several well-established principles of law framing the issues that arise on appeal. I would state them this way.
- [72] On an application based on Rule 9-5(1)(a), a claim will only be struck in whole or in part if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. Another way of putting the test is that the claim has no reasonable prospect of success: *R. v. Imperial Tobacco Canada*, [2011] 3 S.C.R. 45, 2011 SCC 42 at para. 17; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980.

- [73] Where it is plain and obvious that the essential nature of the claim falls within the exclusive jurisdiction of the Tax Court, a claim filed in the Supreme Court has no reasonable prospect of success: *Re Taylor Ventures Ltd. v. Canada Customs and Revenue Agency*, 2005 BCSC 1349; 422252 *Alberta Ltd. v. Canada (Attorney General)*, 2003 BCSC 1362.
- [74] As explained in *Myers v. Canada (Attorney General)*, 2022 BCCA 160 at para. 23 [Myers], the Tax Court has exclusive original jurisdiction to hear appeals under the ITA that challenge the correctness of an assessment to the end of having it vacated or varied. Additionally, appealing the correctness of a tax assessment in another court would be barred by the doctrine of collateral attack, which precludes a challenge to the validity of a binding order in the wrong forum: see *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para 71.
- [75] The question of jurisdiction requires, as a first step, characterization of the essential nature of the claim. The essential nature of the claim must be based on a realistic appreciation of the practical result sought by the claimant. A judge must look beyond the words used in the pleading, the facts alleged, and the remedy sought to be satisfied that the claim is not an "artfully pleaded" but thinly disguised attempt to pursue a claim in an inappropriate forum: *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617 at paras. 25-27; *TeleZone* at para. 78; *Roitman* at para. 16; *Domtar* at para. 28.
- [76] Except for cases in which it is necessary to apply the framework set out in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 to determine whether a dispute arises out of a collective agreement, I agree with the plaintiff that determining the essential nature of a claim is a question of mixed fact and law subject to the palpable and overriding error standard of review: *bcIMC BCCA* at paras. 66-67; *Myers* at para. 19; *Apotex Inc., v. Canada (Health)*, 2012 FCA 322 at para. 9.
- [77] Whether a pleading discloses a reasonable cause of action is generally an extricable question of law to which deference is not owed: *Scott* at paras. 41, 44. Whether it is plain and obvious that a pleading discloses no reasonable cause of action because a provincial superior court has no jurisdiction to entertain the claim is a question of law to which a correctness standard applies: *Ewert v. Höegh Autoliners AS*, 2020 BCCA 181 at paras. 42-44. I do not understand the plaintiff to contest this latter proposition.
- [78] A court is not required to treat assertions of law made in a pleading as correct, nor is it bound to accept as accurate a claimant's assertions respecting the legal significance of pleaded facts: *Scott* at para. 46. And, while I would not characterize it as an established proposition of law, I accept the view expressed in *Grenon v. Canada Revenue Agency*, 2016 ABQB 260 at para. 52, rev'd on other grounds 2017 ABCA 96 [Grenon], that a court cannot accept as true factual statements that are contrary to the terms of a statute. Indeed, the court is obliged to do the opposite. In this case, the chambers judge could not accept as true the plaintiff's pleading that tax was improperly assessed given that s. 152(8) of the ITA deems the assessment to be valid and binding unless varied or vacated on appeal.

- [79] The Tax Court has exclusive jurisdiction to review the correctness of tax assessments--whether the assessment is supported by the facts of the case and the applicable law--by way of an appeal to that Court: bcIMC SCC at paras. 37, 41; Smith at paras. 11-16; J.P. Morgan at para. 82; Roitman at para. 19; Foote at paras. 28-34; Grenon at para. 52.
- [80] Kingstreet did not create a new, sweeping constitutional right in taxpayers to recover tax assessed under a misapplication or misinterpretation of a taxing statute, much less do so outside the legislative scheme that governs the recovery of incorrectly assessed taxes. Kingstreet addresses the right of a taxpayer to recover taxes improperly paid to government under an ultra vires taxing provision. The Court held that restitution was, on the application of constitutional principles, available to a taxpayer to recover money paid under an unconstitutional provision. The case was not concerned with the proper forum in which to advance a claim: *Sorbara v. Canada (Attorney General)*, 2009 ONCA 506, 98 O.R. (3d) 673 at paras. 4-5; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184 at paras. 13-15, 20-22 [Merchant].
- [81] The threshold question of whether the Minister has the authority to impose a tax--as opposed to the correctness of the assessment--does not fall within the exclusive jurisdiction of the Tax Court. As explained in *Canadian Pacific Railway* at paras. 41-46, the question of whether any taxes assessed or collected are unconstitutional or otherwise ultra vires is not an assessment issue arising from an alleged misapplication of the taxing statute. Rather, such an issue goes to the very heart of the ability of the Crown to collect the tax in the first place: see also bcIMC BCSC at para. 95, bcIMC BCCA at para. 65, and bcIMC SCC at paras. 38-41 (SCC). A provincial superior court has jurisdiction over such a claim.
- [82] Relatedly, a taxpayer who is content to let the assessment stand--in the sense that they do not seek to overturn the decision or nullify its legal effect--may commence a civil action in a provincial superior court and seek to establish the unlawfulness of the assessment as a material fact supporting the claim for damages. Once again, a court permitting such a claim to proceed must be satisfied that it is not a thinly veiled attempt to avoid the effects of the assessment altogether: *Myers* at paras. 28-39.
- [83] In *Myers*, taxpayers brought an action in the Supreme Court for damages against the CRA for misfeasance in public office and negligence. As an element of their misfeasance and negligence claims, they alleged that the assessment method used by the CRA was unlawful. The CRA successfully applied to strike the notice of civil claim, arguing that the essence of the claim was an attempt to appeal the assessments and recoup the penalties levied against them--matters falling within the exclusive jurisdiction of the Tax Court. On appeal, this Court concluded that the judge erred in her characterization of the claim as the taxpayers did not seek to avoid the effects of the assessments and related penalties:
43. In the present case, the appellants' assertion that the use of the net-worth assessment method was unlawful is an element of their misfeasance and negligence claims. That issue falls squarely within the subject matter jurisdiction of the BC Supreme Court and is not a

collateral attack on the CRA assessments because the appellants are not attempting to avoid the legal force of those assessments. As the appellants acknowledge, it will be open to the CRA to raise the defence of collateral attack should the appellants at trial seek to recover, as damages, the taxes and penalties payable under the assessments. If the appellants want to avoid the taxes and penalties, they must indeed pursue those remedies in the Tax Court: *Greeneng* [*Greeneng Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2018 BCCA 214] at paras. 33-34.

[Emphasis added.]

- [84] *Leroux* is to similar effect. In that case, a taxpayer brought a claim in the Supreme Court against the CRA for damages founded, amongst other things, on misfeasance in public office--based on an alleged extortion attempt by an auditor employed by the CRA--and negligence. Significantly, the taxpayer accepted that his tax assessments were valid and enforceable. An application by the CRA to strike the tort claims was dismissed. On appeal, the issue was whether the essential nature of the claims required the Supreme Court to intrude on the exclusive jurisdiction of the Tax Court. Applying *TeleZone*, this Court concluded (at para. 22) that there is no principled reason to prevent a taxpayer who is content to let a tax assessment stand from being able to make a case in a provincial superior court for compensation for alleged losses if he can establish a cause of action in tort.
- [85] Finally, no special consideration should be given to proposed class proceedings when considering whether to strike a claim under Rule 9-5(1)(a): *Merchant* at para. 40; *Scott v. Canada (Attorney General)*, 2013 BCSC 1651 at para. 21, rev'd (but not on this point) 2017 BCCA 422. Each claim must stand or fall on the pleadings.

2. Application to the Case at Bar

- [86] Before applying these governing principles to the case at bar, I wish to briefly address the plaintiff's contention that because Canada did not seek an order striking only Claim 2 in the court below, the decision of the chambers judge not to make such an order should attract a deferential standard of review.
- [87] I am unable to accept this argument. While Canada may have been overreaching in the principal position it took in the court below--and doing so for strategic reasons--I am of the view that the judge had an obligation, when the issue was brought to his attention, to determine whether it was plain and obvious that the essence of Claim 2 raised matters falling within the exclusive jurisdiction of the Tax Court. The position taken by Canada below did not relieve the judge of his obligation to determine whether the Supreme Court had jurisdiction over Claim 2. In fact, the judge addressed this discrete issue in paragraph 69 of this RFJ (reproduced above at para. 56). His conclusion that it was not plain and obvious Claim 2 was within the exclusive jurisdiction of the Tax Court raises a question of law to which a correctness standard of review applies.

- [88] Turning to the merits of the appeal, I am of the view that the chambers judge erred in law in concluding that it was not plain and obvious that the Tax Court has exclusive jurisdiction over Claim 2.
- [89] The judge appears to have accepted that the essence of Claim 2 is a challenge to the correctness of the assessments, and that the relief the plaintiff seeks is repayment of improperly assessed and collected taxes (RFJ at para. 69). As I see it, no issue arises here about interfering with the judge's assessment of the essential nature of the claim in the absence of palpable and overriding error. But more to the point, I do not see how the chambers judge could reasonably have come to any other conclusion. The proposed representative plaintiff framed Claim 2 in the ANOCC as an assertion that taxes were "improperly assessed" on income earned by an Indian on a reserve and that he is, therefore, "entitled to repayment" of those taxes. The judge nevertheless concluded that it was not plain and obvious the Tax Court has exclusive jurisdiction to hear "that claim".
- [90] I reject the plaintiff's contention that the nature of the relief sought--equitable damages in an amount equal to the total tax improperly assessed or, alternatively, restitution of the total amounts improperly assessed--gives the Supreme Court jurisdiction to decide Claim 2. To suggest that the nature of the remedy sought determines the jurisdiction of a court to entertain a claim is to put the remedial cart before the subject matter jurisdiction horse. The first question is whether the court in which the proceeding is brought has jurisdiction over the subject matter of the claim. If it does not, the availability of the remedies sought is irrelevant. Nothing in *Kingstreet* supports the plaintiff's position on this point.
- [91] In addition, and respectfully, it is my view that the artful way in which Part 2 of the pleading (Relief Sought) has been drafted in this case--to claim equitable damages or restitution in an amount equal to the tax improperly assessed--cannot disguise what the claim is, as it presently constituted: a challenge to the correctness of the assessment and a claim for the return of money improperly assessed. These matters clearly fall within the exclusive jurisdiction of the Tax Court. The observations of the Federal Court of Appeal in *Horseman* 2016 have direct application to Claim 2 in this case:
6. Even though the appellant's claim is cast as a damage claim, the only damages sought flow directly from the tax re-assessment and seek reimbursement of monies paid in satisfaction of that re-assessment. The appellant's claim, as pleaded, is therefore nothing but a challenge to the validity of the tax re-assessment. The constitutional dimension of the claim did nothing to alter this conclusion, nor did it serve to oust the Tax Court's jurisdiction.
- [92] Further, it is important to note that Claim 2 does not challenge the Minister's authority, constitutional or otherwise, to assess the plaintiff's taxes. In this respect, the case at bar is distinguishable from *Canadian Pacific Railway* and *bcIMC*. As previously noted, what was in issue in those cases was the authority of the Minister to impose the tax, not the correctness of the assessment. By contrast, the pleadings in this case allege that the assessment is not supported by the facts and applicable law. The plaintiff says that the assessments are

"improper" not because they were made in the absence of authority, but because they are wrong.

- [93] Further, the pleading makes clear that the plaintiff is not content to "let the decision stand". Plainly, he seeks, by the institution of proceedings in the Supreme Court, to avoid the effects of the assessment. In this respect, the case is distinguishable from *Leroux and Myers*.
- [94] As noted above, the procedure for objecting to or appealing from a tax assessment referred to in ss. 152(8) of the ITA is set out in sections 165-169. Section 12 of the TCCA, provides the Tax Court with exclusive jurisdiction to determine the correctness of tax assessments.
- [95] Further, I do not accept the plaintiff's apparent contention that the issuance of a declaration of invalidity (in relation to the limitation periods set out in the ITA as applied to Indigenous taxpayers)--in other words, success on Claim 1--would serve to invalidate the impugned assessments on the merits.
- [96] First, the judge could not accept as true the plaintiff's pleading that taxes were improperly assessed for the taxation years in issue. Although the pleading makes this assertion, it is a pleading of law, not of fact, and is contrary to the deeming provision found in ss. 152(8) of the ITA.
- [97] Second, while it is true that Claim 2 cannot succeed if Claim 1 fails, it does not follow (as the plaintiff seems to contend) that Claim 2 would necessarily succeed if the declaration the plaintiff seeks in relation to Claim 1 is granted.
- [98] Respectfully, the plaintiff's analysis ignores a necessary step in the inquiry that falls between the declaration sought in Claim 1 and the remedy sought in Claim 2. Success on Claim 1 would simply remove the impediment the limitation periods represent. While the plaintiff would be able to object to or appeal the tax assessments in the absence of those provisions, the correctness of the assessments would not be determined by the granting of the declaration sought. Again, the correctness of the assessments is a matter that falls within the exclusive jurisdiction of the Tax Court.
- [99] Further, the chambers judge erred in relying on *bcIMC* as an analogous authority on this point. In my respectful view, this case is quite unlike *bcIMC* where granting of the declaration would result in *bcIMC*'s immunity from taxation under the ETA. As the judge at first instance in *bcIMC* noted (at paras. 89-91), if *bcIMC* was successful in its claim for immunity from taxation, the ETA would have no application as the underpinnings of the assessment would disappear. There was no issue in *bcIMC* about the correctness of the assessment if the immunity claim failed.
- [100] *bcIMC* is distinguishable on other, related grounds. In that case, the judge at first instance properly examined each element of the claim to determine whether the Supreme Court had jurisdiction. Two issues arose in *bcIMC*. The first was whether the corporation was immune from taxation and whether a declaration to that effect should be granted--which, as I have explained, does not engage the correctness of the assessment, but goes, instead, to the very

heart of Canada's ability to assess the tax in the first place. The sought-after declaration was within the jurisdiction of the Tax Court and the Supreme Court. The second issue--whether the Province could bind bcIMC to pay tax pursuant to agreements between Canada and the Province--was within the jurisdiction of the Supreme Court of British Columbia, but not within the jurisdiction of the Tax Court. Against this background, the judge concluded that judicial economy militated in favour of the two elements of the claim being heard together. Importantly, there was no issue in bcIMC over which the Tax Court had exclusive jurisdiction.

- [101] I agree with the position of Canada on appeal that the addition of Claim 1 in the ANOCC did not alter the fundamental nature of Claim 2. It certainly did not derogate from Parliament's express and unambiguous intention to grant the Tax Court of Canada exclusive jurisdiction to review the correctness of tax assessments.
- [102] Finally, Johnston is not binding on this Court and does not, in any event, appear to me to provide direct support for the proposition that a provincial superior court can assume jurisdiction over a matter that clearly falls within the exclusive jurisdiction of the Tax Court.
- [103] Canada invites us to engage in an interpretation of the Horseman trilogy and find that the chambers judge erred in concluding the Tax Court has confirmed that it will not consider the constitutionality of the limitation provisions set out in the ITA where a proposed objection to the assessment or appeal falls outside the limitation period. While it is arguable that the chambers judge read too much into the decisions in Horseman, it is, in my view, unnecessary for this Court to resolve the question to dispose of this appeal. Moreover, I am of the view that it would be inappropriate for this Court to wade into the controversy raised by the parties. In coming to this conclusion, I am mindful not only of the expertise that reposes in the Tax Court, but of the admonition of Low J. (as he then was) that courts should be wary of "deciding issues for the purpose of instructing other courts": see *Felsen Foundation v. Jabs Construction Ltd.* (1998), 98 D.T.C. 6454 at para. 7.
- [104] I would leave open the possibility that the plaintiff may be able to amend the pleading by recasting the claim in such a way as to bring it within the jurisdiction of the Supreme Court.
- [105] The plaintiff suggests that if the absence of a constitutional challenge to ss. 152(8) of the ITA is a fatal defect to Claim 2, he should be given an opportunity to amend the claim accordingly. I do not see how this amendment would alter the result, and we have been provided with no other specific suggestions as to how the ANOCC might be amended to bring it within the jurisdiction of the Supreme Court.
- [106] As currently framed, I am satisfied it is plain and obvious that Claim 2 discloses no reasonable cause of action because it raises issues that fall within the exclusive jurisdiction of the Tax Court. Respectfully, I am of the view that the chambers judge erred in law in concluding otherwise.

IV. Disposition

[107] For the foregoing reasons, I would allow the appeal, set aside the order made below and replace it with an order striking Claim 2 from the ANOCC along with the consequential relief premised on the success of Claim 2 enumerated in Part 2, paragraphs 3-5 of the ANOCC. Nothing in these reasons precludes the plaintiff from seeking leave to further amend the ANOCC.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Mr. Justice Marchand"

Appendix of Provisions

Indian Act, R.S.C. 1985, c. I-5

Property exempt from taxation

87 (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the First Nations Fiscal Management Act, the following property is exempt from taxation:

- (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
- (b) the personal property of an Indian or a band situated on a reserve.

Idem

- (2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Amounts not included in income

81 (1) There shall not be included in computing the income of a taxpayer for a taxation year,

Statutory exemptions

- (a) an amount that is declared to be exempt from income tax by any other enactment of Parliament, other than an amount received or receivable by an individual that is exempt by virtue of a provision contained in a tax convention or agreement with another country that has the force of law in Canada;

Assessment deemed valid and binding

152 (8) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto.

Objections to assessment

165 (1) A taxpayer who objects to an assessment under this Part may serve on the Minister a notice of objection, in writing, setting out the reasons for the objection and all relevant facts,

- (a) if the assessment is in respect of the taxpayer for a taxation year and the taxpayer is an individual (other than a trust) or a graduated rate estate for the year, on or before the later of
 - (i) the day that is one year after the taxpayer's filing-due date for the year, and
 - (ii) the day that is 90 days after the day of sending of the notice of assessment; and
- (b) in any other case, on or before the day that is 90 days after the day of sending of the notice of assessment.

Duties of Minister

- (3) On receipt of a notice of objection under this section, the Minister shall, with all due dispatch, reconsider the assessment and vacate, confirm or vary the assessment or reassess, and shall thereupon notify the taxpayer in writing of the Minister's action.

Extension of time by Minister

166.1 (1) Where no notice of objection to an assessment has been served under section 165, nor any request under subsection 245(6) made, within the time limited by those provisions for doing so, the taxpayer may apply to the Minister to extend the time for serving the notice of objection or making the request.

Contents of application

- (2) An application made under subsection 166.1(1) shall set out the reasons why the notice of objection or the request was not served or made, as the case may be, within the time otherwise limited by this Act for doing so.

Duties of Minister

- (5) On receipt of an application made under subsection 166.1(1), the Minister shall, with all due dispatch, consider the application and grant or refuse it, and shall thereupon notify the taxpayer in writing of the Minister's decision.

When order to be made

- (7) No application shall be granted under this section unless
 - (a) the application is made within one year after the expiration of the time otherwise limited by this Act for serving a notice of objection or making a request, as the case may be; and
 - (b) the taxpayer demonstrates that
 - (i) within the time otherwise limited by this Act for serving such a notice or making such a request, as the case may be, the taxpayer
 - (A) was unable to act or to instruct another to act in the taxpayer's name, or
 - (B) had a bona fide intention to object to the assessment or make the request,
 - (ii) given the reasons set out in the application and the circumstances of the case, it would be just and equitable to grant the application, and
 - (iii) the application was made as soon as circumstances permitted.

Extension of time by Tax Court

166.2 (1) A taxpayer who has made an application under subsection 166.1 may apply to the Tax Court of Canada to have the application granted after either

- (a) the Minister has refused the application, or
- (b) 90 days have elapsed after service of the application under subsection 166.1(1) and the Minister has not notified the taxpayer of the Minister's decision,

but no application under this section may be made after the expiration of 90 days after the day on which notification of the decision was mailed to the taxpayer.

Powers of Court

- (4) The Tax Court of Canada may grant or dismiss an application made under subsection 166.2(1) and, in granting an application, may impose such terms as it deems just or order that the notice of objection be deemed to have been served on the date of its order.

When application to be granted

- (5) No application shall be granted under this section unless
 - (a) the application was made under subsection 166.1(1) within one year after the expiration of the time otherwise limited by this Act for serving a notice of objection or making a request, as the case may be; and
 - (b) the taxpayer demonstrates that
 - (i) within the time otherwise limited by this Act for serving such a notice or making such a request, as the case may be, the taxpayer

- (A) was unable to act or to instruct another to act in the taxpayer's name, or
- (B) had a bona fide intention to object to the assessment or make the request,
- (ii) given the reasons set out in the application and the circumstances of the case, it would be just and equitable to grant the application, and
- (iii) the application was made under subsection 166.1(1) as soon as circumstances permitted.

Extension of time to appeal

167 (1) Where an appeal to the Tax Court of Canada has not been instituted by a taxpayer under section 169 within the time limited by that section for doing so, the taxpayer may make an application to the Court for an order extending the time within which the appeal may be instituted and the Court may make an order extending the time for appealing and may impose such terms as it deems just.

Contents of application

- (2) An application made under subsection 167(1) shall set out the reasons why the appeal was not instituted within the time limited by section 169 for doing so.

When order to be made

- (5) No order shall be made under this section unless
 - (a) the application is made within one year after the expiration of the time limited by section 169 for appealing; and
 - (b) the taxpayer demonstrates that
 - (i) within the time otherwise limited by section 169 for appealing the taxpayer

- (A) was unable to act or to instruct another to act in the taxpayer's name, or
- (B) had a bona fide intention to appeal,
- (ii) given the reasons set out in the application and the circumstances of the case, it would be just and equitable to grant the application,
- (iii) the application was made as soon as circumstances permitted, and
- (iv) there are reasonable grounds for the appeal.

Appeal

169 (1) Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either

- (a) the Minister has confirmed the assessment or reassessed, or
- (b) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed,

but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been sent to the taxpayer under section 165 that the Minister has confirmed the assessment or reassessed.

Tax Court of Canada Act, R.S.C., 1985, c. T-2

Jurisdiction

12 (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the Canada Pension Plan, the Cultural Property Export and Import Act, Part IX of the Excise Tax Act, the Old Age Security Act, the Petroleum and Gas Revenue Tax Act, Part V.1 of the Customs Act, the Income Tax Act, the Employment Insurance Act, the Air Travellers Security Charge Act, the Excise Act, 2001, the Softwood Lumber Products Export Charge Act, 2006, the Disability Tax Credit Promoters Restrictions Act, Part 1 of the Greenhouse Gas Pollution Pricing Act and the Underused Housing Tax Act when references or appeals to the Court are provided for in those Acts.

Extensions of time

- (4) The Court has exclusive original jurisdiction to hear and determine applications for extensions of time under subsection 28(1) of the Canada Pension Plan, section 33.2 of the Cultural Property Export and Import Act, section 304 or 305 of the Excise Tax Act, section 97.51 or 97.52 of the Customs Act, section 166.2 or 167 of the Income Tax Act, subsection 103(1) of the Employment Insurance Act, section 45 or 47 of the Air Travellers Security Charge Act, section 197 or 199 of the Excise Act, 2001, section 115 or 117 of the Greenhouse Gas Pollution Pricing Act or section 39 or 41 of the Underused Housing Tax Act.

Constitutional questions

19.2 (1) If the constitutional validity, applicability or operability of an Act of Parliament or its regulations is in question before the Court, the Act or regulations shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).

Supreme Court Civil Rules, B.C. Reg. 168/2009

Rule 9-5 -- Striking Pleadings

Scandalous, frivolous or vexatious matters

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
- (a) it discloses no reasonable claim or defence, as the case may be,
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Prepared on 28 October 2026 · Esheria