
Unresolved Controversies in Suing for Negligence of Tax Officials: Canadian and Australasian Insights and a Primer for Policy Makers' Consideration

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PRÉCIS

Il y a eu récemment au Canada de nombreuses affaires dans lesquelles les contribuables ont prétendu que des agents de l'Agence du revenu du Canada avaient fait preuve de négligence. Cette jurisprudence canadienne en rapide évolution constitue, à l'heure actuelle, la jurisprudence la plus étendue dans le monde de la common law sur la responsabilité délictuelle des agents du fisc. Elle expose également les différends fondamentaux non résolus qui entravent la clarté et la certitude juridiques des limites du droit des contribuables à poursuivre en justice des agents du fisc pour négligence. En comparant ces affaires avec des affaires en Australie et en Nouvelle-Zélande, cet article confirme que ces différends non résolus ne sont pas uniques au Canada. L'auteur propose une série d'options pour résoudre ces problèmes. Destinées à attirer l'attention des responsables des politiques et à susciter un débat, ces propositions sont tirées des approches judiciaires et législatives adoptées au Canada, en Australie et en Nouvelle-Zélande, et dans d'autres juridictions de common law en grande partie comparables.

ABSTRACT

There have been numerous recent Canadian cases in which taxpayers have alleged negligence by Canada Revenue Agency officials. This body of rapidly evolving Canadian case law constitutes, at present, the most extensive jurisprudence in the common-law world considering the tortious liability of tax officials. It also exposes fundamental unresolved controversies that inhibit legal clarity and certainty on the limits of the right of taxpayers to sue for the negligence of tax officials. Through comparison with cases in Australia and New Zealand, this article confirms that these unresolved controversies are not unique to Canada. The author proposes a range of options for addressing these issues. Intended as a primer for policy makers' attention and debate, these proposals are

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drawn from judicial and legislative approaches adopted in Canada, Australia, and New Zealand, and in other broadly comparable common-law jurisdictions.

KEYWORDS: NEGLIGENCE ■ TAX LITIGATION ■ TORTS ■ PUBLIC POLICY

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INTRODUCTION

There have been a number of recent Canadian cases in which taxpayers have alleged negligence by Canada Revenue Agency (CRA) officials. Most have failed to demonstrate reasonable prospects of success and have been summarily dismissed during the pleading stage of proceedings.¹ A few have been permitted to proceed beyond the pleading stage.² The most notable of these is the 2014 decision of the Supreme

1 Cases in which negligence claims have been struck out have included *783783 Alberta Ltd. v. Canada (Attorney General)*, 2010 ABCA 226; *Footo v. Canada (Attorney General)*, 2011 BCSC 1062; and *Canada v. Scheuer*, 2016 FCA 7. For a detailed analysis of the cases up to and including 2013, see John Bevacqua, "Suing Canadian Tax Officials for Negligence: An Assessment of Recent Developments" (2013) 61:4 *Canadian Tax Journal* 893-914.

2 Notable examples include *Leroux v. Canada Revenue Agency*, 2014 BCSC 720; *McCreight v. Canada (Attorney General)*, 2013 ONCA 483; and *Gordon v. Canada*, 2019 FC 853. In *McCreight*, the Ontario Court of Appeal overturned the decision of the Ontario Superior Court in *McCreight v. The Attorney General*, 2012 ONSC 1983, stating, *supra*, at paragraph 60, "[T]he motion judge erred in concluding that it was plain and obvious that the respondent CRA investigators did not owe a duty of care . . . and, therefore, the negligence claim had no reasonable prospect of success and should be struck." In *Gordon*, the Federal Court ultimately found, *supra*, at paragraph 244, that there was insufficient evidence of serious mistakes or

Court of British Columbia in *Leroux*,³ in which, although the taxpayer was ultimately unsuccessful, the existence of a duty of care owed by the CRA to taxpayers was affirmed.⁴

A number of cases have considered *Leroux* and provided further insights into the circumstances in which a negligence claim might lie against the CRA and its tax officers. This growing body of Canadian case law represents, at present, the most extensive jurisprudence in the common-law world considering the tortious conduct of tax officials. It is questionable, however, whether this continuing judicial attention has resulted in greater certainty or clarity either for Canadian taxpayers or for Canadian tax officials seeking to determine the precise nature and scope of any common-law duties of care owed to taxpayers.

The Canadian cases expose a number of fundamental recurring and unresolved issues arising in taxpayer negligence claims against tax officials. These are not unique to Canada. There are striking similarities between the issues that Canadian judges have encountered in dealing with taxpayer negligence claims arising from the conduct of tax officials and those encountered in other common-law countries—particularly in Australia and New Zealand.

errors of judgment made by the CRA to support a finding of negligence. However, Barnes J was satisfied that on the facts of the case a negligence standard of care could be applied (*ibid.*, at paragraph 157), and a cause of action framed in negligence was theoretically available to the plaintiffs (*ibid.*, at paragraph 166).

- 3 *Leroux*, supra note 2. At the preliminary hearing of the matter, Preston J described the facts in the case as “a series of Kafkaesque events”: *Leroux v. Canada Revenue Agency*, 2010 BCSC 865, at paragraph 2. The saga started in 1996 with an audit of the plaintiff’s business. CRA auditors seized business receipts and other records. The plaintiff alleged that, before those records could be copied, the tax officials either shredded, or simply lost, a significant proportion of them (although at the 2014 hearing Humphries J described this assertion as “not convincing”: *Leroux*, supra note 2, at paragraph 220). Nevertheless, the audit was completed, and the plaintiff was assessed as owing more than \$600,000 in taxes, interest, and penalties. A lengthy dispute ensued, and in subsequent Tax Court proceedings, a consent settlement of approximately \$57,000 was reached. After some payments and a “fairness application” to the minister of national revenue (*Leroux*, supra note 2, at paragraph 1), which resulted in the cancellation of all interest and penalties, the plaintiff was owed an income tax *refund* of about \$25,000. Unfortunately, in the meantime, the CRA had issued seizure and sale orders against his property to recover the initially assessed tax debt. As a result, the plaintiff’s mortgage holders foreclosed on his properties. Ultimately, the plaintiff lost his home and business, and was financially ruined.
- 4 See *Leroux*, supra note 2, at paragraph 309. The court’s conclusion is consistent with the BC Court of Appeal’s refusal to strike out the plaintiff’s claim in negligence: see *Leroux v. Canada Revenue Agency*, 2012 BCCA 63. This is not the first time that Canadian courts have recognized the potential of a cause of action in tort against the CRA. See, for example, *Canada Revenue Agency v. Tele-Mobile Company Partnership*, 2011 FCA 89, at paragraph 6, where the Federal Court of Appeal acknowledged (albeit without elaboration) the possibility that a taxpayer plaintiff could bring an action in tort to obtain compensation for damage caused by the CRA. See also *Neumann v. Canada (Attorney General)*, 2011 BCCA 313, a case recognizing the potential applicability of the tort of negligent investigation in the tax investigation context.

While there have been a number of comprehensive expositions of the law of negligence as it applies in tax cases in both Canada⁵ and Australasia,⁶ there has been little focus to date on the legal controversies that recur and remain unresolved across jurisdictions. Accordingly, the primary focus of this article will be on identifying these common unresolved controversies and suggesting options for addressing the legal uncertainties that they have created for taxpayers and tax officials alike. This necessarily requires an analysis of a range of negligence claims, including claims involving allegations of negligent misstatement and negligent investigation in various contexts, in search of high-level and cross-jurisdictionally relevant thematic commonalities.⁷

The analysis will reveal four core unresolved controversies that have been exposed to date in Canadian and Australasian cases. Prime among these is the question of whether and to what extent common-law duties of care can coexist with public duties of tax authorities and officials. A second issue is the nature and scope of any duties specifically owed by tax officials in carrying out tax audits and investigations. A third issue is the evidentiary weight and validity of residual policy concerns that are commonly raised as a bar to tortious claims arising out of taxpayers' allegations of negligence by tax officials. Finally, there is the unresolved question of the standard of care expected of tax officials to satisfy any common-law duties to taxpayers. The first four parts of this article will address these current unresolved controversies and the various judicial approaches to dealing with them.

In the fifth part of the article, possible solutions to the four key controversies are posited. The proposals extend not only to the judicial approaches to dealing with these matters but also to legislative avenues for assisting judges in adjudicating tort claims by taxpayers against tax officials in a coherent and consistent manner. These suggestions are not intended as a comprehensive blueprint for reform, but simply as a primer for much-needed consideration and debate among policy makers.⁸

5 See Bevacqua, supra note 1; and Amir A. Fazel, "Suing the Canada Revenue Agency in Tort" (2019) 67:3 *Canadian Tax Journal* 581-611, especially at 609-10.

6 See John Bevacqua, "A Detailed Assessment of the Potential for a Successful Negligence Claim Against the Commissioner of Taxation" (2008) 37:4 *Australian Tax Review* 241-60. The term "Australasia" is used for convenience in this article to refer collectively to Australia and New Zealand.

7 Hence, the analysis in this article is organized according to the "common controversy" themes that have emerged in the case law, rather than by a more traditional chronological tracing and exposition of the progress of the cases through the courts or by classification of the cases within the various categories of negligence claims to which they relate.

8 In this article, the reference to "policy makers" is intended to encapsulate not only the legislatures in each jurisdiction, but also the judiciary, tax authorities, and other tax system stakeholders who might be directly or indirectly involved in making or influencing the development of policies and procedures in the areas of taxation and tax administration.

COEXISTING COMMON-LAW AND PUBLIC DUTIES

A significant and recurring unresolved issue exposed in Canadian cases and corresponding judicial consideration of taxpayer negligence claims involving tax officials in other common-law jurisdictions is the question of whether tax officials owe coexisting common-law duties and public statutory duties. To a large extent, the answer in each case turns on the specific statutory scheme in the relevant jurisdiction. However, the general challenges that judges face in addressing this matter are broadly comparable.

The Canadian Position

In Canada, the issue of whether tax officials owe coexisting common-law duties and public duties has arisen in the context of applying the *Anns-Cooper* test⁹ for determining whether to impose a duty of care in novel scenarios. The *Anns-Cooper* test has two stages. As described by Fisher J in *Leighton v. Canada (Attorney General)*, these are “(1) whether the relationship between the parties justifies the imposition of a duty of care on the defendant; and (2) whether there are residual policy considerations that militate against recognizing a novel duty of care.”¹⁰

Prior to *Leroux*, all Canadian taxpayer negligence claims against the CRA failed to satisfy the first stage of the *Anns-Cooper* test.¹¹ The biggest obstacle had typically been demonstrating a sufficiently proximate relationship between the taxpayer and the CRA to warrant imposing a common-law duty of care.¹² This was largely due

9 Named after the Supreme Court of Canada’s interpretation, in *Cooper v. Hobart*, 2001 SCC 79, of the UK House of Lords’ approach to determining when a novel duty of care can be established, as set out in *Anns v. Merton London Borough Council*, [1977] UKHL 4.

10 2012 BCSC 961, at paragraph 50. In *Leroux*, supra note 2 at paragraphs 275-76, Humphries J elaborated on the two stages of the *Anns-Cooper* test as follows:

In the proximity inquiry, the legislative scheme is important . . . as it may foreclose a private law duty of care. If the legislation is not determinative, the relationship between the parties, both as described in the legislation and based on the facts of the case, will be examined to determine if proximity has been established.

If the circumstances justify the imposition of a prima facie duty of care, the inquiry then moves to broader residual policy concerns to see if those concerns justify the negation of the prima facie duty of care. At this stage, the burden, which has rested on the plaintiff to show the *prima facie* duty of care, shifts to the defendant.

11 Notable examples include *Leighton*, supra note 10; *Canus v. Canada Customs*, 2005 NSSC 283; 783783 *Alberta*, supra note 1; and *McCreight*, supra note 2 (although this case did not ultimately proceed to a full trial on the negligence action).

12 Stage 1 of the *Anns-Cooper* test involves considering both proximity and foreseeability of harm. The latter usually poses little difficulty. *Leroux*, supra note 2, was no exception, with the CRA conceding that its actions could cause foreseeable harm to taxpayers such as the plaintiff. Hence, as in all the preceding tax cases, the court’s discussion of the application of the test centred on proximity and public policy (see *ibid.*, at paragraphs 271-309).

to the prevailing judicial view that the Income Tax Act¹³ (ITA) precludes the possibility that private-law duties to taxpayers could coexist with the CRA's public-law duties. Comments such as the following, by Hood J in *Canus*, had typically been favoured:

[A]ny duty owed by [the CRA auditor] was to the Minister of National Revenue whose duty is owed in turn to Parliament and to all taxpayers generally. Therefore, there is no duty of care owed to an individual taxpayer under the *Income Tax Act*.¹⁴

Prior to *Leroux*, few judges had been prepared to qualify this statement.¹⁵

In contrast, in *Leroux*, the BC Supreme Court concluded that CRA employees must conduct themselves as reasonably careful professionals, stating, "There is nothing in the statutory scheme of the *Income Tax Act* that would suggest otherwise."¹⁶ Further, CRA public tax collection duties do not conflict with "a duty to take reasonable care in assessing taxes, auditing taxpayers, and particularly in imposing penalties."¹⁷

The court justified this stance by concluding that the CRA is not a "regulator."¹⁸ In cases involving regulators, Canadian courts usually consider that the legislative scheme precludes the possibility of any private-law duties existing alongside the regulator's public duties. In effect, regulatory functions are considered to be immune policy-making functions.¹⁹ In *Leroux*, the court concluded that "the individual employees of CRA are not regulators. Their duties are operational."²⁰

13 Income Tax Act, RSC 1985, c. 1 (5th Supp.), as amended.

14 *Canus*, supra note 11, at paragraph 87. Similar comments were made by Fisher J in *Leighton*, supra note 10, at paragraph 54.

15 For exceptions, see, for example, *Foote*, supra note 1, at paragraph 41; 783783 *Alberta*, supra note 1, at paragraph 45; and *City Centre Properties Inc. v. Canada* (1994), 70 FTR 222, at 239-40.

16 *Leroux*, supra note 2, at paragraph 303.

17 *Ibid.*, at paragraph 306.

18 *Ibid.*, at paragraph 280.

19 This approach accords with the Supreme Court of Canada's decision in *Cooper*, supra note 9. *Cooper* involved allegations of negligence against the registrar of mortgages for failing to oversee the conduct of a broker that it had licensed, and as a result causing the plaintiff investors to suffer economic losses. The Supreme Court held, *ibid.*, at paragraph 44, that the registrar did not owe the plaintiff investors a duty of care. The court held that, as a regulator, the registrar's duty was to the public as a whole, not to any individual investors.

20 *Leroux*, supra note 2, at paragraph 280. The reference to "operational" duties is an allusion to the policy/operational dichotomy—a traditional distinction between unassailable policy decisions of public bodies and operational activities of those bodies that are properly considered capable of giving rise to private-law duties of care. For commentary on the issues surrounding the application of the policy/operational distinction, see Paul Daly, "The Policy/Operational Distinction in Canadian Tort Law: *R. v. Imperial Tobacco Canada Ltd.*", 2011 SCC 42, [2011] 3 S.C.R. 45," *CanLII Connects*, October 28, 2014 (<http://canliiconnects.org/en/commentaries/30413>).

This classification of CRA statutory duties as “operational” rather than “regulatory” has received mixed support in subsequent cases. In *Ludmer c. Attorney General of Canada*,²¹ the Quebec Superior Court broadly followed *Leroux*, characterizing CRA audit functions as not constituting “true core policy acts”²² and hence as being capable of supporting coexisting common-law and public duties. As noted above, in *Leroux*, Humphries J described CRA employee duties as operational on the basis that the CRA is not a regulator endowed with core discretionary policy-making powers. The Quebec Superior Court took a similar stance in *Ludmer*, describing CRA functions as follows:

The CRA is not charged with exercising a legislative or regulatory power or setting tax policy—those are matters for the Finance Department. The CRA’s role is limited to collecting the tax that is due under the *ITA*.²³

The court elaborated, concluding that the CRA does not ordinarily exercise discretionary power; rather,

its mandate is to calculate the tax due, no more and no less. However, it may exercise discretionary powers when it decides, for example, to issue a demand for information.²⁴

In contrast, in *Grenon v. Canada Revenue Agency*,²⁵ the Alberta Court of Appeal did not rely on any distinction between regulators and non-regulatory bodies to determine the issue. Instead, the court determined that private-law duties cannot be

21 2018 QCCS 3381. *Ludmer* was a case decided according to the laws applicable in Quebec.

Hence, while the court accepted that *Leroux* stands as authority for the existence of a duty of care owed by the CRA to taxpayers (and thus this case is instructive for present purposes), the court dismissed reliance on that line of authority in *Ludmer*, characterizing it as pertaining to “common law notions of duty of care, proximity, foreseeability and public policy that have no application in Québec”: *Ludmer*, supra, at paragraph 141.

22 *Ludmer*, supra note 21, at paragraph 144, citing the Supreme Court of Canada’s characterization of the limits of Crown immunity from suit in *R v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at paragraphs 87-90.

23 *Ludmer*, supra note 21, at paragraph 146.

24 *Ibid.*, at paragraph 147. This statement indicates an appreciation of some of the nuances of the distinction between policy and operational activities, albeit falling far short of the detailed consideration in *Carboun*, discussed below (see infra note 125 and the accompanying text).

25 2017 ABCA 96. The case involved an extensive audit of the plaintiff and associated trusts, which ultimately resulted in the issuance of tax assessments and penalties amounting to almost \$500 million. The plaintiff claimed that the CRA had breached its duty of care to him in carrying out the audit by demanding access to a large number of irrelevant, publicly available, or privileged documents; unreasonably requesting information; and issuing numerous settlement proposal letters without prior notice.

owed by the CRA to taxpayers because such duties are incompatible with the “inherently adverse” relationship between taxpayers and the CRA created by the ITA.²⁶

The reasoning in *Grenon* was applied by the Ontario Superior Court of Justice in *McCreight*.²⁷ A broadly similar approach to *McCreight* and *Grenon* was adopted by the Supreme Court of Nova Scotia in *Canus*, in which Hood J described the relationship between tax officials and taxpayers as one of “inherently opposing interests.”²⁸ Hood J elaborated, describing taxpayers as being motivated to minimize their taxes and tax officials as being charged with the responsibility of ensuring that all taxes legally owing are collected.²⁹

The argument is that these inherently opposing interests are created by the statutory scheme under the ITA.³⁰ Therefore, imposing a duty of care would contradict this statutory intent. This argument broadly echoes the reasoning in *City Centre Properties Inc. v. Canada*,³¹ in which the relationship between the CRA and taxpayers was characterized as a creditor-debtor relationship—a relationship intuitively incongruous with any common-law duties of care.³²

26 *Grenon*, supra note 25, at paragraph 25. This characterization of the relationship between CRA officers and taxpayers as “inherently adverse” echoes the comments in *Leighton*, supra note 10, at paragraph 54: “CRA and taxpayers have opposing interests. The relationship is not one where CRA auditors should be responsible for protecting taxpayers from losses arising from their assessments.”

27 *McCreight*, supra note 2. Specifically, Patterson J accepted that the CRA and its prosecutors were in an “inherently adversarial relationship with the subjects of the investigation . . . and therefore, this would be contrary to there being a proximity such that would create a duty of care”: *ibid.*, at paragraph 62.

28 *Canus*, supra note 11, at paragraph 73.

29 *Ibid.*

30 The inherently opposing interests argument advanced by Hood J simply reflects the fact that taxation is fundamentally a state-sanctioned harm imposed on citizens in the form of an “enforced contribution exacted pursuant to legislative authority”: *Gunby v. Yates*, 214 Ga. 17 (1958), at 19. Necessarily, therefore, in administering the provisions of taxation statutes, tax authorities will adversely affect the interests of individual taxpayers, and opposing interests will arise.

31 [1993] FCJ no. 1260.

32 According to McKay J in *City Centre Properties*, supra note 15, at 239-40, to accord taxpayers an ability either to challenge or to counteract an assessment by common-law action in negligence could only subvert the creditor-debtor relationship between the commissioner and the taxpayer. This reasoning has been cited both in New Zealand and in Australia to support the proposition that a duty of care cannot coexist with the duties that tax officers owe to the Crown. For New Zealand examples, see *Ch'elle Properties (NZ) Ltd v. Commissioner of Inland Revenue*, 2005 NZHC 190; and *L R McLean & Co Ltd v. Commissioner of Inland Revenue*, [1994] 16 NZTC 11. For an Australian example, see *Farab Custodians Pty Limited v. Commissioner of Taxation (No 2)*, 2019 FCA 1076.

A more accommodating approach was taken by the Alberta Court of Appeal in *783783 Alberta*.³³ In that case, the court was prepared to concede that “[t]he relationship between the tax assessors and any taxpayer is primarily to ensure that the taxpayer is fairly assessed. The tax assessors also have a general duty to the government they work for, and indirectly to the general public.”³⁴ This more accommodating approach is consistent with cases such as *Gordon*³⁵ and *Neumann*³⁶ in which, in the context of the tort of negligent investigation, judges have accepted that despite the adversarial nature of the relationship between the taxpayer and CRA auditors, a duty of care can arise.³⁷

In *Gordon*, Barnes J affirmed that there were “no identifiable conflicts between the existence of a private law duty of care and an over-arching public duty beyond those that were addressed and dismissed in *Hill*.”³⁸

Australasian Approaches

In Australia and New Zealand, despite the relatively small number of cases dealing with the issue, judicial attention has regularly turned to the question of whether tax authorities owe coexisting public and private duties to taxpayers. However, in both jurisdictions, courts have consistently rejected this possibility. In Australia, this approach has developed despite the views expressed by the Australian High Court almost a century ago in *Moreau v. Federal Commissioner of Taxation*, in which

33 *783783 Alberta*, supra note 1. This case concerned an error by the CRA in allowing a non-resident business competitor of the plaintiff to claim deductions that were available only to Canadian residents. The plaintiff alleged that this error resulted in the loss of its competitive advantage as a Canadian resident.

34 *Ibid.*, at paragraph 45.

35 *Gordon*, supra note 2.

36 *Neumann*, supra note 4.

37 For further discussion of *Neumann* and *Gordon*, see infra notes 55 and 57-58, and the accompanying text. The adversarial nature of the relationship between tax officials carrying out criminal investigations and the taxpayers subjected to those investigations was conceded by the Supreme Court of Canada in *R v. Jarvis*, 2002 SCC 73, at paragraph 2, where the court observed that “there is an adversarial relationship that crystallizes between the taxpayer and the tax officials when the predominant purpose of an official’s inquiry is the determination of penal liability.”

38 *Gordon*, supra note 2, at paragraph 159. The reference to *Hill* is to the Supreme Court of Canada’s decision in *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, where the court held that a duty of care can be imposed on police in cases of negligent criminal investigation of criminal suspects—effectively affirming the existence of a tort of negligent investigation. This case and its application in *Gordon* and other Canadian tax cases is discussed at length below; see infra notes 52-65 and the accompanying text. As far as the applicability of *Hamilton-Wentworth* is concerned, the approach of Barnes J echoes that of Hughes J in 2013, who dismissed the appeal by the defendants against the prothonotary determination refusing to strike out the plaintiffs’ negligence claim: *Gordon v. Canada*, 2013 FC 597, discussed further below in the text accompanying note 65.

the duties of the Australian commissioner of taxation were described as being “to administer the Act with solicitude for the Public Treasury *and with fairness to taxpayers*.”³⁹

In stark contrast, the approach of the New South Wales Supreme Court in *Harris v. Deputy Commissioner of Taxation* accurately encapsulates the more recent Australian judicial attitude:

There is no basis upon which to conclude that there is a tort liability in the Australian Taxation Office or its named officers towards a taxpayer arising out of the lawful exercise of functions under the Income Tax Assessment Act.⁴⁰

The approach in *Harris* is consistent with rare attempts to impose other private-law duties on Australian tax officials. For example, in *Lucas v. O’Reilly*, a case involving allegations of tortious breach of statutory duty by the Australian commissioner (also unsuccessfully pleaded in *Harris*), the Australian Federal Court cursorily rejected the taxpayer’s submissions, stating:

If the cause of action relied upon by the plaintiff is based upon a breach of statutory duty, the plaintiff must show . . . that the statute creating the duty confers upon him a right of action in respect of any breach. . . . However, it is, I think, clear that the defendant owes the plaintiff no such duty. The duty of the Commissioner is owed to the Crown.⁴¹

The judicial reasoning is strikingly similar in Australian cases seeking to make out equitable estoppel claims against the commissioner in order to prevent the commissioner from resiling from previous approaches or representations made to taxpayers. For example, in *AGC (Investments) Ltd. v. Federal Commissioner of Taxation*,⁴² Hill J dismissed the taxpayer’s estoppel action against the commissioner seeking to prevent the commissioner from assessing profits from investment activities of the taxpayer that the commissioner had been aware of for many years and had never previously sought to assess. Hill J reasoned that “[t]he *Income Tax Assessment Act* imposes obligations on the Commissioner and creates public rights and duties, which the application of the doctrine of estoppel would thwart.”⁴³ Similar reasoning was applied by Kitto J in *Federal Commissioner of Taxation v. Wade*, who observed, “No conduct on the part of the Commissioner could operate as an estoppel against the operation of the Act.”⁴⁴

39 1926 HCA 28, at paragraph 4 (emphasis added).

40 2001 NSWSC 550, at paragraph 12.

41 79 ATC 4081, at 4085.

42 91 ATC 4180.

43 *Ibid.*, at 4195.

44 (1951), 84 CLR 105, 117.

Consequently, the commissioner has been estopped in Australia only in extraordinary cases in which the commissioner has sought to resile from an explicit and clear commitment made to an individual taxpayer that is tantamount to a contractual commitment, raising no questions of limits on the exercise of statutory powers or public duties.⁴⁵

In New Zealand, the courts have been equally unequivocal in rejecting the possibility of common-law duties coexisting with tax officials' public duties. The prime example is *Cb'elle*.⁴⁶ In this case, the NZ Court of Appeal affirmed the "undesirability of imposing a duty of care on the Commissioner, given the elaborate statutory construct within which the Commissioner and taxpayers interrelate,"⁴⁷ and struck out the taxpayer's negligence action.⁴⁸

The only hint of a potential softening of this judicial approach in Australasia arose very recently in *Farab*,⁴⁹ in which the Australian Federal Court rejected the Australian commissioner's interlocutory application to strike out the taxpayer's negligence claim. In *Farab*, the commissioner, consistent with the general reasoning in *Harris* and *Lucas*, contended that the commissioner's only duty is to the Crown and "there is no reason to impose on him a common law duty of care."⁵⁰ Despite

45 Cases in which the taxpayer has been successful in having estoppel-like responsibilities imposed on the commissioner of taxation are *Cox v. Deputy Federal Commissioner of Land Tax, Tasmania*, [1914] HCA 3; and *Queensland Trustees Ltd. v. Fowles*, [1910] HCA 51. For a detailed exposition of these cases, see Cameron Rider, "Estoppel of the Revenue: A Review of Recent Developments" (1994) 23:3 *Australian Tax Review* 135-52.

46 *Cb'elle*, supra note 32.

47 *Ibid.*, at paragraph 56.

48 Interestingly, in so doing, the court made direct reference to Canadian authority, expressly applying the reasoning of McKay J in *City Centre Properties*, supra note 15.

49 *Farab*, supra note 32. The facts of this case are relatively straightforward. Essentially, the plaintiff, Farah, was the victim of the fraudulent actions of its former tax agent ("Strathfield Tax") and the principal of Strathfield Tax, Mr. Kennedy. Mr. Kennedy prepared and lodged business activity statements, purportedly on behalf of the plaintiff, which generated substantial tax refunds due to the plaintiff. However, unknown to the plaintiff, Mr. Kennedy nominated a bank account held by a company that he controlled ("Vias") into which the refunds due to the plaintiff were paid, effectively perpetrating a fraudulent misappropriation of the tax refunds. The genesis of the specific allegations of misconduct and negligence against the commissioner stemmed from the fact that the tax officers had been auditing both Strathfield Tax and the plaintiff during much of the period in which the refunds were continuing to be erroneously paid into the Vias bank account (2012-2014). The plaintiff asserted that these payments continued notwithstanding knowledge acquired by the tax officers in the process of carrying out the audit of Strathfield Tax, putting them on notice of the misuse or possible misuse of that account.

50 *Farab*, supra note 32, at paragraph 37. See also *Harris*, supra note 40, at paragraph 12, reproduced in full in the text above at note 40. In *Farab*, supra note 32, at paragraph 74, the commissioner, citing *Deputy Federal Commissioner of Taxation v. Brown*, 1958 HCA 2, at paragraph 4, also submitted that imposing a duty of care would be inconsistent with the assertion that the relevant legislative scheme constituted a "complete and exhaustive code

expressing some sympathy with this viewpoint,⁵¹ Wigney J ultimately reasoned that there were insufficient grounds to conclude that in the specific circumstances pleaded in *Farab*, “the existence of a duty of care . . . is necessarily inconsistent or incompatible with the statutory scheme, or would impose impossible or prohibitive burdens on the Commissioner in the context of the statutory scheme.”⁵² It remains to be seen whether this more nuanced approach will carry through to any future substantive hearing of *Farab*.

TAX AUDIT AND INVESTIGATION DUTIES

Some of the most intractable debates evident in recent Canadian and Australasian judicial consideration of taxpayer negligence claims against tax officials pertain to whether and to what extent any duty of care can be imposed on tax officials conducting tax audits or other investigatory functions.

The Canadian Position

In Canada, judicial discussion has centred on whether duties are owed only in tax audits involving criminal investigation or potential criminal sanction. This criminal/civil investigation distinction is significant since the Supreme Court of Canada determined in *Hamilton-Wentworth*⁵³ that a duty of care can be imposed on police in cases of negligent criminal investigation of criminal suspects—effectively affirming the existence of a tort of negligent investigation. In *Leroux*, the court relied on *Hamilton-Wentworth* and concluded that a CRA audit involving no criminal investigation can trigger a duty of care.

This is not the first time that *Hamilton-Wentworth* has been applied in a context other than a criminal investigation.⁵⁴ Prior to *Leroux*, it had also been applied in a tax case against the CRA involving an audit of the taxpayer where there was no criminal allegation or criminal investigation against the plaintiff, but merely against an

of the rights and obligations of the commissioner and other officers of his department to members of the general public who are subject to its provisions and of those members of the general public to his department.” It is worth noting that *Brown* concerned the High Court’s dismissal of a claim by the commissioner that he could pursue an equitable action against the beneficiary of an estate for a tax debt of the deceased that had not been assessed as owing until after the estate had been distributed. Hence, the comments from *Brown* sought to be relied on by the commissioner in *Farab* related to restricting the powers of the commissioner, rather than limiting the rights of taxpayers.

51 See *Farab*, supra note 32, at paragraph 75.

52 *Ibid.*, at paragraph 89.

53 *Hamilton-Wentworth*, supra note 38.

54 See, for example, *Correia v. Canac Kitchens*, 2008 ONCA 506. In this case, the Ontario Court of Appeal applied the tort of negligent investigation established in *Hamilton-Wentworth* to the case of negligent investigation by a firm of private investigators retained to investigate employees. The court observed, *ibid.*, at paragraph 48, that “on a policy level, the case for recognizing a duty of care in respect of private investigation firms may be stronger than for the police.”

unrelated associate of the plaintiff.⁵⁵ The reasoning in *Leroux* went further, however, applying *Hamilton-Wentworth* in a tax audit context involving no criminal allegation against anybody. Humphries J reasoned that the duty established in *Hamilton-Wentworth* applied in *Leroux* because of the “extended and personal relationship between the auditors and the taxpayer” and “the foreseeably huge and devastating effects” of the audit on the taxpayer.⁵⁶

The underlying logic is that in such situations there is no reason to distinguish between the duty and standard of care owed by a police investigator to a suspect and that owed by a CRA auditor to an audit subject.⁵⁷ Similar reasoning was applied in *Gordon*, in which the Federal Court drew an analogy between subjects of tax audits and situations involving police and a suspect, positing that in both instances the subjects of the investigation have “critical personal interests . . . engaged” in the conduct of the investigation and have “an expectation that the investigation would be conducted in a competent manner.”⁵⁸

The clear implication of the *Leroux* and *Gordon* approaches is that CRA auditors can, through their interactions with taxpayers during the audit process, place themselves in a situation in which they will owe duties of care similar to those owed by criminal investigators, as recognized in *Hamilton-Wentworth*. According to the reasoning in *Leroux*, this risk is heightened in cases in which the outcome of the audit includes imposing huge and potentially devastating penalties on the taxpayer.

The approach taken in *Leroux* and *Gordon* remains contentious in Canada. It was expressly rejected by the Queen’s Bench of Alberta in *Grenon v. Canada Revenue Agency*.⁵⁹ In the subsequent appeal hearing, the Alberta Court of Appeal distinguished

55 *Neumann*, supra note 4, where the BC Court of Appeal appeared to accept that the tort of negligent investigation applied in the case of the execution of a warrant under the ITA. *Neumann* involved an allegation that the CRA had negligently obtained and executed a search warrant to search the plaintiff’s home as part of a tax-evasion investigation of a business associate of the plaintiff. The court was prepared to proceed on the basis that the CRA owed a duty of care to the plaintiff third party, only finding against the plaintiff for failure to establish a breach of that duty.

56 *Leroux*, supra note 2, at paragraph 301.

57 This was a significant justification for Humphries J’s deviation from previous cases in which taxpayers subjected to negligent audits failed to establish the existence of a duty of care owed to them by the CRA. Specifically, in *Leroux*, supra note 2, at paragraph 300, Humphries J distinguished *Canus* (supra note 11), *783783 Alberta* (supra note 1), and *Leighton* (supra note 10) on this basis.

58 *Gordon*, supra note 2, at paragraph 158. It should be noted, however, that *Gordon* was a case involving serious criminal allegations against the taxpayers being audited. Specifically, the chartered accountant plaintiffs and their accounting firm were accused of fraud by the CRA for the methodology that they employed in claiming research and development tax credits for their clients. As a result, the Crown pursued criminal charges against the plaintiffs, which were ultimately dropped after almost seven years.

59 2016 ABQB 260. The plaintiff taxpayer appealed this Queen’s Bench determination, and the appeal was heard in 2017 by the Alberta Court of Appeal (*Grenon*, supra note 25). The appeal

Hamilton-Wentworth,⁶⁰ ruling that a duty of care by the CRA could arise only in the context of tax audits and investigations involving possible criminal sanction.⁶¹

It is unclear which approach will ultimately prevail (although the most recent superior court case is *Gordon*). It is also possible that an altogether different approach will emerge to resolve the issue. For example, tax audits might be excluded from the proper scope of the duty established in *Hamilton-Wentworth* simply because an audit is not an “investigation” at all. There is authority from the Supreme Court of Canada for this characterization of tax audits. Specifically, in *Jarvis*,⁶² the Supreme Court distinguished an audit (a process leading to the determination of the income tax owed by the taxpayer) from the exercise of investigative power (a process leading to the determination of the potential penal liability of the taxpayer).⁶³ It could therefore be argued that if the predominant purpose of an audit of a taxpayer’s affairs is not to determine whether a penal liability should be imposed,⁶⁴ such an audit cannot be considered to be an investigation—and, by extension, a *Hamilton-Wentworth*

was unsuccessful, and the negligence action was struck out. Notwithstanding the comprehensive rejection of the plaintiff’s arguments, the court left the door open to the prospect that a negligence claim could be sustainable against the CRA in future cases. Specifically, the court cited the wide range of cases to date involving strike-out applications against such claims at the pleading stage, concluding that “[n]one of the striking cases is determinative”: *Grenon*, supra note 25, at paragraph 15.

- 60 Specifically, the court observed, “*Hill v Hamilton-Wentworth* involved an exceptional set of circumstances. Moreover, there were particular considerations relevant to proximity and policy applicable to the relationship in that case which are not present here. Those included the likelihood of imprisonment, the legal duties owed by the police under the *Charter*, and the importance of balancing the need for police to be able to investigate effectively with the protection of the fundamental rights of a suspect or accused person.” *Grenon*, supra note 25, at paragraph 22.
- 61 In an unsuccessful attempt to echo the *Leroux* characterization of the relationship between taxpayers and the CRA, the plaintiff had asserted that “as a result of the Audit, the CRA and the CRA Personnel were ‘in a close and direct relationship’ to Grenon and knew that ‘carelessness by them would likely have a close, direct and monumental effect’ on Grenon”: *Grenon*, supra note 59 (QB), at paragraph 16.
- 62 *Jarvis*, supra note 37.
- 63 *Ibid.*, at paragraph 2. *Jarvis* is not mentioned in any of the cases subsequent to *Leroux* with the exception of *Agence du revenu du Québec c. Groupe Enico inc.*, 2016 QCCA 76, at paragraph 85, where *Jarvis* was raised in the context of delineating the scope of the powers of Revenu Québec.
- 64 The Supreme Court in *Jarvis*, supra note 37, at paragraph 94, proposed a series of factors to assist in determining the predominant purpose of an audit, such as asking the following questions:
- “Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?”
 - “Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer’s *mens rea*, is the evidence relevant only to the taxpayer’s penal liability?”
 - “Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation?”

duty does not arise. There is no evidence of application of the *Jarvis* approach in the negligence cases to date. However, it is clear that, as Hughes J held in *Gordon*, with respect to the defendants' appeal against the prothonotary's refusal to strike out the plaintiff's claim, "[t]he case law is clearly evolving in this area, and the last word has yet to be written by an appellate court."⁶⁵

A further unresolved matter recurring in Canada is the question of whether and in what circumstances a tax official has any duty to warn taxpayers of potential harm identified in carrying out audits, investigations, or other checks of taxpayer information. In *Scheuer*,⁶⁶ the taxpayers claimed that the CRA was negligent in failing to warn them of risks involved in their investment in a tax shelter donation program that was ultimately found to be a sham.⁶⁷ The Federal Court of Appeal rejected the taxpayers' claim on the basis that to impose a duty of care in this case would "effectively create an insurance scheme for investors at great cost to the taxpaying public."⁶⁸ The decision in *Scheuer* is unsurprising. Actions that seek to impose duties on public officials to warn citizens of potential economic risks are notoriously difficult to prove in Canada. The Supreme Court of Canada's decisions in *Cooper*⁶⁹ and *Imperial Tobacco*⁷⁰ present obstacles for taxpayers attempting to establish a duty to warn.

Nevertheless, attempts to create the duty continue. For example, in *Easton v. Canada (Revenue Agency)*,⁷¹ the Federal Court held that CRA officials are under no

65 *Gordon*, supra note 38 (FC), at paragraph 39. The defendants were unsuccessful, and their appeal was dismissed by Hughes J.

66 *Scheuer*, supra note 1. The Federal Court of Appeal overturned the Federal Court decision of Diner J, striking out the plaintiffs' negligence claim (*Scheuer v. Canada*, 2015 FC 74). At the Federal Court, the defendants (the CRA and the attorney general of Canada) had failed in their first attempt to have the taxpayers' negligence claim struck out.

67 For a brief summary of the facts by Diner J at first instance, see *Scheuer*, supra note 66 (FC), at paragraph 4.

68 *Scheuer*, supra note 1, at paragraph 43, citing *Cooper*, supra note 9, at paragraph 55. The court also concluded that "this policy consideration applies to a duty of care to warn against investment in an improvident or suspect tax shelter . . . consistent with Parliament's intent that taxpayers should participate in a tax shelter at their own peril, not at the peril of Canadian taxpayers generally": *Scheuer*, supra note 1, at paragraph 44.

69 *Cooper*, supra note 9.

70 *Imperial Tobacco*, supra note 22, concerned a motion to strike out tobacco company allegations against the Canadian government of negligent misrepresentations and negligent design and failure to warn, based on alleged duties of care to warn the public of the risks posed by smoking "mild" cigarettes. The Supreme Court allowed the strike-out application on the basis that no such duty of care was owed by the Canadian government, and the plaintiff's claim therefore had no reasonable prospect of success.

71 2017 FC 113. The case was factually straightforward: the taxpayer had made a mistake in his tax return in claiming a deduction for non-deductible interest payments. The taxpayer argued that the mistake "was so obvious and important that, although he did not see it, the CRA should have seen it, and immediately correct [sic] it, rather than process his tax returns as submitted": *ibid.*, at paragraph 5.

duty to detect obvious mistakes that taxpayers have made in their tax returns. Similarly, in *Herrington v. Canada (National Revenue)*,⁷² the taxpayer argued that the duty of care that the CRA owes to Canadian taxpayers, as established in *Leroux*, extends to an obligation to inform taxpayers of income statement documentation missing from income tax returns and a duty to warn taxpayers before levying penalties. Again, the taxpayer's argument was rejected by the Federal Court.

Australasian Approaches

There is no recognized tort of negligent investigation in Australia or New Zealand equivalent to that recognized by the Supreme Court of Canada in *Hamilton-Wentworth*. In fact, the Australian High Court expressly rejected the existence of such a duty in *Tame v. New South Wales*.⁷³ Similarly, in *Gregory v. Gollan*, the High Court of New Zealand determined “that no such duty exists.”⁷⁴ The Australian and NZ approaches echo the UK courts' position. In *Hill v. Chief Constable of West Yorkshire*,⁷⁵ the House of Lords held that investigative bodies do not owe a duty of care to the subject of an investigation.⁷⁶ Following this reasoning, the Australian High Court has held:

[W]hen public authorities, or their officers, are charged with the responsibility of conducting investigations, or exercising powers, in the public interest, or in the interests of a specified class of persons, the law would not ordinarily subject them to a duty to have regard to the interests of another class of persons where that would impose upon them conflicting claims or obligations.⁷⁷

Although there is no evidence of any shift away from this general approach to the private-law duties of police and other investigatory bodies, the interlocutory

72 2016 FC 953.

73 2002 HCA 35. The court reasoned, *ibid.*, at paragraph 231, “It is unlikely that an investigating police officer owes a duty of care to a person whose conduct is under investigation.” Other Australian authorities for the proposition that police investigators owe no duty to suspects include *Courtney v. State of Tasmania*, 2000 TASSC 83; *Wilson and Ors v. State of New South Wales*, 2001 NSWSC 869, at paragraph 63; *Gruber bbnf Gruber v. Backhouse, the Commonwealth of Australia and Cotterill*, 2003 ACTSC 18, at paragraph 41 (AusLII); and *Duke v. State of New South Wales and Ors*, 2005 NSWSC 632, at paragraph 23.

74 2006 NZHC 426, at paragraph 16.

75 1987 UKHL 12.

76 The reasoning in *West Yorkshire* stems from concerns that imposing such a duty “would give rise to conflicting obligations, or would be contrary to public policy because it would cause the body to adopt an overly defensive approach or would otherwise impede the carrying out of the body's primary functions.” See *Farah*, *supra* note 32, at paragraph 90.

77 *Sullivan v. Moody*, 2001 HCA 59, at paragraph 60. Other Australian cases in which *West Yorkshire* has been applied include *State of NSW v. Tyszyk*, 2008 NSWCA 107; *Cran v. State of New South Wales*, 2004 NSWCA 92; *Rush v. Commissioner of Police*, 2006 FCA 12; and the cases cited in note 73, *supra*.

decision of the Australian Federal Court in *Farab* indicates that the matter may prove relevant in determining future negligence claims against Australian tax officials. Specifically, Wigney J indicated a willingness to distinguish the facts and circumstances of the plaintiff's proposed negligence case from the Australian cases concerning duties of care owed by police and other investigatory bodies.⁷⁸

Serendipitously, the law in Canada and that in Australasia may ultimately converge on the question of when a duty of care arises for tax officials carrying out audits involving no criminal allegations against the taxpayer. In Canada, the taxpayer's path is to extend the application of the Supreme Court of Canada's reasoning in *Hamilton-Wentworth* by drawing an analogy between criminal investigations and tax audits. In Australia and New Zealand, the taxpayer's path is to disclaim any such analogy.

Another unresolved issue in Australasia is the question of whether and in what circumstances tax auditors owe a duty to warn taxpayers or third parties of potential harm identified as part of an audit or investigation into the affairs of a taxpayer. In Australia, this question is also likely to be considered in any future substantive hearing of *Farab*. Wigney J has already pre-empted the likely starting point for resolving the issue, conceding that

as a general proposition, . . . it is unlikely to be the case that, when tax officers are undertaking investigations into the tax liabilities of a particular taxpayer, they owe a general duty to all other taxpayers, or other third parties in respect of the conduct of the investigation.⁷⁹

However, Wigney J was prepared to concede that particular facts might support the recognition of a common-law duty of care to persons potentially affected by harm identified during a tax audit. In Australia, the matter is likely to be resolved by assessing the degree of "control" of the tax officials over the relevant harm. The significance of control as a "salient feature"⁸⁰ for determining the taxpayer's claim was explained by Wigney J in *Farab*, citing the Australian High Court:

[O]n occasions, the powers vested by statute in a public authority may give it such a significant and special measure of control over the safety of the person or property of citizens as to impose upon the authority a duty of care. This may oblige the particular authority to exercise those powers to avert a danger to safety or to bring the danger to

78 *Farab*, supra note 32, at paragraph 93.

79 *Ibid.*, at paragraph 92.

80 The "salient features" approach to determining whether to impose a duty of care in novel cases involving statutory authorities has a long history in Australia. In 1976, in *Caltex Oil (Australia) Pty Ltd v. Dredge "Willemstad"*, 1976 HCA 65, at paragraph 46, Stephen J isolated a number of features that combined to constitute a sufficiently close relationship to give rise to a duty of care. However, the significance of this salient features approach was more recently affirmed by the High Court in cases such as *Crimmins v. Stevedoring Industry Finance Committee*, 1999 HCA 59; *Graham Barclay Oysters Pty Ltd v. Ryan*, 2002 HCA 54; and *Sullivan*, supra note 77.

the knowledge of citizens otherwise at hazard from the danger. In this regard, the factor of control is of fundamental importance.⁸¹

In determining the extent of control by the commissioner of taxation over the risk of harm to the plaintiff and, hence, the duty or otherwise to warn the taxpayer of that risk, Australian courts are likely to be especially careful to ensure that any finding is confined to the particular facts of the case. Thus, even if a taxpayer were to succeed, there is likely to be little scope to infer from that success the existence of any broader duty to warn.

RESIDUAL POLICY CONCERNS

Residual policy concerns are significant factors for judicial consideration in taxpayer negligence claims against tax officials. Courts have raised concerns that imposing a duty of care might expose tax authorities to large and indeterminate liability by opening the floodgates to litigation⁸² or unwittingly generate a range of overly defensive tax officer responses, or “chilling effects.”⁸³ The approaches to dealing with these concerns in Canada and Australasia have been far from uniform both within and across the various jurisdictions.

81 *Farah*, supra note 32, at paragraph 45, citing *Brodie v. Singleton Shire Council*, 2001 HCA 29, at paragraph 102.

82 The indeterminate liability concern encapsulates the desire to avoid “liability in an indeterminate amount for an indeterminate time to an indeterminate class.” This is the oft-quoted summary of the indeterminacy issue by a US jurist, Cardozo J, in *Ultramares Corporation v. Touche*, 255 NY 170 (NYCA 1931), at 179. One commentator has described the indeterminacy concern and its specific relevance to the duty-of-care question in the following terms: “One of the driving forces behind rejecting the existence of a duty of care has been the fear that it may expose a defendant to an indeterminate liability. Indeterminacy refers to not finding a duty of care when the liability flowing from that duty cannot be realistically calculated. Whether the liability is indeterminate will be determined by looking at whether the defendant knew or ought to have known of the number of claims and the nature of those claims.” Michael Legg, “Negligent Acts and Pure Economic Loss in the High Court” (2000) 12:1 *Insurance Law Journal* 101-10, at 107.

83 The chill factor effect is based on the premise that imposing liability on tax officials might provoke a range of overly defensive responses in the performance of their duties. For example, in the United States, chill factor concerns have been used to defend the powers of tax authorities to revoke or modify revenue rulings on a retroactive basis. For discussion, see Edward A. Morse, “Reflections on the Rule of Law and ‘Clear Reflection of Income’: What Constrains Discretion?” (1999) 8:3 *Cornell Journal of Law and Public Policy* 445-539, at 490. Similarly, it has been argued that higher-risk tax collection activities may be avoided for fear of being sued if a mistake is made. For example, reductions in tax collection actions by the US Internal Revenue Service (IRS) in the 1990s have been attributed to the threat of personal actions for damages against tax officials. For discussion, see Christopher M. Pietruszkiewicz, “A Constitutional Cause of Action and the Internal Revenue Code: Can You Shoot (Sue) the Messenger?” (2004) 54:1 *Syracuse Law Review* 1-68, at 5; and Seth Kaufman, “IRS Restructuring and Reform Act of 1998: Monopoly of Force, Administrative Accountability, and Due Process” (1998) 50:4 *Administrative Law Review* 819-36, at 827. It has also been argued that overdefensiveness might manifest in a reluctance by tax authorities to bring forward

The Canadian Position

In Canada, the relevance of residual policy concerns is assured as long as such claims are considered novel and courts are therefore required to continue to apply the two-stage *Anns-Cooper* test.⁸⁴ It will be recalled that the second stage of the *Anns-Cooper* test specifically requires judges to consider whether there are any residual policy considerations that might militate against imposing a duty of care.⁸⁵

In *Leroux*, Humphries J dismissed concerns about chilling effects, pointing out that holding tax auditors to a standard of care that makes them more careful is “not necessarily a bad thing.”⁸⁶ She similarly dismissed concerns about opening the floodgates to litigation and to large and indeterminate liability, describing the path to taxpayer recovery as “a steep uphill one” and concluding that “[i]t is difficult to envision a glut of lawsuits overcoming these onerous burdens.”⁸⁷

The significance ascribed to residual policy concerns in the context of taxpayer claims against the CRA continues to be debated.⁸⁸ While *Hamilton-Wentworth* is not a tax case, the reasoning of the Supreme Court of Canada in that case is instructive. The court cited a number of empirical and academic studies, and concluded that the “chilling effect” scenario remains speculative and “is not (on the basis of present knowledge) a convincing policy rationale for negating a duty of care.”⁸⁹

difficult cases for litigation, and a reduction in the pool of applicants for employment as public servants. See, for example, the comments of the United States Supreme Court in *Harlow v. Fitzgerald*, 457 US 800 (1982), at 816.

- 84 In *Grenon*, supra note 25, it was argued that in the wake of *Leroux*, taxpayer negligence claims should no longer be considered as raising a novel duty of care. The Alberta Court of Appeal rejected that argument, describing this characterization of the current state of Canadian law on the question of common-law duties owed by CRA officials to taxpayers as an “overreach” of the existing jurisprudence: *ibid.*, at paragraph 10.
- 85 See the text accompanying note 12, supra.
- 86 *Leroux*, supra note 2, at paragraph 287, referring to the following comments made in *Hamilton-Wentworth*, supra note 38, at paragraph 56: “In theory, it is conceivable that police might become more careful in conducting investigations if a duty of care in tort is recognized. However, this is not necessarily a bad thing. The police officer must strike a reasonable balance between cautiousness and prudence on the one hand, and efficiency on the other.”
- 87 *Leroux*, supra note 2, at paragraph 307. The full substantive observations of the court on the matter were as follows: “As for the spectre of widespread litigation, the battle for any plaintiff in this situation is a steep uphill one, as Mr. Leroux has found. While taxpayers subjected to an audit constitute a larger class as compared to those subjected wrongfully to criminal investigation as in *Hill*, in order to rely on a duty of care a potential plaintiff must establish the requisite degree of foreseeability and proximity in their particular situation, followed by proven breaches, causation, and damages. Any suit will be rigorously defended with unlimited resources. . . . It is difficult to envision a glut of lawsuits overcoming these onerous burdens.” *Ibid.*
- 88 Indeterminate liability or “floodgates” arguments often go hand-in-glove with chill factor concerns, and judges frequently discuss these issues together. See, for example, *783783 Alberta*, supra note 1; and *Nelles v. Ontario*, [1989] 2 SCR 170.
- 89 *Hamilton-Wentworth*, supra note 38, at paragraph 57. The majority judgment in *Hamilton-Wentworth* continues, *ibid.*, at paragraph 58: “The lack of evidence of a chilling effect despite

Although the jurisprudence is not uniform, several Canadian judges have taken a similar approach in tax cases. For example, in *Sherman v. Canada (Minister of National Revenue)*, Layden-Stevenson J agreed with the taxpayer's contention that "the chilling effect on future investigations is not a valid reason to refuse disclosure."⁹⁰ In contrast, in *Canadian Taxpayers Federation v. Ontario (Minister of Finance)*, Rouleau J dismissed the plaintiff's negligent misrepresentation claim pertaining to a broken written election promise not to introduce any new taxes, and observed:

Imposing a duty of care in circumstances such as exist in the present case would have a chilling effect. . . . Once elected, members [of the legislature] would be concerned about the representations they made during their election campaigns and would not consider themselves at liberty to act and vote in the public interest on each bill as it came before the legislature.⁹¹

Of course, it is important to note that, although this was a tax case involving assertions of negligence, it involved no allegations of CRA negligence. At most, the case may be indicative of the type of reasoning that could arise in factual situations in which the CRA might seek to resile from written representations made to taxpayers.

In *Scheuer*,⁹² the Federal Court adopted a similar approach to the court in *Leroux*, concluding that large and indeterminate liability should not negate a duty of care imposed on CRA officials. The court characterized the issue as "not necessarily determinative," particularly in cases involving a prospective liability to a clear and very narrow class of prospective claimants.⁹³ It will be recalled that *Scheuer* involved a claim by investors in a specific tax shelter donation program that was ultimately found to be a sham.⁹⁴

On the other hand, concerns of large and indeterminate liability were given more credence in *Grenon*. The Federal Court of Appeal resisted imposing a duty of

numerous studies is sufficient to dispose of the suggestion that recognition of a tort duty would motivate prudent officers not to proceed with investigations 'except in cases where the evidence is overwhelming.' This lack of evidence should not surprise us, given the nature of the tort. All the tort of negligent investigation requires is that the police act reasonably in the circumstances."

90 2004 FC 1423, at paragraph 16. This is similar to the approach in *Rubin v. Canada (Minister of Transport)*, 1997 CanLII 6385 (FCA), in which the chill factor argument was repeatedly described as "nebulous."

91 2004 CanLII 48177 (ONSC), at paragraph 71. For further examples, see 783783 *Alberta*, supra note 1; and *Leighton*, supra note 10.

92 *Scheuer*, supra note 66 (FC), at paragraphs 36-37. By way of comparison, in the subsequent appeal hearing, although the issue was not expressly addressed, the Federal Court of Appeal hinted at indeterminate liability concerns, noting the fear of creating an expensive "insurance scheme" (see *Cooper*, supra note 9, at paragraph 55) through imposing a duty of care in the circumstances pleaded by the plaintiff: *Scheuer*, supra note 1 (FCA), at paragraph 43.

93 *Scheuer*, supra note 66 (FC), at paragraph 36.

94 For a brief summary of the facts by Diner J, see *ibid.*, at paragraph 4.

care (in part) because of fear of raising the “spectre of indeterminate liability” through establishing “a duty . . . to all.”⁹⁵ It should be noted, however, that *Grenon* involved purported tax liabilities in the range of \$500 million. It is unclear whether this fact influenced the reasoning in the case. It remains to be seen which point of view will prevail in future.

Australasian Approaches

Concerns similar to those found in the Canadian case law are often raised in Australasian courts by tax authorities seeking to have taxpayers’ tortious claims against them struck out.⁹⁶ In Australia, there is evidence of judicial skepticism toward the chilling effect argument mirroring that exhibited by many Canadian judges, but the similarity with Canada ends there. Australian judges do not display the same willingness to address policy arguments so directly. As a result, residual policy concerns have received less explicit consideration by the courts.

In *Pape v. Commissioner of Taxation*, the commissioner argued that the taxpayer’s attempts to place constitutional limits on the appropriation power contained in section 81 of the Australian constitution would cause Parliament to be constantly “‘looking over its shoulder and being fearful of the long-term consequences’ if it made an appropriation outside power.”⁹⁷ The Australian High Court rejected the argument, observing that “[t]he occasional declaration that federal legislation is invalid does not cause the progress of government to be unduly chilled or stultified.”⁹⁸ While this case involved no allegation of negligence, it provides one of the few examples of the High Court’s expressly addressing chill factor concerns in a tax context and the cursory judicial disposition of the issue.

Similar trends are evident in New Zealand. For example, in *Ch’elle*, a similarly cursory approach (albeit validating chill factor concerns) was adopted. In *Ch’elle*, Keane J accepted, without elaboration, that “[t]here is a legitimate public interest in regulatory bodies being free to perform their role without the chilling effect of undue vulnerability to actions for negligence.”⁹⁹ The case involved allegations of negligence in the commissioner’s resiling from an earlier private tax ruling and disallowing goods and services tax (GST) credits claimed by the taxpayer.

As far as indeterminate liability arguments are concerned, there have been very few specific comments in Australasian cases, although the observations of Mason CJ

95 *Grenon*, supra note 25, at paragraph 13.

96 See, for example, *Farah*, supra note 32, at paragraph 90.

97 2009 HCA 23, at paragraph 589. The commissioner was relying on paragraph 24 of *Victoria v. Commonwealth and Hayden*, 1975 HCA 52, per Murphy J, who asserted that a narrow construction of the provision would have a “chilling effect . . . on governmental and parliamentary initiatives.” See *Pape*, supra, at paragraph 685.

98 *Pape*, supra note 97, at paragraph 596.

99 *Ch’elle*, supra note 32, at paragraph 87, affirming views expressed in *Rolls-Royce New Zealand Ltd v. Carter Holt Harvey Ltd*, 2004 NZCA 97.

in *Commissioner of State Revenue (Vic) v. Royal Insurance Australia Ltd*¹⁰⁰ are pertinent. In that case, Mason CJ indicated support for the proposition that loss from government error is more fairly borne by the taxpaying public as a whole than by victims of error by a revenue authority.¹⁰¹ While those comments were made in the context of an equitable claim for restitution against a state revenue authority, they indicate a judicial willingness to discount any concerns about potential disruption of public finances that might result from permitting private-law taxpayer claims.

STANDARD OF CARE

Despite the relatively large volume of taxpayer tort claims against Canadian tax officials, as already noted, taxpayer success in establishing the existence of a duty of care has been rare. Hence, there has been limited opportunity for judges to consider the standard of care required of tax officials to satisfy that duty of care. In both Australia and New Zealand, given the complete absence of any superior court recognition of a duty of care to taxpayers, unsurprisingly, there has been virtually no consideration of this issue. However, the limited judicial guidance to date indicates significant uncertainty and the emergence of this challenge as another common unresolved controversy.

The Canadian Position

Given the landmark recognition of a duty of care in *Leroux*, Humphries J had the opportunity to pronounce on the standard of care expected of tax auditors to fulfill the duty of care owed to taxpayers. However, the only general guidance provided by Humphries J was the acceptance, without elaboration, that CRA officials should be expected to adhere to the standards set out in the Canadian Taxpayer Bill of Rights (TBOR).¹⁰²

100 1994 HCA 61.

101 *Ibid.*, at paragraph 26. For further discussion, see Keith Mason, “Money Claims By and Against the State,” in P.D. Finn, ed., *Essays on Law and Government: The Citizen and the State in the Court*, vol. 2 (Sydney: Law Book, 1996), 101-35, at 104.

102 *Leroux*, supra note 2, at paragraph 315. TBOR assures the right of taxpayers

1. to receive entitlements and to pay no more and no less than what is required by law;
2. to service in both official languages;
3. to privacy and confidentiality;
4. to a formal review and a subsequent appeal;
5. to be treated professionally, courteously, and fairly;
6. to complete, accurate, clear, and timely information;
7. unless otherwise provided by law, not to pay income tax amounts in dispute before an impartial review;
8. to have the law applied consistently;
9. to lodge a service complaint and to be provided with an explanation of CRA findings;
10. to have the costs of compliance taken into account in the CRA's administration of tax legislation;

The majority of Humphries J's comments were directed to a number of specific complaints arising from the facts of the case.¹⁰³ Humphries J found that the CRA auditors had met the requisite standard of care expected of a reasonably competent auditor in all respects, save for the "manner in which penalties for income tax were considered and assessed."¹⁰⁴ The impugned actions included threatening the plaintiff with "gross negligence" penalties if he did not sign a statute-barred waiver for the 1993 tax year, an act that Humphries J described as a "punitive quid pro quo,"¹⁰⁵ concluding that the CRA auditors "simply proceeded with no apparent care or comprehension as to what they were doing to the taxpayer."¹⁰⁶

Beyond *Leroux*, it is difficult to find any settled Canadian judicial guidance on the standard of care expected of tax officials. In fact, it has been expressly noted that "[t]here are no directions in the [ITA] about how the Minister and his employees should carry out the duties under the [ITA],"¹⁰⁷ and that there is no standard set out anywhere, either implicitly or explicitly, to fix the essential requirements of an assessment or the intensity of any examination of a taxpayer.¹⁰⁸

Consistent with *Leroux*, in *Ludmer*, the Quebec Superior Court concluded that "the CRA must act reasonably in the conduct of an audit. The Taxpayer Bill of Rights helps define what a reasonable auditor would do."¹⁰⁹ However, it bears

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11. to expect the CRA to be accountable;
 12. to relief from penalties and interest under tax legislation because of extraordinary circumstances;
 13. to expect the CRA to publish service standards and report annually;
 14. to expect the CRA to warn about questionable tax schemes in a timely manner;
 15. to be represented by a person of the taxpayer's choice; and
 16. to lodge a service complaint or request a formal review without fear of reprisal.

For more information, see Canada Revenue Agency, "Taxpayer Bill of Rights Guide: Understanding Your Rights as a Taxpayer" (www.canada.ca/content/dam/cra-arc/formspubs/pub/rc17/rc17-18e.pdf).

- 103 These included the characterization of the plaintiff's income and expenses, the imposition of penalties, the process used on the plaintiff's internal CRA appeal, and the GST audit and assessment process.
- 104 *Leroux*, supra note 2, at paragraph 355.
- 105 *Ibid.*, at paragraph 351. This reasoning resembles a misfeasance characterization. Misfeasance in public office was raised in *Leroux* but struck out at the pleading stage of the proceedings.
- 106 *Ibid.*, at paragraph 353.
- 107 *Canus*, supra note 11, at paragraph 74.
- 108 *Ibid.*, at paragraph 75, citing comments of the Supreme Court of Canada in *Western Minerals Ltd. v. Minister of National Revenue*, [1962] SCR 592.
- 109 *Ludmer*, supra note 21, at paragraph 151, where the court also noted:
 - Negligence is sufficient to establish fault;
 - It is not necessary to prove that the CRA acted maliciously with a view to hurting the Plaintiffs. Intentional conduct will be necessary for punitive damages;

reiterating that *Ludmer* was a case decided according to the laws applicable in Quebec rather than Canadian common-law negligence principles.¹¹⁰ In contrast, most recently the Federal Court in *Gordon* considered the potential for TBOR to sustain allegations of a breach of duty of care, characterizing that duty as “nothing more than a set of aspirational principles” with no binding legal effect, and noting that the breach of a duty of care is not, per se, evidence of negligence.¹¹¹

Australasian Approaches

The absence of judicial authority in Australia makes it difficult to predict whether an approach comparable to that taken in *Leroux*, applying a standard of care informed by TBOR, will emerge. To date, however, judicial observations made in passing hint at a likely negative response to any suggestion that the Australian Taxpayers’ Charter¹¹² should be used as a tool for determining the standard of care expected of tax officials. In *Harris*, Grove J cursorily dismissed the taxpayer’s negligence claim and rejected the concept of the charter’s supporting a negligence claim. Grove J observed that “a departure from [a] standard” set out in documents such as the taxpayers’ charter did not give persons affected by the departure a “right to recover tort damages.”¹¹³ Further, he observed that “a duty [of care could not be] . . . established by

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- The CRA can be wrong without being at fault—the CRA does not commit a fault if it reasonably takes a position that turns out to be wrong;
 - To the extent that the CRA has certain powers under the ITA, it must exercise those powers reasonably and not in an abusive fashion.

110 See supra note 21.

111 *Gordon*, supra note 2, at paragraph 168. The court characterized in similar terms the “TOM II Manual”—a manual containing a set of procedural guidelines for the conduct of CRA Special Investigations officials—which the plaintiffs unsuccessfully asserted had been breached by the CRA.

112 The Australian Taxpayers’ Charter commitments currently consist of the following:

- Treating you fairly and reasonably
- Treating you as being honest unless you act otherwise
- Offering you professional service and assistance
- Accepting you can be represented by a person of your choice and get advice
- Respecting your privacy
- Keeping the information we hold about you confidential
- Giving you access to information we hold about you
- Helping you to get things right
- Explaining the decisions we make about you
- Respecting your right to a review
- Respecting your right to make a complaint
- Making it easier for you to comply
- Being accountable.

For further information, see Australian Taxation Office, “Taxpayers’ Charter” (www.ato.gov.au/About-ATO/Commitments-and-reporting/Taxpayers--charter), “Your rights,” at 4-9.

113 *Harris*, supra note 40, at paragraph 12.

reference to proclamations such as the Taxpayers Charter which [merely] express aims of treating [taxpayers] . . . fairly and reasonably.”¹¹⁴ This approach echoes the reasoning of the Canadian Federal Court in *Gordon*, which characterized TBOR as “aspirational”¹¹⁵ and also observed that there is “no tort of ‘unfairness.’”¹¹⁶

While there has been no judicial comment in New Zealand, the NZ Inland Revenue Department (IRD) charter,¹¹⁷ like the Australian charter, has no legal force. It is very much a statement of IRD service commitments. Nevertheless, in the event of a future recognition of a duty of care owed by tax officials to NZ taxpayers, there would be nothing preventing NZ judges from referring to the charter to inform the relevant standard of care expected of tax officials.

A PRIMER FOR POLICY MAKERS’ CONSIDERATION

In this part of the article, attention turns to suggestions for reform to help address the unresolved controversies exposed in the preceding analysis of the Canadian, Australian, and NZ case law. As noted in the introduction to the article, these suggestions are not presented as a fully formed blueprint for reform. They are simply proposed as potentially viable options for consideration and debate.

Coexisting Common-Law and Public Duties

Courts uniformly continue to grapple with whether tax officials owe coexisting common-law duties to taxpayers alongside their statutory duties. Resolution of the issue has been hindered by the absence of any overarching express statutory statement addressing the possibility or desirability of imposing common-law duties on tax officials. In fact, the lack of tax-specific legislative guidance has generated various judicial responses, most of which have resulted in the rejection of taxpayer negligence claims.

In Australia, there has been no express legislative statement directly addressing the question of to whom the Australian commissioner owes his tax administration duties. This reticence has been interpreted as evincing a statutory intent to preclude the possibility of private-law duties coexisting with the commissioner’s public duties. Some Canadian courts have used similar reasoning to justify the rejection of any common-law duty of care imposed on tax officials. For example, as Dario J observed in *Grenon*,

114 Ibid.

115 *Gordon*, supra note 2, at paragraph 168.

116 Ibid., at paragraph 167.

117 New Zealand, Inland Revenue Department, “Inland Revenue’s Charter” (www.classic.ird.govt.nz/aboutir/commitment/aboutir-charter.html).

[s]hould Parliament wish to temper the CRA's authority by imposing a duty of care, it may do so. It is not appropriate for this Court to attempt to achieve that result through an unprincipled application of the law of negligence.¹¹⁸

There are few signs of any consistent shifts in judicial approach toward a more accommodating view of coexisting public and private duties, despite Canadian decisions such as *Leroux* (from which there appear to be early signs of retreat). This situation has developed notwithstanding the existence of general legislation in each jurisdiction establishing a starting premise that statutory authorities are subject to potential common-law suit. For example, in New Zealand, section 27(3) of the New Zealand Bill of Rights Act 1990 specifically provides:

Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

In Australia, Crown immunity from suit was similarly abolished by section 64 of the Australian Judiciary Act 1903. Section 64 provides:

In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

Australian states and territories have similarly abrogated Crown immunity from suit in their respective jurisdictions. In Canada, section 3 of the Crown Liability and Proceedings Act¹¹⁹ serves a similar purpose. It provides that the Crown is liable for the damages for which it would be liable if it were a person, in respect of torts committed by servants of the Crown.

One author writing about the Canadian legislation has suggested that the courts in cases such as *Canus* have applied an unnecessarily narrow interpretation of the Crown Liability and Proceedings Act, and has proposed that the statute be amended to provide clearer judicial guidance.¹²⁰ However, even setting aside such concerns, the limitation of this legislation is that, while it deals with the ability to bring an

118 *Grenon*, supra note 59 (QB), at paragraph 84. This statement echoes the reasoning in earlier cases such as *Canus*, supra note 11, and *Leighton*, supra note 10. In contrast, the New Zealand Law Commission recently expressed the view that determining any principles limiting the liability of the Crown or its instrumentalities is “best left to the courts to continue to develop as they have in the past”: New Zealand Law Commission, *A New Crown Civil Proceedings Act for New Zealand*, NZLC IP no. 35 (Wellington, NZ: Law Commission, April 2014), at paragraph 3.1 (www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP35.pdf).

119 RSC 1985, c. C-50.

120 See Fazel, supra note 5, especially at 609-10.

action arising out of the negligence of tax officials, it provides little by way of clarity on the judicial approaches to resolving those claims once they are brought. It is in this particular respect that the analysis of the common unresolved controversies exposed in this article indicates that more specific legislative guidance is needed.

With this fact in mind, a useful starting point for both Australian and Canadian lawmakers might be to consider enacting legislation modelled on the “care and management” provisions contained in sections 6 and 6A of the New Zealand Tax Administration Act 1994 [TAA].¹²¹ Section 6A(2) is especially pertinent. It provides that in fulfilling the commissioner’s obligations for the care and management of the NZ tax system, “it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law.”¹²²

In New Zealand, this express obligation to maximize revenue collection has been relied on by judges to conclude that imposing private-law duties on tax officials would contradict the express revenue collection maximization obligations of the IRD. This narrow interpretation appears to be reflected in the approach in *Ch’elle* and a number of other cases.¹²³ Hence, such legislation might not result in more frequent successful taxpayer negligence claims against tax officials. But it would provide a more robust legislative backing to current restrictive judicial approaches, and more certainty for taxpayers and tax officials.

Of course, such provisions could be drafted to more readily accommodate taxpayer claims if so desired. Viewed holistically, the NZ care and management provisions already support a more accommodating approach. For example, section 6 of the TAA requires all tax officials to ensure the integrity of the tax system—including protection of the “rights of taxpayers to have their liability determined fairly,

121 The expression “care and management” used in section 6A(2) of the TAA comes from the corresponding UK legislative scheme contained in the Inland Revenue Regulation Act 1809, (UK) and the Taxes Management Act 1970 (UK), 1970, c. 9. For a discussion of the operation of the UK provisions, see *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.*, [1981] 55 TC 133 (www.bailii.org/uk/cases/UKHL/1981/TC_55_133.pdf).

122 Section 6A(2) of the TAA in its substantive entirety states:

It is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law having regard to:

- (a) the resources available to the Commissioner; and
- (b) the importance of promoting compliance, especially voluntary compliance, by all persons with the Inland Revenue Acts; and
- (c) the compliance costs incurred by persons.

123 For example, as the NZ High Court, per Harrison J, noted in *Westpac Banking Corporation v. Commissioner of Inland Revenue*, 2007 NZHC 1151, at paragraph 46, the provisions reduce the scope to challenge tax authority decisions “to rare or exceptional cases.” For an example of academic commentary supporting a similarly narrow interpretation of the care and management provisions, see Andrew Alston, “Taxpayers’ Rights in New Zealand” (1997) 7:1 *Revenue Law Journal* 211-25, at 212.

impartially, and according to law.”¹²⁴ Hence, the revenue collection maximization obligations of the IRD are qualified rather than absolute.

Irrespective of its final form, legislative clarity might also help judges to move away from problematic sweeping characterizations of tax official functions that are currently relied upon—particularly in Canada—to reach and support conclusions concerning the possibility of coexisting common-law and public tax official duties. Prime among these are the policy/operational dichotomy and related regulatory/non-regulatory function delineations.

In Canada, there is some evidence that these distinctions are starting to lose favour. For example, in *Carboun & Sons Enterprises Ltd. v. Canada (Attorney General)*,¹²⁵ the BC Court of Appeal chose not to rely on any distinction between regulators and non-regulatory bodies. Instead, the court called for a less categorical and dichotomous approach to determining whether the relevant statutory scheme permits the imposition of common-law duties on statutory authorities such as the CRA.¹²⁶

Such distinctions, particularly the policy/operational dichotomy, have also lost favour in common-law courts outside Canada.¹²⁷ For example, Australian courts today favour a more overt “incremental approach”¹²⁸ founded on an examination of

124 Section 6(2)(b) of the TAA.

125 2015 BCCA 163. This case involved allegations that the plaintiff had suffered losses as a result of negligence and misfeasance of the government of Canada arising from delays of government officials in carrying out an environmental assessment of the plaintiff’s planned property development. At the BC Court of Appeal, the Canadian government unsuccessfully sought to have the plaintiff’s statement of claim struck out on the basis that the public duties contained in the relevant statute (the Fisheries Act, RSC 1985, c. F-14) were irreconcilable with a private duty of care in negligence and therefore the plaintiff’s claim had no reasonable prospect of success.

126 For example, the court conceded that the distinction requires affording “due deference” to the decision of a public official to prioritize particular public interests over those of private individuals, even if those priorities result in private individual losses through otherwise apparently operational failures (for example, delays in making or communicating a decision): *Carboun*, supra note 125, at paragraph 125.

127 In large part, this is due to the difficulty of delineating between policy and operational acts. The dilemma was enunciated by Lord Slynn in the English case of *Barrett v. Enfield London Borough Council*, [2001] 2 AC 550, at 571: “[It] does not . . . mean that if an element of discretion is involved in an act being done . . . common law negligence is necessarily ruled out. . . . [A]s has often been said even knocking a nail into a piece of wood involves the exercise of some choice or discretion and yet there may be a duty of care in the way it is done.” Lord Slynn’s reference to “knocking a nail” is derived from the US case of *Ham v. Los Angeles County*, 45 Cal. App. 148 (1920), at 162, where it was noted that “[i]t would be difficult to conceive of any official act, no matter how directly ministerial that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail.”

128 In Australia, this rationale was first broached by Brennan J in *Council of the Shire of Sutherland v. Heyman*, 1985 HCA 41, at paragraph 14, in the following terms: “It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care

the “salient features”¹²⁹ of the particular case. This approach was most recently applied by the Australian Federal Court in *Farah*.

While the Australian approaches are no substitute for legislative clarification, an overt shift away from the application of dichotomies to classify tax officials’ duties in Canada may be worth considering in the interim.¹³⁰ It would certainly help to produce more realistic outcomes, reflecting the reality that not all tax official functions fit neatly within any single silo.

Duties of Tax Officials in Carrying Out Audits

A similar prescription of legislative clarification would aid in addressing the vexing question of the common-law duties (if any) to be imposed on tax officials in carrying out audits. In fact, legislative guidance on this issue is likely to prove the most practically useful intervention because the majority of taxpayer negligence claims to date have involved allegedly defective tax audits and investigations.¹³¹

At present, the legislative silence is likely resulting in judicial rejection of more taxpayer claims against tax auditors than might otherwise be the case. For example,

restrained only by indefinable ‘considerations which ought to negative, or to reduce or limit the scope of duty or the class of persons to whom it is owed.’” For similar views applied in the United Kingdom, see *Caparo Plc v. Dickman*, [1990] 2 AC 605 (HL); *X (Minors) v. Bedfordshire County Council*, 1995 UKHL 9; and *Barrett*, supra note 127. The incremental approach was adopted in recent leading Australian cases involving allegations of negligence against public authorities including *Crimmins*, supra note 80; and *Pyrenees Shire Council v. Day*, 1998 HCA 3. See also *infra* note 135.

129 See the discussion in note 80, *supra*.

130 As noted in note 126, *supra*, and the accompanying text, there is some evidence of such a shift in judicial thinking in Canada (for example, in *Carboun*, supra note 125); however, this is far from a uniform trend.

131 Statutory protections afforded to tax officials carrying out other core tax functions, such as tax assessments, limit the avenues for taxpayer challenge and recovery. For example, section 109 of the New Zealand TAA provides:

Except in objection proceedings under Part 8 or a challenge under Part 8A,

(a) no disputable decision may be disputed in a court or in any proceedings on any ground whatsoever; and

(b) every disputable decision and, where relevant, all of its particulars are deemed to be, and are to be taken as being, correct in all respects.

In Australia, similar restrictions are contained in section 175 of the Income Tax Assessment Act 1936, No. 27, 1936, and division 350 of schedule 1 of the Taxation Administration Act 1953, No. 1, 1953. These provisions effectively provide that production of a notice of assessment is conclusive evidence of the due making of the assessment and, except in proceeding under part IVC of the Taxation Administration Act 1953 on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct. In Canada, similar restrictions are contained in subsection 152(8) of the ITA, which provides, “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.”

in Canada, according to Hood J in *Canus*, the absence of legislative directions concerning the “intensity of taxpayer examinations” evinces a statutory intent to preclude the existence of any duty of care owed by tax auditors to taxpayers in carrying out audits.¹³²

Despite the arguably dubious reasoning behind the assertion that statutory silence indicates an intention to preclude the imposition of common-law duties on tax auditors, it is understandable that judges have adopted this position.¹³³ Ever conscious of the separation of legislative and judicial functions, judges are naturally reluctant to risk overstepping their judicial mandate by inferring a non-existent legislative intent.¹³⁴

In addition, without legislative guidance, it is unlikely that judges will be able to move beyond the current judicial preoccupations with attempting to draw analogies between tax audits and other investigatory contexts, such as criminal investigations, in order to determine taxpayer negligence claims. This is because the development of new tort-law duties and standards in novel cases in each of the jurisdictions examined occurs gradually through reference to analogous cases and circumstances.¹³⁵ Ultimately, therefore, it is unrealistic to expect superior court development of a stand-alone thread of authority dealing with tax auditors that is derived independently of any comparison with broadly analogous contexts such as criminal investigations. A stand-alone body of case law can only be built on a foundation of legislative clarity concerning the nature of tax audit and investigation duties.

132 See supra notes 107 and 108, and the accompanying text.

133 As noted by Lord Wilberforce in *Anns*, supra note 9, at 5, statutory silence does not absolve public officials from all private-law responsibility; rather, in such circumstances, the common-law duty is simply modified to “a duty to avoid causing extra or additional damage beyond what must be expected to arise from the exercise of the [statutory] power or duty.” It is difficult, therefore, to sustain an argument that the absence of specific legislative directives as to how CRA officials are to carry out their duties necessarily negates any common-law duty of care to taxpayers. To sustain this argument, there must be something more specific in the legislative scheme.

134 Concerns such as these underpin core principles used to assist in resolving novel negligence claims against public officials, such as the policy/operational dichotomy. This has been confirmed in a number of jurisdictions, including Australia and the United Kingdom. For example, see *Rowling v. Takaro Properties Ltd.*, [1988] AC 473 (PC), at 501, where Lord Keith of Kinkel noted that the policy/operational distinction was developed to address “the need to exclude altogether those cases in which the decision under attack is of such a kind that a question whether it has been made negligently is unsuitable for judicial resolution.” Similar comments were made by the Australian High Court in *Heyman*, supra note 128, at paragraph 39. For academic discussion, see R.A. Buckley, “Negligence in the Public Sphere: Is Clarity Possible?” (2000) 51:1 *Northern Ireland Legal Quarterly* 25-47, at 41.

135 As discussed in note 128, supra, in Australia a formal “incremental approach” has long been used for resolving novel tort claims. For example, see *Heyman*, supra note 128, and *Sullivan*, supra note 77. Pertinently, both of these cases were recently cited by the Australian Federal Court in *Farab*, supra note 32, at paragraph 41. For an interesting academic discussion of incrementalism in Australia, see Prue Vines, “The Needle in the Haystack: Principle in the Duty of Care in Negligence” (2000) 23:2 *University of New South Wales Law Journal* 35-57.

To the extent that policy makers continue to be absent from this space and judges are left to continue to resolve the question of auditor duties unaided by legislative clarification, perhaps the best course is for judges to move beyond the criminal/civil investigation debate that has occupied so much attention to date—particularly in Canada. A useful alternative starting point might be the voluminous case law concerning the duties of private-sector auditors. Discussion of this body of law is conspicuously absent from the tax auditor negligence cases in all three of the jurisdictions examined.

There are likely good reasons for this, including the absence of comparable public duties owed by private-sector auditors and the interweaving of contractual and private-law duties in most cases involving private-sector audits. However, even if unsuitable for establishing a general thread of legal authority concerning tax auditor duties and standards of care, this body of case law may still prove useful. For example, it could assist in determining unresolved questions such as the judicial treatment of the duty of tax officials in carrying out audits to warn third parties who are not the subject of the audit that the audit findings could have potentially detrimental effects on those third parties. There are many cases considering the duty of private-sector auditors to warn persons with whom there is no contractual auditor-client relationship of risks identified as part of an audit.¹³⁶

In Australia, there is evidence of some judicial willingness to extrapolate from cases concerning other private-sector professionals, such as bankers, to address duty-to-warn issues.¹³⁷ Such comparisons with private-sector employees—auditors, bankers, and others—will likely become more relevant over time as tax authorities increasingly seek to apply private-sector service standards and practices to their

136 The issue has been the subject of significant judicial attention across the common-law world. Leading examples include, in the United States, *Ultramares Corporation v. Touche*, supra note 82; in the United Kingdom, *Caparo Plc*, supra note 128; in Canada, *Haig v. Bamford et al.*, [1977] 1 SCR 466; in New Zealand, *Scott Group Ltd v. Macfarlane*, 1977 NZCA 8; and in Australia, *Esanda Finance Corporation Ltd v. Peat Marwick Hungerfords*, 1997 HCA 8. The issue has also long been a fertile subject for academic discussion. For an excellent summary of the law across common-law jurisdictions, see Martin Davies, “The Liability of Auditors to Third Parties in Negligence” (1991) 14:1 *University of New South Wales Law Review* 171-97. In the United States, the academic discussion commenced almost a century ago. For an early example, see David Himmelblau, “Auditors’ Responsibilities to Third Parties” (1933) 8:2 *Accounting Review* 99-104.

137 In *Farab*, supra note 32, at paragraphs 79-88, the Australian Federal Court referred to banking-law cases concerning the duties of bankers to check customer bank account details and potential misuses of taxpayer bank accounts. Pertinently, the court drew direct parallels between the duties of bankers and those of tax officials, observing, “Like a bank acting on an otherwise valid instruction to pay out funds, the Commissioner [of Taxation] could not be expected to be under any duty to withhold a refund, or make further inquiries, unless he was in some way on notice that there was some irregularity in relation to the nominated account, or some other facts which might suggest fraud or dishonesty. It is, however, at least arguable that the Commissioner might owe a duty of care to a taxpayer in respect of the payment of refunds if he is on notice of such matters.” *Ibid.*, at paragraph 88.

day-to-day operations and taxpayer interactions.¹³⁸ In this context, submissions in taxpayer negligence cases calling for tax officials to be held to private-sector accountability standards will inevitably become increasingly common.

Residual Policy Concerns

The preceding discussion has revealed an array of judicial approaches to dealing with residual policy concerns, such as the fear of indeterminate liability and the fear of generating overly defensive responses by imposing common-law liability on public officials. To address this unresolved controversy, there is a range of possible solutions. These solutions involve contributions by the judiciary, the legislature, and researchers alike.

In terms of judicial action, judges in tax cases should attempt to follow the lead of the Supreme Court of Canada in *Hamilton-Wentworth* and subject residual policy concerns to genuine evidentiary scrutiny. It will be recalled that in *Hamilton-Wentworth* the court dealt with the policy concerns raised only after close consideration of empirical research testing the validity of those concerns.

Ideally, judges could go a step further and overtly weigh competing policy concerns. For example, increased trust and confidence in the fairness of the tax administration system resulting from imposing a common-law duty of care in cases of clear tax official negligence might generate positive taxpayer compliance behaviours.¹³⁹ These positive behavioural responses might counter any potential negative behavioural responses of tax officials to successful taxpayer claims. This type of weighing of policy concerns is implicit in the court's comments in *Leroux* that making tax officials liable in tort is "not necessarily a bad thing."¹⁴⁰

138 An obvious indicator is the adoption of private-sector nomenclature, such as referring to taxpayers as "customers" or "clients," and more broadly the corporate business plans of the respective tax authorities in each jurisdiction examined.

139 The positive relationship between greater taxpayer trust and confidence, and increased voluntary compliance is well known and generally accepted. For good examples of the research into the link, see Kristina Murphy, "The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders" (2004) 28:2 *Law and Human Behaviour* 187-209; John T. Scholz and Mark Lubell, "Trust and Taxpaying: Testing the Heuristic Approach to Collective Action" (1998) 42:2 *American Journal of Political Science* 398-417; and K. Murphy, "Procedural Justice and Tax Compliance" (2003) 38:3 *Australian Journal of Social Issues* 379-407. Some recent empirical work by the US National Taxpayer Advocate Service also hints at the existence of this link; see National Taxpayer Advocate Service, *Annual Report to Congress 2018*, vol. 2 (Washington, DC: Internal Revenue Service, 2019) (https://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-ARC/ARC18_Volume2.pdf). A recent "service transformation" statement by the CRA appears to acknowledge the link: "[O]ur commitment to the client experience will be at the centre of everything we do, with a view to increasing trust in the CRA and fostering sustainable voluntary compliance." Canada Revenue Agency, "Summary of the Corporate Business Plan 2019-20: With Perspectives to 2021-22, Trusted, Helpful and Fair by Putting People First," at 16 (www.canada.ca/content/dam/cra-arc/corp-info/aboutcra/corp-bsns-plan/2019-2022/smmry22-en.pdf).

140 See *supra* note 86.

Unfortunately, judges across all three jurisdictions are severely hampered in their ability to apply such rigorous and balanced scrutiny to residual policy concerns in tax cases, owing to the absence of tax-specific empirical study of these concerns. In particular, there is at present no empirical clarity on important questions such as how tax officials will respond to the threat of suit or how taxpayers will respond to any increased prospect of success in any taxpayer claim against tax officials. Hence, there is a clear and pressing need for researchers to engage with these issues.¹⁴¹

Even with the best efforts of researchers, it may prove impossible to fully understand and predict the behavioural responses of taxpayers and tax officials should the courts become more willing to accept the ability of taxpayers to sue tax officials for negligence. If this is the case, the answer may be for the legislature to intervene and form a view on whether or not the potential risks would be offset by the benefits of allowing such claims to proceed. A considered legislative approach along these lines would necessarily involve some assessment of the acceptable limits of any exposure to potential negative consequences if taxpayers were to bring such a suit. Examples of this type of approach are encapsulated in legislation in the United States.

The US Internal Revenue Code¹⁴² (IRC) includes limited statutory rights to sue tax officials for damages, which extend to certain unauthorized negligent tax collection actions.¹⁴³ This right to sue contains a number of restrictions aimed at limiting potential exposure to indeterminate liability and undue generation of negative behavioural responses through exposing tax officials to negligence claims. Restrictions on the right to sue include a requirement to exhaust all other administrative avenues of relief prior to seeking statutory damages relief.¹⁴⁴ Any loss recoverable is also

141 As far as the chill factor effect is concerned, a useful starting point for such research engagement is the Australian work by Creyke and McMillan into the effects of adverse judicial review determinations on government bodies: see Robin Creyke and John McMillan, "The Operation of Judicial Review in Australia," in Marc Hertogh and Simon Halliday, eds., *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004), 161-89. The findings from that study indicated that, aside from a few noted exceptions, there was no evidence of significant overdefensiveness or chill factor consequences. The study concluded, *ibid.*, at 187, that changes brought about by an adverse judicial review outcome were generally received by affected agencies as "valuable and instructive."

142 Internal Revenue Code of 1986, as amended.

143 Specifically, section 7433 of the IRC. Section 7433(a) contains the primary cause of action. It relevantly provides, "If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States."

144 Section 7433(d)(1) of the IRC provides, "A judgment for damages shall not be awarded . . . unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service."

reduced to the extent that the loss could have reasonably been mitigated by the aggrieved taxpayer.¹⁴⁵

The US statutory damages remedy for negligence also imposes a tight statute of limitations: claims must be made within two years of the date on which the right to action accrues.¹⁴⁶ The incorporation of adverse costs consequences for unsuccessful claimants and clear monetary limits on the quantum that can be claimed—a modest \$100,000 (inclusive of costs) in the case of a negligence claim¹⁴⁷—are also intended to address fears of potential erosion of the revenue.

The US approach is not raised here as an exemplar or template for Canada, Australia, or New Zealand to follow. It arose out of a particular political climate¹⁴⁸ and legal context,¹⁴⁹ and it has its critics.¹⁵⁰ However, its existence shows that it is possible for both the legislature and the judiciary to share the burden of delineating the proper limits of taxpayers' ability to sue tax officials for negligence, bearing in mind potentially valid—but largely untested—residual policy concerns.

145 Section 7433(d)(2) of the IRC provides, “The amount of damages awarded . . . shall be reduced by the amount of such damages which could have reasonably been mitigated by the plaintiff.” This may be an especially pertinent addition in any Canadian legislative proposal, since there is already evidence in the Canadian cases of the significance of mitigation to taxpayer success. Specifically, in *Leroux*, supra note 2, the plaintiff was ultimately unsuccessful because he was considered to have failed to demonstrate a sufficient causal link between the negligence and his alleged losses, and to have taken insufficient steps to mitigate his losses. Humphries J considered the plaintiff’s 18-month delay in appealing the CRA tax assessments as an unacceptable failure to mitigate his losses: *Leroux*, supra note 2, at paragraph 386.

146 This limitation is contained in section 7433(d)(3) of the IRC.

147 Section 7433(b) of the IRC. The maximum is \$1 million for cases involving reckless or intentional actions.

148 This climate has been described as one in which Congress was prompted to act in response to “thousands of *horror stories* received from constituents concerning dealings with the IRS”: Linda A. Shaya, “The New Taxpayer’s Bill of Rights: Panacea or Placebo?” (1988) 65:3 *University of Detroit Law Review* 445-526, at 445 (emphasis in original). For further discussion, see Creighton R. Meland, “Omnibus Taxpayers’ Bill of Rights Act: Taxpayers’ Remedy or Political Placebo?” (1988) 86:7 *Michigan Law Review* 1787-1818.

149 Although claims against tax officials have been permitted for decades under the Federal Tort Claims Act 1964 (FTCA), the statute contains a specific carve-out preserving immunity from suit in cases involving tax collection or assessment. Specifically, 28 US Code section 2680(c) provides that, with four specified exceptions, the FTCA does not authorize claims “arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer.” Hence, from a legal perspective, section 7433 of the IRC was enacted to modify this restriction on the ability to sue in respect of certain tax collection actions.

150 For examples of some of the critiques of the legislation, see Abe Greenbaum, “United States Taxpayer Bill of Rights 1, 2, and 3: A Path to the Future or Old Whine in New Bottles?” in Duncan Bentley, ed., *Taxpayers’ Rights: An International Perspective* (Gold Coast, Qld.: Revenue Law Journal, School of Law, Bond University, 1998), 347-79; and Leandra Lederman, “Of Taxpayer Rights, Wrongs and a Proposed Remedy” (2000) 87:8 *Tax Notes* 1133-42.

Standard of Care

As noted above, there is little guidance on the standard of care to be expected of tax officials in Canada, Australia, or New Zealand. The only real guidance is the emerging Canadian proposition that standards set out in charters of taxpayer rights such as TBOR should be considered the minimum standard. However, even if this approach emerges as the accepted minimum across all jurisdictions, practical problems remain. These stem from the general and aspirational nature of many of the commitments set out in TBOR and its international equivalents, such as Australia's taxpayers' charter and New Zealand's IRD charter. Specifically, many of these commitments are incapable of providing much practical guidance for either taxpayers or tax auditors on the expected standard of care.

For example, how does the TBOR right to be treated "courteously," or the equivalent NZ IRD charter commitment to "courteous and professional" treatment, translate to a measurable standard of care?¹⁵¹ While this example may appear trite, concepts such as "fairness" (also included in TBOR and Australia's Taxpayers' Charter)¹⁵² are much more significant in the legal context, and they are open to a similarly broad range of contextual interpretations, which are difficult to translate into specific standards of care capable of providing practical guidance for taxpayers or tax officials.¹⁵³

Again, legislative clarification may ultimately prove to be the most practically useful path. While it may be undesirable or impossible to reduce concepts such as fairness to an all-encompassing closed list of functional standards, it is possible to implement legislative or regulatory measures that could be of some guidance.

151 TBOR contains a right "to be treated professionally, courteously, and fairly," which is elaborated as follows: "You can expect we will treat you courteously and with consideration at all times, including when we ask for information or arrange interviews and audits. Integrity, professionalism, respect, and collaboration are our core values and reflect our commitment to giving you the best possible service. You can also expect us to listen to you and to take your circumstances into account, which is part of the process of making impartial decisions according to the law. We will then explain our decision and inform you of your rights and obligations regarding that decision." "Taxpayer Bill of Rights Guide: Understanding Your Rights as a Taxpayer," *supra* note 102, at 6. See also the IRD charter, *supra* note 117.

152 Australia's charter currently refers to a number of general and aspirational commitments, such as treating the taxpayer "fairly" and offering the taxpayer "professional service and assistance": see *supra* note 112. As noted in note 151, *supra*, Canada's TBOR contains an express commitment to treat taxpayers fairly. New Zealand's IRD charter does not make express reference to fairness but does include a commitment to "consistency and equity": New Zealand, Inland Revenue Department, "[Inland Revenue's Charter (IR 614)] How We Will Work with You," March 2009 (www.classic.ird.govt.nz/resources/b/c/bccdf4004ba3d313a262bf9ef8e4b077/ir614.pdf).

153 For example, as noted by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at 819, procedural fairness, which is central to the concept of natural justice in judicial review proceedings, is "flexible and variable and depends on an appreciation of the context of particular statute and the rights affected."

Again, it may be useful to look to the United States for an example and a trigger for discussion among policy makers. In the United States, requirements that tax official supervisors annually assess their staff for compliance with obligations to treat taxpayers “fairly” have been legislatively enshrined. Specifically, section 1204(b) of the IRC requires Internal Revenue Service (IRS) managers to “use the fair and equitable treatment of taxpayers by employees as one of the standards for evaluating employee performance.” Further, section 7803(d)(1)(2000) of the IRC requires the Treasury inspector general for tax administration to annually evaluate whether the IRS has complied with section 1204(b).

This type of legislative development provides an opportunity to translate aspirations such as the fair treatment of taxpayers into measurable performance standards. In turn, such performance standards could provide clearer guidance for taxpayers and tax officials on the question of how such aspirations might translate into minimum common-law standards of care—provided that they are made public.¹⁵⁴ Ideally, if expected standards were entrenched in such a practical and overt way, one would expect those standards over time to translate into better performance by tax officials, fostering taxpayer trust and confidence and, perhaps, minimizing taxpayer negligence claims. Tax officials could also use compliance with such measures as solid evidentiary proof of having met the minimum standard of care expected of them.

CONCLUSION

As has been apparent from the outset, the law pertaining to duties owed by tax officials to taxpayers is significantly more developed in Canada than it is in Australasia,

154 In this respect, in 2019 the Australian Parliament’s Standing Committee on Tax and Revenue recommended that the Australian Taxation Office formulate appropriate benchmarking performance indicators to assess its performance against the Taxpayers’ Charter commitments, providing both quantitative and qualitative assessments. Parliament of Australia, House of Representatives Standing Committee on Tax and Revenue, *2017 Annual Report of the Australian Taxation Office Fairness, Functions and Frameworks—Performance Review* (Canberra: Commonwealth of Australia, February 2019), at paragraph 5.72 (https://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024240/toc_pdf/2017AnnualReportoftheAustralianTaxationOffice.pdf). In Canada, a recent audit by the Office of the Auditor General made a number of recommendations for better reporting by the CRA, finding that “[t]he Agency also did not accurately report the results of its compliance activities, and its reporting was incomplete.” However, the recommendations did not extend to recommending that the CRA set benchmarks for reporting to evaluate compliance with TBOR commitments. See Office of the Auditor General of Canada, *2018 Fall Reports of the Auditor General of Canada to the Parliament of Canada: Report 7—Compliance Activities—Canada Revenue Agency* (Ottawa: Office of the Auditor General, 2018), at paragraph 7.92 (www.oag-bvg.gc.ca/internet/English/parl_oag_201811_07_e_43205.html). In New Zealand, the IRD collects data, but no longer reports publicly, on its charter performance and has ceased to include such information in its annual reports. The IRD does, however, publicize staff awards for those who display the values and expectations of the charter. For example, see New Zealand, Inland Revenue, “Annual Report 2018,” at 69 (www.classic.ird.govt.nz/resources/0/7/0774560a-7b44-4c03-8a76-cebe59f042c3/annual-report-2018.pdf).

simply by virtue of the volume and frequency of cases. However, it is questionable whether this has resulted in much more clarity for Canadian taxpayers or for Canadian tax officials seeking to determine the precise nature and scope of any common-law duties. Standing in the way of legal clarity are a number of unresolved controversies and emerging judicial challenges. The analysis in this article has demonstrated that such unresolved controversies and judicial challenges plague all three of the jurisdictions examined. Further, there is little evidence of any emerging uniform judicial resolution to any of these controversies and challenges.

This is unsurprising. Negligence claims against tax officials raise an array of public policy concerns that common-law courts are not well equipped to resolve.¹⁵⁵ These underpin a number of the core challenges examined in this article, especially the question of the possibility of coexisting common-law and public-law duties, and residual public policy concerns about imposing a common-law duty of care on tax officials. Resolution of these matters is hindered by a legislative vacuum in all three of the jurisdictions examined.

Accordingly, a number of possible legislative interventions have been proposed. These include a call for a motherhood statement clarifying legislative intent on the question of whether taxpayers are owed common-law duties by tax officials. At a fundamental level, this would confirm whether the prospect of taxpayers successfully suing negligent tax officials is real or merely hypothetical. If the existence of common-law duties to taxpayers were expressly confirmed, litigants and judges could focus on interpreting specific statutory provisions to determine whether a duty exists in the particular factual context. This would be a vast improvement on the generic debates prominent in a number of the judgments examined in this article and conducted in the present legislative void.

Neither this suggestion nor the other reform options canvassed are proposed as a panacea for the unresolved controversies identified in this article. Collectively, however, they do serve as a useful primer to spark sorely needed consideration and debate among policy makers. It is in this spirit that these suggestions for reform have been posited in this article. They have also been made with an awareness of the continuing, undiminished, and essential role of the judiciary in resolving taxpayer negligence claims against tax officials.

Irrespective of whether any of the specific recommendations made in this article are adopted, development and implementation of any solution to the unresolved highlighted controversies will take time. In the interim, we are likely to see continuing incremental, piecemeal, and potentially inconsistent judicial development across

155 Arguments concerning the suitability of courts to determine claims involving statutory authorities and the complex public policy concerns that these claims raise are sometimes expressed in terms of lack of “judicial competency” or “institutional competence.” For discussion of judicial competency to assess cases involving the exercise of powers by statutory authorities, see Paul Craig and Duncan Fairgrieve, “‘Barrett,’ Negligence and Discretionary Powers” (1999) 4 *Public Law* 626-50, especially at 632; and Chris Finn, “The Justiciability of Administrative Decisions: A Redundant Concept?” (2002) 30:2 *Federal Law Review* 239-63.

all three of the jurisdictions examined. It is also noteworthy that judicial consideration to date has not yet extended to extensive consideration of other key elements of the tort of negligence, such as causation, mitigation of loss, or proof and quantification of compensable damage.¹⁵⁶ It is likely that such consideration will give rise to further uncertainties and unresolved controversies.

Consequently, there will be continuing uncertainty, both for taxpayers seeking a remedy for negligent tax official behaviour and for tax officials seeking to carry out their duties free of the hovering spectre of a potential common-law suit.

156 As noted in note 145, *supra*, in *Leroux*, *supra* note 2, the plaintiff lost his case owing to a failure to establish causation or to adequately mitigate his losses. Causation principles and their application in *Leroux* were subsequently considered in *Groupe Enico inc.*, *supra* note 63, although in the context of deliberate action rather than negligence, and common themes have not yet emerged. Other recent Canadian cases make only passing reference to causation. For example, the Federal Court in *Gordon*, *supra* note 2, at paragraph 167, simply noted that “the requirement for a causal link between an investigative error and the outcome of the investigation is a significant liability limitation.” Such issues have not, to date, received any attention in Australia or New Zealand in the context of claims arising out of negligence by tax officials.