Suing the Canada Revenue Agency in Tort

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PRÉCIS
Les contribuables qui ont fait l’objet d’une vérification fiscale abusive peuvent, comme recours, intenter une action en dommages et intérêts contre l’Agence du revenu du Canada (ARC). Dans cet article, l’auteur soutient qu’en réalité, ce recours n’en est pas tellement un. Il présente tout d’abord le problème des vérifications fiscales abusives et donne l’exemple d’une affaire où les contribuables ont intenté une action en dommages et intérêts contre l’ARC pour une poursuite criminelle infructueuse après une vérification. L’auteur présente ensuite les aspects dont les contribuables doivent tenir compte avant d’intenter une action en dommages et intérêts contre l’ARC, il examine les causes des actions en dommages et intérêts qui ont été intentées jusqu’à présent contre l’ARC, et il traite de deux jugements récents au Québec (la seule province de droit civil au Canada). Il propose en conclusion des solutions dont le Parlement devrait tenir compte pour corriger les lacunes du régime existant.

ABSTRACT
Suing the Canada Revenue Agency (CRA) in tort is a remedy available to taxpayers who have been subjected to an abusive tax audit. In this article, the author argues that in practice this is not much of a remedy. He first introduces the problem of abusive tax audits and gives an example of a case in which the taxpayers sued the CRA in tort for a failed criminal prosecution following an audit. The author then sets out the preliminary matters that taxpayers must consider before starting an action in tort against the CRA, examines the causes of action in tort that taxpayers have brought so far against the CRA, and discusses two recent judgments from Quebec (Canada’s sole civil-law jurisdiction). He concludes with suggested solutions for Parliament to consider in addressing the shortcomings of the current system.

KEYWORDS: AUDITS ■ ABUSES ■ JURISDICTION ■ TORTS ■ NEGLIGENCE ■ CIVIL LAW

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INTRODUCTION

How can the law remedy the harm that an abusive audit inflicts on a taxpayer? According to the Federal Court of Appeal, an action in tort is the proper remedy for a taxpayer subjected to an abusive audit. This article defines an abusive audit as a tax audit in which one or more employees of the Canada Revenue Agency (CRA) intentionally or unintentionally commit a wrongful act against a taxpayer under audit. A wrongful act may occur during the audit and may range from malicious conduct, such as asking the taxpayer for a bribe, to an innocent mistake, such as applying the wrong law or standard in an audit. A wrongful act may also occur after the conclusion of the audit and may have little to do with the audit itself; again, the wrongful act may range from malicious conduct, such as knowingly taking collection action on a wrong assessment, to an innocent mistake, such as erroneously referring a case for criminal investigation for tax evasion. Abusive audits may cause taxpayers public humiliation, social stigma, financial ruin, and psychological and emotional distress.

Abusive audits happen. Regardless of how conscientious tax officials may be, they may commit errors through negligence, and those errors may cause taxpayers under

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1 Ereier v. Canada, 2013 FCA 20, at paragraph 36; leave to appeal to the Supreme Court of Canada dismissed July 11, 2013, case no. 35296. This article examines the tort remedies available to taxpayers who have been subjected to an abusive audit; Charter remedies, injunctive remedies, and administrative remedies are beyond the article’s scope. (References herein to “the Charter” are to the Canadian Charter of Rights and Freedoms, part I of the Constitution Act, 1982, being schedule B to the Canada Act 1982 (UK), 1982, c. 11.)
audit enormous damages. An unintentional error in an audit impugns the competence of a tax official, but a malicious act impugns his or her integrity. In the context of an abusive audit, absence of competence in a tax official leads to a negligence cause of action, but lack of integrity leads to several intentional torts. In an article on the exercise of audit powers, Guy Du Pont and Michael Lubetsky point to some of the following experiences among tax practitioners who have represented taxpayers under audit:

- Some auditors, conscious of their powers, professional independence, and personal immunity from civil lawsuits, largely “act with near impunity.”
- Some auditors may “propose and issue assessments and reassessments for substantial amounts of tax not justified by the law or the facts.”
- Some auditors may “drag out an audit for years, making expansive, repetitive, and costly requests for information, extorting waivers of the statutory limitation periods while [threatening] . . . immediate assessment action.”
- Some auditors may issue orders or demands to banks, employers, and other third parties, not only embarrassing taxpayers but also potentially putting their sources of financing at risk.

Furthermore, there can be financial incentives for auditors and collectors to recover tax liabilities, which motivate them to extract as much money as possible from taxpayers. Unfortunately, “[t]he CRA does not publicly disclose the details of the performance metrics it uses” to evaluate employees.

This article analyzes the causes of action in tort that taxpayers subjected to an abusive audit can bring against the CRA. It seeks to add to the previous work in this area of the law—in particular, articles by Du Pont and Lubetsky (referred to above) and David Jacyk. In many tort actions against the CRA, the taxpayers have represented themselves in the federal and provincial courts, including provincial appellate courts. Often, taxpayers who have been subjected to an abusive audit have

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2 Guy Du Pont and Michael H. Lubetsky, “The Power To Audit Is the Power To Destroy: Judicial Supervision of the Exercise of Audit Powers” (2013) 61, special supplement Canadian Tax Journal 103-21, at 105.

3 Ibid., at 104. See Québec (Agence du revenu) c. Groupe Enico inc., 2016 QCCA 76, for a discussion of the CRA’s “Tax Earned by Audit” scheme. See Ludmer c. Attorney General of Canada, 2018 QCCS 3381, for a discussion of the CRA’s structure, mandate, and processes pertinent to a tax audit.

4 Kenneth J. Klassen, Auditing the Auditors: Tax Auditors’ Assessments and Incentives, C.D. Howe Institute E-Brief (Toronto: C.D. Howe Institute, April 2016), at 2 (www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/e-brief_234.pdf).

5 David Jacyk, “The Dividing Line Between the Jurisdictions of the Tax Court of Canada and Other Superior Courts” (2008) 56:3 Canadian Tax Journal 661-707.

6 Several such cases are discussed below. See Chhabra, infra note 54; Longley, infra note 67; and Foote, infra note 33.
been financially ruined because of that audit and are unable to afford a lawyer. Thus, abusive audits raise serious problems of access to justice. Successful cases against the CRA are rare, take a long time, and produce relatively small awards. When the CRA settles such civil actions privately, that settlement is not public information, so it is not possible to analyze whether the taxpayer was compensated fairly. Therefore, it appears that despite what the Federal Court of Appeal said in Ereiser,\(^7\) suing in tort is not much of a remedy for a taxpayer subjected to an abusive audit.

In the next section of the article, I describe a recent case of an abusive audit and its consequences for the taxpayers. In subsequent sections, I discuss the preliminary matters that taxpayers must consider before starting a civil action in tort against the CRA; examine the causes of action in tort that taxpayers have brought to date against the CRA; and review two recent judgments from Quebec, Canada’s sole civil-law jurisdiction. I conclude with some suggested solutions for Parliament to consider in addressing the shortcomings of the current system.

**THE AUDIT OF THE SAMAROOS**

On March 2, 2018, the Supreme Court of British Columbia awarded Tony and Helen Samaroo approximately $1.7 million in damages against the CRA.\(^8\) The Samaroos were a married couple who owned a restaurant, a nightclub, and a motel in Nanaimo, British Columbia. The restaurant operated in three shifts—day, night, and graveyard. In 2006, the CRA received a tip from a former employee that the Samaroos did not report the sales of their graveyard shift. The CRA conducted an audit, which revealed that Mr. Samaroo had made substantial cash deposits into his business accounts using old $50 and $100 bills. After that finding, the CRA started a full investigation of the Samaroos with searches of their residence, three business locations, and their accountant’s office, but did not find any incriminating evidence. As of 2007, the CRA official in charge of the investigation knew that he could not show that the Samaroos had underreported the sales of their restaurant. Nonetheless, he referred the case to the Crown to initiate prosecution of the couple for tax evasion. The Crown prosecutor charged the Samaroos and their closely held corporations with 21 counts of tax evasion. The news of the charges was a front-page story in Nanaimo’s local newspaper.

In April 2011, the Samaroos and their corporations were acquitted of all charges after a 19-day trial.\(^9\) They subsequently sued the CRA for malicious prosecution, claiming $7 million in damages plus out-of-pocket expenses.

The BC Supreme Court found that the Crown prosecutor had relied on the CRA not just to gather the evidence but also to draft and essentially approve the charges. It was not the Crown prosecutor but the CRA official who had overseen the criminal investigation who determined whom to charge, with what offence, and in what

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7 *Ereiser*, supra note 1.
8 *Samaroo v. Canada Revenue Agency*, 2018 BCSC 324.
9 *R v. Samaroo*, 2011 BCPC 503.
amount. The court found that that official had suppressed exculpatory evidence and had intentionally misled the Crown prosecutor in his report of information provided by the Samaroos’ bookkeeper; that report formed the basis of the theory of the Crown’s case.10

More important than one employee’s misconduct, the evidence presented in court revealed what the judge described as “an unfortunate culture within the CRA.”11 The judge noted that some of the CRA employees looked forward with “unprofessional glee” to the Samaroos’ anticipated conviction and ruin,12 and he found it “appalling that the incarceration of the plaintiffs would be joked about.”13 He also considered that the CRA’s advertising of its successes on its website indicated “a deeply troubling approach to its duties,” and likened the practice to a police force advertising on a government website how many people it incarcerated each year.14

The trial judge observed that “[t]he impact of the tax evasion charges and the resulting publicity on [the Samaroos] and their children was . . . [traumatic] and long lasting.”15 Their daughter changed her name in order not to be associated with the stigma of the criminal charges against her parents.16 Their business lost many customers, including officers of the Royal Canadian Mounted Police (RCMP) who were frequent customers and had their own special section in the restaurant.17 As a result of the criminal tax evasion prosecution, Tony and Helen Samaroo were traumatized emotionally and their mental health deteriorated. Helen Samaroo “would not go to work and would stay in bed all day as she was too embarrassed to go to work or out in public.”18 Tony Samaroo “[would] spend his days watching TV and no longer socialize”; he started to drink and smoke heavily.19 The case cost him close to $350,000 in legal defence fees.20 At the time of the judgment, Mr. and Mrs. Samaroo no longer lived together.

On April 9, 2019, the BC Court of Appeal overturned the lower court’s judgment and dismissed the case in its entirety.21 The Court of Appeal found that the circumstances of the case justified the CRA’s view that the Samaroos had probably evaded

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10 Samaroo, supra note 8, at paragraphs 195 and 197.
11 Ibid., at paragraph 259.
12 Ibid., at paragraph 327.
13 Ibid.
14 Ibid., at paragraph 328.
15 Ibid., at paragraph 291.
16 Ibid., at paragraph 292.
17 Ibid.
18 Ibid., at paragraph 293.
19 Ibid., at paragraph 296.
20 Ibid., at paragraph 295.
21 Samaroo v. Canada Revenue Agency, 2019 BCCA 113.
paying taxes and it was reasonable to believe that evasion could have been proved in a court of law beyond a reasonable doubt.\textsuperscript{22} The court found it unnecessary to review whether the CRA officials had acted maliciously toward the Samaroos.\textsuperscript{23}

I will return to these judgments later in the article, to explain the legal analysis on which the courts based their decisions. First, I will outline the underlying legal issues to be considered by a taxpayer who is subjected to an abusive audit.

\textbf{WHAT PRETRIAL MATTERS SHOULD THE TAXPAYER CONSIDER?}

If, during or after an audit, the conduct of CRA employees toward the taxpayer becomes tortious, the taxpayer may be entitled to damages. The taxpayer must know what laws apply to a tort action against the CRA, what remedies exist, and where to seek them. The taxpayer must also know when the CRA is immune from being sued in a civil action.

\textbf{What Laws Govern?}

The CRA is a federal agent of the Crown. Under the common-law doctrine of sovereign immunity, the Crown is not subject to private tort actions without its consent. In Canada, that immunity has been considerably limited by statute, and the Crown may be held liable in tort to the same extent as a private individual.\textsuperscript{24} The Crown Liability and Proceedings Act\textsuperscript{25} imposes liability in tort on the Crown for the tortious actions of its servants. The act does not affect the Crown's other liabilities, such as those under contract or property laws.\textsuperscript{26} Moreover, the Crown is vicariously liable for the tort actions against its agents; that is, it is vicariously liable for damages caused by its servants for which, as their principal, it would be liable if it were a natural private person.\textsuperscript{27}

\textbf{In Which Courts Should Taxpayers Sue the CRA?}\textsuperscript{28}

A taxpayer’s choice of court in which to sue the CRA depends on the type of remedies sought and the stage of the audit process. If the taxpayer seeks to challenge the correctness or validity of an assessment, the Tax Court of Canada is the only available

\begin{footnotes}
\footnote{22}{Ibid., at paragraph 6.}
\footnote{23}{Ibid., at paragraph 7.}
\footnote{24}{\textit{Miazga v. Kvello Estate}, 2009 SCC 51, at paragraphs 4 and 43.}
\footnote{25}{RSC 1985, c. C-50.}
\footnote{26}{See, for example, \textit{Soleiko v. Canada} (1988), 22 FTR 20 (TD) (finding the Department of Fisheries, a federal Crown agency, liable for the torts of nuisance and negligence); and \textit{Arsenovski v. Bodin}, 2016 BCSC 359 (finding the Insurance Corporation of British Columbia, a provincial Crown corporation, liable for the tort of malicious prosecution).}
\footnote{27}{\textit{Crown Liability and Proceedings Act}, supra note 25, section 3(b)(i).}
\footnote{28}{For a more detailed discussion, see Jacyk, supra note 5.}
\end{footnotes}
court to which the taxpayer can appeal to redress the issue. If the taxpayer seeks judicial review of the conduct of the CRA's employees while the audit is still ongoing or afterward, and wishes to apply for injunctive relief through a writ of certiorari, mandamus, prohibition, or quo warranto, or any injunction, the Federal Court is the only available court with jurisdiction to hear the application and issue such an injunction against the CRA. If the taxpayer seeks monetary damages against the CRA for tortious conduct of its officials, the provincial superior courts and the Federal Court have concurrent jurisdiction for relief.

However, a taxpayer may not launch a collateral attack on a tax assessment by bringing a civil claim against the CRA. A collateral attack is an attack “made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment,” and is forbidden. As Du Pont and Lubetsky note, while the Federal Court of Appeal has affirmed the Tax Court of Canada’s exclusive jurisdiction to determine the correctness and validity of a tax assessment, it has also held that this exclusive jurisdiction does not include the power to consider procedural matters regarding a tax assessment. The direct consequence of this assignment of jurisdiction is that taxpayers must be prepared for prolonged proceedings in multiple courts, litigating the same facts but seeking different remedies. Thus, a taxpayer seeking to sue the CRA for damages for an abusive audit may have to either concede the correctness of any assessment at issue or first appeal to the Tax Court of Canada to vacate the assessment, and then sue the CRA in tort.

What Immunities Does the CRA Have?

The CRA, as an agent of the Crown, is immune from tort actions when exercising any power exercisable by the prerogative of the Crown or by any power conferred on it by an act of Parliament, such as the Income Tax Act. For example, the CRA is immune from liability when deciding to assess or reassess the tax liability of a

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29 Tax Court of Canada Act, RSC 1985, c. T-2, as amended, section 12(1).
30 Federal Courts Act, RSC 1985, c. F-7, as amended, section 18(1). See 861808 Ontario Inc. v. Canada (Revenue Agency), 2013 ONCA 604; leave to appeal dismissed by the Supreme Court of Canada [2014] GSTC 24, 472 NR 398 (note). (The Ontario Court of Appeal upheld a trial court's dismissal of a taxpayer's action under contract law when the CRA allegedly breached a settlement agreement; the court held that the action should have been brought in the Federal Court of Canada.)
31 Ereiser, supra note 1, at paragraphs 35-36.
32 Ibid., at paragraph 35.
33 Foote v. Canada (Attorney General), 2011 BCSC 1062, at paragraph 22, citing Wilson v. The Queen, [1983] 2 SCR 594, at 599. See also Canada v. Roitman, 2006 FCA 266, at paragraph 20.
34 Du Pont and Lubetsky, supra note 2, at 105.
35 Ibid., at 116.
36 Crown Liability and Proceedings Act, supra note 25, section 8; Income Tax Act, RSC 1985, c. 1 (5th Supp.), as amended.
taxpayer. However, the Supreme Court of Canada has held that this immunity is “limited to true core policy acts,” and even then, it is not absolute. As defined by the court, “core policy” government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith.” Moreover, making policy decisions is “the proper role of government, not the courts. For this reason, decisions and conduct based on these [public policy] considerations cannot ground an action in tort.” The court has also stated that no immunity exists when the plaintiff proves that the Crown acted in bad faith.

Bad faith can be established by proving that the [Crown] acted deliberately with the specific intent to harm another person . . . [or] by proof of serious recklessness that reveals a breakdown of the orderly exercise of authority so fundamental that absence of good faith can be deduced, and bad faith presumed.

While the decision to exercise a power conferred by Parliament is immune from a tort action, such immunity does not extend to the way the power is exercised. In this regard, the Supreme Court of Canada has distinguished “policy” from “discretion”:

Discretion is concerned with whether a particular actor had a choice to act in one way or the other . . . Policy decisions are always discretionary, in the sense that a different policy could have been chosen. But not all discretionary decisions by government are policy decisions.

In particular, the Canada Revenue Agency Act explicitly excludes the power to make regulations from the powers of the CRA. The minister of finance, not the minister

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37 Sinha v. MNR, 81 DTC 465, at paragraph 5. In Neumann v. Canada (Attorney General), 2011 BCCA 313, the court overturned a $1.3 million jury verdict and dismissed Mr. Neumann’s action for violation of his rights under the Charter. The CRA had obtained a warrant to search Mr. Neumann’s residence in the course of its investigation of another taxpayer for tax evasion charges. The search warrant was legally obtained and properly executed. The court held that “the search warrant is an important and accepted enforcement tool utilized by those charged with investigating crime. If a search warrant is lawfully obtained and executed, those subjected to it cannot seek compensation for its unintended repercussions.” (Ibid., at paragraph 7.) So even though Mr. Neumann maintained that he had been traumatized by the search of his residence, the CRA was not liable in respect of such trauma.

38 Ludmer, supra note 3, at paragraph 144, citing R v. Imperial Tobacco Canada Ltd., 2011 SCC 42, at paragraphs 87–90; and Hinse v. Canada (Attorney General), 2015 SCC 35, at paragraphs 23–24.

39 Imperial Tobacco, supra note 38, at paragraph 90.

40 Ibid., at paragraph 87.

41 Hinse, supra note 38, at paragraph 53.

42 Ibid.

43 Imperial Tobacco, supra note 38, at paragraph 88.

44 Canada Revenue Agency Act, SC 1999, c. 17, section 8(3)(a).
of national revenue or the commissioner of the CRA, is charged with exercising a legislative or regulatory power in setting tax policy. The conduct of an audit is never a “true core policy act”; therefore, the CRA cannot claim any immunity from a tort action for the conduct of its employees during or after an audit.

WHAT CAUSES OF ACTION IN TORT MAY EXIST AGAINST THE CRA FOR AN ABUSIVE AUDIT?

Tort actions against the CRA for an abusive audit can be classified under two heads:

1. intentional torts, in which one or more CRA employees acted with deliberate intent to harm the taxpayer; and
2. unintentional torts, in which one or more CRA employees negligently harmed the taxpayer.

Intentional Torts

So far, the CRA has been sued successfully under four categories of intentional tort; however, “success” in this context means that a court recognized a cause of action as a valid tort and allowed the case to continue beyond the pleading stage. Going beyond the pleading stage allows the court to review the merits of the case, but it does not mean that the court ruled, or would have ruled, in favour of the plaintiff-taxpayer. The four categories of intentional tort are

1. misfeasance in a public office, in which the CRA acted maliciously or outside its powers, against a taxpayer;
2. malicious prosecution, in which the CRA maliciously initiated criminal proceedings against a taxpayer for tax evasion;
3. abuse of process, in which the CRA wrongfully initiated criminal or civil proceedings against a taxpayer; and
4. intentional interference with economic relations, in which the CRA intentionally interfered with the economic relations between a taxpayer and a third party.

45 Ludmer, supra note 3, at paragraph 146.
46 Ibid.
47 When the taxpayer becomes aware of the conduct of a CRA official that gives rise to a tort, the applicable statute of limitations will start to run. See Gardner v. Canada (Attorney General), 2012 ONSC 1837, in which the taxpayer's tort action was dismissed as being outside the limitation period; and Leroux, infra note 63, at paragraphs 233-34, for another example of a possible limitations defence. A discussion of defences available to the CRA is beyond the scope of this article.
48 Some authorities call this tort “misfeasance of public office.” The two phrases refer to the same tort.
Misfeasance in a Public Office

The tort of misfeasance in a public office can arise in one of two ways: (1) a public officer’s conduct is specifically intended to injure a person or class of persons; or (2) a public officer “acts with knowledge . . . that he or she has no power to do the act complained of and the act is likely to injure the plaintiff.”

For the first category, evidence that the public officer acted for the express purpose of harming the plaintiff (that is, with malice) is sufficient to prove the tort, because “a public officer does not have the authority to exercise his powers for an improper purpose, such as deliberately harming a member of the public.” For the second category, however, the plaintiff must prove that the defendant acted with “deliberate disregard of official duty” and “knowledge that the misconduct [was] likely to injure the plaintiff”; and the plaintiff must also prove that “the tortious conduct was the legal cause of his or her injuries” and that “the injuries suffered are compensable in tort law.”

The first category of this tort has a single element, so if the taxpayer can prove that the CRA acted maliciously toward him or her, the taxpayer does not have to prove any damages caused by that malicious conduct. If the taxpayer suffered any damages, the compensatory damages will be in addition to the punitive damages that the court will award against the CRA. Moreover, to allege this tort against the CRA, the taxpayer does not need to specifically identify the official who allegedly committed it.

An example of an action in the first category is Chhabra. In that case, the court found that the conduct of the CRA employees was malicious, and a finding of malice was sufficient to prove the cause of action. Specifically, the court found that the CRA committed the tort of misfeasance in a public office when its employees’ abusive audit and subsequent collection actions forced a physician to end his medical practice and caused him financial ruin, emotional trauma, and public humiliation.

Dr. Chhabra had entered into a partnership with his American nephew to buy real estate in California, but the nephew embezzled his uncle’s funds and stole from him with the aid of an accountant. In 1981, in what the court described as “not one of [the CRA’s] finest hours,” the CRA reassessed Dr. Chhabra on the basis of falsified financial documents that he had provided as examples of his nephew’s wrongdoing. The Federal Court Trial Division set aside the reassessments in 1987.
to that time, however, the CRA imposed a 75 percent garnishment order on Dr. Chhabra’s wages, and it refused to make any arrangement with him to settle his debt, despite knowing of his proven inability to pay.58 Dr. Chhabra endured public exposure of his tax problems in a TV program and newspaper articles, which, the court found, had a serious impact on his reputation.59 He lost his hospital privileges, and he had to close his medical practice and move out of province.60 The court found that the tax officials were guilty of the tort of misfeasance because they had acted both with malice and with the knowledge that they did not have the power that they purported to exercise (because the collection division had knowingly continued to collect even after the audit division within the same office had become aware that the underlying assessment was wrong).61 The court awarded Dr. Chhabra $1,000 for general damages and $10,000 for exemplary damages.62

Malice is difficult to prove; therefore, the decision to accuse the CRA of malicious conduct must not be taken lightly. In cases such as Chhabra and the trial decision in Samaroo, where the courts held that CRA officials had acted maliciously, the proof came from documentary evidence found in the CRA’s internal communications. Oral evidence, however, may not be enough to prove that a CRA employee’s conduct was malicious. For example, in Leroux,63 the Supreme Court of British Columbia was not persuaded that an alleged bribery attempt (that is, malicious conduct) took place even though the taxpayer had credible witnesses corroborating his testimony. Mr. Leroux alleged that in December 1998, the CRA auditor responsible for his case told him that “the CRA was coming after him for a lot of money” and if Mr. Leroux “gave him $25,000 . . . he would make his CRA problems disappear.”64 Mr. Leroux testified that he had informed his son-in-law (who was a member of the RCMP), one of his friends, and his member of Parliament (MP) about this alleged extortion or bribery attempt at the time, and at trial all three confirmed that testimony.65 However, the court was not persuaded on a balance of probabilities that the alleged extortion had occurred. The court noted that the CRA auditor had died within the same month as the alleged extortion, and the notices of reassessment had already been issued; therefore, the auditor had no power to change or dismiss the reassessment.66 While not being able to defend one’s name because of an untimely

58 Chhabra, supra note 54, at 5312.
59 Ibid., at 5320.
60 Ibid., at 5312.
61 Ibid., at 5318-19.
62 Ibid., at 5322-23.
63 Leroux v. Canada Revenue Agency, 2014 BCSC 720.
64 Ibid., at paragraph 33.
65 Ibid., at paragraphs 34 and 227.
66 Ibid., at paragraph 230. The court found that Mr. Leroux genuinely believed that he had been asked to pay a bribe, and he had told others that it had happened, but that belief by itself did not mean that an attempted bribery had in fact occurred. The decision does not indicate
death may be a relevant factor to consider, the fact that the court in *Leroux* considered whether an official had the power to act on a promise allegedly given in exchange for a bribe is curious, because it suggests that taxpayers who may be victims of attempted bribery may have to prove that the allegedly corrupt officials had the power to deliver on their promises.

An example of the second category of the tort of misfeasance in a public office is the conduct at issue in the *Longley* case, though this did not involve an abusive audit. Deliberately misleading a taxpayer or dealing with a taxpayer dishonestly are grounds for a finding of misfeasance in a public office. In *Longley*, the CRA was found to have committed this tort. The plaintiff, Mr. Longley, had discovered a possibly unintended consequence (which he referred to as “a loophole”) of a provision in the Income Tax Act under which “taxpayers could receive federal political contribution tax credits for contributions made to a political party which the taxpayer could direct to be paid so as to benefit either the taxpayer or some other individual whom the taxpayer designated.” From 1985 to 1990, Mr. Longley sought written confirmation from the CRA that his tax scheme based on his interpretation of the statute was legal. Although the CRA had obtained legal advice confirming that Mr. Longley’s tax scheme did not violate the Act, it nevertheless advised him that it had no such advice. The CRA’s employees evidently hoped that if they did not confirm the legality of the scheme, Mr. Longley would not be able to attract many contributors, and Parliament would correct what the CRA considered to be a flaw in the legislation. In 1990, the CRA told Mr. Longley that his scheme violated section 245 of the Income Tax Act (the general anti-avoidance rule, or GAAR), which had been enacted in 1988. Mr. Longley sued the CRA for misfeasance in a public office. The court found that the CRA had intentionally misled Mr. Longley from 1985 until the adoption of GAAR in 1988, and thus had dealt with Mr. Longley dishonestly. On the basis of these two findings, the court was satisfied that the CRA was liable for misfeasance in a public office. It awarded Mr. Longley $5,000 in general damages and $50,000 in punitive damages against the CRA.

Merely being wrong is not sufficient for the CRA to be liable for misfeasance in a public office. For example, in *Canus*, the auditor used the wrong methodology

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67 *Longley v. Canada (MNR)*, 1999 CanLII 5750 (BCSC); aff’d 2000 BCCA 241; leave to appeal to the Supreme Court of Canada dismissed June 7, 2000, docket no. 27927.

68 Ibid. (BCSC), at paragraph 1.

69 Ibid., at paragraphs 93 and 94.

70 Ibid., at paragraphs 92 and 94-95.

71 Ibid., at paragraphs 136 and 141. Both sides appealed the decision, but the minister discontinued his appeal (without explanation). The BC Court of Appeal dismissed Mr. Longley’s cross-appeal (he wanted $99 billion in damages) and affirmed the lower court’s judgment. See *Longley*, supra note 67 (BCCA), at paragraphs 1 and 26.

72 *Canus v. Canada*, 2005 NSSC 283.
in reassessing the taxpayer’s transfer-pricing audit; however, he did not breach any relevant statutory provisions, acted within his statutory powers, and did not act for any improper purpose. He did not intend to harm the taxpayer by his actions, though his mistake clearly did have that result. Therefore, the court dismissed the taxpayer’s action for misfeasance in a public office.73

**Malicious Prosecution**

In an action for malicious prosecution, the plaintiff seeks compensation for losses caused by an unjustified prosecution.74 The claim targets the defendant’s decision to initiate or continue with a criminal prosecution against the plaintiff.75 In *Miazga*, the Supreme Court of Canada held that for such an action to succeed, a plaintiff must prove that the prosecution was: (1) initiated by the defendant; (2) terminated in favour of the plaintiff; (3) undertaken without reasonable and probable cause; and (4) motivated by malice or a primary purpose other than that of carrying the law into effect.76

For the first element, the plaintiff must satisfy the court that the defendant named in the action initiated the prosecution. While as a matter of procedure the Crown prosecutor always initiates a criminal prosecution, the initiation requirement of the tort may be met when an individual—for example, a CRA employee—swears an information (which sets out the charges against the accused). Therefore, someone other than the Crown prosecutor who appears on behalf of the CRA in court can be liable for this tort. This is illustrated by *Samaroo*, where the court found that the CRA investigator was clearly instrumental in the prosecution of the Samaroos for tax evasion. It was he, and not the Crown prosecutor, who was really in charge of the criminal investigation into the Samaroos; he also drafted and swore the final draft of the information without the Crown prosecutor’s review. He, and therefore his employer, the CRA, caused everything to be done to “set the law in motion” wrongfully against the Samaroos.77

The second element, termination of the prosecution in the plaintiff’s favour, may be satisfied regardless of how the proceedings ended—whether in an acquittal, a

73 Ibid., at paragraph 43. Misfeasance in a public office is personal in nature, so a bankrupt individual, but not the trustee of a bankrupt estate, can bring an action against the CRA for an abusive audit that led to the bankrupt’s bankruptcy. (In *Canus*, the CRA was the taxpayer’s sole creditor.) See *Edell v. Canada*, 2010 FCA 26. However, a minority shareholder of a corporation does not have standing to bring an action against the CRA for an alleged abusive audit of the corporation. See *Leighton v. Canada (Attorney General)*, 2012 BCSC 961, at paragraphs 22-28.

74 *Miazga*, supra note 24, at paragraph 42.

75 Ibid., at paragraph 6.

76 Ibid., at paragraph 3.

77 *Samaroo*, supra note 8, at paragraph 198; see also paragraphs 112 and 196-97.
discharge at a preliminary hearing, a withdrawal, or a stay.\(^\text{78}\) In *Samaroo*, because the plaintiffs had been acquitted, satisfaction of this requirement was not in dispute. However, as the Supreme Court of Canada noted in *Miazga*, in situations where the criminal proceedings did not end with a decision on the merits of the charges (for example, where there was a settlement or a plea bargain), it may not be considered that those proceedings had ended in the plaintiff’s favour, even if the outcome might have appeared to be a victory for the plaintiff at the criminal proceeding stage.\(^\text{79}\) To illustrate, if a taxpayer charged with tax evasion settles the charge by paying a nominal fine and subsequently sues the CRA for malicious prosecution in a civil court, the court may not treat that settlement as an outcome favouring the taxpayer.

Regarding the third element, reasonable and probable cause, the Supreme Court of Canada noted in *Miazga* that a court is not concerned with the personal views of the prosecutor regarding the guilt of the accused, but rather with the prosecutor’s professional assessment of the legal merits of the case.\(^\text{80}\) In a criminal trial, belief in probable guilt means that the prosecutor believes that, in the existing circumstances, he or she can prove the guilt of the accused beyond a reasonable doubt in a court of law.\(^\text{81}\) Reasonable and probable cause is “a question of law to be decided by the judge”;\(^\text{82}\) and, as noted in *Samaroo*, the same test applies to both an investigator and a Crown prosecutor.\(^\text{83}\) Only if the court determines that no objective grounds existed for the prosecution at the relevant time can the court consider whether the intent to prosecute the accused was malicious.\(^\text{84}\) In *Samaroo*, the court found that on the basis of the circumstances actually known to the CRA’s investigators, the lead investigator did not have reasonable and probable cause to believe that the Samaroos’ guilt could be proved beyond a reasonable doubt.\(^\text{85}\)

The BC Court of Appeal, however, disagreed. The court found that the CRA offered “a considerable body of circumstantial and other evidence from which an inference could be drawn that the Samaroos were suppressing the existence of taxable income by skimming cash out of the businesses.”\(^\text{86}\) For example, before the audit began in 2006, Mr. Samaroo routinely destroyed documents, such as the till tapes, even though he had an obligation under the Income Tax Act to preserve documents underlying the tax returns.\(^\text{87}\) Furthermore, Mr. Samaroo commingled

\(^{78}\) *Miazga*, supra note 24, at paragraph 54.

\(^{79}\) Ibid.

\(^{80}\) Ibid., at paragraph 63, citing *Proulx v. Quebec (Attorney General)*, 2001 SCC 66.

\(^{81}\) *Miazga*, supra note 24, at paragraph 63.

\(^{82}\) Ibid., at paragraph 74.

\(^{83}\) *Samaroo*, supra note 8, at paragraph 130.

\(^{84}\) *Miazga*, supra note 24, at paragraph 77.

\(^{85}\) *Samaroo*, supra note 8, at paragraph 211.

\(^{86}\) *Samaroo*, supra note 21, at paragraph 59.

\(^{87}\) Ibid., at paragraph 85.
cash income from his various businesses and did not keep proper records for the source of various deposits into personal or business bank accounts.88 Finally, after the audit began, the gross revenue of Mr. Samaroo’s restaurant increased by almost $50,000 a month while the makeup and volume of customers remained about the same.89 Clearly, this evidence was not compelling at the criminal trial; however, whether the evidence was compelling enough to convict is not the test in an action for malicious prosecution. The test is “whether objectively, as a matter of law, the evidence known at the time . . . met the requisite standard of reasonable and probable cause to initiate a prosecution.”90 The plaintiff bears the onus “to prove an absence of reasonable and probable cause to initiate the prosecution.”91 In other words, in the view of the BC Court of Appeal, the plaintiff must prove a negative: that the CRA could not have had reasonable and probable cause to initiate the prosecution.

As to the fourth element, the motivation for the prosecution, the Supreme Court said in Miazga that this element is proved when a court is satisfied, on a balance of probabilities, that the defendant Crown prosecutor commenced or continued the impugned prosecution with a purpose inconsistent with his or her role as a “minister of justice.” The plaintiff must demonstrate on the totality of the evidence that the prosecutor deliberately intended to subvert or abuse the Office of the Attorney General or the process of criminal justice.92

Satisfying the third element does not dispense with the necessity of proving an improper purpose. Moreover, incompetence, recklessness,93 or gross negligence is not sufficient to prove malice.94

In Samaroo, the trial court found on a balance of probabilities that the lead CRA investigator had acted deliberately to subvert and abuse his office by (1) suppressing exculpatory evidence and attributing inaccurate evidence to witnesses; (2) knowingly misstating material evidence essential to the proof of tax evasion; (3) filing a misleading report on which he knew the Crown would rely to authorize the prosecution; and (4) swearing the information—“all in the hope of convicting the Samaroos.”95 Because his purpose was improper, the court found that the malice

88 Ibid., at paragraph 84.
89 Ibid., at paragraph 87.
90 Ibid., at paragraph 40.
91 Ibid., at paragraph 45 (emphasis in original).
92 Miazga, supra note 24, at paragraph 89.
93 Compare Hinse, supra note 38, at paragraph 53. Recklessness shows bad faith but not malice. Thus, even if a prosecutor was reckless, that is not enough for the prosecutor to be held liable for malicious prosecution. In Samaroo, the cause of action for malicious prosecution against the person of the Crown prosecutor was dismissed over this distinction.
94 Miazga, supra note 24, at paragraph 81.
95 Samaroo, supra note 8, at paragraph 257.
requirement of the tort was satisfied, and therefore that the Samaroos had proved malice vicariously against the CRA.\textsuperscript{96} However, the BC Court of Appeal found it unnecessary to review the element of malice after finding that the CRA had sufficient evidence to initiate the prosecution. The court found that it was not necessary to examine whether [the CRA investigator] intentionally suppressed or withheld material evidence from the prosecutors, [or] failed to make clear disclosure of witness statements, grapple with the many criticisms leveled at him about his conduct in the investigation and criminal prosecution, nor to otherwise consider whether he acted for an improper purpose.\textsuperscript{97}

In my view, the decision of the BC Court of Appeal could be criticized under the law of torts for at least two reasons. First, as discussed under the first category of the tort of misfeasance in a public office, if a Crown official acts maliciously toward an individual, that individual is entitled to receive punitive damages even if he or she did not suffer any other damages. Here, the Samaroos had proved at trial that the CRA investigator acted with malice toward them. Regardless of whether the Samaroos had proved the other three elements of the tort of malicious prosecution, the BC Court of Appeal had to review the element of malice because, once proved, existence of malice entitled the plaintiffs to some damages. Instead, the court proceeded to dismiss the case in its entirety without considering the actions of the CRA investigator.

Second, the court made a glaring error of law in misstating the test of malicious prosecution from \textit{Miazga}. In \textit{Miazga}, the Supreme Court said, “It is readily apparent from its constituent elements that the tort of malicious prosecution targets the decision to initiate or continue with a criminal prosecution.”\textsuperscript{98} The BC Court of Appeal did not state and never considered whether the CRA had reasonable and probable cause \textit{to continue} with the prosecution of the Samaroos. The charges against the Samaroos were laid in 2007; the criminal trial started in 2010 and ended in 2011. The prosecution of the Samaroos continued even after the CRA lead investigator had admitted to his mistakes during the criminal phase of the audit.\textsuperscript{99} The BC Court of Appeal applied the test of reasonable and probable cause only to the initiation of the prosecution in 2007, and not to its continuation through 2011.

It remains to be seen whether the Supreme Court of Canada will grant leave to appeal the decision.

\textit{Abuse of Process}

The tort of abuse of process exists if the defendant used a legal process for a purpose other than the administration of justice, such as oppression or extortion. There are

\textsuperscript{96} Ibid.

\textsuperscript{97} \textit{Samaroo}, supra note 21, at paragraph 7.

\textsuperscript{98} \textit{Miazga}, supra note 24, at paragraph 6 (emphasis added).

\textsuperscript{99} \textit{Samaroo}, supra note 9, at paragraph 33.
two elements to be satisfied in an action for abuse of process: (1) the defendant had a collateral and improper purpose in using the legal process, and (2) the defendant committed a definite act to serve that improper purpose. No liability exists when the defendant, even with bad intentions, merely employs a regular legal process reaching a proper conclusion.

Taxpayers usually plead the tort of abuse of process along with malicious prosecution when suing the CRA for initiating criminal proceedings against them. In Miazga, the Supreme Court described the torts of malicious prosecution and abuse of process as “two sides of the same coin” when the underlying legal proceeding involves criminal charges. Therefore, to avoid double recovery for the same wrongful act, a court will award damages for one, but not both, of these torts when the plaintiff has alleged both. The tort of abuse of process becomes a distinct tort when the CRA initiates a civil proceeding against a taxpayer; however, circumstances in which the CRA will undertake a civil proceeding against a taxpayer (meaning that the CRA is the plaintiff or petitioner in a civil court rather than the defendant or respondent) are rare. In contrast to malicious prosecution, in an action for abuse of process the plaintiff is not required to prove malice on the part of the CRA; therefore, it may be advantageous for taxpayers to plead and argue this tort even when the tort of malicious prosecution also is pleaded.

The only case that discusses the tort of abuse of process against the CRA is McCreight. Mr. McCreight was a chartered accountant. The case began in 1998 when the CRA investigated several corporate taxpayers and their accounting firm, in which Mr. McCreight was a partner. The CRA believed that the corporate taxpayers were fraudulently applying for tax credits with the help of the accounting firm. It executed three search warrants on the homes and businesses of the corporate taxpayers, as well as those of their lawyers and accountants, including Mr. McCreight. Pursuant to these searches, the CRA seized some 60 boxes of materials and three hard drives. Later, the court ordered the CRA to return the seized materials. On the day the CRA had to return the seized materials, the Crown charged the corporate taxpayers and their accountants, including Mr. McCreight, with fraud and conspiracy. As a result of the criminal charges, the CRA could keep the seized materials. In the subsequent criminal proceedings, the court found that the CRA had brought the charges primarily to enable it to keep the seized documents. Mr. McCreight was acquitted of all charges in 2006, and afterward sued the CRA for abuse of process. The trial court struck his pleading for not stating a valid cause of action; the

100 Smith v. Rusk, 2009 BCCA 96, at paragraph 34.
101 Ibid.
102 Miazga, supra note 24, at paragraph 51.
103 McCreight v. Canada (Attorney General), 2013 ONCA 483.
104 See ibid., at paragraph 8. See also Miller, Canfield, Paddock and Stone v. BDO Dunwoody, 2015 ONSC 4806, at paragraph 2.
105 McCreight v. Canada (Attorney General), 2012 ONCA 1983.
Ontario Court of Appeal overturned the order to strike and allowed the action to continue.\textsuperscript{106} McCreight, however, was an appeal from an order dismissing the pleadings. The case did not reach a judgment on its merits.

**Intentional Interference with Economic Relations**

A cause of action for intentional interference with economic relations between parties arises when the defendant intentionally commits an unlawful act against a third party and that act harms the plaintiff economically. However, the Supreme Court of Canada has defined this tort as being narrow in scope, and if the plaintiff can recover losses by pursuing another cause of action in relation to the alleged misconduct, this tort is less likely to succeed.\textsuperscript{107} Six elements must be satisfied to prove this tort: (1) a valid business relationship (or business expectancy) existed between a plaintiff and a third party; (2) the defendant knew of the business relationship; (3) the defendant intentionally interfered, and that interference induced or caused the termination of the business relationship; (4) the interference was by unlawful means; (5) the interference legally caused the termination of the business relationship; and (6) the plaintiff suffered a loss as a result.\textsuperscript{108} Considering the number of elements that the taxpayer must prove and the Supreme Court’s strong qualification regarding the use of this tort, it is unlikely that an action against the CRA based on this tort will ever succeed.

A cause of action for this tort was challenged by the CRA in Gordon.\textsuperscript{109} In an appeal of the trial court’s ruling not to strike Mr. Gordon’s cause of action, the CRA argued that the claim was a collateral attack on the tax assessments, and a collateral attack on an assessment could not be made through a civil action for damages.\textsuperscript{110} The Federal Court disagreed, because the CRA employees were alleged to have frightened off customers and potential customers of the taxpayer’s business, and those customers would otherwise have used the taxpayer’s services and would have paid him.\textsuperscript{111} Although the taxpayer in Gordon succeeded in persuading the court that his cause of action should survive the pleading stage, the case did not reach trial on its merits.

**Unintentional Torts—Negligence**

Unintentional torts include negligence, product liability, or nuisance (among other causes). In the context of an abusive audit, the most common scenario occurs when

\textsuperscript{106} McCreight, supra note 103, at paragraphs 72 and 74.

\textsuperscript{107} AI Enterprises Ltd. v. Bram Enterprises Ltd., 2014 SCC 12, at paragraph 81.

\textsuperscript{108} Gordon v. Canada, 2013 FC 597, at paragraph 16.

\textsuperscript{109} Ibid.

\textsuperscript{110} Ibid., at paragraph 18.

\textsuperscript{111} Ibid., at paragraph 21.
an auditor unintentionally makes an error that harms the taxpayer, thus raising the possibility of an action for negligence. The absence of intent to harm is key: even a conscientious auditor whose personal integrity is beyond reproach may be negligent in his or her conduct toward a taxpayer. Negligence is the most commonly litigated cause of action in tort; consequently, whether the CRA can be found liable for negligence in an abusive audit has been the subject of many commentaries, from articles in peer-reviewed journals112 to online posts on law firms’ websites.113 Since several new judgments have been issued in recent years, this section will update the jurisprudence in this area of law.

The Crown Liability and Proceedings Act allows victims to sue the Crown when one of its agents is liable in tort to that victim;114 neither that act nor any other federal legislation limits the Crown’s liability only to intentional torts. Therefore, the CRA will be vicariously liable for negligence by its agents in respect of a taxpayer if a court finds those agents liable. The taxpayer must establish on a balance of probabilities that the CRA was negligent, meaning that it did not follow an objective standard of care regardless of its good intentions. However, negligent conduct by itself does not establish liability; the taxpayer must still prove that that conduct legally caused the damages that he or she suffered, and that the law provides remedies for those types of damages. Proof of causation and damages are questions of fact to be determined in all negligence actions, and a trial court must decide them on a case-by-case basis. However, whether the CRA owes a duty of care to a taxpayer,115 and, if so, what the standard of care is for the conduct of the CRA’s agents, are questions of law. Parliament and the Supreme Court of Canada have not answered those questions yet, and the federal courts and superior courts of three provinces have reached different answers.116

112 See, for example, John Bevacqua, “Suing Canadian Tax Officials for Negligence: An Assessment of Recent Developments” (2013) 61:4 Canadian Tax Journal 893-914; and Shaira Nanji, “Can Taxpayers Successfully Sue the CRA for Negligence?” Tax Topics no. 2171, October 17, 2013, 1-4.

113 See, for example, Graham Purse, “How To Sue the CRA,” Mondaq, June 3, 2015 (www.mondaq.com/canada/x/402130/tax-authorities/How+To+Sue+The+CRA).

114 Crown Liabilities and Proceedings Act, supra note 25, section 3(b)(i).

115 This article discusses whether the CRA owes a taxpayer a duty of care during or after an audit. In Canada v. Scheuer, 2016 FCA 7, the taxpayer argued that the CRA owed a duty to warn third-party taxpayers regarding a scam tax-shelter scheme. The court dismissed the action at the pleading stage. See also Deluca v. Canada, 2016 ONSC 3865, for a similar argument and result. The question of whether the CRA owes a duty to warn third-party taxpayers is beyond the scope of this article.

116 In Canada’s common-law provinces, a decision of the highest court in the province is a binding authority for all the lower courts in that province for future lawsuits, but merely persuasive in other provinces. For example, absent a decision to the contrary by the Supreme Court of Canada or the federal or provincial legislature, a decision of the Alberta Court of Appeal is binding and must be followed by all lower courts in Alberta, but a court in any other province has no obligation to follow it.
A duty of care is “an obligation, recognised by law, to take reasonable care to avoid conduct that entails an unreasonable risk of harm to others.”\textsuperscript{117} To decide whether a defendant owes a duty of care to a plaintiff as a matter of law, a Canadian court must apply the Anns-Cooper test,\textsuperscript{118} in which a trial judge must first inquire whether a sufficiently close relationship between the plaintiff and defendant existed such that the defendant owed the plaintiff a prima facie duty of care.\textsuperscript{119} The trial judge must then consider whether there are any residual policy considerations that ought to cancel the duty altogether, narrow its scope, or reduce the class of persons to whom it is owed.\textsuperscript{120}

\textbf{Federal Courts}

The federal courts have held that the CRA may be held liable in negligence depending on the facts of a case. In \textit{Edell}, the Federal Court of Appeal reversed the trial judge’s decision to strike the plaintiff’s claim for negligence against the CRA because the “CRA . . . failed to demonstrate a valid basis to exclude its duty of care or to shelter it completely from an action in the tort of negligence.”\textsuperscript{121} In \textit{Gordon}, the Federal Court dismissed the CRA’s appeal of the trial judge’s order to allow the taxpayer’s claim of negligence against the CRA to continue.\textsuperscript{122} Applying the Anns-Cooper test, the court held that the taxpayer’s action may have “a reasonable prospect of success,”\textsuperscript{123} noted that the case law was “evolving,” and found that the continuation of the claim was not “unduly burdensome.”\textsuperscript{124} Therefore, a finding of negligence against the CRA for an abusive audit is possible at a federal court.

\textbf{British Columbia}

In British Columbia, the CRA owes a duty of care to taxpayers, although the circumstances in which this duty arises may be narrow and fact-specific.\textsuperscript{125} The Supreme Court of British Columbia found that this duty existed in \textit{Leroux}. Mr. Leroux was a small-business owner in northern British Columbia.\textsuperscript{126} The CRA started goods and services tax (GST) and income tax audits of Mr. Leroux in October 1996. A long chain of events followed, which the court described as “Kafkaesque,”\textsuperscript{127} and which

\begin{itemize}
\item \textsuperscript{117} \textit{Odhavji Estate}, supra note 49, at paragraph 45.
\item \textsuperscript{118} Named after \textit{Anns v. Merton London Borough Council}, [1977] UKHL 4; and \textit{Cooper v. Hobart}, 2001 SCC 79.
\item \textsuperscript{119} \textit{Odhavji Estate}, supra note 49, at paragraph 47.
\item \textsuperscript{120} Ibid., at paragraph 51.
\item \textsuperscript{121} \textit{Edell}, supra note 73, at paragraph 9.
\item \textsuperscript{122} \textit{Gordon}, supra note 108.
\item \textsuperscript{123} Ibid., at paragraph 35.
\item \textsuperscript{124} Ibid., at paragraph 39.
\item \textsuperscript{125} \textit{Leroux}, supra note 63, at paragraph 309.
\item \textsuperscript{126} See ibid., at paragraphs 1-205, for the findings of fact in this 18-year-long story.
\item \textsuperscript{127} \textit{Leroux v. Canada Revenue Agency}, 2010 BCSC 865, at paragraph 2; rev’d 2012 BCCA 63.
\end{itemize}
has been featured in news magazines and on CBC radio, and even on dedicated websites. At the outset of the process, the CRA’s auditors went to Mr. Leroux’s residence without a warrant and seized two boxes of documents. In the years that followed, Mr. Leroux and the auditors maintained continuous communications, which included many phone calls and face-to-face meetings. While the court did not expressly so find, Mr. Leroux perhaps never realized the adversarial nature of his relationship with the auditors, but rather treated them as tax advisers, or at least as neutral intermediaries between himself and the CRA. In October 1998, Mr. Leroux received GST notices of reassessment for 1994, 1995, and 1996 totalling more than $82,000. In September 1999, he received income tax notices of reassessment for 1993, 1994, and 1995 totalling more than $600,000. By 2006, all the assessments were settled, and the related penalties and interest were set aside. Perhaps the most important fact was the finding of the Tax Court of Canada that Mr. Leroux had been correct in characterizing the proceeds from the sale of some logs from his property as capital assets instead of income. The CRA’s patently unreasonable characterization was the basis on which the CRA had accused Mr. Leroux of gross negligence to justify its reassessment of his income in statute-barred years.

Mr. Leroux sued the CRA for negligence and alleged that its abusive audits and the subsequent objections, appeals, Tax Court proceedings, and fairness application to the minister, all of which had lasted over 10 years at the time of filing of the action, had caused his financial ruin, loss of his business, loss of his home, and his deteriorating health in his senior years. It was suggested that Leroux realistically raised the possibility that a court would at last find the CRA liable in negligence because the case offered “clear and seemingly uncontroverted evidence of purely operational failures” that had caused Mr. Leroux’s ordeal. The subsequent legal proceedings at the Supreme Court of British Columbia started in 2006 and concluded in 2014 when the court dismissed Mr. Leroux’s action in its entirety.

The court’s analysis included an examination of the following elements:

- **Proximity.** Applying the Anns-Cooper test, the court found that the CRA owes a private duty of care to taxpayers under audit. An audit does not necessarily place a taxpayer in a close and direct relationship with an auditor;

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128 Nanji, supra note 112.
129 Leroux, supra note 63, at paragraph 32.
130 Ibid., at paragraph 107.
131 Ibid., at paragraph 59.
132 Ibid., at paragraph 164.
133 Ibid., at paragraphs 63-66.
134 Bevacqua, supra note 112, at 914.
135 Leroux, supra note 63, at paragraph 410.
136 Ibid., at paragraph 305.
generally, the required degree of proximity does not exist. But in this case, an extended and personal relationship had been formed between the auditors and Mr. Leroux, a close and direct nexus existed between the discretionary decisions taken by the auditors and the harm that Mr. Leroux allegedly suffered, and the devastating effects of those discretionary decisions on Mr. Leroux were obvious to the auditors at the time they made them.137 When such proximity existed, the CRA auditors had to be held liable for the consequences of their decisions.138

- Foreseeability. The court described the audit of Mr. Leroux as a focussed and intensive one taking place over many years, covering three years of statute barred taxes, involving three auditors, many face to face meetings and phone calls, significant changes in tax characterization between the [tax returns] and the assessments as a result of discretionary decisions, and huge penalties. The results were foreseeably and obviously devastating to Mr. Leroux.139

The court held that the foreseeability of devastating consequences to Mr. Leroux “was evident to everyone involved at the time the assessment was levied, . . . even if the specifics of Mr. Leroux’s business difficulties were not known to them.”140 Because of the proximity of the auditors’ relationship with Mr. Leroux and the foreseeability of the harm of their decisions to him, the court found that the CRA’s employees had a duty “to conduct themselves as reasonably careful professionals in these circumstances.”141

- Public policy. The court then addressed the question of whether policy considerations should prevent a duty of care from being imposed on the CRA. The CRA advanced two policy arguments that this duty should not be imposed: first, it would conflict with the CRA’s duty to collect taxes; and second, it would open the floodgates to litigation by taxpayers under audit. The first argument is a variation of the “chill-factor” argument, which holds that imposing legal liability on revenue authorities may result in a range of undesired administrative responses, such as not providing taxpayers with information or guidelines, avoiding high-risk tax collection activities, or not auditing sophisticated taxpayers out of fear of prolonged litigation.142 The court rejected both of the CRA’s policy arguments.

137 Ibid., at paragraph 301.
138 Ibid., at paragraph 304.
139 Ibid., at paragraph 302.
140 Ibid., at paragraph 303.
141 Ibid.
142 John Bevacqua, “A Chilling Account: North American and Australian Approaches to Fears of Over-Defensive Responses to Taxpayer Claims Against Tax Officials” (2015) 13:1 eJournal of Tax Research 262-79, at 263. (Bevacqua argues that fears of overdefensive administrative responses to liability of tax authorities are unfounded.)
While the court acknowledged that the CRA owes “a duty to the public and to the Minister of National Revenue to collect taxes that are properly payable,” it did not find that that duty conflicted with “a duty to take reasonable care in assessing taxes, auditing taxpayers, and . . . imposing penalties.”\textsuperscript{143} Within the Canadian tax system, the CRA’s auditors are not accountable to any independent body for their actions, except through an appeal to the Tax Court of Canada, and then only in respect of the correctness and validity of their assessments of taxpayers’ tax liabilities. Accordingly, the court suggested, holding CRA auditors to a standard of care that might make them more careful “is not necessarily a bad thing.”\textsuperscript{144} Moreover, the onus on any taxpayer in a negligence action against the CRA is high, so fear of widespread litigation is unfounded.\textsuperscript{145} A taxpayer undertaking such an action must first establish the required degree of foreseeability and proximity in his or her situation, “followed by proven breaches, causation, and damages.”\textsuperscript{146} Furthermore, the CRA will defend itself vigorously against any suit, employing all resources at its disposal, so it is unlikely that it would face a flood of lawsuits if legal liability were imposed.\textsuperscript{147}

- **Breach.** After finding that the CRA auditors owed Mr. Leroux a duty of care, the court found that the applicable standard of care for the auditors was that of a “reasonably competent tax auditor in the circumstances.”\textsuperscript{148} The auditors breached that standard of care when they unjustifiably reopened Mr. Leroux’s income tax for statute-barred years and assessed penalties with daily compound interest against him, while acting as if the burden was on Mr. Leroux to prove that he was not grossly negligent (whereas it is the CRA that bears the burden to prove gross negligence on the part of the taxpayer).\textsuperscript{149}

- **Causation.** The court nevertheless went on to dismiss Mr. Leroux’s action for negligence, because he had failed to prove on a balance of probabilities that the CRA auditors’ breach of the applicable standard of care legally caused “the impairment of his credit, his difficulties with the mortgage payments, and the consequent loss of his RV park and home.”\textsuperscript{150} Moreover, Mr. Leroux did not provide any medical evidence to support his claim that the CRA’s negligence legally caused his declining health.\textsuperscript{151} Basically, Mr. Leroux’s action

\textsuperscript{143} Leroux, supra note 63, at paragraph 306.
\textsuperscript{144} Ibid.
\textsuperscript{145} Ibid., at paragraph 307.
\textsuperscript{146} Ibid.
\textsuperscript{147} Ibid.
\textsuperscript{148} Ibid., at paragraph 311.
\textsuperscript{149} Ibid., at paragraph 355.
\textsuperscript{150} Ibid., at paragraph 385.
\textsuperscript{151} Ibid., at paragraph 397.
failed because too many other intervening factors were present that had nothing to do with the CRA.152

*Leroux* is the only decision in Canada finding that the CRA’s auditors owe a private duty of care toward taxpayers under audit. However, the duty found in *Leroux* is too narrow in scope to form a strong foundation for future cases against the CRA, because the facts surrounding the conduct of the auditors toward Mr. Leroux influenced the reasoning of the court when it analyzed the proximity requirement for the existence of a duty of care. Such a finding will be highly unlikely when a sophisticated taxpayer deals at arm’s length with a CRA auditor, with a full appreciation of the inherent adversity of interests that exists between a taxpayer and an auditor. An earlier BC decision denied that the CRA owes any duty to a taxpayer. In *Foote*, the Supreme Court of British Columbia held that “[t]he duty of care owed by the [CRA] is to the Crown—not to the taxpayer. As long as the auditor is reasonably competent, any flaws in the investigation are not subject to liability.”153 The court in *Leroux* distinguished *Foote* (after pointing out that Mr. Foote was a self-represented litigant) on the basis that the ruling on liability in that case was qualified by the phrase “as long as the auditor is reasonably competent.”154 So even applying *Foote*, liability for negligence may arise if the auditor is found to be incompetent. However, *Foote* is no longer reliable law because of a subsequent decision of the BC Court of Appeal in *Leroux*. Ruling on whether the CRA may owe a private duty of care to Mr. Leroux, the Court of Appeal allowed his action for negligence to advance from the pleading stage, and declared that Mr. Leroux “must ultimately plead and prove that the CRA or one of its employees was in a close and direct relationship to him such that it is just to impose a duty of care in the circumstances.”155 That ruling led to the BC Supreme Court’s subsequent decision in 2014, discussed at length above.

**The Other Common-Law Provinces**

Wrongful conduct of an audit is not a ground for a claim of liability against the CRA in Nova Scotia. In *Canus*, the Supreme Court of Nova Scotia dismissed the taxpayer’s actions for negligence and misfeasance in a public office, even though the court found that the CRA auditor “wrongly conducted the audit.”156 The taxpayer was a fish-processing company in Nova Scotia and its parent was a US company. In 1995, the CRA conducted a transfer-pricing audit of the taxpayer for its income in 1991 and 1992, and reassessed its tax liability for more than $1 million.157 As a

152 Ibid., at paragraph 399.
153 *Foote*, supra note 33, at paragraph 41.
154 *Leroux*, supra note 63, at paragraph 293.
155 Ibid., at paragraph 298.
156 *Canus*, supra note 72, at paragraph 29.
157 Ibid., at paragraphs 14-15.
result of the unexpected tax liability, in 1997 the taxpayer lost part of its bank financing; it had to reduce the size of its business and consequently lost profits. The CRA’s appeal division vacated the reassessment in 1998, and in 2000, the taxpayer sued the CRA for negligence.

In 2005, the Supreme Court of Nova Scotia dismissed the case, even though it found that the harm that the taxpayer had suffered was foreseeable to the auditor. The court held that because the interests of a taxpayer and the CRA are inherently opposed, no legal proximity for the rise of a duty of care can possibly exist between the CRA and taxpayers: “The interest of a taxpayer is to pay as little in taxes as is legally possible and the interest of CRA is to ensure all taxes legally owing are remitted.” Further, “any duty owed by [an auditor] is to the Minister of National Revenue whose duty is owed in turn to Parliament and to all taxpayers generally.”

Moreover, public policy considerations would prevent the imposition of a duty of care on the CRA, because the “purpose of the Income Tax Act is to raise revenue for the government” and “[t]he Minister of National Revenue under the Act has a duty to administer and enforce the Act for the benefit of Parliament and the general public.” The court believed that imposing a duty of care “would [negatively] affect the ability of the Minister of National Revenue to raise revenue.” It also held that the imposition of a duty of care would require CRA employees (that is, its auditors) to “always correctly interpret the Income Tax Act.” In other words, they would have to be right all the time; otherwise, “there could be a successful lawsuit every time an assessment or reassessment was overturned on appeal.”

In Alberta, as the law currently stands, the CRA is never liable for negligence against a taxpayer. Adopting similar proximity and public policy reasonings to those set out in Canus, the Alberta Court of Appeal has denied that a duty of care can ever exist between the CRA and taxpayers. First, a finding of sufficient proximity to ground a private-law duty of care cannot exist because the relationship between the CRA auditors who exercise a statutory function and taxpayers is inherently adverse. Second, public policy considerations militate against finding the existence of a

158 Ibid., at paragraph 69.
159 Ibid., at paragraph 73.
160 Ibid., at paragraph 87.
161 Ibid., at paragraph 103.
162 Ibid.
163 Ibid., at paragraph 50.
164 Ibid.
165 Grenon v. Canada Revenue Agency, 2017 ABCA 96, at paragraph 25; aff’g 2016 ABQB 260; leave to appeal to the Supreme Court of Canada dismissed September 21, 2017, case no. 37584. The CRA does not have a duty to protect a taxpayer from losses caused by any “competitive disadvantage” that may result from the taxpayer’s going through a tax audit. See 783783 Alberta Ltd. v. Canada (Attorney General), 2010 ABCA 226, at paragraph 45.
prima facie duty of care on the part of the CRA when it is auditing a taxpayer. In *Grenon*, the trial court had struck the pleadings of the taxpayer, who was in a protracted taxation dispute still pending before the Tax Court of Canada; the taxpayer then appealed the ruling on its pleading. The decision of the Alberta Court of Appeal criticized *Leroux* for “insufficient footing” and “bad policy” in creating a new private duty of care, which would raise “the spectre of indeterminate liability.” The court reasoned that in the “regulatory context,” a “regulator does not owe a private law duty of care to plaintiffs who might be damaged by activities of the regulated parties.” As between CRA employees and taxpayers, not enough foreseeability and proximity exist to establish a private-law duty of care, and strong policy reasons prevent the imposition of a duty of care.

In my view, *Canus* and *Grenon* were incorrectly decided. The taxpayers, courts, and Parliament should expect the CRA *always* to correctly and faithfully execute the Income Tax Act and the other legislation that it enforces; if the CRA makes a mistake in an audit and a taxpayer suffers damages legally caused by that mistake, the CRA should be held liable in tort as any private person in place of the CRA would have been liable—as the Crown Liability and Proceedings Act asserts. The CRA will not be liable to all taxpayers under audit or in all audits in which the auditor made a mistake, but only in those cases where the taxpayer suffers damages legally caused by the CRA’s negligence. The burden will still be on the taxpayer to prove causation and damages. The court in *Canus* was correct to hold that there “are no directions in the [Income Tax] Act about how the Minister [of National Revenue] and his employees should carry out the duties under the Act”; however, the Income Tax Act is not the only legislation that governs the conduct of the CRA as an agent of the Crown. That is the error of law in *Canus*.

The error of law in *Grenon* is even more palpable than in *Canus*. The Alberta Court of Appeal assumed that an audit is a “regulatory” function of the CRA. However, the “Commissioner [of the CRA] or any other person employed or engaged by the [CRA] or who occupies a position of responsibility in the [CRA]” may not have “a power to make regulations” under section 8(3)(a) of the Canada Revenue Agency Act. So the conduct of an audit of an individual taxpayer cannot be a regulatory function; it is an administrative or quasi-adjudicative function open to objection and review at the same administrative agency (that is, the CRA’s appeal division), appeal to the Tax Court of Canada, or judicial review before the Federal Court. After relying

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166 See *Grenon*, supra note 165 (ABCA).

167 Ibid. (ABQB).

168 Ibid. (ABCA), at paragraph 13.

169 Ibid., at paragraph 17.

170 Ibid.

171 *Canus*, supra note 72, at paragraph 74.

172 Canada Revenue Agency Act, supra note 44, sections 8(3)(a) and (1).
on a series of authorities showing that the courts must grant deference to the power of an administrative body to make regulations, the court dismissed Mr. Grenon’s appeal.\textsuperscript{173} The court could have reached the same disposition if it had characterized the negligence action as a collateral attack on an assessment that was pending before the Tax Court of Canada.\textsuperscript{174} In addition, the court could have relied on the fact that Mr. Grenon had been a resident of New Zealand since 2012, and even though the income tax audit of Mr. Grenon and his several corporations started in 2007, the claim that the audit itself had put the CRA “in a close and direct relationship” with a sophisticated taxpayer like Mr. Grenon was perfunctory at best.\textsuperscript{175} Instead, the court chose to permanently close a negligence cause of action against the CRA, contrary to the text, context, and purpose of the Crown Liability and Proceedings Act.

### Civil Remedies for an Abusive Audit in Quebec

Tort is an area of law in all of Canada’s common-law provinces. Quebec, however, has a fundamentally different system of “obligations” under its Civil Code.\textsuperscript{176} For example, “common law notions of duty of care, proximity, foreseeability, and public policy” do not exist under the Civil Code of Québec.\textsuperscript{177} Moreover, Quebec has its own provincial revenue agency, l’Agence du revenu du Québec (Revenu Québec), to enforce the federal and Quebec income tax acts.\textsuperscript{178} Quebec also has its own Charter of Human Rights and Freedoms, which grants Quebec residents the constitutional right to protection of their private property: “Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.”\textsuperscript{179} The residents of Canada’s common-law provinces do not have an equivalent right under the Canadian Charter; therefore, if a resident of Quebec brings an action against Revenu Québec for abuse of its powers and unjust deprivation of property, the taxpayer’s case may have an additional constitutional dimension that a civil claim in a common-law province never has. Finally, there are stark differences between legal analysis under the civil-law system and legal analysis under a common-law regime, which affect the precedential value of Quebec jurisprudence in other provinces, and vice versa. However, two recent decisions show how the courts in Quebec

\begin{footnotesize}
\begin{enumerate}
\item G\textsuperscript{1} \textit{Grenon}, supra note 165 (ABCA), at paragraphs 17-26.
\item See \textit{Grenon}, supra note 165 (ABQB), at paragraph 15.
\item Ibid., at paragraph 16.
\item Code civil du Québec, RLRQ c. CCQ-1991.
\item \textit{Ludmer}, supra note 3, at paragraph 141.
\item An examination of the extent to which Revenu Québec follows the methods, processes, and procedures of the CRA is beyond the scope of this article.
\item Charter of Human Rights and Freedoms, CQLR c. C-12, section 6.
\end{enumerate}
\end{footnotesize}
have ruled in cases of abusive audits by the CRA and Revenu Québec. More importantly, these cases cast additional light on the CRA’s structure, practices, and auditing processes, which may prove invaluable in future cases against the CRA.

In *Ludmer*, the CRA conducted a nine-year-long audit of a group of taxpayers regarding an international investment scheme in Bermuda, but the audit was eventually abandoned. When the taxpayers’ investment scheme failed, they alleged that this was the result of the protracted and inconclusive audit and sued the CRA for $117 million. Evidence presented at trial showed that, during the audit, the CRA had requested information from the authorities in Bermuda and had falsely claimed that the civil audit was a criminal investigation. Significantly breaking away from its prior practice, the CRA had applied an assessing position to the taxpayers that it had not previously applied to any other taxpayer—even though the consistent application of taxation law is a fundamental principle set out in the Taxpayer Bill of Rights. Later, the CRA had made settlement offers to the taxpayers in bad faith, knowing that its position was wrong and could not be maintained. Finally, the CRA had broken specific undertakings that it had given to the taxpayers, wrongfully delayed providing necessary information that the taxpayers had requested, and destroyed material documents. The court applied the pertinent article of the Civil Code of Québec, which states that “[e]very person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another,” and found the CRA to be “at fault.” The court then applied the Crown Liabilities and Proceedings Act and ordered the CRA to pay close to $4.8 million to the taxpayers. *Ludmer* is under appeal.

The second illustration of how civil claims for abusive tax audits can succeed in Quebec is *Groupe Enico*. In that case, Revenu Québec had audited two taxpayers and their business. The auditors engaged in many clearly wrongful acts over several years, with knowledge of the consequences of their actions for the taxpayers and their business. For example, during the audit, Revenu Québec’s agents had intentionally created 153 false entries in the taxpayers’ business records; destroyed a box of taxpayers’ documents; intentionally delayed correcting proven errors in the assessment, with knowledge of the consequences of their delay for the taxpayers and their business; and seized the taxpayers’ line of credit, causing the bank to cancel

180 *Ludmer*, supra note 3.
181 Ibid., at paragraphs 554-71 and 702.
182 Ibid., at paragraphs 426-40.
183 Ibid., at paragraphs 639-70.
184 Ibid., at paragraphs 677-702.
185 Code civil du Québec, supra note 176, article 1457.
186 *Ludmer*, supra note 3, at paragraph 702.
187 Ibid., at paragraph 832.
188 *Groupe Enico*, supra note 3. For another example of a successful civil claim against Revenu Québec, see *Joncas c. Agence du revenu du Québec*, 2012 QCCQ 5096.
it.\textsuperscript{189} Furthermore, Revenu Québec knew that the main auditor was an “at-risk individual,” who was at the time the target of an internal investigation for misappropriating another taxpayer’s confidential information.\textsuperscript{190} The court described the auditors’ actions as “malicious and abusive conduct, gross carelessness tantamount to abuse of power, and reckless conduct tantamount to bad faith,”\textsuperscript{191} and it awarded the taxpayers almost $4 million, including $2 million in punitive damages.\textsuperscript{192} In 2016, the Quebec Court of Appeal largely affirmed the judgment, but admonished the trial judge for criticizing the internal procedures of Revenu Québec, especially the “tax earnings by audit” system, which effectively motivates auditors to inflate taxpayers’ tax liability in order to receive larger performance bonuses.\textsuperscript{193}

\textbf{CONCLUSION}

Tort actions against the CRA take a long time. \textit{Leroux} lasted 18 years; the audit started in 1996 and the resulting legal dispute ended in 2014. The CRA audited the Samarroos in 2006, but the subsequent legal disputes continue to this day. The Income Tax Act presumes that an assessment is valid and binding\textsuperscript{194} unless eventually the courts say otherwise. Consequently, taxpayers who are subjected to an abusive audit must go through the process of challenging an assessment and, once the assessment is set aside, must file a civil action for damages at the Federal Court or the relevant provincial superior court. Because the CRA defends itself against civil cases zealously, going through each level of these processes may take many years.

While the Quebec courts in \textit{Ludmer} and \textit{Groupe Enico} awarded multi-million-dollar judgments against the CRA and Revenu Québec respectively, in common-law provinces only \textit{Samaroo} has resulted in a large judgment. However, whether these judgments truly compensated the enormous losses suffered by those taxpayers is certainly debatable.

Moreover, the courts often dismiss tort cases against the CRA at the pleading stage; not many have reached trial on their merits. The courts have been, in my view, unnecessarily cautious in applying to the CRA the same principles of law that they apply to other Crown agencies, mainly because of the inherent adversarial interests of the CRA and taxpayers. This unnecessary caution has led the courts to a narrow application of the Crown Liability and Proceedings Act, such that it is applied only to intentional torts, and mostly to those requiring a finding of malice. Some decisions do not rely on or even cite that act. For example, the court in \textit{Camus} held that “there is no duty of care owed to an individual taxpayer under the Income Tax Act.”

\begin{itemize}
  \item \textsuperscript{189} Ibid., at paragraph 76.
  \item \textsuperscript{190} Ibid.
  \item \textsuperscript{191} Ibid.
  \item \textsuperscript{192} Ibid., at paragraph 137.
  \item \textsuperscript{193} Ibid., at paragraphs 92-95.
  \item \textsuperscript{194} Income Tax Act, supra note 36, subsection 152(8).
\end{itemize}
But the CRA is an agent of the Crown, and the Income Tax Act is not the only legislation that governs its conduct. The general duty of care not to harm another person arising out of the Crown Liability and Proceedings Act, though qualified by the Anns-Cooper test, still applies to the CRA. Because the courts have treated the CRA differently from other Crown agencies, the body of case law necessary to guide taxpayers in tort litigation against the CRA is thin. The tort awards that exist are relatively small and, from a practitioner's perspective, rarely justify advising a client to fight the CRA with a tort case, even though the trend created by Groupe Enico, Ludmer, and Samaroo appears to favour taxpayers.

It has been suggested that one solution is for Parliament to amend the Income Tax Act, the Federal Courts Act, and the Tax Court of Canada Act to expand the jurisdiction of the Tax Court (1) to hear matters of procedure as well as substance, (2) to be able to vary or dismiss penalties and interest, and (3) to be able to vacate an assessment or award damages against the CRA for the wrongful conduct of its employees. There are several arguments that support this solution:

1. It would avoid multiple proceedings; the taxpayer and the CRA could present their cases before one court in one trial. As currently constituted, the Tax Court of Canada cannot review whether the CRA exercised its powers properly; it can only review whether a taxpayer properly owes an assessment under the Income Tax Act.

2. The judges on the Tax Court are experts in tax administration and dispute resolution; the taxpayer and the CRA do not need to spend time and money on detailed explanations of the internal procedures of the CRA or the administration of the Income Tax Act.

3. Parliament has already given the CRA the privilege of recourse to a tax court in which it has the benefit of always being the respondent and therefore not having the burden of proof most of the time. Having the same lawyers and judges deal with procedural as well as substantive matters is clearly efficient and cost-effective.

4. Parliament has already given the Federal Court concurrent jurisdiction with provincial superior courts to hear offences under the Crown Liability and Proceedings Act (that is, tort cases) against a Crown agency, and exclusive jurisdiction to issue injunctive relief against Crown agencies. Expanding the jurisdiction of the Tax Court to include powers that Parliament has

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195 Canus, supra note 72, at paragraph 87.
196 See Du Pont and Lubetsky, supra note 2, at 120-21.
197 Main Rehabilitation Co. v. Canada, 2004 FCA 403, at paragraph 8; leave to appeal to the Supreme Court of Canada dismissed January 27, 2005, docket no. 30739. See Gallant v. The Queen, 2012 TCC 119. (The Tax Court dismissed a taxpayer's appeal for lack of jurisdiction “with considerable regret,” though it found the conduct of the CRA to be unfair: ibid., at paragraph 19.)
already granted to the Federal Court means that the CRA and taxpayers would litigate all aspects of a tax dispute before one court with expertise in those matters.

5. This solution would allow the Tax Court to have other legal and equitable remedies available even if the assessment itself were upheld.

Parliament should also amend the Crown Liability and Proceedings Act for greater clarity. The decisions of the Supreme Court of British Columbia in Leroux and the Alberta Court of Appeal in Grenon clearly contradict each other. The taxpayer in Grenon appealed to the Supreme Court of Canada, but that court did not grant leave to hear the case. Therefore, the question of whether a taxpayer can bring a cause of action in negligence has contradictory answers in different provinces. Parliament can solve this problem by overruling Grenon and clarifying that the Crown Liability and Proceedings Act includes unintentional torts such as negligence and is not limited to intentional torts.

Until Parliament adopts these solutions, an action in tort against the CRA is a possible remedy for an abused taxpayer, but it will rarely be a satisfactory one.
