Suing Canadian Tax Officials for Negligence: An Assessment of Recent Developments

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P R É C I S
Dans Leroux v. Canada, la Cour d’appel de la Colombie-Britannique a refusé une demande de l’Agence du revenu du Canada (ARC) de radier l’action d’un contribuable pour négligence contre l’ARC. Ce faisant, la Cour a confirmé la possibilité que l’ARC puisse avoir un devoir de diligence délictuel envers un contribuable.

Leroux est la plus récente d’une série d’actions pour négligence contre des agents canadiens du fisc. Le présent article examine le raisonnement dans ces causes et analyse ce qui distingue l’arrêt Leroux de ses prédécesseurs infructueux. L’analyse s’étend à l’examen des principes canadiens de droit de la responsabilité délictuelle qui pourraient être appliqués dans un procès sur le fond entourant les questions de négligence dans Leroux.

A B S T R A C T
In Leroux v. Canada, the British Columbia Court of Appeal refused a Canada Revenue Agency (CRA) application to strike out a taxpayer plaintiff negligence action against the CRA. In so doing, the court confirmed the possibility that the CRA could owe a tortious duty of care in negligence to a taxpayer.

Leroux is the latest in a line of recent negligence actions against Canadian tax officials. This article examines the reasoning in those cases and assesses what distinguishes the Leroux case from its unsuccessful predecessors. The analysis extends to discussion of the Canadian tort-law principles that might be applied in a full trial of the negligence issues in Leroux.

KEYWORDS: NEGLIGENCE ■ TAX LITIGATION ■ TORTS ■ PUBLIC POLICY

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INTRODUCTION

There has recently been a spate of Canadian cases in which taxpayers have raised causes of action alleging negligence by Canada Revenue Agency (CRA) officials. To date, none of these negligence actions has been successful. Most of the claims have been summarily dismissed. However, a recent exception arose in *Leroux v. Canada*. In this case, the British Columbia Court of Appeal refused to strike out the plaintiff’s claim in negligence. While the decision in *Leroux* falls short of recognizing a CRA tortious duty of care to taxpayers, this is not the first time that Canadian courts have recognized the potential for a tortious claim against the CRA. It does, though, give renewed cause for a detailed assessment of the prospects of such a duty being recognized, either in any eventual trial of *Leroux* or otherwise.

The first part of this article examines the reasoning in the recent negligence cases against the CRA. The aim is to extrapolate common threads of judicial reasoning in the treatment of negligence claims against the CRA and its officers. In the second part of the article, the analysis extends to a consideration of the developing tort of negligent investigation and its application in a tax context. The third part discusses how Canadian tort-law principles might be applied in a full trial of the negligence claims in *Leroux*.

RECENT NEGLIGENCE CLAIMS AGAINST CANADIAN TAX OFFICIALS

It has been observed that “there are very limited remedies available to a taxpayer where . . . negligent conduct on the part of Revenue Canada officials has caused him or her expenses.” As far as damages claims via the tort of negligence are concerned, recent negligence claims against Canadian tax officials appear to bear out this observation. As noted above, in almost every case, these claims have been summarily

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2 See, for example, *Canada Revenue Agency v. Tele-Mobile Company Partnership*, 2011 FCA 89, at paragraph 6, where the Federal Court of Appeal acknowledged the possibility that a taxpayer plaintiff could bring an action in tort to obtain compensation for damages caused by the CRA.
dismissed. No case has recognized any CRA tortious duty of care in negligence to taxpayers.  

In order to determine whether a duty of care in negligence exists, the Canadian tax cases apply the two-stage “Anns-Cooper” test. Fisher J in Leighton v. Canada (Attorney General) described the test as follows:

The Anns-Cooper test has two stages: (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.

To date, all Canadian negligence claims by taxpayers against the CRA have failed at the first stage of the Anns-Cooper test. Specifically, the biggest stumbling block for taxpayer plaintiffs has been the task of establishing the existence of a sufficiently proximate relationship to support a common-law duty of care.

Taxpayer Claims and Proximity

The decision in Leighton illustrates the difficulties posed by the proximity requirement. The plaintiff was the shareholder of a taxpayer company. He alleged that he had suffered loss attributable to negligent delay by the CRA in correcting “obvious accounting errors” in assessing the taxpayer company. In rejecting the plaintiff’s application to amend his claim to include a claim in negligence, Fisher J explained that

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4 Although, referring to the determination in Leroux, supra note 1, the Federal Court of Appeal in Ereiser v. Canada, 2013 FCA 20, at paragraph 36, has subsequently acknowledged the possibility of an action in tort for damages for wrongful conduct of an income tax official. As noted in note 2, supra, the Federal Court of Appeal also made similar observations in Tele-Mobile Company Partnership, a case decided prior to the determination in Leroux.

5 This test reflects 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. London Borough of Merton, [1977] 2 All ER 492.

6 2012 BCSC 961, at paragraph 50. According to the Supreme Court of Canada in Cooper v. Hobart, supra note 5, at paragraph 30, the first stage of the analysis requires consideration of two questions: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant’s act; and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of the test, why tort liability should not be recognized in the case before the court? At the second stage, as noted by the court, “the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.” Ibid.

7 According to the reasoning in Cooper, supra note 5, at paragraph 30, “[t]he proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises.”

8 The plaintiff had sought to amend his pleadings (which already included claims of defamation, estoppel, and abuse of process) to include a claim in negligence against the CRA. Fisher J refused leave for the plaintiff to amend his claim.
a duty of care by CRA in respect of its statutory audit function to the shareholder of a corporate taxpayer has not been established within a category that has been recognized at law, nor is it a duty of care that can be given legal recognition.9

He concluded:

[T]here is simply no basis to establish any proximity of relationship in these circumstances.10

The reasoning in Leighton is similar to that of the Alberta Court of Appeal in 783783 Alberta Ltd. v. Canada (Attorney General).11 This complaint concerned an error by the CRA in allowing a non-resident business competitor of the plaintiff to claim deductions that were only available to Canadian residents. The plaintiff alleged that this error resulted in the loss of its competitive advantage as a Canadian resident.

In striking out the plaintiff’s claim, the court reasoned that proximity could not be established in these circumstances. The court observed:

There is no prior case establishing liability on the part of tax collectors to one group of taxpayers based on the taxes imposed on another group of taxpayers. . . . It is significant that nothing in the Income Tax Act suggests that one taxpayer has any remedy with respect to the assessment of another taxpayer.12

Similarly, in McCreight v. The Attorney General,13 the Ontario Superior Court of Justice rejected the plaintiffs’ negligence claim on proximity grounds.14 The plaintiff’s accountants alleged that CRA auditors owed them a tortious duty of care in carrying out audit investigations that resulted in lengthy (and ultimately discontinued) fraud and conspiracy prosecutions against the accountants for tax advice provided to some of their clients.15 Patterson J accepted the Crown’s submission that 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.16

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9 Leighton, supra note 6, at paragraph 57.
10 Ibid., at paragraph 44.
11 2010 ABCA 226.
12 Ibid., at paragraph 44.
14 Nevertheless, the court agreed with a range of residual policy concerns raised by the CRA. These are discussed below under the heading “Parliamentary Sovereignty, Floodgates, and Chill Factor Policy Concerns.”
15 The facts in McCreight are discussed further in the second part of this article.
16 McCreight, supra note 13, at paragraph 62.
Broadly similar reasoning was applied in *Canus v. Canada Customs*.\(^\text{17}\) In this case, the plaintiff taxpayer alleged that the CRA had been negligent in conducting an audit of the taxpayer. The audit resulted initially in a reassessment of the taxpayer for substantial additional income taxes. The audit was vacated three years later, but not before the plaintiff had suffered significant business losses as a result of the increased contingent tax liability resulting from the initial erroneous audit. Hood J held that there is no sufficiently proximate relationship between taxpayers and CRA auditors capable of sustaining a duty of care. According to Hood J, taxpayers and CRA auditors have “inherently opposing interests,” with the former being motivated to minimize their taxes and the latter being charged with the responsibility of ensuring that all taxes legally owing are collected.\(^\text{18}\)

In advancing this argument, Hood J referred to the statutory framework regulating the relationship between taxpayers and the CRA. She pointed out that

> [t]here are no directions in the *Act* about how the Minister and his employees should carry out the duties under the *Act*.\(^\text{19}\)

According to Hood J, this statutory silence evinces a parliamentary intent to preclude any relationship of tortious proximity between CRA auditors and taxpayers in the CRA’s performance of its audit function.

Hood J drew a broader conclusion, however, surmising that

> [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*.\(^\text{20}\)

**The CRA’s Exclusive Duties to the Crown**

The reasoning of Hood J in *Canus* is consistent with that of a number of other judges who have also confined the statutory duties of the CRA exclusively to the Crown and have reasoned that, accordingly, there is no room to impose any tortious duty of care to taxpayers. These arguments have been raised not just in determining

\(^{17}\) 2005 NSSC 283.

\(^{18}\) Ibid., at paragraph 73. It should be noted that Hood J also found against the plaintiff on negation of duty of care, standard of care/breach, causation and damages, and the awarding of general damages. In fact, the only successful argument for the plaintiff was on the question of reasonable foreseeability of the harm caused.

\(^{19}\) *Canus*, supra note 17, at paragraph 74. Citing comments in *Western Minerals Ltd. v. Minister of National Revenue*, [1962] SCR 592, Hood J went on to note that there is no standard set out anywhere, either implicitly or explicitly, to fix essential requirements of an assessment or the intensity of any examination of a taxpayer.

\(^{20}\) *Canus*, supra note 17, at paragraph 87. Fisher J made similar comments in *Leighton*, and was also blunt in his conclusion that “[t]hese cases demonstrate that proximity is not established where statutory duties are owed to the public.” *Leighton*, supra note 6, at paragraph 54.
the issue of proximity, but also as residual policy considerations negating any duty of care in accordance with the second stage of the Annis-Cooper analysis.

For example, in Leighton, Fisher J dealt with the matter both as a question of proximity and as a residual policy consideration, observing in respect of the latter that

there are residual policy considerations that would militate against recognizing a duty of care in this case, one example being that the effect of recognizing a duty of care would conflict with CRA’s broad duties under the Income Tax Act to ensure that all taxes lawfully owing are correctly assessed and collected.21

Similarly, in the decision of the Supreme Court of British Columbia in Foote v. Canada (Attorney General), Dley J struck out the plaintiff’s negligence claim, concluding that the duties of the CRA are owed exclusively to the Crown:

The duty of care owed by the Revenue Agency 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 under the tort of negligent investigation.22

In 783783 Alberta, the court also characterized the duties owed by CRA tax assessors as fundamentally public duties, although the observations of the Alberta Court of Appeal are more nuanced than those of Hood J in Canus, Fisher J in Leighton, and Dley J in Foote:

The 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. But overall, the relationship is not one where the tax assessors should be responsible for protecting taxpayers from losses arising from competitive disadvantages of the type pleaded. The assessors’ duty is directed elsewhere.23

In City Centre Properties Inc. v. Canada,24 MacKay J also asserted that the duty of CRA employees is to protect the Crown’s interest, characterizing the relationship between taxpayers and the CRA as a debtor-creditor relationship. Accordingly, while

21 Leighton, supra note 6, at paragraph 58.
22 2011 BCSC 1062, at paragraph 41 (citing Canus, supra note 17, at paragraphs 50-51, 61-65, and 86-87; 783783 Alberta, supra note 11, at paragraph 48; and Hill v. Hamilton-Wentworth Regional Police Services Board, 2007 SCC 41). In Foote, the plaintiffs alleged negligence, misfeasance in public office, breach of privacy, false imprisonment, and trespass arising out of CRA tax-evasion investigation activities.
23 783783 Alberta, supra note 11, at paragraph 45.
24 (1994), 70 FTR 222.
expressly conceding that the relevant official in this case had been careless in allowing a letter guaranteeing tax debts to lapse, this carelessness was insufficient to support a duty of care to any taxpayer. MacKay J observed:

In my view he [the tax official] was at fault in performance of his duties in relation to the letter of guarantee by letting it lapse. But carelessness in performance of his duty in ensuring protection of the Crown’s interest does not constitute negligence at common law for he owed no duty to [the taxpayer] to call for payment under the bank guarantee.  

Parliamentary Sovereignty, Floodgates, and Chill Factor Policy Concerns

In addition to the concern not to impose private-law duties on tax officials that might conflict with CRA duties to the Crown, a number of other residual policy concerns have been raised in the tax cases. One such concern is the fear of subjecting the CRA to large and indeterminate liability. For example, in 783783 Alberta, the court held that

[r]ecognizing a duty of care in tort in such circumstances would expose Canada to liability to an unidentifiable group for an indeterminate amount.  

In Canadian Taxpayers Federation v. Ontario (Minister of Finance), the same issue was raised in rejecting the plaintiffs’ claim of negligent misrepresentation, with Rouleau J expressing a fear that imposing a duty of care “would raise the spectre of unlimited liability to an indeterminate class.” This case concerned a written election promise by Ontario Premier Dalton McGuinty that a re-elected Liberal government would not introduce any new taxes. Upon re-election, the Liberal government introduced the Ontario health premium. The plaintiffs alleged that this constituted either a breach of contract and/or a negligent misrepresentation.

Rouleau J, in dismissing the negligent misrepresentation claim, also referred to a number of other policy concerns, including a concern that

[i]mposing a duty of care in circumstances such as exist in the present case would have a chilling effect. . . . Once elected, members 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.

25 Ibid., at 239-40.
26 783783 Alberta, supra note 11, at paragraph 48.
27 (2004), 73 OR (3d) 621, at paragraph 70 (SC).
28 Ibid., at paragraph 71.
In *McCreight*, Patterson J summarized a number of additional policy arguments centred on justiciability and underlying separation-of-powers concerns often raised by the Crown to negate any possible duty of care to individual taxpayers:

The government in this case argued that there were other remedies available to the plaintiffs; that the issue of misfeasance and malicious prosecution are available for the plaintiff in this case against the Attorney General of Canada; that it should not be permissible for the public to second guess every aspect of the investigatory work with the benefit of hindsight; and, that a duty of care to the public at large is contrary to the self-assessing tax system and the government’s need to raise revenue through the *Income Tax Act*.29

Collateral Attack/Availability of Alternative Remedies

The reasoning of Patterson J in *McCreight* refers to the availability of alternative remedies as negating any possible CRA duty of care to taxpayers. This issue features prominently in the reasoning in a number of cases. Typically, the argument is justified by reference to the comprehensive measures contained in the *Income Tax Act* (ITA)30 that allow taxpayers to challenge tax assessments. An argument to this effect was accepted by Hood J in *Canus*. She observed that

the *Act* provides a complete remedy by way of notices of objection and appeals. As well, s. 152(8) of the *Act* provides that assessments are deemed to be valid and binding.31

This argument is particularly prominent in cases where negligence by the CRA in carrying out its tax-assessment duties is alleged. For example, in *Canada v. Roitman*,32 the appellants raised a range of tortious claims arising out of a reassessment of their tax liabilities in accordance with terms of settlement struck with the CRA. The Federal Court of Appeal dealt summarily with these allegations, concluding that it had no jurisdiction to hear such claims.

The court in *Roitman* characterized the appellants’ claim as, in reality, a challenge to tax assessments, and held that such challenges must be dealt with utilizing the mechanisms contained in Canadian tax legislation.33 This argument is often referred

29 *McCreight*, supra note 13, at paragraph 63.
30 RSC 1985, c. 1 (5th Supp.), as amended.
31 *Canus*, supra note 17, at paragraph 104.
32 2006 FCA 266. The appellants also pleaded breach of fiduciary duty, unjust enrichment, breach of trust, and abuse of public office.
33 Similarly, in *Smith et al. v. Canada (Attorney General) et al.*, 2006 BCCA 237, at paragraph 11, the British Columbia Court of Appeal concluded, “The causes of action all have a common element: they allege that the respondents acted wrongfully toward the appellants in the rule-making and administration of the tax scheme regarding their meal expenses. This is, in reality, a challenge to the assessments by the Canada Revenue Agency. Since the *Income Tax Act* provides administrative remedies for disputes regarding income tax assessments, the issues lie outside the jurisdiction of the Supreme Court.”
to as the “collateral attack” doctrine. The substance of the collateral attack doctrine is that “a plaintiff is not allowed to frame his action, with a degree of artificiality, in the tort of negligence to circumvent the application of a statute.”

Some limitations have been placed on the collateral attack doctrine. For example, in *Gardner v. Canada (Attorney General)*, an interesting distinction was drawn by the Ontario Superior Court of Justice between tortious actions challenging CRA processes as distinct from assessments of tax:

Ms. Gardner’s claim for tort damages depended on the alleged improper process and improper purpose for which the CRA officials acted in reassessing her tax return. The issue in her tort claim was not whether or not the taxes were owing but rather her allegation that the process followed by CRA officials constituted tortious conduct which caused her to suffer damage. . . . The issue of whether the taxes were really owing is a different issue from whether the CRA officials’ actions were tortious, namely that they followed an improper process and acted for an improper purpose and thereby caused Ms. Gardner to suffer damage.

Accordingly, if a case involves no challenge to any tax assessment and comprises allegations of negligence only peripherally associated with an assessment, the collateral attack argument loses its force.

**CANADIAN TAX OFFICIALS AND THE TORT OF NEGLIGENT INVESTIGATION**

Concurrently with the developments outlined above, Canadian courts have also recognized a tort of negligent investigation that has significant scope for application in a tax context. The tort was first recognized in 1997 in *Beckstead v. Ottawa (City of)*. In that case, the Ontario Court of Appeal recognized the tort in the context of criminal prosecutions. The case involved an action for damages for negligence on the part of a police officer in laying a criminal charge against the plaintiff. Subsequently, in *Hill v. Hamilton-Wentworth Regional Police Services Board*, the Supreme Court of Canada in a 6-3 decision reaffirmed the existence of the tort, with the majority concluding that police are not immune from liability under the Canadian law of negligence, that the police owe a duty of care in negligence to suspects being investigated, and that their

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35 2012 ONSC 1837, at paragraphs 54-55.

36 As discussed below, the British Columbia Court of Appeal had cause to give comprehensive consideration to the scope of the collateral attack argument in *Leroux*, supra note 1.

37 1997 CanLII 1583 (ONCA).
conduct during the course of an investigation should be measured against the standard of how a reasonable officer in like circumstances would have acted. The tort of negligent investigation exists in Canada.38

The scope of the tort has subsequently been extended in a number of cases. For example, in 2008 in Correia v. Canac Kitchens,39 the Ontario Court of Appeal extended the tort to cover the case of negligent investigation by a firm of private investigators retained to investigate employees. Most pertinently, however, in 2011, in Neumann v. Canada (Attorney General),40 the British Columbia 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, but held that the plaintiff had not made out a case of negligence. 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. In effect, therefore, the plaintiff was a third party to the investigation of the suspect. Despite this fact and the fact that, in contrast, both Hill and Beckstead involved a direct relationship between investigator and suspect, the court was prepared to proceed on the basis that the CRA still owed a duty of care to the plaintiff third party, only finding against the plaintiff on the basis of absence of a breach of that duty.

It is interesting to contrast this finding with the determinations in cases such as Leighton and 783783 Alberta, which also involved allegations of negligence by third parties (a shareholder of the corporate taxpayer in Leighton and a business competitor of the taxpayer in 783783 Alberta). It will be recalled from the earlier discussion of these cases that the proximity hurdle proved insurmountable for the third-party plaintiffs in seeking to establish the existence of a CRA duty of care. Accordingly, in cases where third parties allege that they are owed a tortious duty of care, the tort of negligent investigation potentially holds better prospects for success. The matter, however, is far from resolved. The question of whether a duty could be owed to a third party was not raised by the CRA in Neumann until both parties had concluded their cases, allowing no scope for judicial consideration.

The question of the applicability of the tort of negligent investigation in the tax context was most recently re-examined in Gordon v. Canada.41 In this case, the plaintiff chartered accountants 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

38 Hill, supra note 22, at paragraph 3. The Ontario Court of Appeal had revisited the issue in 2005 (Hill v. Hamilton Wentworth Regional Police Services Board, 76 OR (3d) 481) and reaffirmed the existence of the tort by a 3-2 decision (although concluding that a case for liability had not been made out).
39 2008 ONCA 506.
40 2011 BCCA 313.
41 2013 FC 597.
the plaintiffs, which were ultimately dropped after almost seven years. Hughes J rejected an application by the Crown to strike out the negligent investigation claim by the plaintiffs, accepting the prothonotary’s characterization of the plaintiffs’ situation as analogous to the situation involving police and a suspect. Specifically, Hughes J observed that in both instances, the subjects of the investigation have a critical personal interest in the conduct of the investigation, with their personal freedom and reputations being at stake. Accordingly, although describing the allegations of negligence as “tenuous,” Hughes J concluded that

[i]t can hardly be said that the Claims are bereft of any likelihood that there is no proximate relationship giving rise to a duty of care.42

However, he further qualified his conclusion by noting that

[t]he case law is clearly evolving in this area, and the last word has yet to be written by an appellate court.43

It is interesting to contrast the approach of Hughes J in Gordon with the approach of Patterson J in McCreight as outlined in the earlier discussion. The CRA sought to rely on McCreight in Gordon on the basis of the factual similarity between the two cases. McCreight also involved ultimately discontinued prosecutions of tax advisers for fraud and conspiracy arising out of research and development credit claims by a number of their clients. It will be recalled that the plaintiffs in McCreight failed both stages of the Anns-Cooper test. Despite the factual similarity, Patterson J made little reference in McCreight to the tort of negligent investigation; he simply referred to Neumann as confirming “that there is no legal authority for establishing a duty of care between CRA officers and the subject of an investigation”44 and confined Hill to its facts.45 Hughes J in Gordon noted that McCreight is currently on appeal.46 It will be interesting to see whether the Ontario Court of Appeal affords greater weight to the tort of negligent investigation argument.

One hopes that the Court of Appeal in its decision on McCreight will resolve the uncertainties with respect to proximity and foreseeability—stage one of the Anns-Cooper analysis—concerning the potential application of the tort of negligent investigation in the tax context. Ideally, the court will also give detailed consideration to the possible policy concerns at stage two of the Anns-Cooper analysis, which could be raised in seeking to apply the tort of negligent investigation in the tax context.

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42 Ibid., at paragraph 28.
43 Ibid., at paragraph 39.
44 McCreight, supra note 13, at paragraph 54.
45 This cursory treatment of the tort is typical of the tax cases. See, for example, the comments of Dley J in Foote, supra note 22, at paragraph 41 (quoted in the text above at note 22).
46 Gordon, supra note 41, at paragraph 33.
context. This detailed consideration is lacking in the cases to date, despite the significant judicial attention given to a range of policy concerns in Hill. The majority of the Supreme Court in Hill considered policy issues such as the quasi-judicial nature of police duties, the potential effect that imposing liability could have on prosecutorial discretion, the potential for confusion with the standard of care for arrest, potential chilling effects and floodgate effects, and the risk that guilty persons who are acquitted may unjustly recover in tort.

It is difficult to predict how consideration of such concerns might play out in the tax context. For example, on the one hand it could be argued that criminal law touches upon fundamental issues of liberty and security of the person, demanding tortious protection not applicable in the context of simple revenue statutes. But it could also be argued that if the Supreme Court was able (in Hill) to extend tortious protection in an area as fundamental as criminal law (notwithstanding arguable risk to the integrity of the criminal justice system), extending that same protection to less serious forms of investigation should pose little difficulty. Certainly this was the type of reasoning applied in Correia to extend liability to private investigators, where the Ontario Court of Appeal observed that “on a policy level, the case for recognizing a duty of care in respect of private investigation firms may be stronger than for police.”

It is unclear, however, whether a similarly expansive approach will be taken in the tax investigation context.

The question may ultimately come down to the extent to which the tax functions being challenged are characteristic of fact-based investigative functions, similar to the functions carried out by police. The answer is likely to differ for different tax administration activities. For example, investigations in connection with alleged offences under the ITA and the Excise Tax Act (ETA) are closely related to the police investigations described in Hill. However, tax audits under those statutes may not be as directly comparable. It is unclear whether this would make them more or less susceptible to the imposition of a duty of care to taxpayers.

In either event, the standard for assessing how much weight various policy concerns should be afforded to determine whether a duty of care should be imposed was explained by McLachlin CJ in Hill as follows:

In approaching these arguments, I proceed on the basis that policy concerns raised against imposing a duty of care must be more than speculative; a real potential for negative consequences must be apparent.

There is little guidance to date in the tax cases involving the tort of negligent investigation as to how judges might approach the application of this test and which policy concerns might prevail. Accordingly, at present, the treatment of the policy

47 Correia, supra note 39, at paragraph 38.
49 Hill, supra note 22, at paragraph 48.
issues in the negligence cases discussed above provides the greatest insight into how judges might approach these issues. These cases indicate that there are a number of policy concerns that will be afforded significant weight in the tax context. For example, while McLachlin CJ in *Hill* was dismissive of floodgate and chill factor concerns in the police context, such concerns have been taken much more seriously in tax cases such as *783783 Alberta* and *Canadian Taxpayers Federation*. It will be recalled from the earlier discussion that in *783783 Alberta*, the court held that “[r]ecognizing a duty of care in tort . . . would expose Canada to liability to an unidentifiable group for an indeterminate amount.” Similar comments were made by Rouleau J in *Canadian Taxpayers Federation*.53

Perhaps the most significant policy hurdle that might be encountered in the tax context is the argument that the ITA does not create any duties to taxpayers and that the duties of the CRA are owed exclusively to the Crown. This argument was advanced by the CRA in *Gordon*. Hughes J agreed that the ITA itself creates no tortious duties to taxpayers. This is broadly consistent with the reasoning in *Foote*, *Canus*, *783783 Alberta*, and *Leighton*, as discussed above. Hughes J also reproduced the reasoning in *Leighton*, to the effect that “recognizing a duty of care would conflict with CRA’s broad duties under the *Income Tax Act* to ensure that all taxes lawfully owing are correctly assessed and collected.”54 However, for reasons including an acknowledgment of the evolving and unresolved nature of the law in this area, Hughes J was not prepared to dismiss the possibility that a tortious duty of care might be capable of coexisting with the CRA’s statutory duties to the Crown. Accordingly, the question has been left open. Undoubtedly it is a policy question that will arise for consideration in *Leroux*.

**LEROUX AND THE PROSPECT OF A SUCCESSFUL NEGLIGENCE CLAIM AGAINST THE CRA**

In all of the cases discussed thus far, the plaintiffs’ tortious actions against the CRA were unsuccessful. However, a glimmer of hope that a taxpayer negligence claim against the CRA might succeed arose recently in *Leroux*. In this case, the plaintiff alleged misfeasance in public office, negligence, and breach of the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights.56 While the Charter and

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50 See ibid., at paragraph 61.
51 Ibid., at paragraphs 56-59.
52 *783783 Alberta*, supra note 11, at paragraph 48.
53 *Canadian Taxpayers Federation*, supra note 27, at paragraph 70.
54 *Leighton*, supra note 6, at paragraph 58, cited in *Gordon*, supra note 41, at paragraph 31.
55 Canadian Charter of Rights and Freedoms, part 1 of the Constitution Act, 1982, being schedule B to the Canada Act 1982 (UK), 1982, c. 11 (herein referred to as “the Charter”).
56 Canadian Bill of Rights, SC 1960, c. 44 (herein referred to as “the Bill of Rights”).
Bill of Rights claims were struck out, the British Columbia Court of Appeal refused to strike out the tortious claims. In reaching this conclusion, the court reasoned as follows:

The question on this appeal is whether negligent supervision or a negligent act in the course of the administration or enforcement of either of the taxing acts in issue, can give rise to a private law remedy. The answer to that question depends on whether a duty of care should be imposed on the CRA or any of its employees toward a taxpayer. Neither party has provided any authority or analogous cases in which any court has previously identified proximity between a taxing authority and a taxpayer.

While the decision falls short of confirming a taxpayer’s capacity to successfully sue the CRA for negligence, the issue is now unequivocally open to debate. It is therefore pertinent to consider how the facts in Leroux might play out if the case ultimately proceeds to a full hearing of the negligence issues. A necessary starting point for this consideration is an understanding of the basic facts of the case.

The Facts in Leroux

The facts in Leroux were described by Preston J in the hearing of the matter by the British Columbia Supreme Court as “a series of Kafkaesque events that spanned approximately 13 years.” The plaintiff’s problems started in 1996 with an audit of business records related to the recreational vehicle park that he operated in the province. As part of the audit process, the CRA auditors took possession of the taxpayer’s business receipts and other records. Before those records could be copied, a significant proportion of them were shredded or simply lost by the CRA. Nevertheless, the audit was completed, and since the taxpayer was unable to substantiate significant business expense deductions, his liability for both income tax and goods and services tax (GST) was reassessed (after numerous audits over a number of years) at a combined total of approximately $1 million.

The CRA issued seizure and sale orders against the plaintiff’s property to recover the assessed tax debt. The plaintiff unsuccessfully sought to put up cash deposits with the CRA while he sought refinancing to secure the tax debt. As a result, he lost his properties and was ruined financially.

57 The British Columbia Court of Appeal affirmed the Supreme Court’s decision to strike out the Charter and Bill of Rights claims: see Leroux (BCCA), supra note 1, at paragraphs 47, 55, and 57; and Leroux v. Revenue Canada Agency, 2010 BCSC 865, at paragraph 75.
58 Leroux, supra note 1, at paragraph 38.
59 Although in some cases the findings of the Court of Appeal in Leroux have been overstated. For example, in McCreight, supra note 13, at paragraph 57, Patterson J observed that “the Leroux case found for the first time, in Canada, that a duty of care was owed by CRA agents for negligent conduct.”
60 Leroux (BCSC), supra note 57, at paragraph 2.
The plaintiff’s appeal against the reassessments was heard by the Tax Court of Canada in 2005. Those proceedings were ultimately resolved by consent orders, pursuant to which the CRA agreed to reduce the plaintiff’s income tax liability to zero and his GST liability to $20,000. The latter amount was offset against a similar-sized refund owing to the plaintiff. The plaintiff subsequently commenced the current tortious proceedings, seeking millions of dollars in damages for the loss of his property and business.61

The Supreme Court and Court of Appeal Proceedings

At the Supreme Court of British Columbia, the CRA sought to strike out the plaintiff’s statement of claim as a collateral attack on the tax assessments62 and/or as an abuse of process. Preston J rejected the collateral attack argument, characterizing the plaintiff’s claim in the following terms:

This action . . . raises issues distinct from those that would have been addressed in the statutory review process which concerned itself with the validity of the assessments. Further, the statutory review process under the ITA would not have provided the plaintiff with the remedy he seeks. On the information before this Court at this stage, the plaintiff’s action does not raise a collateral attack on the validity of the earlier proceedings.63

Preston J also considered and rejected the argument that the doctrine against collateral attack requires plaintiffs to first exhaust avenues of administrative law relief prior to resorting to damages claims in provincial superior courts. He concluded that

where the plaintiff’s claim does not challenge the validity of the decision, where the review process will not address the issues the plaintiff seeks to litigate and where the review process will not grant the plaintiff the remedy sought, requiring judicial review

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61 The Supreme Court of British Columbia described the plaintiff’s claims in the following terms: “His basic allegations are that the defendant CRA conducted a prolonged sequence of audits, assessments, reassessments, and collection procedures relating to both Income Tax and Goods and Services Tax that caused his substantial business empire to collapse and impoverished him.” Ibid., at paragraph 1.

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

63 Ibid., at paragraph 54.
as a pre-requisite does not serve the policy interests that underlie the rule against collateral attack.\textsuperscript{64}

On the question of whether a reasonable cause of action in tort might lie, Preston J was brief and to the point, concluding that

\[ \text{the facts pleaded in the amended statement of claim are sufficient to support those claims. The existence of a duty in tort on the part of CRA is an arguable issue.} \textsuperscript{65} \]

At the Court of Appeal, the CRA unsuccessfully appealed the Supreme Court’s refusal to strike out the plaintiff’s tort claims.\textsuperscript{66} The court rejected the CRA’s suggestion that the plaintiff’s claim would necessarily involve revisiting particulars of the assessments that were the subject of the earlier Tax Court proceedings. The court observed that while

\[ \text{Crown liability in tort and the validity of an underlying administrative decision may generate some overlapping considerations . . . they present distinct and separate justiciable issues. They are conceptually distinct.} \textsuperscript{67} \]

On the question of whether the pleading revealed a sustainable cause of action in negligence, the court was less conclusive:

\[ \text{The CRA’s primary duty, as the agent of the Minister, is to fulfill its statutory mandate to administer and enforce the ITA . . . as well as other taxing statutes. . . .} \]

\[ \text{The question on this appeal is whether negligent supervision or a negligent act in the course of the administration or enforcement of either of the taxing acts in issue, can give rise to a private law remedy. The answer to that question depends on whether a duty of care should be imposed on the CRA or any of its employees toward a taxpayer. Neither party has provided any authority or analogous cases in which any court has previously identified proximity between a taxing authority and a taxpayer. Without such an established or analogous category, Mr. Leroux must plead and ultimately prove that the CRA or one of its employees was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances.} \textsuperscript{68} \]

\textsuperscript{64} Ibid., at paragraph 49. The reasoning is similar to the reasoning of the Alberta Court of Appeal in 783783 Alberta, supra note 11. In that case, at paragraph 42, the court rejected an interpretation of \textit{Holland v. Saskatchewan}, [2008] 2 SCR 551, that would have incorporated “into the law of tort the administrative law concept of exhaustion of remedies. The law of tort is a free-standing, primary basis for civil liability, not merely a residual cause of action which only exists when no other remedy can be identified.”

\textsuperscript{65} \textit{Leroux} (BCSC), supra note 57, at paragraph 56.

\textsuperscript{66} The plaintiff cross-appealed against the dismissal of his Charter and Bill of Rights claims. As noted above, both the appeal and the cross-appeal were unsuccessful: see supra note 57.

\textsuperscript{67} \textit{Leroux}, supra note 1, at paragraph 22.

\textsuperscript{68} Ibid., at paragraphs 37-38.
The Leroux Negligence Claims and Stage One of the Anns-Cooper Approach

As intimated by the Court of Appeal, the greatest—and preliminary—hurdle for Mr. Leroux in any eventual trial of his tortious claims will be establishing a duty of care. The court will apply the Anns-Cooper analysis to determine this question. As noted earlier, stage one of the Anns-Cooper analysis addresses questions of reasonable foreseeability and proximity. The question of foreseeability is likely to be uncontroversial in the Leroux case. As noted by the Court of Appeal, the CRA “accepts [that] the circumstances pleaded disclose the reasonable foreseeability of harm.”

However, as in the cases examined in the first part of this article, proximity will also be a significant hurdle for Mr. Leroux. Some of those cases can easily be distinguished from Leroux. For example, in Leighton and 783783 Alberta, the plaintiffs sought to extend proximity respectively to situations involving shareholders of taxpayers and to taxpayers for assessments of third parties. Leroux is confined purely to a discrete individual taxpayer-CRA relationship and involves no allegations of a CRA duty of care to any third party.

A greater challenge arises in dealing with the reasoning in cases such as Canus and McCreight, in which the plaintiffs also sought to confine a duty of care to discrete taxpayer-CRA relationships. It will be recalled that in McCreight Patterson J accepted as given the Crown’s submission 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.

This argument is peculiar at best. Extending this reasoning to its logical conclusion would lead to the questionable result that persons in an adversarial relationship do not owe each other a duty of care. Patterson J cites no authority for such an approach in any tax case or in tort more generally. His acceptance of the Crown’s submission on this point is also inconsistent with cases such as Gordon and Neumann, in which, in the context of the tort of negligent investigation, judges have been prepared to concede that despite the adversarial nature of the relationship between the taxpayer and the CRA investigator, a duty of care can arise. Accordingly, a strong case could be advanced in Leroux that such an argument should not hold sway on the question of duty of care.

However, it may be that Patterson J had in mind the less controversial (and more difficult to overcome) “inherently opposing interests” argument advanced by Hood J.

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69 Ibid., at paragraph 40.
70 McCreight, supra note 13, at paragraph 62.
71 Alternatively, the McCreight argument could be confined to situations involving criminal prosecutions of taxpayers.
The nub of the argument is that opposing interests are created by the statutory scheme under the ITA. Accordingly, to impose a duty of care in these circumstances would be to contradict the statutory intent implied by that scheme. Hood J in Canus went further, arguing that this argument is strengthened by legislative silence as to how the minister and his employees should carry out their audit functions.

At its heart, 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.” Necessarily, therefore, the ITA, and the CRA in administering its provisions, will adversely affect the interests of individual taxpayers, and opposing interests will arise. However, this fact, even when coupled with legislative silence as to how CRA officials are to carry out their duties, cannot be taken to preclude the possibility of the existence of any CRA tortious duty of care to taxpayers.

As noted by Lord Wilberforce in Anns v. London Borough of Merton, such situations do not absolve public officials from all tortious responsibility. In such situations, 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 inherently opposing interests of taxpayers and CRA officials, or 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.

Really, then, the question is whether any express tax provision or provisions can be interpreted as evincing a statutory intent to preclude a duty of care in negligence. Such an argument was considered in British Columbia Ferry Corp. v. Canada (Minister of National Revenue). In this unjust enrichment case, the Federal Court held that the relevant provision of the ETA—section 71—was a “comprehensive code” sufficient to preclude “the common law or any equitable remedy.” However, ETA section 71 is unequivocal, providing that

71. Except as provided in this or any other Act of Parliament, no person has a right of action against Her Majesty for the recovery of any moneys paid to Her Majesty that are taken into account by Her Majesty as taxes, penalties, interest or other sums under this Act.

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72 See supra notes 18-19 and the related text.
74 Anns, supra note 5.
75 Ibid., at 500.
76 2000 CanLII 14950 (FC).
77 Ibid., at paragraph 10.
Pertinently, ETA section 71 is similar to one of the provisions under consideration in the landmark tort case of *Cooper v. Hobart*,78 namely, section 20 of the British Columbia Mortgage Brokers Act.79 This provision expressly prohibits action against the mortgage brokers registrar “unless it was done in bad faith.”80 In the face of such unequivocal statutory limitations on suit, it is understandable that both the Supreme Court in *Cooper* and the Federal Court in *British Columbia Ferry Corp.* reasoned that there was no room for any common-law duty of care to coexist alongside the statutory duties of the defendant public officials.

What distinguishes provisions such as these from a more general suggestion that common-law causes of action are always precluded in the tax context is that these provisions are prescriptive and expressly create specific immunities from suit. Arguably, the closest equivalent general income tax provision is the privative clause contained in ITA subsection 152(8). This provision provides limited immunity from suit with respect to assessments of tax,81 and reads as follows:

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

Consequently, a submission could be made in *Leroux* that Parliament turned its mind to questions of immunity from suit in the income tax context and chose not to extend immunity more broadly. The provisions considered in *Cooper* and in *British Columbia Ferry Corp.* provide examples of the Canadian legislature creating broader immunity from suit—the latter in a revenue context. Hence, if Parliament had intended to include a similar restriction on the right to sue the CRA, it could have done so.82 Instead, the privative provision in ITA subsection 152(8) applies only to tax assessments.

The more appropriate question, therefore, is whether the *Leroux* case falls within the scope of the express restriction on common-law suit contemplated by the current legislative scheme for dealing with tax complaints. This concern is captured by the

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78 *Cooper*, supra note 5.
79 RSBC 1996, c. 313.
80 Section 20 in its entirety provides, “An action may not be brought or continued against the registrar or a person acting under the authority of the registrar for anything done by the registrar or the person in the performance of duties under this Act or in pursuance or intended or supposed pursuance of this Act or the regulations, unless it was done in bad faith.”
81 Such provisions are common in the international tax context. International examples include sections 175 and 177 of the Australia Income Tax Assessment Act 1936 (Cth).
82 This argument is consistent with basic principles of statutory interpretation such as the well-known maxim _expressio unius est exclusio alterius_. For a generic discussion of this longstanding principle, see Clifton Williams, “Expressio Unius Est Exclusio Alterius” (1931) 15:4 *Marquette Law Review* 191-96.
residual public policy “collateral attack” argument. If the argument can be confined to the collateral attack doctrine in *Leroux*, the plaintiff is on solid ground. As noted above, both the British Columbia Supreme Court and the Court of Appeal in *Leroux* dealt with and dismissed the collateral attack argument (and the affiliated argument of exhaustion of alternative avenues of relief). The Court of Appeal described questions surrounding the assessment of the plaintiff’s tax liabilities and his tortious claims as “distinct and separate justiciable issues.” Accordingly, while the answer to the proximity question for the purposes of stage one of the *Anns-Cooper* analysis is far from straightforward, the preceding discussion suggests that *Leroux* is capable of falling within a narrow band of cases in which proximity could be established.

This is particularly true if the tort of negligent investigation is pleaded because, as discussed in the second part of the article, courts appear to have been more receptive of arguments that the relationship between tax officials and the subjects of CRA investigations is sufficiently proximate to support a tortious duty of care. It is significant, however, that to date the tort of negligent investigation has been raised in the tax context only in cases involving criminal conduct investigations. It would therefore be a significant extension of the current body of case law to seek to apply the tort in the *Leroux* context.

**The Leroux Negligence Claims and Stage Two of the Anns-Cooper Approach**

At stage two of the *Anns-Cooper* analysis, involving residual policy considerations, the plaintiff will also encounter significant difficulties, whether or not the tort of negligent investigation is also pleaded. The primary issue (which has also intruded in the stage one proximity analysis) is the general judicial view that the imposition of a tortious duty of care would conflict with the CRA’s duties to the Crown. However, on closer analysis, most judges have been equivocal when advancing this view. For example, as discussed above in *Foote* Dley J qualified his comments on this point, observing that such an argument would apply “as long as the auditor is reasonably competent.” Similarly, in *783783 Alberta* the court implicitly accepted that “[t]he relationship between the tax assessors and any taxpayer is primarily to ensure that the taxpayer is fairly assessed.” Such obiter comments indicate that there is room for a common-law duty to taxpayers for torts falling short of deliberate misconduct to coexist with the CRA’s duties to the Crown. Tort of negligent investigation cases such as *Gordon* and *Neumann* appear to bear this out.

83 *Leroux*, supra note 1, at paragraph 22.
84 *Foote*, supra note 22, at paragraph 41. (For additional context, see note 22 and the related text.) Unfortunately, Dley J did not elaborate on what he meant by “reasonably competent.”
85 *783783 Alberta*, supra note 11, at paragraph 45. (For additional context, see supra note 23 and the related text.)
86 Given the peculiar facts in *783783 Alberta*, in which a duty to third parties in carrying out tax-assessment functions was advanced by the plaintiff, the court was able to easily dispose of the question that any such duty is implicit in the Canadian legislative framework.
Nevertheless, not all judges have conceded this possibility. A prime example is the approach of MacKay J in *City Centre Properties*. It will be recalled that this case concerned a failure of a CRA official to enforce a bank guarantee securing tax debts of a predecessor of the plaintiff before the bank guarantee expired. Although MacKay J conceded that the CRA official had been careless, he reasoned that the official’s duties were owed to the Crown, not the taxpayer.87

The facts in *City Centre Properties* justify the approach of MacKay J and can be readily distinguished from the situation in *Leroux*. Had MacKay J concluded otherwise in that case, the effective result would have been the forgiveness of a tax debt owed by the plaintiff, creating inequality in the tax treatment of the plaintiff and other taxpayers. It is easy to see why residual rule-of-law and parliamentary sovereignty policy concerns would be permitted to intrude in these situations. No such situation exists in *Leroux* since the plaintiff no longer has an outstanding tax debt. There is no relationship of taxpayer debtor and CRA creditor in this case.

The unusual facts in *Leroux* are also likely to assist the plaintiff in dispelling the policy challenge that permitting his claim to succeed would open the floodgates to suit and potentially expose the CRA to large and indeterminate liability, and the allied concern that exposing the CRA to an extension of liability to taxpayers might result in overly defensive behaviour by tax officials or chilling effects. It is unlikely that there would be a flood of claims arising from taxpayer success in *Leroux*. This is because any precedent would be confined to factual situations in which

1. no challenge is posed to a CRA assessment decision;
2. the plaintiff does not owe any tax debt;
3. the actions complained of raise no challenge to the CRA’s decision-making or policy discretion; and
4. the factual matters and remedies sought cannot be dealt with under the review and objection mechanisms contained in the ITA.

Consequently, properly understood, a determination in favour of the plaintiff in *Leroux* should not elicit an overly defensive or wary response among reasonable and responsible tax officials, or usher in a flood of similar claims. Such potential negative consequences are more likely to be speculative than real.88 Nevertheless, if the CRA persists in advancing such arguments, those arguments should be weighed against any possible countervailing positive policy effects (for example, improvements in taxpayer trust and confidence and the encouragement of greater care) that might flow from imposing liability on the CRA in circumstances such as those that arose in

87 See supra notes 24-25 and the related text.

88 It will be recalled that in *Hill*, supra note 22, at paragraph 48, the Supreme Court of Canada approached such policy concerns (in the context of the tort of negligent investigation) on the basis that to be sustainable, the negative effects of imposing liability must be more than speculative—a real potential for negative consequences must be apparent.
In this respect, it is relevant to note that the CRA’s treatment of Mr. Leroux has been widely and publicly denounced as unfair and unacceptable.\(^89\)

**CONCLUSIONS**

The analysis in this article has demonstrated that the prospects of a successful negligence claim against the CRA are far from certain. Canadian judges have consistently expressed a reluctance to impose tortious duties of care in negligence on CRA officers. However, prior to *Leroux*, Canadian judges had not been faced with a realistic challenge to the sustainability of this reluctance. The cases to date have all asked judges to stretch concepts such as proximity beyond incremental encroachments on the CRA’s duties to the Crown in assessing and collecting Canadian taxes.

While it is difficult to speculate on the basis of pleadings alone how the appeal in *Leroux* might play out, this case is different. It raises no challenge to tax assessments and arises out of facts in which the taxpayer is not indebted to the CRA. It raises no challenge to the discretion of CRA officials in their interpretation of Canadian tax laws. It raises clear and seemingly uncontroverted evidence of purely operational CRA failures—especially in the negligent destruction/misplacement of the plaintiff’s original documentation—which were the catalyst for the calamitous and protracted continuing dispute between the CRA and Mr. Leroux. These factors may all enhance the plaintiff’s prospects of success.

Nevertheless, it remains to be seen whether Canadian judges will take up the challenge to deal with cases such as *Leroux* in a manner that resists the allure of rejecting the existence of a CRA duty of care on the basis of largely untested residual policy concerns—particularly any unstated but presumed legislative intent to deny taxpayer recovery in tort. This article has sought to provide an analysis of the existing case law to assist judges in this process.

Policy makers too could use this analysis as a primer for legislative clarification, particularly on the questions of to whom CRA duties are owed, and in what circumstances (if any) common-law duties are owed to taxpayers. Ultimately, this would be preferable to relying on piecemeal and incremental judicial innovation.

Even if the result of this legislative attention is the express negation of any common-law duties of care to taxpayers, the certainty that this development would produce for all taxation stakeholders and their advisers would be a welcome improvement. At the very least, it would eliminate any possibility that taxpayer rights may be needlessly sacrificed in the name of a presumed, but potentially non-existent, legislative intent.

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