Is the Tax Payer Bill of Rights only a Public Relations Exercise

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IS THE TAXPAYER BILL OF RIGHTS ONLY A PUBLIC RELATIONS EXERCISE?

David H. Sohmer

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A

INTRODUCTION

1

Branch and these programs, the distribution of national-, regional-, office-, and case-level objection decision reports, as well as research and analysis of objection decisions. These processes have been initiated to improve program policies and procedures, as well as train staff.

- A review of all key processes related to the processing of objections was conducted, resulting in the identification of a number of opportunities for efficiencies. Examples of initiatives already implemented include the automation of some data collection and data-entry steps, updated forms and procedures, the elimination of unnecessary data captures, and the introduction of a triage function for low-complexity and some medium-complexity objections. In many cases, this triage function has resulted in taxpayers being contacted within 30 days to request supporting documentation, over 100 days earlier in the process.

- The Agency has added resources to address the workload of high-complexity objections.

- The Objections Program has improved its data integrity and performance reporting; timeliness reporting includes all the time an objection's resolution falls within the control of the Government of Canada and excludes time spent awaiting supporting information from the objector.

Going forward, the CRA will continue to improve the Objections Program's timeliness and efficiency, and target the resolution of group objections.

Question 7: Effect of recent negligence cases on tax administration

There have been a few negligence cases that receive disproportionate attention (*Leroux*, *Samaroo*, *Group Enico*, *Ludmer*). Does CRA want to comment on whether/how these cases have affected tax administration?

CRA response

In broad terms, these cases, some of which are under appeal and thus will not be directly commented on, have not caused specific changes in tax administration practices. Without commenting directly on the cases in the opening question, close observers can see a spectrum in the underlying fact situations.

That being said:

- There are recent efforts to update the process for informal disclosure of information to a taxpayer during an audit and ongoing efforts to improve internal ATIP processes.

- CRA has (for many years) had a code of conduct for staff, a Taxpayer Bill of Rights and an Office of the Taxpayers' Ombudsman. These all serve to set out and redress service level and staff conduct expectations for taxpayers and the CRA.

- Recently, the CRA has announced the appointment of a Chief Service Officer, Mireille Laroche, as part of a renewed focus on service.

- CRA is always looking to improve the policies, procedures and training provided to staff including areas which deal face to face with taxpayers. This includes how best to obtain information from taxpayers in light of identified tax compliance risks, scope of review, industry sector etc.

Taxpayers with significant resources available to them should not expect different results with respect to the technical merits of their case, where their tax situation is similar to that of other taxpayers. Furthermore, where reliance is placed on a published view regarding a plain vanilla domestic tax arrangement, taxpayers should not be surprised that the CRA might take the view that the underlying facts and issues in an offshore structure would be sufficiently distinguishable to result in a challenge to taxpayer's self-reported assessment of tax.

Accordingly, the CRA is committed to:

- Arriving at reasonable assessing positions that are timely and transparent;

- Communication to taxpayers when adopting positions that deviate from long standing interpretations, especially when there are publicly stated positions;

- Treating taxpayers fairly and respectfully;

And,

- Supporting its employees who may have been singled out for legal action in order to try to thwart the efforts of CRA in administering compliance activities such as an audit or a reassessment.

Most importantly, the CRA's commitment to fair, and unbiased conduct that is ethical and honest, and to resolve disputes at the earliest possible stage is the best defence to any civil action. While the possibility of legal action against the CRA can't be ruled out, the CRA will always be committed to serve the public with integrity, professionalism, respect, and cooperation in carrying out its mandate.

Question 8: Related Party Initiative and risk-based business audits update

The Related Party Initiative (RPI) and Risk-Based business audits are significant CRA initiatives that have been running for some time. Can CRA provide an update that includes statistics of interest and comments on the future direction of these initiatives?

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7. You have the right, unless otherwise provided by law, not to pay income tax amounts in dispute before you have had an impartial review

You have the right not to pay **personal tax amounts** in dispute until you have had an impartial review by the CRA or, if you have sent an appeal to the Tax Court of Canada, until that court has issued its decision. **Interest charges will continue to accumulate during this period.**

In circumstances that are specified in legislation, such as when an amount is in jeopardy, the CRA can take collection action even though an objection or appeal has been sent.

If you disagree with a decision that resulted in an amount owing

You have the right to object to an assessment or reassessment if you think we did not apply the law correctly. If you disagree with, or do not understand, an assessment or a reassessment, you should contact us at once for an explanation. If you can provide some evidence that our assessment is not correct, we will suspend collection actions on the part of the assessed taxes that you are questioning until the matter is reviewed and resolved. However, you have to pay at once any amounts not in dispute.

For more information on your rights and obligations in paying disputed personal tax amounts, go to **canada.ca/cra-collections**.

8. You have the right to have the law applied consistently

It is your right to have us apply the law consistently so everyone gets their entitlements and pays the right amount. We will take your particular circumstances into account as allowed by law.

Accuracy and consistency are essential in the administration of tax legislation. We take a number of measures to make sure that we administer legislation in a consistent manner across the country. These measures include:

- systematically analyzing the most common errors made by taxpayers and taking steps to prevent them
- training our employees
- issuing technical directives
- reviewing our technical publications for accuracy

If we have not applied the law consistently or correctly in your situation

You should talk to us. If you still disagree with our decision after talking to us, you have the right to ask for a formal review of your file and to then have our decision reviewed by a court.

To find out on how to ask for a formal review under the legislation we administer, see "4. You have the right to a formal review and a subsequent appeal" on page 5.

9. You have the right to lodge a service complaint and to be provided with an explanation of our findings

You can expect that if you make a service-related complaint, you will be listened to and given the opportunity to explain your situation. We will deal with your complaint promptly and in confidence, and we will explain our findings.

Generally, "service" refers to the quality and timeliness of the work we performed. A service complaint could involve having received unclear or misleading information, staff behaviour matters, mistakes, or undue delays.

If you are not satisfied with the service you received

You can try to resolve the matter with the CRA employee you have been dealing with or call the telephone number provided in the CRA's correspondence. If you do not have contact information, go to **canada.ca/cra-contact**.

If you still disagree with the way your concerns were addressed, you can ask to discuss the matter with the employee's supervisor.

If you are still not satisfied, you can send a service complaint by filling out Form RC193, Service-Related Complaint. For more information, go to **canada.ca/cra-service-complaints**.

If the CRA has not resolved your service-related complaint, you can submit a complaint with the Office of the Taxpayers' Ombudsman. For more information, go to **oto-boc.gc.ca**.

PRELIMINARY OBSERVATIONS

1. In reference to consistency is a reference to the consistent application of the law and not the consistent excessive of discretion. Auditors have wide discretion re-assessment – what to assess, how many years to assess, what penalty to assess, post-assessment – 220(3.1) relief.

2. The division of jurisdiction believes the Tax Court, the Federal Court and the Superior Court and the limbed competence of each is a barrier to the enforcement of the Taxpayer Bill of Rights.

3. Small to medium enterprise may not have the resources to litigate, so the threat of supporting employees who have been singled out for litigation is unconceivable interlocution.

4. Decentralization has resulted in the abdication by Head Office of its supervisory role.

B

ENFORCEMENT OF THE TAXPAYER BILL OF RIGHTS BY CRA ADMINISTRATION

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1992 CR 9E:p.3 Audit Function in Revenue Canada (Gauthier, E.H.)

Tax Avoidance and GAAR Matters

Role of Tax Avoidance

The role of tax avoidance is "to examine transactions or arrangements, which appear to circumvent the law or its intent." In principle, its role is no different from that of a regular audit except the audit is normally focused on a particular issue or arrangement.

1992 CR 9E:p.3 Audit Function in Revenue Canada (Gauthier, E.H.)

In the past couple of years, the tax-avoidance staff in our field offices have been empowered with all tax-avoidance processing and assessing functions in order to give you faster and more responsive service. The only exception to this decentralization is general anti-avoidance rule (GAAR) reassessments, which still must be approved by Head Office.

1992 CR 9E:p.3 Audit Function in Revenue Canada (Gauthier, E.H.)

Head Office is responsible for establishing the programs for the field, procedures, and guidelines, and for providing, on request, technical or other assistance. Head Office is also responsible for ensuring that there is consistency in the field through training, communications, program reviews, and coordinating national issues or subjects.

1992 CR 9E:p.3/4 Audit Function in Revenue Canada (Gauthier, E.H.)

I will emphasize that the district offices are now in charge of the audit and they are the ones that are delivering the programs. Head Office is there | to advise and assist. This is so even in subsection 55(2) " " " cases, swaps, or whatever.

6.8 The Canada Revenue Agency introduced **Competency-Based Human Resource Management (CBHRM)** as the foundation for its management of human resources. CBHRM is based on the principle that effective organizational performance will result from having the right people, in the right jobs, at the right time, and with the right skills. In other words, CBHRM is designed to help the Agency meet its business needs.

6.9 A competency is any measurable or observable skill, ability, knowledge, or behavioural characteristic. Each competency has levels of proficiency. An example of a competency (and its levels of proficiency) is analytical thinking (Exhibit 6.1). The Agency's competency catalogue includes more than 55 competencies developed by groups of managers and employees. These competencies are aligned with the Agency's business needs.

Exhibit 6.1—Each competency has levels of proficiency

Analytical thinking: understanding a situation by breaking it into smaller pieces, or by tracing its implications, issues, or problems in a step-by-step way. Analytical thinking describes the behaviours required to perform a thinking process used to produce useful information that will support appropriate actions and decisions.

Scale	Underlying notion	Possible illustrations
Level 1—passive behaviour	Recognizing basic situations	Recognizes basic situations/issues and selects from a limited number of pre-established responses.
Level 2—active behaviour	Clarifying the situation	Clarifies what the situation/issue is by breaking it down into components. Selects appropriate action(s) from defined options, available guidelines, and precedents.
Level 3—proactive behaviour	Examining the facts and making assumptions	Analyzes and examines the available information, identifying gaps and developing potential explanations or causes in order to select the most appropriate response(s).
Level 4—strategic behaviour	Evaluating, interpreting, and integrating	Evaluates and interprets situations/issues that are typically multi-dimensional, abstract, and precedent setting and integrates them into a complete solution.

Source: Canada Revenue Agency

6.10 Each job has a distinct competency profile, called a job competency profile (JCP), that includes no more than 13 competencies and the level of each competency required to do the job. Almost all of the Agency's jobs now have a JCP. Each employee has a distinct competency profile, called an employee competency profile (ECP). It includes the level achieved in the competencies for which the employee has been assessed. At the time of the audit, 65 percent of employees had at least one competency assessed; 30 percent had five or more.

Competencies are the basis for human resources management

6.8 The Canada Revenue Agency introduced **Competency-Based Human Resource Management (CBHRM)** as the foundation for its management of human resources. CBHRM is based on the principle that effective organizational performance will result from having the right people, in the right jobs, at the right time, and with the right skills. In other words, CBHRM is designed to help the Agency meet its business needs.

6.9 A competency is any measurable or observable skill, ability, knowledge, or behavioural characteristic. Each competency has levels of proficiency. An example of a competency (and its levels of proficiency) is analytical

Audit

A referral to Head Office is usually premised on ensuring uniformity in the application of the law.[45] At the Audit level, unless the taxpayer's audit is part of a Head Office project or an industry-wide audit, referral of the entire file is unlikely and probably ill advised. A referral of a question of law to Head Office or Legal Services is the more likely scenario. Since 1989, Head Office has undergone significant structural alterations, resulting in even further delegation (if not abdication) to District Offices. This | decentralization was accompanied by a decrease in Head Office personnel and it continues to the present time. Even a request for a Head Office opinion can be processed locally.[46]

With the decrease in personnel and the current operational structure, referring the file to Head Office, Audit is likely to be a time-consuming, costly exercise that will have a very limited impact on advancing the chances for resolution or settlement, except in the circumstances outlined above.

When the purpose of a referral is to obtain direction on audit policy and procedure, the request should go to the Audit Applications Division. Similarly, referrals involving an international transaction should go to the International Audit Division, and technical questions may generally be referred to the Rulings or Specialty Rulings Directorate. From an operational viewpoint, in such a referral Revenue Canada's auditor must:

- include a statement of Audit's position or understanding together with that of the taxpayer;
- get the approval of the chief of audit;
- include a reference in the T20 report to the Head Office referral, and give details of the same; and
- make every effort to provide the taxpayer with a copy of the reply. [47] |

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Government of Canada Gouvernement du Canada

Home → Innovation, Science and Economic Development Canada → Corporations Canada

Directors and officers

Directors are responsible for supervising the activities of the corporation and for making decisions regarding those activities. Officers are responsible for the day-to-day operation of the corporation.

On this page

Your corporation's board of directors

Your corporation must have at least one director. The number of directors is specified in your articles of incorporation. Shareholders elect directors at the shareholders' meeting by a majority of votes. An individual can be the sole shareholder, director and officer of a corporation.

Note

If you want to increase or decrease the number of directors of your corporation permitted by your articles, you must amend your articles and pay the fee (see Services, fees and turnaround times – CBCA (Canada Business Corporations Act)).

Director requirements

A director must:

- be at least 18 years old
- not have been declared incapable under the laws of a Canadian province or territory, or by a court in a jurisdiction outside Canada
- be an individual (a corporation cannot be a director)
- not be in bankrupt status.

Duty of care

One of the most important duties set out for directors and officers of a corporation in the CBCA (Canada Business Corporations Act) is the duty of care. Duty of care requires that, in carrying out their functions, the directors and officers must:

- exercise at least the level of care and diligence that a reasonable person would exercise in similar circumstances
- act honestly at all times, in good faith and in the best interests of the corporation, as opposed to their own personal interests.

Remaining informed

A corporation's directors and officers cannot avoid liability on the grounds that they did not know what the corporation was doing. The CBCA (Canada Business Corporations Act) specifies that directors and officers, within the scope of their authority, must always:

- remain informed about the corporation's activities
- ensure that the corporation's activities are legal and in the best interests of the corporation.

Preventing conflicts of interest

The CBCA (Canada Business Corporations Act) tries to prevent conflicts between the interests of the corporation and those of the directors or officers. For example, directors and officers must disclose in writing any personal interest they can have in a contract with the corporation. Failure to make such a disclosure could result in a court setting aside the contract upon application by the corporation or a shareholder.

Specific liabilities

The CBCA (Canada Business Corporations Act) also imposes certain specific liabilities on directors and officers of a corporation. In certain circumstances, directors are liable for up to six months' worth of unpaid wages to employees of the corporation, as well as for any unpaid source deductions.

Protection from liability

Consider adopting some of the following methods that have been developed to protect directors and officers of corporations from certain liabilities that could be imposed upon them. For example, your corporation could:

To: David Sohmer
Subject: Bruno , Kehar, et al

R v Bruno 2018 CarswellQue 9013

A)Projet Cocagne

1)43 L'existence du **Projet** Cocagne confirme que la préoccupation concernant un problème de corruption à l'ARC n'est certes pas nouvelle. Aussi, le même fonctionnaire supposément corrompu, (Kehar) était déjà ciblé dans le **Projet** Cocagne. Ces constations ne suffisent pas à établir le droit aux requérants d'avoir accès aux éléments de l'enquête Cocagne.
2)Note that Projet Cocagne was launched in 2000; interim report June 2003;final report September 2003

3)R v Accurso, footnote 61: "Gouin did not know about the Cocagne investigation in 2000-2003, but she received the report in January 2008 .....She gave it to Chounard when he replaced her in April 2008."

B)Projets

1)Projet Cocagne (Montreal and Lava- RCMP/CRA)

2)Projet Delvex

3)Projet Infiltration

4)Projet Colisee (RCMP, November 2006- organized crime unit)

5)Projet Coche(RCMP)

6)Laval ; Projet Critique RCMP)

7)April 2007, internal review of audit trails by CRA employees ordered by Gouin

C) people involved

1)Projet Coche: 15 individuals charged including 8 CRA employees;

2)Gemmar:-Oliverio, Furgiuele, josee Bissonnette, Genevieve Robillard, Michel Gionet, Ralph Amar,(CUPE), Isabelle Frappier (auditor ATP HQ)

3()Accurso:

necessarily refer to their official title.)

Cavanagh, David: Leader of the CIP.

Châtillon, Marc: Team leader of the SEP.

Chouinard, Patrice: Director of the Montreal TSO, from April 2008.

Côté, France: SEP Team leader.

Daigneault, Guy: Team leader of the SEP.

Dornier, Patrick: Legal counsel at CRA.

Faribault, André: CIP Investigator, affiant of the CRA ITOs.

Gagnon, Louis: Interim Director of the SES (until February 2007) and the head of the CRA for Projet Colisée (until September 2006).

Godard, André: Team leader of the CIP and head of the CRA for Projet Colisée (September 2006-November 2008).

Gouin, Carole: Director of the Montreal TSO (until April 2008.) (Note first informed of corruption in winter 2007 by someone in a shopping center and first informed of anonym,ous tip to Pquette in March 2008

L'Heureux, Jocelyn: Major Fraud Team leader, RCMP.

Labelle, Josée: Internal Affairs Department of CRA

Labranche, Michael: Sgt-Major of the Commercial Crimes Unit at the RCMP

Léveillé, Pierre: CRA Internal Affairs Investigator.

Malo, Jocelyn: Director General of the CRA Internal Affairs from 1998.

Meunier, Denis: "Directeur général de l'exécution et des divulgations de l'ARC" and signatory of the 2007 MOU.

Orlando, Savario: Head of the Commercial Crime Section of the RCMP.

Paquette, Jean-Pierre: CRA Agent seconded to Projet Colisée (anonymous tip in March 2006).

Pennors, Catherine: CIP Investigator.

Proulx, Marc: CRA Auditor.

St-Amand, André: Director of the SES.

Talbot, Yvon: CRA Auditor.

4)Madan Kehar (anonymous tip in March 2006)

David Sohmer

Avocat / Lawyer, Actionnaire / Shareholder

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PRÉAMBULE

1. Les défendeurs ont des motifs raisonnables de croire que le soi-disant vendeur d'un logiciel aux demandeurs, la mise-en-cause Mangrove Application Ltd. **(Mangrove)**, une société qui est incorporée à Anguilla - un paradis fiscal - n'était qu'une façade faisant partie d'un stratagème fiscal et, de plus, qu'il n'y a pas eu de réelles négociations entre Mangrove et les soi-disant acheteurs du logiciel;

2. Ces derniers, dont les demandeurs, sont en réalité des « participants » dans ce stratagème fiscal et leur intérêt était de faire l'acquisition d'attributs fiscaux que leur ont fait miroiter des professionnels. Le réel intérêt des demandeurs n'était pas envers le logiciel, qui, d'ailleurs, s'est avéré n'avoir aucune valeur et n'avoir jamais été commercialisé, mais il était plutôt focalisé sur l'acquisition d'un montage fiscal procurant des avantages fiscaux disproportionnés;

3. Les demandeurs savaient ou auraient dû savoir que la lettre du 8 décembre 2008 de l'Agence du revenu du Canada (**l'ARC**) (pièce P-8) (les demandeurs utilisent l'expression « Notification » pour référer à cette lettre) sollicitée par les représentants des demandeurs, dont certains sont les artisans du stratagème fiscal, ne leur offrait aucune garantie d'obtenir le traitement fiscal avantageux recherché. L'ARC pouvait légalement mener une vérification fiscale subséquente comme elle l'a fait, ce qui lui a permis de découvrir le stratagème fiscal et ses failles, dont notamment le fait qu'il s'agissait d'un simulacre (communément désigné par l'expression anglaise « *sham* » et l'expression française « trompe-l'œil »). Cette vérification subséquente a menée à l'émission de nouvelles cotisations fiscales annulant les avantages fiscaux que procurait le stratagème fiscal;

4. La *Requête introductive d'instance en dommages et intérêts modifiée* datée du 20 octobre 2017 **(RIIM)** des demandeurs est mal fondée et sans mérite. Les demandeurs et leurs professionnels sont les véritables responsables des dommages que les demandeurs allèguent avoir subis, le cas échéant;

[ENGLISH TRANSLATION]

I. Nature of the case

1 This is an application for judicial review under section 18.1 of the *Federal Courts Act*, RSC (1985), c. F-7, against a decision issued on May 6, 2016 [the Decision]. In that Decision, Diane Lorenzato, Assistant Commissioner [the Assistant Commissioner] of the Human Resources Branch of the Canada Revenue Agency [CRA] dismissed the grievances filed by the applicants at the final level. The Assistant Commissioner found that the applicants were not eligible for legal assistance from the CRA, as they did not meet the criteria set out in the [TRANSLATION] *Policy on Compensation and Legal Assistance that can be Granted to CRA Employees* [the Policy].

II. Background

2 The two applicants, Mr. Oliverio and Mr. Furgiuele, were CRA employees for a certain number of years. Prior to his resignation on January 31, 2011, Mr. Oliverio worked for the CRA for 25 years. For the last five years of his employment, he was an audit manger in the Small and Medium Enterprise Division.

3 For his part, Mr. Furgiuele worked for the CRA for 18 years. For the last five years of his employment, he was a team leader on the workload development team [the Team], reporting to Mr. Oliverio. On December 14, 2009, Mr. Furgiuele was dismissed.

4 In 2008, the company **Gemmar** Systems International Inc. **[Gemmar]** contacted Mr. Oliverio directly regarding a software purchase. **Gemmar** wanted to check whether the software constituted a tax shelter. The respondent claims that, under the circumstances, it was not normal for a taxpayer to contact a CRA manager directly rather than inquiring with CRA Headquarters [HQ].

5 The applicants then asked Josée Bissonnette, an auditor on the team, to conduct an audit to determine whether the purchase of the software represented a tax shelter. When she left on maternity leave, the applicants reassigned that audit to Geneviève Robillard, a junior auditor.

6 Ms. Robillard explained that she was not comfortable carrying out that mandate and that she had basic knowledge in that area. As such, she suggested that the matter be transferred to the tax avoidance team. However, Mr. Oliverio asked that Ms. Robillard handle the matter.

7 Ms. Robillard followed Mr. Oliverio's orders. She finally prepared a letter to **Gemmar** on December 8, 2008, in which she stated that the acquisition of the software did not constitute a tax shelter. This therefore represented significant tax consequences for **Gemmar**.

8 On April 13, 2010, Mr. Oliverio and the Assistant Director, Audit requested a review of Ms. Robillard's audit report. That review was conducted by Ralph Amar, an auditor in the Aggressive Tax Planning Division (previously "Tax Avoidance") at the Montréal Tax Services Office.

9 Given the complexity of the file, Mr. Amar contacted his union, as he was not comfortable with that work assignment. Despite his reservations, he finally prepared his report on October 15, 2010, finding that "[...] in the absence prima facie of any indicia as to statements or representations, I concur with the view of the previous auditor that the acquisition of the interest in the software by the taxpayer is not an acquisition of a 'tax shelter,' as defined in the Act [...]" (Applicants' Record, at p 128 [AR]).

10 After reading the report prepared by Mr. Amar, CRA HQ was of the view that his findings were problematic. Isabelle Frappier, an auditor on the aggressive tax planning team at HQ, was therefore asked to conduct a new audit—the third, following those prepared by Ms. Robillard and Mr. Amar.

11 On May 29, 2013, Ms. Frappier submitted her report, in which she found, among other things, that the purchase of the software in fact represented a tax shelter. The CRA therefore issued a notice of assessment to **Gemmar** and cancelled the tax consequences previously granted.

July 13, 2010

BY TELECOPIER

Government of Canada
Taxpayers' Ombudsman
50 O'Connor Street
Suite 724
Ottawa, Ontario
K1P 6L2

Attention: Rachelle Scully

Re: Henro Holdings Corporation
: Case Number 09/10-12208
: Our file: 77865-122

Dear Ms. Scully:

Enclosed is a copy of a letter containing the specific questions which I request be answered by Mr. Bettez and which you may forward to him.

I must say that I was surprised by your understanding that Mr Bettez was not prepared to discuss allegations of "staff misbehaviour" with me. It appears to me that the failure by staff to respect the rights enshrined in the Taxpayer Bill of Rights is aptly described as "staff misbehaviour". I must also say that I was disturbed by the implication that Mr Bettez found offensive my observation that a police investigation of corruption at the TSO had commenced. When two senior members of management (i.e. Messrs. Gionet and Oliverio) effectively disappear without explanation in the course of an audit at the same time as police are conducting a highly-publicized investigation into corruption, the burden should be on the CRA to re-assure taxpayers that their rights will be respected and to take the necessary steps to protect such rights. It is an incontestable fact that a submission to Messrs. Gionet and Oliverio that took approximately 100 hours to prepare was ignored for approximately six months until we complained to the Assistant Deputy Commissioner who apparently asked the Director of the TSO to meet with the taxpayer's advisers. It is also questionable as to whether management ever reviewed the submission. This delay resulted in hundreds of thousands of dollars of interest being assessed. The suggestion that the taxpayer should accept this behaviour in a docile manner would be unacceptable even if there was no Taxpayer Bill of Rights and no Taxpayers' Ombudsman.

Yours truly,

SPIEGEL SOHMER INC.

Per: _____
David H. Sohmer

DHS/sl
Encl.

(9)

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October 10, 2013

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BY MESSENGER

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Re: Henro Holdings Corporation vs. Canada Revenue Agency
Undertakings
N°: 500-17-075862-139

Dear Colleagues:

Further to the above-captioned matter, the purpose of this letter is to provide you with the undertakings made during the examination of **Me David H. Sohmer**, which took place on September 25, 2013.

A. Undertaking 1: Supply copy of any documentation that would support plaintiff's claim that the audit/appeal branch of CRA should try to resolve factual, non-precedential cases at the administrative level, rather than incurring expenses of going to court;

Response : At the 2009 Annual Canadian Tax Foundation Conference, Canada Revenue Agency Round Table, the following question was addressed to the CRA and the following response was provided :

> **"Assessments**
>
> **Question 17**
>
> An assessment can create significant negative disclosure issues for a publicly traded taxpayer, notwithstanding any ultimate resolution of the issue in the taxpayer's favour. What recourse does a taxpayer have when it feels that it is being treated unfairly by, or is not receiving a proper hearing from, a Taxation Services Office (TSO)? In particular, in what circumstances does the taxpayer have a right to elevate its concerns to head office?

Response 17

Taxpayers should first discuss their concerns with the official raising the assessment. If taxpayers continue to have concerns, they are encouraged to raise the issue with that official's supervisor, and to move progressively to higher levels of management within the TSO as appropriate. If, after communicating with the higher levels of management in the TSO, taxpayers continue to have concerns, they can call officials in Headquarters. It is preferable that taxpayers try to resolve this issue with officials in the TSO first, since accountability for the assessing position with regard to the file rests with the TSO.

Proposed assessments frequently involve input from CRA experts, as appropriate. If the taxpayer requests it of the auditor, valuators will meet with the taxpayer or the taxpayers' representatives and provide their interpretation of the facts, consider all additional information provided, and adjust their report as required. Where advice has been received from the Department of Justice, the CRA may develop an assessment that takes that advice into consideration, and therefore the CRA auditor is the most appropriate person with whom to discuss any concerns about the assessment. In exceptional circumstances, the auditor may ask a representative from the Department of Justice to assist in addressing these concerns.

For all other documents relating to Undertaking 1, please refer to **Tab 1**

B. Undertaking 2: Describe the circumstances where Mr. Joseph Armanious failed to act impartially, acted in bad faith and refused to negotiate;

Response :

(a) At a meeting at the Montreal TSO on January 16, 2008 between David Sohmer, his partner Alexandre Dufresne, Joseph Armanious, Romano Fratarcangeli and Mr. Armanious, Mr. Sohmer distributed a spreadsheet containing various settlement options and both Romano Fratarcangeli and Mr. Armanious stated that they were not prepared to entertain any settlement discussions (Romano Fratarcangeli pointed to a document and said that it was a "27 page Justice Opinion"). The spreadsheet reflected the three alternative reassessments proposed in the

C

ENFORCEMENT OF THE TAXPAYER BILL OF RIGHTS BY THE COURTS

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(10)

2013 CR 38: p.2/3 The Possibilities and Perils of Tax Litigation (Samtani, P.)

Choosing the Right Forum: Tax Court Versus Federal Court

In the general civil context, litigants are typically required to pursue all causes of action arising from the same course of conduct at once and in the same court. Litigation in the tax context is unique on this account. Taxpayers can challenge the substantive merits of tax assessments, or the process by which they are issued, or both. Notwithstanding that in some cases the remedy may be the same (that the assessments be vacated or quashed, and the corresponding tax liability reversed), these complaints must be pursued in different courts.

These procedural peculiarities are attributable to the fine and often ambiguous division between the jurisdiction of the Tax Court of Canada and that of the Federal Court. While a series of recent decisions has brought these jurisdictional lines into sharper focus, the final word has not yet been spoken, and may prove to be elusive.

Under the Income Tax Act,[1] a taxpayer can object to a tax assessment and, if necessary, appeal the assessment to the Tax Court. However, the role of that court is limited. It can only determine the validity and correctness of the assessment.[2] It cannot consider the process by which the assessment was raised and has no jurisdiction to provide the prerogative remedies that are available at the Federal Court. In other words, the jurisdiction of the Tax Court is restricted to determining whether, as a matter of fact and law, an assessment is correct or not.[3]

Having regard to this limitation, the initial threshold that must be crossed before any further procedural steps can be taken is to ensure that proceedings are commenced in the right court. This, in turn, hinges on identifying the true nature of the complaint and the precise form of remedy sought.

It is well established that in exercising her discretionary powers under the Act,[4] the minister of national revenue has a duty to act reasonably and in good faith. This is consistent with the general and commonly accepted principle that all administrative decision makers[5] must exercise a discretionary power conferred by a statute having regard to statutory intent and purpose, and may not act arbitrarily.[6]

In contrast to the Tax Court, the Federal Court plays a critical role in ensuring that the minister adheres to this duty. However, there are many cases in which taxpayers have applied to the Federal Court or the superior court of a province for an order setting aside the decision to issue an assessment or quashing the assessment itself by asserting that, in certain circumstances, the power to assess is discretionary.

Taxpayers come to these courts with a variety of grievances, such as the allegedly tortious, abusive, or otherwise unreasonable conduct of tax officials. The courts overwhelmingly decline to entertain these applications or actions. In many instances, they view these kinds of proceedings as collateral attacks on the validity and correctness of the assessment—matters that Parliament has put within the exclusive purview of the Tax Court.[7] The Federal Court, in particular, may

11

with a motion to strike:

> [16] The decision of a judge to grant or refuse a motion to strike is discretionary. This Court will defer to such a decision on appeal in the absence of an error of law, a misapprehension of the facts, a failure to give appropriate weight to all relevant factors, or an obvious injustice: see, for example, *Collins v. Canada*, 2011 FCA 140at paragraph 12, *Domtar Inc. v. Canada*, 2009 FCA 218at paragraph 24, *Apotex Inc. v. Canada (Governor in Council)*, 2007 FCA 374 at paragraph 15, *Elders Grain Co. v. M.V. Ralph Misener (The)*, 2005 FCA 139, [2005] 3 F.C.R. 367 at paragraph 13, *Mayne Pharma (Canada) Inc. v. Aventis Pharma Inc.*, 2005 FCA 50at paragraph 9.

12 Bowman, C.J., at paragraph 4 of his reasons in *Sentinel Hill Productions (1999) Corp. v. R.*, 2008 D.T.C. 2544 (Eng.) (T.C.C. [General Procedure]), set out the following principles to be applied in a Rule 53 motion:

> [4] ...
>
> (a) The facts as alleged in the impugned pleading must be taken as true subject to the limitations stated in *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441 at 455. It is not open to a party attacking a pleading under Rule 53 to challenge assertions of fact.
>
> (b) To strike out a pleading or part of a pleading under Rule 53 it must be plain and obvious that the position has no hope of succeeding. The test is a stringent one and the power to strike out a pleading must be exercised with great care.
>
> (c) A motions judge should avoid usurping the power of the trial judge in making determinations of fact or relevancy. Such matters should be left to the judge who hears the evidence.
>
> ...

13 This Court has exclusive jurisdiction to determine the validity of tax assessments. However, its jurisdiction is limited by the statutory provisions set out in the *Act*. Specifically, section 171 of the *Act* sets out the parameters of this Court in dealing with a taxpayer's appeal under the *Act*. In this regard, the Court may dismiss an appeal or allow it and vacate an assessment or vary it or refer it back to the Minister for reconsideration and reassessment.

14 There is a long line of jurisprudence both in this Court and the Federal Court of Appeal to support the Respondent's position that the conduct of the Minister and CRA officials is irrelevant in determining the validity and correctness of an assessment. The Federal Court of Appeal confirmed this principle in both *Main Rehabilitation Co. v. R.*, 2004 FCA 403 (F.C.A.), and *Ereiser*. Sharlow J.A. in *Ereiser*, at paragraph 40, concluded that:

> [40] ... The fact that a seizure of documents is unlawful may affect the admissibility of evidence obtained as a result of the seizure, but wrongful conduct unrelated to an evidentiary matter generally is not relevant to the admissibility of evidence. ...

This Court has no jurisdiction to vacate an assessment on the basis of reprehensible conduct involved in the process leading up to that assessment. The Federal Court of Appeal in *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250 (F.C.A.), at paragraph 83, stated this principle succinctly:

> [83]... If an assessment is correct on the facts and the law, the taxpayer is liable for the tax.

15 Recently, Webb J.A. in *Johnson v. R.*, 2015 FCA 52, [2015] F.C.J. No. 216 (F.C.A.), at para. 4, reiterated the approach that the Courts have taken:

> [4] ... The motivation of the Minister in issuing such assessments or any collection action taken by the Minister in relation to such assessments is not relevant to this inquiry.

12

3. A writ of prohibition restricting Mr. Daniel Malcolm and Ms. Leslie Olson from any further involvement in the audit of the Applicant, and prohibiting the Minister from assessing the Applicant for any tax, interest and/or penalties relating to the period 01-01-2013 to 31-12-2017 until at least 90 days after the herein application has been determined by this Court.

4. Costs of this application.

[Emphasis added.]

27 Further, looking at the basis of the bias allegations, it becomes even clearer that Mr. Ghazi actually takes issue with certain evidence being disregarded or ignored and with the ETA's application.

28 Regarding the June 19, 2018 decision, the Assistant Director reviewed whether the CRA officers were following the law:

> Based on the concerns raised in your letter of June 8, 2018, I have reviewed the manner in which the audit is being conducted. I am satisfied that the Canada Revenue Agency's (CRA) policies, procedures and the Excise Tax Act (ETA) are being adhered to. There is no basis or grounds on which to have the audit file transferred.
>
> [Emphasis added.]

29 In sum, there is no true allegation of bias outlined in the facts. Mr. Ghazi is predominantly alleging mistreatment of evidence. While he is alleging issues regarding procedural fairness, the "procedural defects" complained of are matters of law within the jurisdiction of the Tax Court - he takes issue with the Assistant Director's finding that the CRA officers are following proper procedure and properly applying the ETA. Matters of law and issues regarding mistreatment of evidence fall within the jurisdiction of the Tax Court.

30 Bias has no effect on the tax assessment process as tax assessments are either right or wrong. If the tax assessment is wrong, it does not matter if the process was flawed, and the only way to address the issue is on appeal to the Tax Court. Procedural defects in a tax assessment by the Minister are not sufficient grounds on their own to set aside the assessment (*Webster v. R.*, 2003 FCA 388 (F.C.A.)).

31 At paragraph 82 of *JP Morgan Asset Management (Canada) Inc.*, Justice Stratas summarizes the different types of defects which can be cured by an appeal to the Tax Court, one of which is applicable to Mr. Ghazi's notice of application:

> *Inadequate procedures followed by the Minister in making the assessment.* Procedural defects committed by the Minister in making the assessment are not, themselves, grounds for setting aside the assessment: *Main Rehabilitation Co. v. R.*, 2004 FCA 403 (F.C.A.) at paragraph 7; *Webster*, supra at paragraph 20; *Consumers' Gas Co. v. R.* (1986), [1987] 2 F.C. 60 (Fed. C.A.) at page 67. To the extent the Minister ignored, disregarded, suppressed or misapprehended evidence, an appeal under the General Procedure in the Tax Court is an adequate, curative remedy. In the Tax Court appeal, the parties will have the opportunity to discover and present documentary and oral evidence, and make submissions. Procedural rights available later can cure earlier procedural defects: *Posluns v. Toronto Stock Exchange*, [1968] 1 S.C.R. 330 (S.C.C.); *King v. University of Saskatchewan*, [1969] S.C.R. 678 (S.C.C.) at page 689; *Taiga Works Wilderness Equipment Ltd.*, Re, 2010 BCCA 97 (B.C. C.A.) at paragraph 28; *Histed v. Law Society (Manitoba)*, 2006 MBCA 89, 274 D.L.R. (4th) 326 (Man. C.A.); *McNamara v. Ontario Racing Commission* (1998), 164 D.L.R. (4th) 99, 111 O.A.C. 375 (Ont. C.A.).
>
> [Emphasis added.]

32 Even if the Tax Court cannot redress a procedural fairness breach, it does not follow that the Federal Court has this power. In matters of tax liability, tax is either payable or not, based on the facts and the law.

33 While I determined that the Applicant is not truly arguing bias, even if he was, *JP Morgan Asset Management (Canada) Inc.* makes it clear that it would not affect his assessment.

34 Mr. Ghazi draws the Court's attention to paragraph 98 of *JP Morgan Asset Management (Canada) Inc.* to argue that bias is reviewable by the Federal Court. With respect, I do not believe that the door left open by Justice Stratas is that widely open. Justice Stratas seems to have wanted to limit this Court's intervention to cases where CRA's improper dealing with a taxpayer leads to an unfair or discriminatory result:

> [98] Nevertheless, even at this juncture, one can imagine examples of judicial reviews that might avoid the three objections to judicial review. Suppose that the Minister launches aggressive methods of investigation against members of a political party because of hostility to that political party in circumstances where immediate, effective relief is required. Suppose that the Minister could issue an assessment under section 160 of the Income Tax Act against any one of the five directors of a corporation for the corporation's tax liability. Only one of the directors is a person of colour. The Minister issues an assessment only against that director, and only because of the colour of his skin, in circumstances where immediate, effective relief is required.
>
> [Emphasis added.]

35 This is simply not the case here. Mr. Ghazi simply alleges that the CRA officers are biased against him as they ignored evidence.

36 Further, Mr. Ghazi takes issue with the June 19, 2018 letter where the Assistant Director determined that there were no grounds to transfer the audit file. Specifically, the Assistant Director stated "I am satisfied that the Canada Revenue Agency's (CRA) policies, procedures and the Excise Tax Act (ETA) are being adhered to." Whether the CRA officers are following CRA procedures and policies and the ETA are matters of law within the jurisdiction of the Tax Court. As stated in *Webster*:

> [21] I would add that the right to appeal an income tax assessment to the Tax Court is a substantial one. The mandate of the Tax Court is to decide, on the basis of a trial at which both parties will have the opportunity to present documentary and oral evidence, whether the assessments under appeal are correct in law, or not. If the assessments are incorrect as a matter of law, it will not matter whether the objection process was flawed. If they are correct, they must stand even if the objection process was flawed.
>
> [Emphasis added.]

37 Therefore, I am of the view that Mr. Ghazi does not raise a true administrative law claim and that the issues raised in his application for judicial review fall within the jurisdiction of the Tax Court.

(2) Is the Federal Court prevented from dealing with the administrative law claim by virtue of section 18.5 of the Federal Courts Act or some other legal principle?

38 In any event, even if Mr. Ghazi had raised an administrative law claim, the relief sought is an interlocutory step which could only be granted in exceptional cases. Judicial review of interlocutory decisions results in fragmentation of the administrative process set up by Parliament.

39 It is clear from the June 19, 2018 decision that the CRA was still waiting for the Applicant to respond to the concerns regarding his assertion that he is not a builder as defined in the ETA. The CRA has not made any final decision on this matter but has only raised concerns regarding this point of the Applicant's proposed assessment. As stated by the Federal Court of Appeal in *C.B. Powell Ltd. c. Canada (Agence des services frontaliers)*, 2010 FCA 61 (F.C.A.), the administrative process must be complete before the Applicant can seek relief from the court:

> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process

affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[Emphasis added.]

40 Justice Stratas adds the following in *C.B. Powell Ltd.*:

> [33] ... Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted [citations omitted] ....

41 Therefore, the administrative process should be allowed to continue and if ever it results in an assessment that is in line with CRA's proposed assessment, Mr. Ghazi will be able to object, and eventually file an appeal *de novo* before the Tax Court. As stated by Justice Stratas at paragraph 91 of *JP Morgan Asset Management (Canada) Inc.*, section 18.5 of the Act can apply to carve out the Federal Court's jurisdiction whether the appeal to the Tax Court can be launched now or later.

42 With all due respect, I view the additional step taken before this Court as causing needless additional expenses and delay.

43 In addition to the above analysis, one needs to keep in mind that this Court has the discretion to refuse to hear an application for judicial review if the Applicant has an adequate alternative remedy available. In this case Mr. Ghazi has filed a formal service complaint to the Office of the Taxpayers' Ombudsman and a formal Service-Related Complaint with the Appeals Division of the CRA. The remedy sought does not need to be identical, only adequate. In addition, any relief not covered by the Ombudsman or the Appeals Division can be sought through a civil claim (*JP Morgan Asset Management (Canada) Inc.*, at para 89).

44 Judicial review is a means of last resort and it should not be sought when there are alternative remedies available.

45 The Supreme Court of Canada in *Strickland v. Canada (Attorney General)*, 2015 SCC 37 (S.C.C.) reviewed when an adequate alternative remedy would be appropriate grounds to strike an application for judicial review. The Supreme Court stated:

> [42] The cases identify a number of considerations relevant to deciding whether an alternative remedy or forum is adequate so as to justify a discretionary refusal to hear a judicial review application. These considerations include the convenience of the alternative remedy; the nature of the error alleged; the nature of the other forum which could deal with the issue, including its remedial capacity; the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and cost: Matsqui, at para. 37; C.B. Powell Ltd. c. Canada (Agence des services frontaliers), 2010 FCA 61, [2011] 2 F.C.R. 332 (F.C.A.), at para. 31; Mullan, at pp. 430-31; Brown and Evans, at topics 3:2110 and 3:2330; Harelkin, at p. 588. In order for an alternative forum or remedy to be adequate, neither the process nor the remedy need be identical to those available on judicial review. As Brown and Evans put it, "in each context the reviewing court applies the same basic test: is the alternative remedy adequate in all the circumstances to address the applicant's grievance?": at topic 3:2100.
>
> [Emphasis added.]

46 In my view, Mr. Ghazi can seek relief from the Tax Court for most of his complaints regarding the CRA officers' proposed assessment and the Assistant Director's decision. In addition, he made a complaint to the Taxpayers' Ombudsman alleging, among other things, that the CRA employees' conduct should be reviewed under section 5 of the Taxpayer Bill of Rights. In the present application, Mr. Ghazi is alleging that he was not treated fairly or courteously. This, in my view falls squarely within the mandate of the Taxpayers' Ombudsman who is charged with "assist[ing], advis[ing], and inform[ing] the Minister about any matter relating to services provided to a taxpayer by the [CRA]." Finally, the Ombudsman is mandated to resolve issues "effectively and efficiently" and "to communicate with any officials that may be identified by the [CRA]." It is

true that the Ombudsman's authority is limited and that his or her recommendations are not binding. However, in light of my previous finding that any unfairness can be cured by a *de novo* appeal to the Tax Court, I find that a complaint to the Ombudsman is an adequate alternative remedy in these circumstances.

47 Should there be any other outstanding remedy sought by Mr. Ghazi, a civil action may also be open to him. As stated in *JP Morgan Asset Management (Canada) Inc.*:

> [89] In the tax context, to the extent that the Minister has engaged in reprehensible conduct that is beyond the reach of the Tax Court's powers, adequate and effective recourses may be available by means other than an application for judicial review in the Federal Court: Tele-Mobile, supra; Ereiser, supra at paragraph 38. For example, breaches of agreements, careless, malicious or fraudulent actions, inexcusable delay, and abuses of process may be redressed by way of actions for breach of contract, regulatory negligence, negligent misrepresentation, fraud, abuse of process, or misfeasance in public office: in the tax context see, e.g., *Swift v. The Queen*, 2004 FCA 316; *Leroux v. Canada Revenue Agency*, 2012 BCCA 63at paragraph 22; *Gardner v. Canada (Attorney General)*, 2012 ONSC 1837, rev'd on another point 2013 ONCA 423; *McCreight v. Canada (Attorney General)*, 2013 ONCA 483. Whether these actually constitute adequate, effective recourses depends upon the circumstances of the particular case.

48 Therefore, an application for judicial review is premature as there are other adequate remedies available to Mr. Ghazi.

(3) Can the Federal Court grant the relief sought?

(a) Mandamus

49 The Respondent submits that the Applicant does not meet the seven-part test to grant a mandamus:

1. There must be a public legal duty to act;
2. The duty must be owed to the applicant;
3. There is a clear right to performance of that duty;
4. No other adequate remedy is available to the applicant;
5. The order sought will be of some practical value or effect;
6. The court in the exercise of its discretion finds no equitable bar for relief; and
7. On a "balance of convenience" an order in the nature of mandamus should (or should not) be issued.

50 She argues that step one is not met as there is no such duty by the Minister to suspend the CRA employees. As the Applicant does not meet step one, he cannot meet steps two and three. In addition, step four is not met as there are other adequate remedies.

51 Mr. Ghazi is rather of the opinion that the Respondent's arguments are not supported by any case law and that cross-examination and affidavit evidence may be necessary to assess the Minister's duty and other elements of the test.

52 In my view, Mr. Ghazi has not provided the basis for the Minister's public legal duty to suspend the employees or to "cease causing further prejudice." Under the *Canada Revenue Agency Act*, S.C. 1999, c. 17 there does not appear to be any such duty placed upon the Minister:

Powers, duties, and functions of Minister

13

32 In the same case, after citing *Ford Motor Company of Canada v. M.N.R.* (1994), 85 F.T.R. 116, which applied the same rule in a similar case, he added (at D.T.C. 5344):

While it is understandable that the plaintiff considers it unfair that Revenue Canada appears to have treated taxpayers in similar circumstances differently, that cannot be the basis for the plaintiff's appeal. The plaintiff is either entitled on a reasonable interpretation of the words of subparagraph 110(1) (f)(iii) of the Income Tax Act, to the social assistance deduction or he is not. I have found that it is clear that he is not.

VII. Conclusion

[60] The Delegate's decision in this case was reasonable. The reasons for the decision are intelligible, transparent, and justifiable, and the decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and law. The Applicants' applications for judicial review are, therefore, dismissed.

[61] At the hearing of this matter, the Respondents indicated they were not seeking costs. Accordingly, there will be no order as to costs.

JUDGMENT IN T-943-18 AND T-982-18

THIS COURT'S JUDGMENT is that: the applications for judicial review are dismissed; a copy of this judgment shall be placed in each of court file T-943-18 and T-982-18; and there is no order as to costs.
"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-943-18

STYLE OF CAUSE: VINCENT BAILINI, RANDALL BARRS, GEOFFREY BELCHETZ, ROBERT BERGER, STEVEN BLACK, CLEMENTE CABILLAN, WAYNE CARMAN, DAVID DE SILVA, JOYCE DOYLE, WILLIAM EASTON, TIMOTHY FELTIS, SANDRA GERTNER, JOSEPH GOTTDENKER, ROBERT HILL, NIZAR KANJI, ANASTASSIOS KARANTONIS, FRANK KOSAR, HENRY KUTZKO, FRANK MAGNUS, MARIO MASELLIS, ALAN MCFADYEN, THE ESTATE OF THE LATE DAVID MCINNIS, STUART MITCHELL, FRANN RASMINSKY-MITCHELL, JAMES RATHBUN, JOHN NKANSAH, NARH OMABOE, GAIL PALERMO, IAN BRUCE ROBINSON, LOUIS SCHEINMAN, HOWARD SIDSWORTH, MICHAEL SLOCOMBE, MICHAEL SPIVAK, MALCOLM STAFFORD, ROBERT TAUTKUS, DAVID THOMAS, GARY THORNTON, JOSEPH TRAGER, EDWARD VALLEAU, WALTER VOGL and WILLIAM WILKINSON v HER MAJESTY THE QUEEN (as represented by the Minister of National Revenue in her capacity as Minister responsible for the Income Tax Act), CANADA REVENUE AGENCY and THE ATTORNEY GENERAL OF CANADA

AND DOCKET: T-982-18

In saying this, the Respondents claim the Delegate did not restrain or fetter the discretion afforded under subsection 220(3.1).

[52] The Respondents say the Delegate could not ignore the provisions of the *ITA*. According to the Respondents, prior to 2005 the Minister could grant interest relief for unlimited time periods under subsection 220(3.1). According to the Respondents, subsection 220(3.1) now permits the Minister to exercise her discretion only to cancel or waive accrued interest in any taxation year ending within ten years before the taxpayer's request for relief, regardless of when the underlying tax debt arose.

[53] The Respondents also say the treatment of other taxpayers is legally irrelevant when determining the merits of the case brought by the current taxpayer. In the Respondents' view, the Applicants have failed to show how the KPMG Untouchables or the GLGI donors are related to the Applicants. These applications concern interest being cancelled and the Delegate reasonably determined that there was little weight to be given to a comparison with settlements from other tax schemes.

VI. Analysis

[54] I agree with the Respondents that the Delegate considered all the grounds submitted by the Applicants. It was reasonable for the Delegate to refer back to the earlier reviews, and just because he referred to those reviews does not mean he did not conduct a *de novo* review.

[55] I also agree with the Respondents that the sheer quantity of the delays did not automatically warrant interest relief. In my view, the Delegate conducted a holistic review of all the delays and other considerations raised by the Applicants. The Delegate reasonably considered the length of the delays and recognized that certain time periods were not appropriate for interest relief and others had already been accounted for in the earlier reviews. All in all, I find the Delegate's analysis of the Applicants' requests for further interest relief was reasonable.

[56] It also was reasonable for the Delegate to find that, since interest relief had already been provided in respect of the reneged 1994 settlement, no further relief stemming from that settlement should be granted in the third review.

[57] I agree with the Respondents that there were no circumstances beyond the Applicants' control which prevented them with complying with their obligations to pay tax. Had the Applicants accepted the offer in the intercept letters for their returns to be assessed without the flow-through tax credits and other deductions, they would have received notices of assessment they could have objected to on the basis that the assessments did not include credits and deductions they genuinely believed to be valid. If they paid the taxes owing as stated in the assessments, no interest would have accumulated. If the objections were ultimately upheld and the flow-through tax credits and deductions found to be valid, the Applicants could have been retroactively granted the credits and deductions with interest, thereby making them whole.

[58] As to creating equality amongst the Applicants, in my view the Delegate appropriately denied interest relief beyond 10 years for the 2014 Applicants. Under subsection 220(3.1), the Minister no longer has discretion to cancel or waive interest beyond 10 years before a taxpayer's request for relief, regardless of when the underlying tax debt arose (*Bozzer v Canada*, 2011 FCA 186 at paras 12 and 58 to 59).

[59] Lastly, I agree with the Respondents that comparisons to the KPMG Untouchables or the GLGI donors are neither factually relevant nor legally permissible. In *Ludco Enterprises Ltd v Canada*, [1994] FCJ No 2007, the Federal Court of Appeal held that evidence about other taxpayers who had benefited from an interest deduction for loans obtained in circumstances identical to those of the appellants was inadmissible:

> 30 The appellants sought to present evidence that other taxpayers had benefited from the interest deduction under s. 20(1)(c) of the Act for loans obtained in identical circumstances. They made the argument that the Minister was guilty of discrimination against them.
>
> 31 In my opinion this allegation does not give rise to the conclusions of the action and the evidence is accordingly not admissible. In *Hokkhold v The Queen*, 93 D.T.C. 5339, a case which specifically involved a motion to dismiss allegations, Rothstein J. said in this regard (at 5344):
>
> The plaintiff's concern seems to be that other taxpayers were treated differently than he was by Revenue Canada. Whatever the reasons for Revenue Canada's action in respect of other taxpayers, they are not relevant to the plaintiff's situation.

14

> [36] The reality is that tax disputes are settled every day in this country. If they were not, and every difference had to be litigated to judgment, unmanageable backlogs would quickly accumulate and the system would break down.
>
> [37] The Crown settles tort and contract claims brought by and against it on a regular basis. There is no reason why it should not settle tax disputes as well. Both sides of a dispute are entitled to know that if they invest the time and effort required to negotiate a settlement, then their agreement will bind both parties.

Webb J., as he then was, endorsed fully the comments of Bowie J. in *Huppe v. R.* (2010), 2011 D.T.C. 1042 (Eng.), 2010 TCC 644 (T.C.C. [General Procedure]) [*Huppe*]. He went on to find that precedents like *Galway* and *Cohen* were concerned with binary situations: it was an all or nothing proposition, either the whole amount was to be included or not in *Galway* and the income was non-taxable capital gain or not in *Cohen*. Webb J. seems to have found that the precedential value of this line of cases is limited:

> [13] It seems to me that this case can be distinguished from *Galway*, *Cohen* and *Garber*. This is not a case whether it is all or nothing and this is not a case where the Appellant continued to negotiate following the repudiation by the Crown. As a result I do not agree with the position of the Crown that the Crown is simply not bound even if there was an agreement to settle this Appeal.
>
> [My emphasis]

88 It goes without saying that if an agreement is for the purpose of arriving at an assessment that is neither consonant with the facts as found nor defensible on a proper understanding of the law, the *Galway* line of authorities is binding on this **Court** (see *Willers v Joyce & Anor (Re: Gubay (deceased))*, [2016] UKSC 44). But this case is not a case concerning an assessment justifiable on the facts and the law (*1390758 Ontario Corp.*, para 40). The assessment, the taxpayer's liability for taxes concerning particular transactions has already taken place and nothing on this record suggests that it is not justifiable on the facts and the law. Instead, we have an agreement that stipulates that if the facts change, the Minister may then be able to proceed with any reassessment. In fact, the agreement reached conforms with the *Galway* line of authorities. The CRA has already assessed the taxpayer based on the facts as known and the legislation as understood. If there is a change, the parties agree that the Minister can proceed with reassessments; if the facts have changed, reassessments may occur.

89 In my view, the *Galway* line of authorities is not binding on this **Court**, in the peculiar circumstances of this case that are significantly different from the findings in those cases. It bears repeating that the Minister entered freely into this agreement after having conducted a proper assessment. The Minister proceeded to that assessment over many months and an agreement was reached. The party opposite governed himself accordingly by not entering into more straddling transactions. I certainly share the view of Bowie J. that the system would crumble under its own weight if agreements were not possible, or were so uncertain that it would be negligent to agree to anything if the contracting party can renege as he wishes. An agreement that does not encroach on the *Galway* line of authorities ought to be enforceable because it is part of the administration of the *ITA*. The Minister shall administer the *ITA* and she did.

90 During the hearing of this case, the **Court** alluded to the recent decision of the Supreme **Court** of Canada concerning plea bargains in the criminal context. In *R. v. Anthony-Cook*, 2016 SCC 43 (S.C.C.), the **Court** made comments that were eerily similar to those of Bowie J. in *1390758 Ontario Corp.* and Webb J. in *Huppe*:

> [1] Resolution discussions between Crown and defence counsel are not only commonplace in the criminal justice system, they are essential. Properly conducted, they permit the system to function smoothly and efficiently.
>
> [2] Joint submissions on sentence—that is, when Crown and defence counsel agree to recommend a particular sentence to the judge, in exchange for the accused entering a plea of guilty—are a subset of resolution discussions. They are both an accepted and acceptable means of plea resolution. They occur every day in courtrooms across this country and they are vital to the efficient operation of the criminal justice system. As this **Court** said in *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, not only do joint submissions "help to resolve the vast majority of criminal cases in Canada", but "in doing so, [they] contribute to a fair and efficient criminal justice system" (para. 47). [Footnote omitted]

> namely, that the **Court** cannot grant a judgment on consent that it could not grant after the trial of an action or the hearing of an appeal. It follows that, as the **Court** cannot, after a trial or hearing, refer a matter back for assessment except for assessment in the manner provided by the statute and cannot therefore, at such a stage, refer a matter back for reassessment to implement a compromise settlement, the **Court** cannot refer a matter back by way of a consent judgment for reassessment for such a purpose.
>
> [My emphasis]

83 As can be seen, the refusal to accept the agreement of the parties as binding was on a very narrow basis. Indeed, the **Court** went on to agree that the parties could reapply "on the basis of a consent to a judgment designed to implement an agreement of the parties as to how the assessment should have been made by application of the law to the true facts." In other words, once the facts are ascertained and the law as understood is applied to them, there is one answer that comes out. An agreement to depart from that result will not be binding.

84 That appears to be the long and short of it. That is the conclusion of the **Federal Court** of Appeal in *Cohen v. R.* (1980), 80 D.T.C. 6250 (Fed. C.A.) [*Cohen*], where the **Court**, relying on *Galway*, found that "[t]he agreement whereby the Minister would agree to assess income tax otherwise in accordance with the law would, in my view, be an illegal agreement."

85 The line of cases generated by *Galway* is to the same effect (*Harris v. R.*, [2000] 4 F.C. 37 (Fed. C.A.), *CIBC World Markets Inc. v. R.*, 2012 FCA 3, 426 N.R. 182 (F.C.A.)). The assessment is on the basis of the facts as known and the law as understood. Any agreement must take that into account. However, that line of authorities does not go any further.

86 On the contrary, case law emanating from the Tax **Court** of Canada acknowledges that tax matters are settled every day. In *Consoltex Inc. v. R.* (1997), 97 D.T.C. 724 (T.C.C.), Bowman J. cited this passage from *Principles of Canadian Income Tax Law* (Hogg, Peter W., Joanne E. Magee, and Jinyan Li, *Principles of Canadian Income Tax Law* 5th ed, (Toronto: Thomson Carswell, 2005)):

> The attitude of the **Federal Court** of Appeal in *Cohen* and *Galway* is far too rigid and doctrinaire. If the Minister were really unable to make compromise settlements, he or she would be denied an essential tool of enforcement. The Minister must husband the Department's limited resources, and it is not realistic to require the Minister to insist on every last legal point, and to litigate every dispute to the bitter end. Most disputes about tax are simply disputes about money which are inherently capable of resolution by compromise. Presumably, the Minister would agree to a compromise settlement only on the basis that it offered a better net recovery than would probably be achieved by continuance of the litigation. It seems foolish to require the Minister to incur the unnecessary costs of avoidable litigation in the name of an abstract statutory duty to apply the law. (p 844)

Indeed, in *Enterac Property Corp. v. R.* (1998), 98 D.T.C. 6202 (Fed. C.A.), MacDonald J.A. all but invited that the matter be revisited:

> By proceeding to trial this would also give counsel an opportunity to ask the **Court** to revisit the jurisprudence in *Nathan Cohen, et al v. Her Majesty the Queen*, 80 D.T.C. 6250 (F.C.A.), *David Ludmer, et al. v. Her Majesty the Queen*, 95 D.T.C. 5311 (F.C.A.) leave to appeal refused, [1995] 4 S.C.R. vii, in light of the comments of Judge Bowman in *Consoltex Inc. v. The Queen*, [1980] C.T.C. 318 (F.C.A.) and the statement of Chief Justice Laskin in *Smerchanski and Eco Exploration Co. Ltd. v. Minister of National Revenue*, 76 D.T.C. 6247 (S.C.C.)

87 More recently, Bowie J. of the Tax **Court** of Canada suggested that agreements freely concluded ought to be binding. He said in *1390758 Ontario Corp. v. R.*, 2010 TCC 572, [2010] D.T.C. 1385 (T.C.C. [Informal Procedure]), [*1390758 Ontario Corp.*]:

> [35] I agree with Bowman C.J. and the authors Hogg, Magee and Li that there are sound policy reasons to uphold negotiated settlements of tax disputes freely arrived at between taxpayers and the Minister's representatives. The addition of subsection 169(3) to the Act in 1994 is recognition by Parliament of that. It is not for the **Courts** to purport to review the propriety of such settlements. That task properly belongs to the Auditor General.

15

Appealed to FCA (15)

(1) Jurisdictional Fact Issue

21 I conclude that I do not have the jurisdiction to review the letter of the Officer dated December 17, 2018, as it is not evidence of a "decision" within the meaning of subsection 18.1(3) of the *Federal Courts Act*, RSC 1985, c F-7 [FCA] necessary for the Court to assume jurisdiction.

22 The letter is essentially a fairness letter providing Mr. Prince with an opportunity to provide submissions why the reassessment should not be made. To date the reassessment has not been made.

23 Mr. Prince argues that his position with respect to any submission he would make regarding the voluntary disclosure was known. Nevertheless, I am not in a position to conclude that the letter of December 17, 2018 was representative of a decision within the meaning of the FCA when it indicated on the face of its wording that it would consider the Applicant's further submissions and provided time to the Applicant to do so. Moreover, it has still not reassessed Mr. Prince.

24 In the alternative, the Respondent argues that if the letter of December 17, 2018 was, in effect, a decision that the CRA was reassessing the Applicant, then the Federal Court would be denied jurisdiction by the effect of section 18.5 of the FCA due to the availability of an appeal of the decision. I agree. Either way, I do not have jurisdiction.

25 Moreover, with respect to the second issue, if I have misapprehended the restrictions regarding my jurisdiction, I nevertheless would not issue an order quashing the letter of December 17, 2018, or granting the other requested relief to the same effect pending the completion of the second-level VDP process.

26 I would not exercise my discretion, which would apply in the circumstances of these judicial review proceedings, because I do not see any prejudice to the Applicant if the reassessments are made prior to the pending decision of the VDP application, which is estimated to be made within two months or so.

27 I add that the timing of a decision with respect to a voluntary disclosure would not likely play any role in any event unless some clear prejudice could be ascribed as resulting from the reassessments.

28 In regard to the prejudice alleged by the Applicant were the reassessments to proceed in advance of the decision on his VDP application, the Respondent directed the Court to the evidence from a deponent, Mr. Ducharme, in an affidavit dated January 25, 2019, particularly at paragraphs 13 and 16:

> [13] Although a reassessment and a decision on an initial VD Application may be made almost simultaneously, it is our practice when an audit is underway. That [*sic*] VDP officers will wait for the audit to be completed before making a decision. VDP officers can thus benefit from the information gathered by the auditor.
>
> ...
>
> [16] In the event that a VD Application is granted, after a reassessment was made, the Agency will issue a new notice of reassessment, taking into account the reduction of penalties and interests, if any.

29 The Court is drawn to paragraph 16, which would appear to apply specifically to the circumstances in this matter. Mr. Ducharme indicates that even if the VDP application was granted after the assessment was made, the CRA would issue a new reassessment taking into account its decision.

30 I am also in agreement with the submission by the Respondent that if the Minister grants Mr. Prince's second-level VDP application review, she will not charge him penalties and will not prosecute him. She may also partially relieve him of interest (Circular IC00-1R5 at paras 11, 13). Nothing in the ITA or in the Circular prevents the Minister from granting such relief where the Minister has reassessed a taxpayer in the course of a regular audit. Furthermore, and if necessary for the implementation of the decision on the second-level review, the Minister may reassess notwithstanding subsections 152(4) and (5) along with subsection 220(3.1) of the ITA. Mr. Prince would not lose the benefits of a favourable decision on the second-level review even if made before reassessments are issued.

31 Mr. Prince could not point to any statutory provisions that contradict this evidence. His arguments were based upon legal

automatically to confer on the appellant a right to have the section 223 certificate nullified.

As appears from our review of the provisions of the Act, there is a difference between

(a) a liability under the Act to pay tax, and

(b) an "assessment" (including a reassessment for a further assessment), which is a determination or calculation of the tax liability.

It follows that a reassessment of tax does not nullify the liability to pay the tax covered by the previous [assessment] as long as that tax is included in the amount reassessed. As there can be no basis for the appellant's contention on this motion unless the "amount payable" on which the certificate was based had ceased to be "payable" and as the material before us does not show that it had ceased to be payable, in our view, the appeal had to be dismissed. Indeed, the appeal was argued, as we understood the argument, on the assumption that the amounts on which the certificate was based were carried forward into the new assessments.

[Emphasis added.]

17 Two things appear clear from the above two cases. First, if the second assessment is a reassessment, as it appears to be since it adds nothing to the tax assessed and only sets forth the statutorily prescribed accrued interest payable thereon, it renders void the assessment dated June 3, 1985.

18 Secondly, while I confess some difficulty in understanding why the collection proceedings undertaken pursuant to that unpaid assessment, are not also rendered void, the *Lambert* decision seems to so hold and is binding on us, i.e., the void assessment does not affect the requirement to pay. Its life is maintained. That being so, to the extent that the present appeal arises from the orders for *certiorari* relating to moneys, if any, held by the Royal Bank of Canada and the Canada Permanent Trust Company and to the order of prohibition arising out of the section 223 certificate, it is not moot. The appeal must on those issues, be heard on its merits. It is thus unnecessary, at least with respect thereto, to discuss the principles applicable in determining whether an appeal has been rendered moot as those principles are set forth in *Borowski v. A.-G. Canada*, 57 D.L.R. (4th) 231. It is necessary, however, to first determine the jurisdiction of the Trial Division to entertain the originating motion brought before it pursuant to section 18 of the *Federal Court Act*, R.S.C. 1985, c. F-7.

Jurisdiction under Section 18

19 Very simply, it had been the respondent's position on the hearing of the originating motion that, relying on the advice given on the attachment to the notice of assessment dated June 3, 1985, as quoted earlier herein, the respondent's president and major shareholder, Mr. Adamson, expecting that his company's tax liability would be eliminated before the tax year end, it would not be required to do anything in response to the notice of assessment. No notice of objection was served on the Minister. Indeed, Mr. Adamson was not aware that such an appeal procedure existed until after the time limit for filing it had passed. I should reiterate that at no time did the respondent satisfy the Minister that its tax liability, if any existed in law, (a question which could not properly be decided in this appeal), would be extinguished before the end of the 1986 tax year nor did it provide satisfactory or any security for any such liability.

20 The Minister's equally simple position was that at the time the respondent filed the designations under subsection 194(4) of the Act, *supra*, the respondent knew or ought to have known that its Part VIII tax liability could be as much as 50 per cent of the total amount designated. As a result, by virtue of subsection 195(2) of the Act, *supra*, it was liable to make a payment in respect thereto or, in accordance with the policy of the Minister as explained in the advice attached to the notice of assessment, provide security for the amount due on account of tax or satisfy the Minister that its tax liability would be extinguished before the end of the 1986 tax year.

16

No. 17 (S.C.C.) — followed

Statutes considered:

Can. *Federal Courts Act*, R.S.C. 1985, c. F-7
s. 18.2 [en. 1990, c. 8, s. 5] — pursuant to — referred to in minority/dissenting opinion
s. 18.5 [en. 1990, c. 8, s. 5] — considered

Can. *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to
s. 152(4) — considered
s. 165(3) — considered
s. 171 — considered
s. 220(3.1) [en. 1994, c. 7, Sched. II, s. 181(1)] — considered

MOTION by taxpayer for emergency suspension and interlocutory injunction order to prevent Minister of National Revenue from issuing reassessment for earlier tax years.

Luc Martineau J.:

[ENGLISH TRANSLATION]

1 Citing the Court's authority under section 18.2 and the *Federal Courts Act*, RSC 1985, c. F-7, the applicant is seeking an emergency suspension and interlocutory injunction order to prevent the Minister of National Revenue [the Minister] from issuing a reassessment under subsection 152(4) or any other provision of the *Income Tax Act*, RSC 1985 c. 1 (5th Supp.) [ITA] for the 2004 taxation year or any other previous year.

2 For the following reasons, I am not satisfied in this case that the applicant has discharged his burden of demonstrating to the Court that his notice of application for judicial review dated December 5, 2017—seeking a writ of prohibition and various declaratory conclusions—raises a serious question, i.e. that he would suffer irreparable harm if the motion for a suspension and interlocutory judgment is not allowed, and that the balance of probabilities is in his favour based on the public interest in this case (see *RJR-Macdonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 111 DLR (4th) 385).

3 The Canada Revenue Agency [CRA] Voluntary Disclosure Program promotes compliance with Canada's tax laws by encouraging taxpayers to make voluntary disclosures to correct past omissions in their dealings with the CRA. Taxpayers who make valid voluntary disclosures must pay the taxes and interest, but without the penalties or prosecution they would otherwise face. Unless an application was filed prior to the 10-year rule, which came into effect on January 1, 2005, applications filed for taxation years from 1985 to 1994 will not be accepted. See Information Circular IC00-1R5 regarding the Voluntary Disclosure Program [the Circular].

4 In 1978, the applicant allegedly transferred $300,000 to a bank account in the Bahamas, a tax haven. That amount came from savings. Apparently wanting to put his affairs in order and not pass his tax problems on to his heirs, the applicant voluntarily disclosed the unreported income for the years from 2005 to 2014. The voluntary disclosure was apparently received by the CRA on January 7, 2015, and accepted on June 17, 2015, on behalf of the Minister under subsection 220(3.1) of the ITA and the Circular.

5 In this case, the CRA accepted the applicant's disclosure, waived the penalties, and granted interest relief for the tax years from 2005 to 2014.

6 However, in August 2016, based on information provided by the applicant, the CRA began an audit of the applicant's income tax returns from 1980 to 2004. As explained in an affidavit by Michel Audet, a CRA auditor, given the applicant's inability to provide details or documents regarding the initial transfer of $300,000 or the management of his bank account

beginning in 1978, he evaluated two assessment scenarios, choosing [TRANSLATION] to "include total investment income ($173,460) in taxable income for 2004, distributed among dividends from Canadian sources and interest based on a percentage equal to the distribution of his portfolio for the taxation years from 2005 to 2014 to allow him to claim a dividend tax credit [sic] and only assess the penalty for failing to file form T1135 and the penalties set out in subsections 162(10) and (10.1) of the Income Tax Act".

7 In short, the applicant is now arguing that issuing any assessment in relation to the adjustment proposal prepared by the CRA on November 7, 2017, would be contrary to the agreement entered into following the voluntary disclosure by the applicant, who argues that issuing a reassessment for any year prior to 2005 is contrary to the CRA's common practice, when a taxpayer making a voluntary disclosure is not prepared to commit [TRANSLATION] "tax suicide".

8 For their part, the respondents vigorously dispute the applicant's interpretation of the letter dated June 17, 2015, and the Circular and the effects that he attributes to them. In fact, on reading the acceptance letter, the CRA was very clear: the voluntary disclosure was only valid for the 2005 to 2014 taxation years, which the applicant is challenging, claiming that the letter dated June 17, 2015, and the Circular must not be read literally.

9 The best that can be said at first glance is that the evidence is contradictory. I therefore agree with counsel for the respondents that the applicant has not, at this stage, submitted convincing evidence of the essential allegations behind his motion for suspension and an interlocutory injunction—particularly that the respondents in fact agreed to not raise reassessments for tax years prior to the tax years in question in the applicant's voluntary disclosure that results in the application of the doctrine of estoppel in public law (see *Immeubles Jacques Robitaille Inc v Québec (City)*, 2014 SCC 34, at paras 19, 20 and 24).

10 On another hand, as this is a question of the possible merits of a prohibition to prevent the exercise of discretion that is clearly assigned tot he Minister by the ITA—that of issuing a reassessment—it must be noted that the applicant was unable to cite any specific jurisprudence in this regard, and even less so for a motion for an interlocutory injunction aimed at suspending, to the sole benefit of the applicant, the application of a law of general application such as the ITA, the constitutionality of which is not in question.

11 In his affidavit, the applicant stated that he understands that [TRANSLATION] "the reasons raised in support of [his] application for judicial review are related to fairness", while he does not "challenge the merits of an assessment before this Honourable Court". That said, he generally alleges that "the hasty issuance of assessment would cause [him] serious and irreparable harm", without clarifying. As well, the fact that this application for judicial review can become moot does not constitute irreparable harm according to jurisprudence (see *United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200, at para 17).

12 Moreover, there is another appropriate and effective recourse for raising a substantive issue related to the admissibility of an assessment allegedly raised against the contents of the agreement and the representations cited by the applicant—not yet proven at this stage of the proceedings—particularly as the Minister (following an objection) and the Tax Court of Canada (following an appeal) can cancel an assessment (see subsection 165(3) and section 171 of the ITA; section 18.5 of the *Federal Courts Act*; *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, at para 81).

13 The balance of convenience clearly favours the respondents. The public interest—i.e. the orderly application of the ITA—takes precedence here over the financial and other inconveniences that the applicant may face by having, like all taxpayers, to follow the normal challenge procedure set out in the ITA.

14 For these reasons, this motion is dismissed. Given the results, the applicants are entitled to costs.

ORDER

THE COURT ORDERS that the applicant's motion for suspension and interlocutory judgment be dismissed with costs.
Motion dismissed.

End of Document

17

A. Standard of Conduct

131 The parties take different positions on the standard of fault that applies in this matter.

132 The Plaintiffs argue that the applicable standard is the general notion of civil fault under Article 1457 of the *Civil Code of Québec* ("*C.C.Q.*") and that the Defendants therefore commit a fault if they fail to meet the standard of the reasonably competent tax auditor. The Plaintiffs also argue that their claim is based in part on the notion of abuse of rights.

133 The Defendants, on the other hand, argue that the case is framed in terms of abuse of power/rights such that the Defendants are only liable if they (1) intended to cause harm to the Plaintiffs or (2) were reckless in that regard. They argue that this is similar to the common law notion of misfeasance in public office.

134 As this is a claim against the federal Crown and its representatives, the starting point in the analysis is Section 3(a) of the *Crown Liability and Proceedings Act*:[101]

> **3** The Crown is liable for the damages for which, if it were a person, it would be liable
>
> **(a)** in the Province of Quebec, in respect of
>
> (i) the damage caused by the fault of a servant of the Crown, or
>
> (ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner;

135 This means that the general principles of civil liability applicable to private persons under Québec law also apply to the actions of the federal Crown in Québec.

136 This is confirmed by Article 1376 *C.C.Q.*, which provides that the rules in the book on obligations apply to the State:

> **1376.** The rules set forth in this Book apply to the State and its bodies, and to all other legal persons established in the public interest, subject to any other rules of law which may be applicable to them.

137 In principle, then, the general notion of civil fault under Article 1457 *C.C.Q.* applies to the federal Crown:

> [25] Civil liability of the federal Crown for wrongful acts of its agents is governed by the law of the jurisdiction where the acts were committed. In Quebec, the combined effect of the *Crown Liability and Proceedings Act* and the relevant provisions of the *Civil Code of Québec* is that the federal Crown is subject to the rules respecting civil liability set out in art. 1457 *C.C.Q.*[102]

138 The first paragraph of Article 1457 *C.C.Q.* provides as follows:

> **1457.** Every 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.

139 This means that in principle, the CRA commits a fault if it does not meet the standard of a reasonable person in similar circumstances.

140 The Alberta Court of Appeal recently held that the CRA cannot be sued for negligence in the performance of an audit:

> [25] In our view, it is plain and obvious that an action in negligence cannot succeed. It is clear that, because of the inherently adverse relationship between auditors who are exercising a statutory function and taxpayers, a finding of sufficient proximity to ground a private law duty of care does not exist. The chambers judge correctly applied the *Cooper-Anns* test and considered foreseeability and proximity to reach the same conclusion. Not only is her decision entitled to deference, the chambers judge could have gone further to conclude that public policy considerations also militate against finding the existence of a *prima facie* duty of care in this case.[103]

our findings

10. You have the right to have the costs of compliance taken into account when administering tax legislation

11. You have the right to expect us to be accountable

12. You have the right to relief from penalties and interest under tax legislation because of extraordinary circumstances

13. You have the right to expect us to publish our service standards and report annually

14. You have the right to expect us to warn you about questionable tax schemes in a timely manner

15. You have the right to be represented by a person of your choice

16. You have the right to lodge a service complaint or request a formal review without fear of reprisal[106]

150 Moreover, the CRA's role is limited to matters of administration and enforcement. Its duty is to assess no more and no less than the amount of tax payable under the ITA, and not to take the highest assessing position in order to collect the most tax. As stated by the Federal Court of Appeal in *Harris v. R.* [2000 CarswellNat 1047 (Fed. C.A.)]:

> [36] Revenue Canada is vested with no such powers. In *Ludmer v. Canada*, this Court held that the powers provided to the Commissioners which were at issue in the *National Federation of Self-Employed* case are «fundamentally different» from the powers of the Minister in Canada:
>
> > Neither the Minister of National Revenue nor his employees have any discretion whatever in the way in which they must apply the Income Tax Act. They are required to follow it absolutely, just as taxpayers are also required to obey it as it stands. The institution of Commissioners equipped with broad powers and an extensive discretion to deal with particular cases does not exist here. Accordingly, it is not possible to judge their actions by varying and flexible criteria such as those required by the rules of natural justice. In determining whether their decisions are valid the question is not whether they exercised their powers properly or wrongfully, but whether they acted as the law governing them required them to act.[108]
>
> [References omitted]

151 The Court therefore concludes as follows on the issue of the standard of conduct:

- The CRA must act reasonably in the conduct of an audit. The Taxpayer Bill of Rights helps define what a reasonable auditor would do;
- Negligence is sufficient to establish fault;
- It is not necessary to prove that the CRA acted maliciously with a view to hurting the Plaintiffs. Intentional conduct will be necessary for punitive damages;
- The CRA can be wrong without being at fault – the CRA does not commit a fault if it reasonably takes a position that turns out to be wrong;
- To the extent that the CRA has certain powers under the ITA, it must exercise those powers reasonably and not in an abusive fashion;

issue in the context of this case, in that only a few e-mailboxes were destroyed and copies of the destroyed documents were found in other e-mailboxes and included in the record. Moreover, each of Adams, Jolie, Ranger and Leduc testified at the trial. There is no evidence that any destroyed document would have had an impact on the outcome of this litigation.

9. Conclusion on Fault

702 The Court concludes that the CRA was at fault in its conduct of the SLT audit:

- The CRA took an unreasonable final assessing position on the following issues:
  - o Its interpretation of Regulation 7000 was inconsistent with its prior (and subsequent) position with respect to similar instruments issued by financial institutions in Canada;
  - o Its interpretation of Regulation 7000 to include the increase in value of the Notes in taxation years prior to 2005 was unreasonable;
  - o Its position denying the application of the CIF rules was inconsistent with the clear evidence; and
  - o Its calculation of foreign exchange was inconsistent with the position of Rulings and resulted in a much higher amount of income from year to year;
- It failed to give the five days' notice prior to issuing the reassessments in May 2012, as promised in November 2010. It also filed to provide the responsive submissions, as promised in June 2011;
- In making a request for information from the Bermudian authorities, it characterized the SLT matter as "a criminal tax matter";
- It acted improperly in regard to the settlement offer in May 2014 by offering to settle elements that it knew it was going to abandon;
- It was at fault in the *ATIA* process and thereby delayed the inevitable disclosure of the relevant documents by years and put the Plaintiffs to considerable expense.

703 The Plaintiffs sought to characterize these faults as deliberate, in order either to get Ludmer or to destroy SLT or as an attempt to collect greater bonuses.

704 The Court rejects both arguments.

705 With respect to the personal *animus* against Ludmer, the theory appeared to be that the CRA was mad at Ludmer because he had beaten them in a tax dispute that went all the way to the Supreme Court of Canada in 2001.[466] The Plaintiffs put questions to each CRA witness as to whether they were aware of the prior litigation and whether they bore any grudge against Ludmer as a result of it. Most witnesses testified that were not aware of the prior litigation, and those that were aware of it testified that it did not affect their attitude towards Ludmer in the SLT audit. The testimonies appear credible and the Court has no basis to reject them other than speculation by the Plaintiffs. The Court dismisses this argument.

706 As for the attempt to destroy SLT to dissuade Canadians from investing in similar vehicles going forward, the Plaintiffs point to the so-called Stephkan settlement, which was conditional on the taxpayer selling its SLT shares and thereby crystallizing the deferred capital gain,[467] Adams' recommendation that the CRA consider a settlement "where the investment would be wound up",[468] and the CRA request for information from the Irish authorities,[469] which the Plaintiffs characterize as a transparent attempt to cause SLT to be de-listed.[470]

707 With respect to Stephkan, the settlement was signed by a CRA official under peculiar circumstances at the time of or

(17)

832 The amounts awarded to each Plaintiff are as follows:

Plaintiff	Lost interest	Professional fees	Damage to reputation	Stress, trouble, inconvenience	Total
Ludmer			$100,000.00	$50,000.00	**$150,000.00**
3488055	$30,904.75	$75,695.68			**$106,600.43**
3488063	$31,545.04	$75,660.03			**$107,205.07**
3488071	$30,248.43	$75,654.53			**$105,902.96**
2534-2825	$1,030,671.50	$1,035,803.97			**2,066,475.47**
4077211	$373,853.47	$302,288.61			**$676,142.08**
Steinberg			$50,000.00	$50,000.00	**$100,000.00**
Habland		$146,211.53			**$146,211.53**
Stoneview		$747,677.29			**$747,677.29**
3421848		$638,444.02			**$638,444.02**
TOTAL	**$1,497,223.19**	**$3,097,435.66**	**$150,000.00**	**$100,000.00**	**$4,844,658.85**

833 The remaining claims put forward by the Plaintiffs will be dismissed.

834 Costs will be awarded to the Plaintiffs. Those costs will not include the expert fees of Mareval S.E.N.C.R.L. since the Court did not retain the conclusions of that report.

835 Finally, the Court thanks the attorneys for both sides for their work in this file and apologizes to the parties for the delay in issuing this judgment.

836 *MAINTAINS* in part the Re-Re-Amended and Re-Particularized Motion to Institute proceedings filed by the Plaintiffs;

837 *CONDEMNS* the Attorney General of Canada and the Canada Revenue Agency, solidarily, to pay to the Plaintiffs the following amounts:

Irving **Ludmer**	$150,000.00
3488055 Canada Inc.	$106,600.43
3488063 Canada Inc.	$107,205.07
3488071 Canada Inc.	$105,902.96
2534-2825 Québec Inc.	$2,066,475.47
4077211 Canada Inc.	$676,142.08
Mark Brender, Phil Nadler, Margot Steinberg and Donna Steinberg as liquidators of the Estate of the late Arnold Steinberg	$100,000.00
Habland Investments Inc.	$146,211.53
Stoneview Inc.	$747,677.29

(17)

v.

ATTORNEY GENERAL OF CANADA, being served pursuant to the *Crown Liability and Proceedings (Provincial Court) Regulations* through the Director of the Québec Regional Office of the Department of Justice Canada, Guy-Favreau Complex, East Tower, 9th Floor, 200 René-Lévesque Boulevard West, in the City and District of Montréal, Province of Québec, H2Z 1X4;

and

CANADA REVENUE AGENCY, a federal agency pursuant to the Canada Revenue Agency Act, S.C. 1999, c. 17, having a place of operations at 305 René-Lévesque Boulevard West, in the City of Montréal, judicial district of Montréal, Province of Québec, H2Z 1A6;

RESPONDENTS [Incidental Appellants]

NOTICE OF INCIDENTAL APPEAL
(Article 360 *C.C.P.*)
Respondents and Incidental Appellants
September 7, 2018

---

1. The Attorney General of Canada ("AGC") and the Canada Revenue Agency ("CRA"), as Incidental Appellants, are appealing the judgment of the Superior Court, rendered on July 31, 2018, by the Honourable Stephen W. Hamilton, J.S.C., District of Montreal, which is already under appeal by the Appellants.

2. The judgment maintains in part the Re-Re-Amended and Re-Particularized Motion to Institute Proceedings filed by the Plaintiffs and orders the Attorney General of Canada and the Canada Revenue Agency ("CRA"), solidarily, to pay

to the Plaintiffs the amount of $4,844,658.66 with interest at the legal rate and the additional indemnity provided for at article 1619 C.C.Q. from the date of institution of the proceedings.

3. The trial judge made an error in law and palpable and overriding errors of fact in concluding that the CRA committed civil faults and in attributing damages to them.

Error in law: the standard of conduct

4. The trial judge erred in law in deciding that negligence on the part of the CRA is sufficient to establish fault.[1]

5. The judge's conclusion on the standard of conduct of the CRA deviates from the standard established by the Supreme Court of Canada in *Finney v. Barreau du Québec*, 2004 SCC 36, and *Entreprises Sibeca inc, v. Frelishburg (Municipalité)*, 2004 SCC 61, as applied by this Court in *Agence du revenu du Québec v. Groupe Enico inc.*, 2016 QCCA 76.

6. The CRA can be liable for damages only if its officers are found to have exercised their powers abusively, contrary to the requirements of good faith.

7. The same standard applies whether the CRA officers were exercising their powers under the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) ("*ITA*") or the *Access to Information Act*, R.S.C., 1985, c. A-1.

8. The judge did not find that the CRA acted in bad faith or exercised its powers abusively in auditing the Appellants or in responding to their requests under the *Access to Information Act*.

[1] *Ludmer c. Attorney General of Canada*, 2018 QCCS 3381, para. 151.

D

HENRO HOLDINGS CORPORATION
V.
MINISTER OF NATIONAL REVENUE

APPEAL TO FEDERAL COURT

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(18)

July 18, 2013

David H. Sohmer
Main line: 514-875-2100
E-mail: dsohmer@spiegelsohmer.com

BY REGISTERED MAIL

Office of the Information Commissioner
Place de Ville, Tower B
112 Kent Street
22nd Floor
Ottawa, Ontario K1A 1H3

RE: OFFICIAL COMPLAINT
Access to Information Request for the Company:
Henro Holdings Corporation ("Henro")
Business Number: 102326949
Our File: 77865-122
Your Reference: A-048394 & A-060381

To whom it may concern:

This complaint concerns two requests which were made by Me Julie Gaudreault-Martel and Me Daniel Bornstein of Spiegel Sohmer Inc. with regards to Henro. Documents pursuant to the requests were disclosed on August 12, 2010 and October 9, 2012 respectively.

Enclosed please find the following documents:

1. An email from Marco Fratarcangeli to Tom Liu dated November 7, 2008 stating:

   "2) We are of the view that the land acquired is land which would have attracted speculators. We would like your comments regarding whether the land in question is such that would attract speculators."

2. An excerpt from the audit report dated February 15, 2010 stating:

   "89. Henro had then acquired the land in question from the presently defunct bank, the Canadian Commercial Bank, for $550,000 in 1987, at a substantial discount of approximately 55% of the purchase price.

90. During that time frame, Peter Lee, an evaluator of the Calgary TSO, confirmed that there was much speculation in and about the land."

3. An excerpt from the Montreal Appeals T401 dated May 28, 2012 stating:

"Between 1984 and 1987, Peter Lee, an evaluator with the Calgary TSO, confirmed that there was much speculation surrounding the land [...]."

4. An excerpt from the Reply to the Amended Notice of Appeal dated September 18, 2012 stating:

"49.67 The vacant land was the type of which, in 1987, would have attracted and did attract speculators."

5. An email from Tom Liu to Joseph Armanious dated December 2, 2008 whereby Mr. Liu stated and confirmed that the appraisal report he was in the process of completing needed to be reviewed and approved by his team leader.

At the time each of the above statements were made, the Canada Revenue Agency auditors involved with the file were well aware of the contents of the attached document entitled *Appraisal Report* dated December 12, 2008 by Tom Liu and approved by Peter Lee (team leader). The Appraisal Report states the following:

> "Financial speculation" involves buying, holding and selling (e.g.) real estate to profit from price fluctuation versus acquiring it for use or for income. Normally, a purchaser of land within the city intends to develop it. In a "booming" market, it would attract speculators at times of escalating values. Our market research reveals that there were few and infrequent land transactions in the subject area between 1985 and 1987. Further, price increases were modest and not spiralling during this period. In fact, most sales did not occur until after 1999. Consequently, the market initially seemed non-speculative from 1987 to 1999, but then it became relatively speculative from 2000 to 2005."

The parcel of land in question was acquired by Henro in December 1987.

The Appraisal Report was never disclosed to us pursuant to either of the access to information requests. It was only disclosed to us pursuant to the Book of Respondent's Documents provided by the Queen in the case of *Henro Holdings*

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Corporation v. Her Majesty the Queen (2012-2829(IT)G). This was 4 and a half years after the CRA auditors were aware of its contents.

Would you kindly advise us as to why said document was not disclosed pursuant to either of the two requests?

Should you have any questions or comments, please do not hesitate to contact the undersigned.

Yours very truly,

SPIEGEL SOHMER INC.

David H. Sohmer

DHS/
Encls.

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(19)

Court File No.:_____

FEDERAL COURT

BETWEEN:

HENRO HOLDINGS CORPORATION

Applicant

AND

MINISTER OF NATIONAL REVENUE

Respondent

Application under sections 18 and 18.1 of the *Federal Courts Act*

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and a place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard in Montreal.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor, or where the Applicant is self-represented, to the Applicant, WITHIN 10 DAYS after being served with this notice of application.

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20. On or about **October 11, 2018**, the Applicant filed for a second administrative review of the Initial Decision (the "**Second Administrative Review Application**");

21. On or about **June 12, 2019**, the Applicant received the Decision rendered by S. Kulczycki, Senior Taxpayer Relief Officer, Prairie Region Center of Expertise of the CRA which concluded that the Decision was well-founded and refused to intervene;

22. The Decision was erroneous, unfair, unreasonable and illegal because it improperly and unfairly failed to take into account the following facts:

    a. The CRA auditor in charge of the Applicant's audit obtained a document (the "**Concealed Report**") which supported the Applicant's position on the merits;

    b. The auditor re-assessed and the audit report misrepresented the contents of the Concealed Report;

    c. The Applicant made an Access to Information request to Access to Information and Privacy ("**ATIP**") and ATIP did not provide the Applicant with the Concealed Report. The request was for all correspondence between CRA personnel;

    d. The Applicant filed a notice of objection and the appeals agent rejected the objection. The T401 indicates that the rejection was based on the audit report, which misrepresented the contents of the Concealed Report;

    e. The taxpayer made a second application to ATIP and ATIP did not provide the taxpayer with the Concealed Report. The request was for all documents in the taxpayer's file;

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f. The taxpayer appealed to the Tax Court of Canada and the Concealed Report was disclosed on the List of Documents provided to the undersigned attorneys by the Department of Justice;

g. The Applicant instituted a damage action against the CRA;

h. The Applicant examined the audit team leader and the appeals agent on discovery. The appeals agent admitted that he based his decision to reject the objection on the audit report and admitted that the contents of the Concealed Report had been misrepresented. The appeals agent also admitted the following:

(1) That he does not remember if he read the notice of objection;

(2) That he only read the leading case on land trading (*Canada Safeway Ltd. v. R*, 2008 FCA 24), after he closed the file; and

(3) That the Concealed Report was not in the file provided to him by the auditor because the copy showed to him had letters "AA" in pen and that he never used double letters in indexing documents;

i. The Applicant filed a complaint with Service Complaints. The complaint was rejected because two senior CRA officials advised the director of Service Complaints that the Concealed Report was not provided because it was not relevant to years under audit even though both the audit report and the T401 indicated it was relevant;

(19)

j. On July 18, 2013 the taxpayer filed a complaint with ATIP. By letter dated January 10, 2018 (i.e. 4 ½ years after the complaint and 4 years after the case was settled), ATIP concluded that the complaint was well-founded but that there was no evidence of obstruction or concealment. There were two principal grounds for finding that there was no evidence of an offence. The first was that "On its face, it was therefore not apparent why CRA officials ought to have identified the Report in response to your client's request, as framed" because the Access application requested copies of "correspondence" and the word "correspondence" is generally taken to mean "a communication by letter or emails" or "letters or e-mails sent or received". The second was that none of a number of current and former CRA employees with potential involvement could recall "why, years prior, the Appraisal Report or other responsive records had been omitted from the CRA's response to your client's request under the Act". Investigators at ATIP knew that the auditor and section manager who signed the audit report containing the misrepresentation were asked to resign while the RCMP was investigating corruption at the TSO. They also knew that the team leader who signed the report had lied under oath and was not credible.

k. The Applicant filed a request for interest relief under ss 220(3.1) ITA. The request was partially rejected. The Applicant requested a second level review. The second level review confirmed the Minister's decision. Although reasons were given in the Initial Decision and the Decision to deny relief, neither questioned the veracity of the material facts on which their reasoning was based. The principal reason for the confirmation was that neither the appeals agent, the Department of Justice, ATIP, nor Service Complaints had a

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duty to question the veracity of facts represented to them by CRA personnel. Since they all followed established CRA procedure, there was no undue delay.

l. The taxpayer was unaware that Taxpayer Relief had an internal policy that requests for interest relief not to be processed while there was an "open" notice of objection. Had the taxpayer been advised of the policy it would have withdrawn the objection as soon as it would have been advised of the policy, particularly since Appeals sent a letter in July 2016 (being four months after the objection was filed) that its position was that the objection was invalid (in which position taxpayer's lawyer concurred). The Director of Taxpayer Relief was advised multiple times that an expeditious processing of the request for interest relief was requested because its decision would have a material effect on the amount of interest payable to Alberta with respect to Alberta's tax on the transactions.

m. Each of the personnel involved in the file were legally designated as agents of the Minister. Their acts were deemed to be the Minister's acts and the facts known to them were deemed to be facts known to her. It follows that her own procedure for dealing with notices of objection requires her to accept the veracity of facts which she knows to be false, and permits her to reject an objection without reading the notice of objection, the taxpayer's submissions, or the relevant jurisprudence. Consequently, the Initial Decision and the Decision could not consider the true version of the material facts underlying their reasoning in light of the misrepresentations uncovered as part of the Applicant's objection and appeal in the TCC.

(19)

n. In following the Minister's own procedure for dealing with requests for interest relief under subsection 220(3.1) ITA, the Minister purports to be able to ignore material facts, even though these material facts were factors in the delay being undue;

o. The Minister goes so far as to say that the time required to pursue the truth by litigating does not contribute to a delay being undue because the facts uncovered were "not needed for the review of delay on the part of CRA". She also has no duty to advise the taxpayer of the policy with respect to "open objections";

p. Had the Applicant known that Mark Toner was unaware of the content of the Concealed Appraisal Report and would base his "appeal" opinion solely upon the audit report without conducting any independent review, it would have appealed to the Tax Court of Canada immediately after the expiry of 90 days from the filing of the notice of objection.

q. At the very least, it is reasonable to conclude that had tax litigation been commenced at an earlier stage, as opposed to Applicant participating in an administrative dispute resolution process, the result would likely have been an out-of-court settlement on terms substantially similar to the terms of the Out-of-Court Settlement, but at a much earlier date, and the amount of interest would obviously have been materially less.

r. The ITA does not provide a forum for challenging a response by the CRA to allegations of undue delay in applications for interest relief under subsection 220(3.1) ITA. There is no trial and no examination of witnesses. It is for this reason that the Applicant did not make an application for interest relief prior to

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conducting examinations on discovery of Messrs. Armanious and Toner. The Applicant should not be denied relief from interest which accrued while it was pursuing the truth.

s. This was a run-of-the-mill fact-based trading case which did not involve issues of a precedential nature. The vast majority of such cases are settled at the audit stage. Had the CRA respected the Taxpayer Bill of Rights, this case would have been settled at the audit stage so that interest would not have been an issue.

t. In the case of *Conille v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 F.C. 33, the court stated the following:

> *"From the reasons of the Court, it appears that three requirements must be met if a delay is to be considered unreasonable:*
>
> *The delay in question has been longer than the nature of the process required, prima facie;*
>
> *The applicant and his counsel are not responsible for the delay; and*
>
> *The authority responsible for the delay has not provided satisfactory justification."*

u. The three requirements described above have been met. The Notice of Objection was filed on March 28, 2010, and the Notice of Confirmation was issued on April 25, 2012, i.e. a

MISCELLANEOUS

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Appendix A to the offer letter dated 1 May 2015
Table of interest and penalties

In the event the taxpayer voluntarily declares in the course of the 2015 calendar year, the adjustments for the different tax years shall be treated in the way presented below[1].

Tax year	Interest	Penalties
2014	No relief of interest — at the prescribed rates	No penalty regarding the returns[2] Mandatory penalties[3] can be applied, according to the particular situation of the taxpayer
2013	No relief of interest — at the prescribed rates	No penalty
2012	No relief of interest — at the prescribed rates	No penalty
2011	No relief of interest — at the prescribed rates	No penalty
2010	Prescribed rates less 4% up to the date of coming into effect of disclosure	No penalty
2009	Prescribed rates less 4% up to the date of coming into effect of disclosure	No penalty
2008	Prescribed rates less 4% up to the date of coming into effect of disclosure	No penalty

[1] For all taxation years, the interest shall be charged at the prescribed rates from the date of coming into effect of disclosure until date of payment. The date of coming into effect of disclosure is the 90th day following the date of the offer letter.

[2] For the application of the offer, the "penalties related to returns" are the penalties assessed under subsections 162(10) and 162(10.1) and of section 163 of the *Income Tax Act*.

[3] For the application of the offer, the "mandatory penalties" are all the penalties other than the penalties related to the returns assessed under the *Income Tax Act*. For example, the penalties assessed for the late production of income tax returns and the failure to pay installments are mandatory penalties.

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2007	Prescribed rates less 4% up to the date of coming into effect of disclosure	No penalty
2006	Prescribed rates less 4% up to the date of coming into effect of disclosure	No penalty
2005	Prescribed rates less 4% up to the date of coming into effect of disclosure	No penalty
2004	Prescribed rates less 4% up to the date of coming into effect of disclosure	No penalty
2003	Prescribed rate until 31 December 2003 Total relief of interest from 1 January 2004 up to the date of coming into force of disclosure	No penalty related to returns Mandatory penalties can be applied, depending on the particular situation of the taxpayer
2002	Prescribed rate until 31 December 2003 Total relief of interest from 1 January 2004 up to the date of coming into force of disclosure	No penalty related to returns Mandatory penalties can be applied, depending on the particular situation of the taxpayer
2001	Prescribed rate until 31 December 2003 Total relief of interest from 1 January 2004 up to the date of coming into force of disclosure	No penalty related to returns Mandatory penalties can be applied, depending on the particular situation of the taxpayer
2000	Prescribed rate until 31 December 2003 Total relief of interest from 1 January 2004 up to the date of coming into force of disclosure	No penalty related to returns Mandatory penalties can be applied, depending on the particular situation of the taxpayer

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THE CANADIAN TAXPAYER

Editor: Arthur B.C. Drache, C.M., Q.C.
Pages 17-24 February 8, 2019 Vol. xli No. 3

A CRA All Star Tag Team v. Gaston Gauthier: Politics Trumps Transparency

David H. Sohmer

In the case of *Gauthier v. CRA*,[1] the Federal Court refused to grant an injunction preventing the Minister from issuing a reassessment. Mr. Justice Martineau summarized the facts as follows at paras. 4 and 6 of the decision:

> In 1978, the applicant allegedly transferred $300,000 to a bank account in the Bahamas, a tax haven. That amount came from savings. Apparently wanting to put his affairs in order and not pass his tax problems on to his heirs, the applicant voluntarily disclosed the unreported income for the years from 2005 to 2014. The voluntary disclosure was apparently received by the CRA on January 7, 2015, and accepted on June 17, 2015, on behalf of the Minister under subsection 220(3.1) of the ITA and the Circular.
>
> However, in August 2016, based on information provided by the applicant, the CRA began an audit of the applicant's income tax returns from 1980 to 2004. As explained in an affidavit by Michel Audet, a CRA auditor, given the applicant's inability to provide details or documents regarding the initial transfer of $300,000 or the management of his bank account beginning in 1978, he evaluated two assessment scenarios, choosing to **[TRANSLATION]** "include total investment income ($173,460) in taxable income for 2004, distributed among dividends from Canadian sources and interest based on a percentage equal to the distribution of his portfolio for the taxation years from 2005 to 2014 to allow him to claim a dividend tax credit [sic] and only assess the penalty for failing to file form T1135 and the penalties set out in subsections 162(10) and (10.1) of the Income Tax Act.

The assessment scenario which the auditor evaluated but did not choose is described in the affidavit by the auditor:

> **[TRANSLATION]** Include the $300,000 in Mr. Gauthier's income for the 1980 tax year, split the total investment income ($173,460), namely the difference between the initial transfer and the adjusted cost base of his investment on December 31, 2004 ($473,460), between each tax year from 1980 to 2004, impose a penalty for failing to file form T1135 for each tax year between 1998 and 2004 ($2,500 for each form), as well as a gross negligence penalty for each year from 1980 to 2004.

In May of 2016 (i.e. three months before the CRA began the audit of Mr. Gauthier's returns from 1980 to 2004), the House of Commons Standing Committee on Finance

[1] 2017 FC 1173, [2018] 4 C.T.C. 13.

IN THIS ISSUE

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(f) the appellant was required to pay penalties of 6% per year on the balance;

(g) penalties of $2,386.44 is calculated at the rate of 6% per year on the balance, computed beginning the day following the date the balance (or part thereof) was required to be remitted or paid.

4 Although no evidence was adduced it was stated, without challenge, that the mistakes were made in good faith—indeed some mistakes were in the Minister's favour—and, given the newness of the goods and services tax and the complexity of this new law, it was understandable that such mistakes would be made and that therefore the penalties should not be imposed. Both the agent for the appellant and counsel for the Minister submitted written arguments following the hearing.

5 Counsel for the Minister did not, either in the reply or in argument suggest that the mistakes were any other than honest errors made in good faith and without any intent to avoid the payment of tax.

6 I accept this view of the facts, but it does not end the matter. Subsec. 280(1) of the *Excise Tax Act* reads as follows:

> Subject to this section and section 281, where a person fails to remit or pay an amount to the Receiver General when required under this Part, the person shall pay on the amount not remitted or paid
>
> (a) a penalty of 6% per year, and
>
> (b) interest at the prescribed rate,
>
> computed for the period beginning on the first day following the day on or before which the amount was required to be remitted or paid and ending on the day the amount is remitted or paid.

7 This section, it will be noted, does not specifically require that there be any intent to avoid tax or any reprehensible behaviour. It may be contrasted with s. 285 which requires, as a condition to an imposition of a penalty under that section, that the taxpayer "knowingly or under circumstances amounting to gross negligence" makes a false statement in any of the numerous types of documents that are required to be filed under this statute.

8 I agree with the representative for the appellant that there is an element of unfairness here in subjecting to a penalty an innocent taxpayer who has, in calculating the amount owing under a new and complex statute, made, in good faith, errors that are attributable neither to gross negligence nor to wilful intent.

9 The penalty under subsec. 280(1) is the type of penalty which imposes upon the Crown no obligation to adduce evidence of the type of behaviour or mental state contemplated by section 285. All that is initially required is that there be an underpayment of tax. It is not dissimilar to the penalty imposed under subsec. 163(1) of the *Income Tax Act*, which was considered in *Maltais v. The Queen*, 91 D.T.C. 1385, (sub nom. *Maltais v. Minister of National Revenue*) [1991] 2 C.T.C. 2651 and subsec. 227(9) of the *Income Tax Act*, which was considered in *Andrew Paving & Engineering Ltd. v. Minister of National Revenue*, 84 D.T.C. 1157.

10 In *The Queen v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, Dickson J. (as he then was) analysed the question of offences that either required or did not require proof of *mens rea* and concluded that it was time that the law recognized three categories of offence, rather than two. At pp. 1325–6 he stated:

> I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:
>
> 1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
>
> 2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid

liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in *Hickey's* case.

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

Offences which are criminal in the true sense fall in the first category. Public welfare offences would *prima facie* be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as "wilfully," "with intent," "knowingly," or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.

11 Although Mr. Justice Dickson was dealing with "offences" I can see no reason in principle for not extending his analysis to administratively imposed penalties as well. A penalty, as the name implies, is a form of punishment. It is, I think, contrary to ordinary concepts of fairness that a taxpayer should be penalized for a failure to observe a statutory provision or to calculate tax correctly if that taxpayer demonstrates that even with the exercise of due diligence the mistake was unavoidable. Counsel for the respondent, in her written submission endeavoured to restrict the application of Dickson J.'s second category of offence, that of "strict liability offences", to public welfare offences. She stated:

> ... no compelling reason exists to extend the principles of *Sault Ste. Marie* outside the context of public welfare offences to the civil penalties provided for in subsection 280(1) ETA.

12 On the contrary, I think that the Crown would need to demonstrate a compelling reason for treating the imposition of the numerous penalties provided for in our fiscal statutes as incapable of being challenged by a taxpayer who could establish that he or she was without fault and acted with due diligence. To infer a legislative intent that such penalties were unassailable on any ground would be contrary to the principle enunciated by Dickson J. in the *Sault Ste. Marie* case that:

> ... punishment should in general not be inflicted on those without fault ...

13 Dickson J. in the passage quoted above stated that:

> Offences of absolute liability would be those in respect of which the Legislature had *made it clear* that guilt would follow proof merely of the proscribed act. (emphasis added)

14 If Parliament envisaged so draconian a result it would be incumbent upon it to express its intent explicitly and unambiguously.

15 The position of the respondent appears to be based upon the premise that penalties that do not fall within category 1 (such as those contained in subsec.[1] 163(2) of the *Income Tax Act* or s. 285 of the *Excise Tax Act*) must necessarily fall within category 3 (absolute liability).

16 Such an assumption runs counter to ordinary principles of justice and cannot be justified in light of the *Sault Ste. Marie* case. The imposition of administrative penalties upon a blameless taxpayer who is to be left without any type of defence is so extraordinary that it would require compelling and cogent reasons to justify placing such penalties in category 3.

17 That a person should be susceptible of being penalized administratively by a public servant without any possibility of exculpating himself by demonstrating due diligence is not only extraordinary. It is abhorrent. It is no less abhorrent because it

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Government of Canada / Gouvernement du Canada

Canada

Criminal Code (R.S.C. (Revised Statutes of Canada), 1985, c. C-46)

Act current to 2019-06-20 and last amended on 2019-06-17.

Other sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,

(v) evidence that the offence was a terrorism offence, or

(vi) evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the *Corrections and Conditional Release Act*

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

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2016-3680(IT)G, 2019 TCC 85, 2019 CCI 85 – Smith J. – 19/04/24 – Tax – Income tax – Capital gains and losses – Taxable capital gains – Administration and enforcement – Assessments – Limitation period – Waiver by taxpayer – Corporate taxpayer was wholly-owned subsidiary of parent company, that owned 84 acres of land – Parent company transferred parcel of land to corporate taxpayer, and both elected to do so on rollover basis –When computing its income for 2003 taxation year, taxpayer reported capital gain of $7,904,475.00 and taxable capital gain of $3,952,238.00 – In 2002-2003, taxpayer declared paid dividends to parent company and elected to have dividends paid from its capital dividend account – Corporate taxpayer reported capital gain from disposition of parcel of land and paid taxes in amount of $1,809,598.00 – In 2009, Minister reassessed corporate taxpayer on basis that it had received refund in excess of amount to which it was entitled – Following initial assessment and in context of audit of parent company, Minister issued reassessment in 2010 reducing capital gain to nil and purported to refund taxes paid with refund interest of $767,633.00 for total of $2,577,231.00 – Having later reached agreement with parent company, Minister issued further reassessment seeking return of excess refund with arrears interest of $682,187.00 for total of $3,259,418.00 – Minister took position that rollover was invalid, and that proceeds of disposition of land would be treated as parent company business income – Taxpayer appealed Minister's reassessment – APPEAL ALLOWED – Reassessment of 2010 was sent outside of normal reassessment period –Taxpayer's waiver with Minister to filing within normal reassessment period was also null and void, as waiver was filed outside of normal reassessment period – Since 2010 reassessment was null and void, 2003 assessment subsisted – Taxpayer was not required to repay amount of $2,577,231.00 under Income Tax Act.

984274 Alberta Inc. v. R.

984274 ALBERTA INC. (Appellant) and HER MAJESTY THE QUEEN (Respondent)

Citation: 2019 CarswellNat 1306, 2019 TCC 85, 2019 D.T.C. 1062
Tax Court of Canada [General Procedure]
Guy R. Smith J.
Heard: April 27, 2018
Judgment: April 24, 2019
Year: 2019
Docket: 2016-3680(IT)G

Counsel: Barry Landy, Marie-Lou Laprise for Appellant
Simon Petit for Respondent

Subject:
Corporate and Commercial; Income Tax (Federal)

Table of Authorities

Cases considered by *Guy R. Smith J.*:

Bois Aisé de Roberval Inc. c. R. (1998), 1998 CarswellNat 2475, (sub nom. *Bois Aisé de Roberval Inc. v. R.*) 99 D.T.C. 380 (Fr.), 1998 CarswellNat 2978, [1999] 4 C.T.C. 2161 (T.C.C.) — considered

Bolton Steel Tube Co. v. R. (2014), 2014 TCC 94, 2014 CarswellNat 803, 2014 D.T.C. 1102 (Eng.), [2014] 4 C.T.C. 2253, [2014] T.C.J. No. 74 (T.C.C. [General Procedure]) — considered

Canada Safeway Ltd. v. R. (1997), 1997 CarswellNat 1947, (sub nom. *R. v. Canada Safeway Ltd.*) 98 D.T.C. 6060, (sub nom. *Canada Safeway Ltd. v. Canada*) 154 D.L.R. (4th) 449, (sub nom. *Minister of National Revenue v. Canada Safeway Ltd.*) 222 N.R. 342, [1998] 1 C.T.C. 120, (sub nom. *R. v. Canada Safeway Ltd.*) 98 G.T.C. 6036, 1997 CarswellNat 3597, [1997] F.C.J. No. 1632 (Fed. C.A.) — considered

Canadian Marconi Co. v. Canada (1991), 91 D.T.C. 5626, 85 D.L.R. (4th) 670, [1991] 2 C.T.C. 352, 137 N.R. 15, 51 F.T.R. 159 (note), 1991 CarswellNat 813, [1992] 1 F.C. 655, 1991 CarswellNat 533 (Fed. C.A.)

