Rulings on CRA general duty of care a positive development

The Canada Revenue Agency has historically had a wide prerogative in its interactions with Canadian taxpayers.

Past decisions have always held that CRA owed a duty of care only to the minister of revenue with no private law duty of care owed to taxpayers. Two recent cases, however, may signal the end of the era of non-accountability at the CRA as a general duty of care may be developing.

McCreight v. Canada (Attorney General) holds that CRA investigators may owe a duty of care to suspects under investigation even if they are not the taxpayers themselves. According to the case, the CRA had been conducting an investigation into two tax advisers, a chartered accountant and a research and development consultant retained by taxpayers, and seized boxes of materials. The CRA did not complete its investigation by the deadline for it to return the materials. The CRA investigator sought approval to lay an information

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charging various taxpayers as well as the tax advisers with fraud and conspiracy under the Income Tax Act and the Criminal Code.
The Department of Justice approved.

A year later, the Justice Department withdrew all charges against the tax advisers but not before the CRA investigator swore another information alleging 23 additional offences. It was not until six years later that the court, following a preliminary inquiry, discharged the tax advisers on all counts. In later proceedings, the court held that the CRA investigator had sworn the information primarily to retain possession of the seized documents. Among other claims, the tax advisers brought a cause of action for negligence by the CRA investigator. Following the test set out in Hill v. Hamilton-Wentworth Regional Police Services Board, the Ontario Court of Appeal held it was "at least arguable" that a cause of action for negligence by the CRA investigator could succeed and allowed the tax advisers' action for negligence to proceed to trial.

Similarly, the Supreme Court of British Columbia, in Leroux v. Canada Revenue Agency, held that the CRA owed the taxpayer a duty of care.
In Leroux, a prolonged CRA audit resulted in, among other things, the imposition of gross negligence penalties. Along the way, the CRA seized the taxpayer's original documents without authorization and refused to return them. The CRA later told the taxpayer the originals had been shredded accidentally and he had to provide further supporting documentation. The court found the CRA owed a duty of care that it had breached. However, the taxpayer's claim failed on causation as he could not prove his losses were the result of the CRA's

negligence. The taxpayer has since appealed to the B.C. Court of Appeal, and the CRA has cross-appealed the finding of a duty of care.

What Leroux and McCreight suggest is a potential shift in how the courts will review the actions taken by CRA employees in the context of civil claims arising from a regular or criminal tax investigation. It is worth noting that the court in Leroux emphasized that "while being wrong is not being negligent, nor are [the auditor]'s mistakes in fact or law negligent, it is the misuse and misapplication of the term 'grossly negligent' that is objectionable."

We have yet to see how widely or narrowly courts will interpret Leroux and McCreight. The court in Leroux cautioned that "an audit may not necessarily place a taxpayer in a close and direct relationship with the auditors' and McCreight simply allows the negligence claim proceed to benefit from a full factual record at trial. That said, both of these cases are highly germane to any discussion on whether the CRA owes a general duty of care to a subject of an investigation and are a welcome development for taxpayers and counsel alike who have experienced the department's increasingly aggressive tactics.

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