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Judges affirm that Canada Revenue Agency has 'duty of care' to taxpayers



JULIUS MELNITZER | January 26, 2016 3:36 PM ET
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The Canada Revenue Agency headquarters in Ottawa.

Sean Kilpatrick/The Canadian Press

Two appellate court rulings confirm that the Canada Revenue Agency is not at liberty to intimidate and threaten taxpayers and must take appropriate care in how it treats them.

In separate decisions released earlier this month, both the Federal Court of Appeal and the British Columbia Court of Appeal confirmed that the CRA has a general legal "duty of care" with respect to taxpayers.

"A few decisions have accepted this principle over time, but these are the most senior courts to affirm," says tax lawyer David Rotfleisch of Rotfleisch & Samulovitch PC in Toronto. "This should, over time, result in a difference in the way the CRA treats taxpayers and their rights."

Yet the results are not a complete win for taxpayers. According to the Federal Court of Appeal (FCA), the duty is general but not specific. In particular, the FCA found that the CRA did not have a specific duty to warn investors about the potential dangers of tax shelters — even when the CRA has cause for concern about particular ones.

"The FCA negated the existence of a classical tortious duty of care on the part of CRA and its official in the highly contentious area of tax shelters," says Bill Innes, a tax lawyer with Rueter Scargall Bennett LLP in Toronto.

Still, the decisions suggest that the tax agency is not at liberty to treat taxpayers as it chooses.

The B.C. court case involved Irvin Leroux, a Prince George businessman. The decision marked the end of his 19-year fight with the CRA. He claimed the CRA wrongfully imposed tax assessments on him and sought well over \$1

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While tax season may still be a few weeks away, in preparation for the annual ritual, the Canada Revenue Agency recently unveiled its new "Auto-fill my return" service to make filing your 2015 taxes online easier and faster than ever before.

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million, including interest and penalties.

During its audit, the CRA took original documents without authorization, shredded them accidentally, and then asked Leroux to provide further documentation.

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Even after the CRA reduced the assessment, Leroux continued his claim for compensation, alleging the Agency's actions had caused him to lose his business. The Canadian Taxpayers Federation supported Leroux in his fight.

Leroux won the war but lost the battle. Tax professionals are calling the B.C. court's ruling a milestone for taxpayers who seek to hold the CRA accountable for its actions. But the court also found that the CRA's actions were not the cause of Leroux's losses. Not only did Leroux fail to receive compensation, the court ordered him to pay the CRA's legal fees. The case settled earlier this month with Leroux paying the nominal sum of \$10 to the CRA for legal costs.

The Federal Court of Appeal case also produced a bittersweet result for the taxpayers in a case released this month called Canada v. Scheuer.

The bitter part follows the appellate courts refusal to acknowledge that the CRA had a specific duty to investors in terms of tax shelters. Imposing such a duty "would be to effectively create an insurance scheme for investors at great cost to the taxpaying public," the court stated.

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"The Income Tax Act clearly requires the shelter promoter to indicate that CRA deems the shelter to be a tax shelter."

"Warning the investors about the shelter advice that could make them liable to tax."

Then there's the sweet part, the federal court ruling that public officials act in a manner inconsistent with the public interest in an improper fashion," wrote Justice Eleanore Kottfleisch.

Because the taxpayers had relied on a specific duty of care, the federal court struck out the claim. The court gave the taxpayers the right to change their pleadings to assert a lawful basis for their suit.

Kottfleisch believes both the Federal Court of Appeal and the B.C. Court of Appeal got it right.


"It's a far cry from a general duty of care to a specific duty not to issue a tax shelter number or warn about a tax shelter," he says.

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number to anyone who applies, and also requires the tax shelter promoter to indicate that CRA deems the shelter to be a tax shelter," Kottfleisch says.

put the CRA in the position of providing investment and tax shelter advice that could make them liable to tax."

nt of the CRA's general duty of care. "Liability may attach if exercise of their statutory duties, in bad faith or in some other improper fashion," wrote Justice Eleanore Kottfleisch.

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