WHEN ISN'T NEGLIGENCE GROSS? STRUGGLES WITH THE STANDARD OF CARE

or

What to Do When a Proposal Letter Contains This Sentence: Since the amount of the unreported income is substantial, the Minister must give consideration to levying a penalty under subsection 163(2) of the Income Tax Act and subsection 38(1) of the Income Tax Act of British Columbia

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PART I -- INTRODUCTION

In 2009, I was a participant in a tax administration panel with senior management of the Canada Revenue Agency ("**CRA**") and Mr. Shane Onufrechuk, a private sector chartered accountant and tax specialist working in Vancouver. Mr. Onufrechuk and I prepared and submitted questions to the CRA panel members in advance so that they would have an opportunity to give considered answers.

One of the inquiries was whether the CRA had changed its policy in respect of the assessment of gross negligence penalties. The answer to the question is the written proceedings from the 2009 British Columbia Canadian Tax Foundation ("**CTF**") Conference. The answer was "No."

That answer did not jibe with my experience. Over the course of several years of representing taxpayers in a variety of audits, my experience was that the assessment of gross negligence penalties and the reassessment of "statute barred" years was becoming more frequent.

While the panel presentation was underway, some of the relatively unused neural connections in my brain fired and I was inspired to ask the follow-up question, "Is the CRA issuing more gross negligence penalty assessments currently than it has been historically?" The answer to that question does not appear in the 2009 British Columbia CTF written proceedings.[1] The answer to that question was "Yes."

I do not think that the CRA officials were being disingenuous in their written response. Indeed, the CRA has published a list of factors that should be considered by an auditor prior to issuing a gross negligence penalty assessment. At the 2012 CTF BC Tax Conference, the CRA confirmed that its auditors examine the following factors when deciding to assess gross negligence penalties:[2]

- materiality of the false statement or omission
- nature of the false statement or omission
- taxpayer's history of compliance
- taxpayer's knowledge of tax matters
- taxpayer's involvement in preparing the return
- adequacy of books and records

The fact remains that at least as of 2009 more gross negligence penalty assessments were being issued compared to previous years.

My experience is that auditors routinely consider issuing gross negligence penalties, particularly if a taxpayer has not reported a capital gain on a sale of a QSBC share or if the audit has opened statute barred years. The subtitle to this paper is likely familiar to advisors whose practice includes representing taxpayers in audits.

Mr. Larry Chapman, executive director and CEO of the CTF[3], volunteered me to write a paper explaining gross negligence. Writing a paper is an excuse for a practitioner to justify non-billable time to partners and associates under the guise of "marketing", when the reality is that frequently it is just an opportunity for the writer to "geek out" on a topic that the writer finds interesting; so I jumped at the opportunity.

The concept of "gross negligence" parallels the development of the concept of negligence. To understand gross negligence, the underpinnings of the law of negligence must be explained. In tax law the term "negligence" comes up most often in cases where the CRA has opened a statute barred year, often as a springboard to the assessment of gross negligence penalties. It is easy to blur the lines between the two concepts.

Initially, one goal of this paper was to find a demarcation between negligence and gross negligence. After researching the history of gross negligence and the application of the concept in other fields of law it is apparent that no easy demarcation exists. The courts openly struggle with the concept of gross negligence. Indeed, the use of the adjective "gross" in front of any noun invites subjective analysis. What is the difference between "obese" and "grossly obese", or "excessive" and "grossly excessive"?

1.01 STRUCTURE OF THE PAPER

Structurally, this paper begins with a Cook's tour through the law of negligence. The law of negligence is then applied in a tax context. My assumption is that before we can determine what conduct constitutes gross negligence, we must determine what conduct is deemed to be negligent.

Negligence in a tax context is an elusive concept. As a starting place, a comparison of two recent "statute barred" decisions is provided to show that the terms "neglect" and "carelessness" in subsection 152(4) of the *Income Tax Act* (the "**ITA**") may refer to something less than "negligence" as the terms is understood in the civil law.

The paper then proceeds to a discussion of gross negligence. The concept has been imported into tax law. This discussion is historical and moves from judicial considerations of when harm should be compensated to judicial considerations of when actions should be punished. A discussion of significant gross negligence tax decisions follows that historical review.

My analysis is consistent with the conclusions of at least one other writer[4] on the topic; gross negligence decisions follow two lines of reasoning. First, some decisions look for a clear standard to measure the impugned actions against. In other decisions there are no clear standards. In these decisions, the courts focus on the knowledge of the wrongdoer (for lack of a better noun) and the actions or inactions of the wrongdoer in light of that knowledge.

The second part of the paper suggests a framework for audit disputes where statute barred years are reopenbed and gross negligence penalties are being considered.

The paper suggests a practical approach to resolving the disputes before they proceed to court. Be forewarned there is no agreed formula to the proper standard that applies in opening statute barred years and no formula for determining gross negligence. Some of the suggestions may unfortunately lead to increased conflict if they are pursued in the wrong circumstances.

PART II -- NEGLIGENCE: A COOK'S TOUR & SOME CIVIL LAW DEFINITIONS[5]

Negligence developed as a distinct category of tort law in the common law. A tort is a wrongful act that results in harm to another person. Negligence operates in a world where a mythic "reasonable person" exists. The classic definition of negligence was stated by Justice Alderson of the English Court of the Exchequer:

> The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.[6]

That definition is informed by other key concepts.

First, even though a wrongdoer may act negligently in a particular set of circumstances, no cause of action will arise from that negligence unless the actions cause harm to another person.

However, even if harm is caused, it does not mean that a cause of action is available to the person who has been harmed. The wrongdoer must have owed the harmed person a "duty of care".

The classic definition of duty of care was penned by Lord Atkin in the seminal case *Donoghue v. Stevenson:*

> There must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances ... The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being affected when I am directing my mind to the acts or omissions which are called in question.[7]

To paraphrase, we must take reasonable care to avoid acts or omission which we can reasonably foresee would be likely to injury our "neighbour". Neighbour means those people who we should reasonably contemplate as likely to be affected by our acts or omissions. Of course, nothing is ever so simple. As discussed below, sometimes courts refuse to acknowledge a "duty of care" in circumstances where the neighbour test would seem to apply.

Even where a duty of care exists, the court must find that that the conduct of the wrongdoer fell below the "standard of care." This is where the reasonable man test is applied. When considering the standard of care courts consider any number of factors, including:[8]

> 1) the capacity of the defendant 2) whether the claimant gave consent 3) the cost and difficulty of the defendant taking precautionary measures 4) the extent of the potential risk to the claimant 5) the seriousness of any likely injury 6) state of knowledge 7) industry standards, and 8) whether the defendant held themself (sic) out as an expert.

In some cases, a determination of the appropriate standard of care appears to be glossed over by

the court. The impugned action appears to be deemed negligent by the harm that has resulted. However, those decisions may just reflect a standard of care that is so firm that any deviation from it will be negligent.

In summary, the law of negligence consists of the following elements.

1. A determination of whether a duty of care exists.
2. A determination of whether that duty was breached, either by acts or omissions (standard of care), and
3. Harm (or damages) suffered by the person to whom the duty was owed.

The law of negligence recognises the imperfection of the human species. The quantification of damages is typically not meant to punish the wrongdoer. Instead, damages are supposed to put the person harmed in the same position as if the harm had never occurred.[9]

Other adjectives abound in negligence law, often in respect of describing a standard of care, or actions that do not meet a standard of care. Some of the more common terms include the following:

Inadvertance: *Black's Law Dictionary* defines "inadvertence" as:

> Heedlessness; lack of attention; want of care; carelessness; failure of a person to pay careful and prudent attention to the progress of a negotiation or a proceeding in court by which his rights may be affected. Used chiefly in statutory and rule enumerations of the grounds on which a judgment or decree may be vacated or set aside; as, "mistake, inadvertence, surprise, or excusable neglect." Fed.R. Civil P. 60(b). State ex rel. Regis v. District Court of Second Judicial Dist. In and for Silver Bow County, 102 Mont. 74, 55 P.2d 1295, 1298.[10]

Carelessness: The Ontario Court of Appeal has explained "carelessness" as follows:

> The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in the law of negligence.[11]

Neglect: *Black's Law Dictionary* defines "neglect":

> May mean to omit, fail, or forbear to do a thing that can be done, or that is required to be done, but it may also import an absence of care or attention in the doing or omission of a given act. And it may mean a designed refusal or unwillingness to perform one's duty. In re Perkins, 234 Mo.App. 716, 117 S.W.2d 686, 692.[12]

Other terms are sometimes used to denote a lower standard of care that may or may not be synonymous with gross negligence. The most commonly used synonyms are recklessness, and willful blindness. It should be noted that some decisions stress that those two terms are not synonymous with gross negligence. The analysis in this paper will bog down completely if I attempt to discern the differences between gross negligence, willful blindness and recklessness. It is probably safe to say that if the terms are not synonyms, then gross negligence would denote

the least offensive behaviour of the three terms. For the purposes of this paper, I will use recklessness and willful blindness as examples of types of gross negligence.

Recklessness: *Black's Law Dictionary* defines "recklessness" as:

> Rashness; heedlessness; wanton conduct. The state of mind accompanying an act, which either pays no regard to its probably or possibly injurious consequences, or which, though forseeing such consequences, persists in spite of such knowledge. Recklessness is a stronger term than mere or ordinary negligence, and to be reckless, the conduct must be such as to evince disregard of or indifference to consequences, under circumstances involving danger to life or safety of others, although no harm was intended. Blackburn v. Colvin, 191 Kan. 239, 380 P.2d 432, 437.[13]

Willful Blindness: With respect to tax law, the British Columbia Supreme Court has explained the keys to "willful blindness" as follows:

> Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.[14]

2.01 NEGLIGENCE IN TAX LAW

It is no surprise that the law of negligence has limited application in tax law. Determinations of income and expenses do not need a reasonable person analysis. The standard of conduct of a taxpayer is usually irrelevant outside of the penalty provisions in the ITA. Even though negligence concepts have little relevance to most substantive tax matters, reviews of taxpayer's conduct are not all that uncommon. The issue of negligent conduct usually arises in a decision to reassess statute barred years.

The duty of care owed by taxpayers in filing their taxes is imposed by the ITA and not the common law. Subsection 150(1) of the ITA imposes a duty on taxpayers to file a tax return containing prescribed information. That subsection does not directly speak to a standard of care regarding the content of tax returns.

The taxpayers' standard of care for filing tax returns is found in subsection 152(4) of the ITA. It is inferred from the power of the Minister of National Revenue (the "**Minister**") to assess or reassess income tax returns beyond the normal reassessment period.

The Minister is authorized to reassess outside of the normal reassessment period if the person who has filed a return has made any misrepresentation that is attributable to neglect, carelessness, or willful default, or has committed fraud in filing the return. By inference, the *minimum* standard imposed on taxpayers is that they must not be neglectful or careless[15] in filing their tax returns.

Imposition of a statutory duty of care on taxpayers to not be careless in filing tax returns is not that surprising. If one take the view from the level of the forest and not the trees, it is easy to conclude that Canadians should have each other in contemplation as "neighbours" when preparing and filing their tax returns. Failure to take adequate care causes "harm" if the result is that wrongdoers do not pay their fair share of taxes.

Statute Barred Years: Case Law

Subsection 152(4) of the ITA does not use the term "negligence". It uses the terms neglect and carelessness. Some tax court decisions describe carelessness as a synonym for negligence. Other decisions are silent on that issue. It may well be that "carelessness" is not negligence. A comprehensive review of decisions has been undertaken elsewhere.[16] A comparison of two fairly recent decisions provides some insight into the possible standard of care imposed on taxpayers.

The Tax Court has on occasion emphasized the remedial nature of subparagraph 152(4)(a)(i), almost to the exclusion of evidence of negligence by the taxpayer. At other times, the court has focused its attention on the conduct of the taxpayer in priority to ensuring that the "correct" amount of tax has been paid. Good examples of the differing approaches of the tax court can be found in *College Park Motors Ltd. v. R.* ("*College Park Motors*")[17] and the more recent decision of *Aridi v. HMQ* ("*Aridi*").[18]

2.02 UNQUALIFIED DUTY OF COMPLIANCE

The facts in *College Park Motors* were summarized very well in a CTF Current Cases summary from 2010:[19]

> College Park Motors and Joseph Alan Holdings were members of a group of 10 companies that operated automobile dealerships in the prairies and the holdings company which rented real estate to the other companies in the group. When the Appellants filed their income tax returns for the years in issue, they claimed the small business deduction and did not calculate or report their liability for Part I.3 tax. The entire group of companies used the same chartered accountant to prepare their returns and had done so for more than 20 years. Before the returns were filed, the principal of the group of companies (Mr. Ulmer) would meet with the accountant and review each company's return before signing them. The evidence was that this meeting would take approximately one day and that Mr. Ulmer was familiar with the financial condition of each company in the group. A few years later, Mr. Ulmer was made aware of the error that was made in reporting the companies' incomes. Mr. Ulmer brought the error to the attention of the companies' CA and the decision was ultimately made to make a voluntary disclosure for the year at issue in the appeal as well as the subsequent years where the same mistake had been repeated. The Appellants were reassessed beyond the normal reassessment period for Part I.3 tax and to disallow the claimed small business deduction. The Appellants agreed that the substance of the reassessment was correct but they took issue with the timing of the reassessment. The Appellants did not take issue with the reassessments for the years that were not statute-barred.[20]

From the decision, it is apparent that the error in the tax filing came at the hand of the corporate

accountant. The principal of the corporations testified that he was familiar with the financial conditions of each company in the corporate group, he reviewed the monthly financial statements carefully, and that he spent a full day with the corporate accountant reviewing the various tax returns of the corporate group prior to signing them. The Tax Court found that the corporate principal and the corporate accountant were careful and conscientious people.[21] However, the Court found that either or both of them were capable of a momentary lapse of care.[22]

There was no issue about whether the corporate principal had provided all of the correct information to the corporate accountant and it was accepted that the corporate principal had reviewed the returns before they were filed. The Court seems to have accepted that the appellant's record keeping was exemplary and that the accountant was given full and accurate particulars of the corporate financial affairs.[23]

The Court found that the returns were filed carelessly filed for the following reasons:

> If Mr. Ulmer had reviewed the draft returns as carefully as a wise and prudent taxpayer would, then he would have read the questions on page 2 and he would have seen there the questions relating to Part 1.3 tax. Not knowing what they referred to, he would have asked Mr. Baert what Part 1.3 tax is, and he would have learned that Mr. Baert did not know either. At that point they would have referred to the guide item 115, or some other source, and they would have learned that the answers to two of the questions relating to Part 1.3 should be "yes", that the Part 1.3 return should be filed with the T2 return, and that the small business deduction was not available to the appellants. It is immaterial whether the carelessness lies in failing to read all the questions on page 2, or, having read the questions, in failing to make the necessary inquiries to find out what Part 1.3 tax is all about. In either event, he did not take the required degree of care.[24]

The Court explains the standard of care owed by taxpayers and the reason for the particular standard of care.

> **At the risk of redundancy, I wish to reemphasize that the purpose of subparagraph 152(4)(a)(i) is not penal but remedial.** It balances the need for taxpayers to have some finality in respect of their taxes for the year with the requirement of a self-reporting system that the taxing authority not be foreclosed from reassessing in those instances where a taxpayer's conduct, whether through lack of care or attention at one end of the scale, or willful fraud at the other end, has resulted in an assessment more favourable to the taxpayer than it should have been. This, quite rightly, is not a penalty case. It is simply a case where the fisc should not be deprived simply by reason of the **passage of time between Mr.Ulmer's *innocent* mistake and his discovery of it,** and resulting voluntary disclosure.[25] (*my emphasis*)

Bowie J. does not equate carelessness as equivalent to negligence. In civil law, a finding of negligence depends on the court making a determination that a person did not act reasonably in the circumstances. This standard is flexible depending on the circumstances. If a standared of carelessness includes innocent mistakes, then carelessness is not synonymous with negligence.

It is unclear from the decision when the actions of a taxpayer would not be careless. The primary consideration for the court is ensuring that the correct amount of taxes have been paid.

If careful taxpayers who make innocent mistakes cannot avail themselves of the prerequisite of the Minister proving something more than an innocent error then the standard of care is essentially unqualified.

2.03 QUALIFIED DUTY

In *Aridi*, Hogan J. provides a comprehensive review of key decisions regarding neglect and carelessness[26] particularly when the conduct of an advisor is also in issue. After reviewing the relevant case law, Hogan J. concluded that there is abundant and divided case law on the possibility that a taxpayer has not acted negligently in relying on the negligent advice of an advisor.[27]

In *Aridi*, the Court found the actions of the advisor/accountant were negligent, but the taxpayer/appellant had not acted negligently in filing the relevant tax returns based on the advice of that accountant. In particular, the Court noted the following evidence to support a finding that the appellant was not negligent.[28]

1. The appellant knew that a taxable capital gain would need to be reported on the disposition of certain property.
2. The appellant believed that the gain would be taxable.
3. He provided all of the documents to his accountant.
4. His accountant advised him of a possible deferral regarding the treatment of the capital gain.
5. The appellant asked the accountant a few questions and accepted the accountant's proposal, which seemed advantageous.
6. The accountant prepared the tax return.
7. The appellant and the accountant reviewed the tax return for more than an hour and the taxpayer asked questions about the return and the deferral on a capital gain.
8. The appellant was not required to ask precise and technical questions about the tax deferral proposed by the accountant.

The Court says further that the following common factors are found in decisions that find the taxpayer acted negligently:[29]

1. The taxpayer had not carefully examined or had simply not read the tax returns before signing them.
2. The taxpayer could have easily noticed the existence of the misrepresentation if the taxpayer had asked questions or taken the trouble to do a more thorough analysis.
3. The taxpayer had to know, given the situation, that there was a misrepresentation.

The Court found that the conduct of the appellant was that of a wise and prudent person. Ultimately, the court concluded that it is insufficient for a taxpayer to rely on the negligence of an advisor as a reason not to open a statute barred year. The taxpayer must also show that they acted prudently in the circumstances.[30] As the appellant's reliance on his accountant was not imprudent, the normal reassessment period applied.

2.04 SUMMARY

It is fair to ask whether the term "carelessness" should be equated with taxpayer negligence. The law of negligence allows for a reasonable people to make mistakes. If the standard care imposed by Bowie J. in *College Park* is correct, then the negligence standard does not apply.

If the *Aridi* standard applies and the CRA must show that a tax filing was made negligently to reopen a statute barred year. On the facts of that case Mr. Aridi did not make any errors. A narrow holding of the decision is that the negligence of an advisor is not attributed to a taxpayer who was not negligent. Presumably, if Mr. Aridi had made an error, the court would have been justified in examining whether he took reasonable steps in the circumstances so that the error would not be deemed to be negligent.[31]

As a precursor to determining a gross negligence standard for the assessment of gross negligence penalties, the carelessness standard is of no help if innocent errors are starting place for a determination of gross negligence.

If, however, the word "carelessness" is equivalent to a negligence standard, then there is a starting place for the determination of gross negligence. Negligence would be found where the taxpayer was imprudent in filing their tax return. Here, the comments in *Aridi* are of assistance.

The law of negligence does not require perfection. Reasonable people can make mistakes and not be negligent if they were acting prudently. It is safe to conclude that Mr. Aridi's conduct was prudent in the circumstances. The description of the level of review and consultation he undertook with his accountant suggest that he was more diligent than many taxpayers, whether they file personally or with the assistance of an accountant. Is it fair to use Mr. Aridi as a prototype of a reasonable person? After all, Hogan J. finds eight factors indicating just how prudent Mr. Aridi was in the circumstances, and finds that there are three factors that are common to cases where the statute barred year is re-opened.

PART III -- GROSS NEGLIGENCE

The premise of this paper is that gross negligence must be considered in the context of the factors a court will consider in the context of negligence. *Aridi* says the following factors are common to cases of taxpayer negligence.

1. The taxpayer did not carefully examine or had simply not read the tax returns before signing them.
2. The taxpayer could have easily noticed the existence of the misrepresentation if the taxpayer had asked questions or taken the trouble to do a more thorough analysis.
3. The taxpayer had to know, given the situation, that there was a misrepresentation.

Presumably grossly negligent behaviour would require something more than the kinds of behaviour Hogan J. described as illustrative if taxpayer negligence. Just how far that behaviour would have to fall requires further analysis. How is gross negligence defined? What is the standard of care in gross negligence? Are there common factors in the determination of conduct that is grossly negligent?

3.01 GROSS NEGLIGENCE IN CIVIL LITIGATION

The concept of gross negligence has its roots in the common law.[32] The leading case law in Canada analyzes gross negligence in the context of statute law. In a modern context, gross negligence developed as a statutory effort to limit the liability of certain defendants, including certain vehicle operators ("guest passenger vehicles"), first responders, and municipalities performing essential services.[33] As a starting place, gross negligence is not founded on the desire to punish certain behaviour. It is a statutory effort to limit liability.

More than a century ago the Supreme Court of Canada ("SCC") provided an analysis of the meaning of gross negligence in *Kingston (City) v. Drennan.*[34] The City of Kingston had passed a bylaw that required public roads to be kept in good repair; in so doing Kingston created a duty of care. The bylaw limited the city's liability to circumstances of gross negligence. The city was sued by a woman who had slipped and fallen in a snow bank and had been severely injured as a result. In affirming that the city had been grossly negligent Sedgewick, J. stated as follows:[35]

> That evidence—a portion of it above set out—showed that the slope was unnecessarily, unreasonably, and unsafely steep; that its existence and character must have for some time before the accident been brought to the knowledge of the authorities, or at least they must be presumed to have had such knowledge; and that it was a feasible, simple and inexpensive matter to remove all occasion of injury.

In summary, the city new about the problem and did nothing about it even though a remedy was feasible and inexpensive. Sedgewick, J. declined to define gross negligence, stating as follows:[36]

> I am not bold enough to enter upon a detailed investigation as to the difference between gross and other kinds of negligence….judges have been found to say that there are no degrees of negligence. However this may be we must, I suppose, give some meaning to this expression of the legislative will and the meaning I give to it is "very great negligence." (*my emphasis*)

The SCC expounded on the "very great negligence" test in the 1927. In *Holland v City of Toronto*[37]. The municipality, again, had a duty of care to keep the roadways safe and a statutory limitation of liability to situations of gross negligence. Again, the plaintiff had slipped and fallen on a sidewalk. Significantly, the defendant had been aware of the dangerous conditions on the sidewalk for at least a couple of days beforehand and had not moved to take any actions to correct the dangerous conditions.

Anglin, C.J.C. explained gross negligence as follows.[38]

> The term 'gross negligence' in this statute is not susceptible to definition. No *a priori* standard can be set up for determining when negligence should be deemed "very great negligence" - a paraphrase suggested in *Drennan v. City of Kingston* 27 SCR 46 which for a lack of anything better has been generally accepted.

Anglin, C.J.C. acknowledges that the definition "very great negligence" is inadequate. Despite this inadequacy, the court is bound by the legislation to analyse the defendant's conduct.

The court considers the elements of gross negligence. The factors are recognized as being subject to a variation in "infinite degree" but are considered vital in determining whether conduct amounted to gross negligence.

1. There must be a duty. In this case, the duty arose out of the legislation. The duty was an obligation to remove or correct the dangerous road conditions.
2. The Court then analyses the standard of care. To be grossly negligent, the city had to have notice, constructive or otherwise, of the existence of the dangerous conditions.
3. Finally, in light of that knowledge, there must be a period of time of neglect in fulfillment of the duty.[39]

Failing to act to reduce the risk of harm to a known hazard is not always the key. For example, *Seymour v. Maloney*[40] considered gross negligence in the context of guest passenger legislation.[41] The defendant Maloney was found to be engaged in conduct that amounted to gross negligence for injuries caused by a vehicle he was driving at excessive speeds for a length of time while in an intoxicated state.

MacDonald J stated as follows:[42]

> The guest passenger has only a qualified right of action against his negligent driver, *viz.*, for "very great negligence" ... and since even gross negligence is a breach of duty, the duty owing by a driver in such cases, is simply the marginal duty to refrain from very great negligence.

Absent the legislative restraints, the assumption is that the duty of care on the defendants will be a typical duty of care. By limiting claims to circumstances of gross negligence, the duty of care still exists, but the standard of care is reduced. The standard of care is no longer to act reasonably in the circumstances. Instead, the duty is a duty not to be grossly negligent or very greatly negligent, a phrase that is not susceptible to an *a priori* definition.

The very great negligence phrasing of the SCC is replaced by the "very marked departure test" in *McCulloch v. Murray*[43], another guest passenger decision. The appellant had been injured while riding as a passenger in a vehicle. The actual conduct of the defendant is not known.[44] The Supreme Court does not detail the conduct of the driver other than to note that the jury found that his driving was reckless.

The often quoted paragraph written by Duff, C.J. for the majority states as follows[45]

> All these phrases, gross negligence, willful and wanton misconduct, imply conduct in which, if there is not a conscious wrongdoing, there is a very marked departure from the standards by which responsible and competent people in charge of our motor cars habitually govern themselves.

The Supreme Court comes close to saying that gross negligence is a conscious wrongdoing, but steps back from that requirement, with the "marked departure" qualification. The quote also indicates that gross negligence has two forms: (1) conscious wrongdoing; and (2) a very marked departure from the standards of responsible people.

These somewhat antiquated decisions show that conceptually gross negligence has long vexed the courts. In 1926 Professor Cecil A. Wright reviewed the history of gross negligence and the difficulties inherent in the phrase. [46] He called gross negligence a "veritable chameleon", meaning an absence of slight care, absence of the upmost care, and the absence of ordinary care. "Since the term has such a variety of definitions it has no value in the law."[47]

Over 80 years later, professor Lewis Klar described our current understanding of gross negligence in a civil context.[48]

> It is clear that the phrase 'gross negligence' itself is not susceptible of a clear definition to assist courts in deciding whether it has been shown...One writer has described the doctrine of different degrees of care as "an untested invention of fancy" which does not spring from the common law. (Green, High Care and Gross Negligence)...It has been agreed, however, that despite these objections, whether there has been gross negligence or not is a question of fact depending entirely upon the circumstances of cases...Despite the difficulty involved in defining the term gross negligence, that the intention of its use has been to lighten the legal liability of defendants engaged in certain activities... (*my emphasis*)

The continued lack of clarity of the meaning of gross negligence in a civil context is seen in the 2010 Ontario Court of Appeal decision in *Crinson v. City of Toronto*[49] The Court of Appeal notes gross negligence has a long history of searching for a proper definition and concluded the jurisprudence shows that the courts have not defined the term with any linguistic precision.[50] The Court only finds that the breach of the duty of care must rise to a level that can properly be described as gross negligence[51].

Crinson again considered the conduct of a municipality. Mr. Crinson had slipped and injured himself on icy Toronto streets. Like *Drennan* and *Holland* the Court found that the defendant city was aware of the dangerous sidewalk condition and had not taken sufficient steps to address the problem.[52] The court also found prior knowledge of the unsafe conditions and the failure to take action in a reasonable time.

The court defined the breach of the standard of care in terms of what would be expected of a reasonable defendant:

> [55] In our view, the evidence clearly establishes that the reasonable steps required of the City in this case were to commence the sidewalk salting earlier, in the same manner that the road salters were sent out because the patrollers were concerned about icy conditions. The failure to do so amounts to gross negligence. (*my emphasis*)

The above passage is somewhat troubling, as it appears to conflate "gross negligence" with simple negligence. Perhaps the use of the phrase "reasonable steps" is just a poor choice of words on the part of the Ontario Court of Appeal. Alternatively, the decision may also be an indication of the court's distaste for a statutory limitation on compensation of harm.

3.02 SUMMARY: CIVIL LITIGATION

The civil law does not show much development in the concept over the last 100 years. The case law indicates that gross negligence can be found in (at least) two categories.

1. Where there has been a conscious wrongdoing; or

2. Where the behaviour shows a very marked departure from the standards of responsible people.

Outside of these general categories civil case law may be of little use for defining gross negligence in the ITA. The rationale for the concept "gross negligence" in a civil context is meant to limit liability to limited circumstances and the goal is to remedy losses suffered from the behaviour. In tax law, gross negligence is also limited to certain circumstances, but the goal is punishment of that behaviour.

PART IV -- CRIMINAL GROSS NEGLIGENCE

Criminal law is arguably a more appropriate source for decisions explaining the meaning of gross negligence in respect of the imposition of penalties. The civil law is concerned with compensation for harm suffered by the acts of others. Penalties, whether civil or criminal in nature, are meant to punish. It may well be that the courts look at gross negligence differently when deciding whether to mete out punishment.

The use of criminal negligence cases to inform civil gross negligence penalty cases, however, must be made cautiously. The burden of proof in criminal cases is "beyond a reasonable doubt". In civil cases the burden is "on the balance of probabilities." It should not be assumed that criminal negligence trial finding of "not guilty" would lead to a result of "not grossly negligent" if the matter was examined in a civil trial. The burden of proof in criminal matters is such that different results are entirely possible.

The terminology in the Criminal Code refers to *criminal* negligence, not *gross* negligence. Criminal negligence under the Criminal Code was initially a codification of the English concept of negligence causing death in homicide cases. Jeremy Horder describes that development as follows,[53]

> The insistence that the negligence be 'gross' or 'criminal' before it will suffice in respect of a death caused is a nineteenth –century development, one that gathers pace following the increase in maximum penalties for manslaughter in 1822.

In *Gosset v. R.* Lamer C.J.C. explained the different purpose of the phrase "gross negligence" in criminal and civil cases.[54]

> Unlike negligence under civil law, which is concerned with the apportionment of loss, penal negligence is concerned with the punishment of moral blameworthiness. The practical implication of the distinction is that a finding of negligence under the Code, whatever degree or species of negligence is contemplated by the charging section, is made somewhat differently than a finding of civil negligence. Penal negligence incorporates the particular frailties of the accused, if any, because he or she could not

have acted other than they did in the circumstances.

When penal negligence is in issue further inquiries are required. Lamer C.J. described the analysis as follows:[55]

> The analytical distinction between these types of personal factors is best illustrated in a checklist of questions for the trier of fact. In the determination of fault under s. 86(2) of the Code, it would be necessary for the jury to be instructed to consider the following questions:
>
> > (1) Was the conduct of the accused a marked departure from the standard of care of a reasonable person in the circumstances of the offence? (*my emphasis*)
> >
> > If the answer to this question is no, then the accused must be acquitted, since his or her conduct was not objectively negligent. If the answer is yes, however, then the jury must be instructed to consider the second question:
> >
> > (2) Was the conduct of the accused a marked departure from the required standard of care because:
> >
> > > (a) he or she did not turn his or her mind to the duty of care and thus to the risk likely to result from the conduct; or
> > >
> > > (b) he or she lacked the capacity to turn his or her mind to the duty of care, due to human frailties?
>
> If the answer is (a) then the penalty must be assessed; if the answer is (b) then the penalty should not be assessed.

The subjective lack of intent in criminal negligence cases has perplexed the courts[56] and the SCC has revisited the rules for criminal negligence several times over the past 25 years. A sampling of the more recent SCC decisions shows that there are two general categories of criminal negligence that repeat the broad categories set out in the civil sphere.[57]

In one category, the wrongdoer is presumed to a have a set of skills that are common to a similar group. Doctors, lawyers, accountants and, in the examples below, drivers, are all presumed to possess a set of skills so that it is possible to determine a reasonable standard of conduct and a marked departure from that standard.

In the other category, there is no reference to an objective baseline of a reasonable person. Instead, the SCC examines the knowledge or constructive knowledge of the wrongdoer and the actions of the wrongdoer in light of that knowledge. It is the failure to act in light of that knowledge that amounts to gross negligence.

In both categories the analysis is consistent with the gross negligence analysis conducted by the courts in civil law. However, in addition to the examination of the wrongdoer's knowledge, the courts examine whether there are exculpatory reasons for the failure to act.

Very Marked Departure Gross Negligence Test

A common starting place for a review of the application of gross negligence principles in a criminal negligence penal case is *R. v. Hundal*.[58] Mr. Hundal, was charged with dangerous driving under section 233 (now 249) of the *Criminal Code*. He was involved in a fatal motor

accident in heavy afternoon traffic on a wet four lane street in downtown Vancouver. The deceased had waited at the intersection for a red light and was proceeding through it on a green light. He had crossed the crosswalk and the two west-bound lanes when his car was struck broadsides by Mr. Hundal's overloaded truck in the east-bound passing lane.

Mr. Hundal testified that he believed that he could not stop in time and had proceeded through the intersection. The police testified that there was a significant delay between red lights and green lights at the intersection. Other witnesses testified that the defendant had proceeded through the intersection at between 50 and 60 kms per hour.

Cory J. for the majority upheld the conviction on the basis that Mr. Hundal's conduct represented a gross departure from the standards of a reasonably prudent driver.[59] The trier of fact was provided with the following framework for reviewing the conduct of the wrongdoer.[60]

1. The licensing requirement for driving ensures that all drivers have a knowledge of the reasonable standard of care required.
2. The trier of fact must be satisfied with the conduct of the defendant amounted to a marked departure from the standard of care that a reasonable person would observe in the defendants situation.
3. If the defendant offers an explanation, the trier of fact should examine that explanation in light of how a reasonable person would have reacted in similar circumstances.

In *R. v. Beatty,*[61] the accused was charged with dangerous operation of a motor vehicle causing death under section 249 of the *Criminal Code.* The essential facts were that Beatty's truck suddenly crossed the solid center line into the path of an oncoming vehicle, killing all the occupants. Witnesses confirmed that the accused had been driving in a proper manner prior to the accident. There was no evidence of mechanical failure. Intoxicants were not a factor. The accused testified that he did not know what happened and assumed that he had fallen asleep at the wheel. At trial the Court found that a few seconds of negligent driving could not support a finding of a marked departure from the standard of care of a reasonable prudent driver. The Court of Appeal found that crossing the double yellow line was an objectively dangerous and marked departure from the requisite standard of care. Mr. Beatty was found not guilty.

At the SCC Charron J. stated the following with respect to criminal negligence.[62]

> ...unquestionably, conduct which constitutes a departure from the normal expected of a reasonably prudent person forms the basis of both civil and penal negligence…
>
> ...this test for penal negligence modifies, the purely objective norm for determining civil negligence. It does so in two important respects. First, there must be a "marked departure" from the civil norm in the circumstances of the case...the Court adds a second test in light of the fact that this is a criminal code offence.[63]The trier of fact must consider whether a reasonable person having those same thoughts would be aware of the risks from the particular conduct in question.[64]

Charron J. confirmed that the adoption of an objective test for criminal negligence is appropriate on the basis that drivers have an assumed knowledge of the reasonable standard of care required of all licensed drivers.[65]

Knowledge or Constructive Knowledge Gross Negligence Test

In *R. v. Tutton*[66] the defendants were charged with criminal negligence causing the death of their five-year-old son. The Tuttons were deeply religious and believed in faith healing, including a belief in the miraculous cure of illnesses.

Two years before their son's death he had been diagnosed as diabetic. Their doctor explicitly told the Tuttons that their son needed insulin to live. In the fall of 1980 Mrs. Tutton stopped giving her son insulin and within two days he was admitted to hospital. The absence of insulin had made their son very ill. The attending doctor admonished the Tuttons for consciously withholding insulin and advised them that he would need insulin for his whole life.

After her son was released from hospital, Mrs. Tutton believed that she had received a vision from God that her son was cured. She stopped giving him insulin and he died within three days. The Tuttons were charged and convicted of manslaughter for failing their duty to provide the necessaries of life for their child.

The Criminal Code provision uses the phrase "wanton or reckless disregard." The judgements are not in agreement on whether that phrase is synonymous with gross negligence, but the test employed by the court in respect of the conduct of the wrongdoer is familiar.

In *Tutton*, the judges agreed that the Tuttons were made aware by medical practitioners of the necessity of providing insulin. The failure of the Tuttons to give their son insulin amounted to criminal/gross negligence that might be excused by the particular circumstances. A conviction should occur if an accused either adverted to or became aware of the risk to the lives or safety of others or wilfully closed his eyes to the reality of that risk.[67]

The Tutton's belief in faith healing needed to be considered by any trier of fact before a conviction could be entered.

In *R. v. J. F.* [68] the SCC considered criminal negligence in the context of manslaughter. Briefly, M was a four year old child who died in his foster home from multiple blunt traumas to his head. His body was also extensively bruised. M's foster mother confessed to causing the injuries and pled guilty to manslaughter.

The issue before the SCC were the charges against M's foster father. He had been charged with manslaughter by criminal negligence and manslaughter by failure to provide the necessaries of life. At the lower courts the foster father had been acquitted on one of the charges and convicted on the other. The SCC focused its attention on the inconsistent verdicts.[69]

Under both counts, the jury was required to determine not what the defendant knew or intended, but he what he ought to foreseen.[70] The SCC reviewed the evidence entered at trial on the extent of bruising and the length of time that it was apparent that M was suffering abuse at the hands of his foster mother.[71] The foster father's conduct was examined in light of the objective proof of the physical assaults that were occurring. The Crown's appeal was dismissed.

4.01 CONCLUSIONS FROM CRIMINAL NEGLIGENCE CASES

The SCC has considered criminal negligence and applied principles used in a determination of gross negligence several times in the last 25 years. The cases are before the SCC because of the difficulty of applying a test that finds fault based on the actions of an accused in comparison to the actions of a reasonable person.

In all of the cases, the Crown was obligated to show the wrongdoer's conduct represented either a marked departure or a marked and substantial departure from the conduct of a reasonable person in the circumstances. That phrasing is still as vague as the phrasing of the SCC in the *Drennan* decision from 1897. What is of interest is that there, again, appears to be two categories of evidence that are determinative.

In one category, the court looks for a standard of care based on an assumed baseline of knowledge that all members of a particular group should have. For motor vehicle offences, that base line is the training and skills that are required to get a driver's license.

In the other category, a baseline set of skills is not assumed. Instead, the wrongdoer has knowledge or constructive knowledge of the dangerous situation and fails to take the appropriate action in light of that knowledge. However, in penal cases, the SCC says that the explanations for the conduct of the wrong doer may mediate against finding criminal negligence.

PART V -- SUMMARY: GROSS NEGLIGENCE IN THE CIVIL LAW AND THE CRIMINAL LAW

In the civil and criminal law, the definition of gross negligence has not really changed in over 100 years. The phrase has been used interchangeably with phrases such as recklessness, and willful blindness. The cases fit into two general categories.

1. Knowledge or constructive knowledge. In these cases the wrongdoer either new or was willfully blind about a dangerous situation and failed to act correctly in light of that knowledge.
2. Recklessness. In these cases the wrongdoer's conduct can be compared to some kind of objective standard. The actions of the wrongdoer are far beyond an acceptable standard in the circumstances.

Both categories provide the trier of fact with evidence that is not particularly subtle. In criminal penal cases, the SCC proposes that the wrongdoer is afforded some opportunity to provide an exculpatory explanation for the impugned behaviour. This distinction is only significant in that the circumstances of the accused should only be used to exculpate the accused. In civil negligence, the actions of the wrongdoer are to be compared against a reasonable person in similar circumstances. Those circumstances may increase or decrease the chance of finding a wrongdoer negligent.

Despite these general categories, a finding of gross negligence sometimes seems harsh. The decisions finding municipalities grossly negligent for failing to keep the city streets clean of snow are understandable from the perspective of "failing to act on a known risk." The response time to remove the risk is only a few days. Is it reasonable to find a wrongdoer grossly negligent where the time frame for responding to a known harm is so short? In some decisions, for

example *Crinson*[72] the court's reasoning is fairly easily read as ignoring the gross negligence standard and applying a negligence standard of care on the defendant.

The most frustrating aspect of the decision is that the definition of gross negligence has not really been refined in over 100 years. Very smart judges have continued to echo the comments of the SCC in the *Drennan*[73] decision. Sedjwick J. declined to enter into a detailed investigation of the difference between gross negligence and other types of negligence and only reluctantly gave it the definition of "very great negligence." The refinements of that description/definition over the last 100 years have not been particularly illuminating.

PART VI -- GROSS NEGLIGENCE DECISIONS IN TAX LAW

In civil law, the concepts of negligence, duty of care and standard of care are robust. In tax law, it is unclear at this time whether a negligence standard applies anywhere under the ITA.

The premise of this paper was that finding a negligence standard of care for taxpayers is a necessary antecedent to finding a gross negligence standard for taxpayers. It is clear that there is no agreement on the negligence standard for taxpayers at this time. Despite the lack of an agreement on the meaning of "carelessness" in tax law, the Tax Court routinely considers gross negligence penalties. This is a court with a limited mandate. It would not surprise me if the tax court had rendered more gross negligence decisions than any other court over the last 10 years.

From the research conducted for this paper we determined that 395 TCC cases between 2004-2014 mention the phrase "gross negligence". Of those cases 224 dealt with gross negligence and/or gross negligence administrative penalties under the *Income Tax Act*. In comparison, in British Columbia, 119 BCSC cases mentioned "gross negligence" between 2004-2014 and 32 cases actually dealt with the issue of gross negligence in some capacity.[74]

The decisions rendered by the tax court judges have not suffered from the lack of a clear negligence standard. The Court typically holds the CRA and DOJ to a high standard of proof in disputes involving the assessment of gross negligence penalties. Where the Court confirms the assessment of the penalty the reader is usually left shaking his or her head at the audacity of the taxpayer in bringing the matter to court.

My analysis of various tax court decisions shows that Tax Court judges often ignore the CRA audit guidelines. Instead, the judges are looking for the same types of behaviour that judges in the civil and criminal sphere examine. Despite Anglin CJC's comment in *Holland*[75] that no *a priori* standard can be set up for determining when negligence should be deemed "very great negligence" the Tax Court has been consistent in its approach.

Most decisions that make a finding of gross negligence are premised on the taxpayer's knowledge (constructive or real) of a particular filing obligation and the failure to act in light of that knowledge. In other cases, the taxpayer is very disorganised, unable to explain their conduct, and has materially benefitted from that state of affairs. It is easy to call the taxpayer's behaviour reckless in the circumstances.

Below, the reader will find summary sample of interesting gross negligence penalty cases. The sample is provided in order to give the reader a variety of scenarios where gross negligence penalties have been assessed and also provide a summary of the court's reasoning in the

decisions. Some of the important, but troubling decisions are also provided. These cases typically do not turn on onion skin differences between gross negligence, willful blindness and recklessness. If anything, the use of various terms has more to do with a description of the actual behaviour being scrutinised.

Venne v. R. 1984 CarswellNat 210[76]

This is a leading case on the standard for the reassessment of otherwise statute-barred years and the interpretation of "gross negligence" for income tax purposes. The case concerned a taxpayer who was reassessed for failing to report a substantial amount of income, including certain business income, mortgage interest and bank account interest. The taxpayer was reassessed for a period of several years, many of which were otherwise statute-barred. The taxpayer was also assessed gross negligence penalties.

On appeal to the Federal Court Trial Division, the taxpayer was found to have been sufficiently negligent for the reassessment of otherwise statute-barred years. However, the Court held that the taxpayer's circumstances did not warrant the assessment of gross negligence penalties.

In examining the standard for reassessing statute-barred years, the Court held that for the purposes of section 152(4)(a)(i), neglect is established by showing that the taxpayer has not exercised reasonable care. It also noted that the term “neglect” in this section “involves a lesser standard of deficiency akin to that used in other fields of law such as the law of tort.”[77]

The Court found that there was ample evidence to suggest that the taxpayer's bookkeeper did not do an adequate job of preparing the taxpayer’s income tax returns.[78] For two reasons, however, the Court found that bookkeeper's negligence did not prevent the taxpayer from being found to have acted with neglect. First, the taxpayer did not read his income tax returns before signing them. Second, due to the magnitude of the unreported income and the steady growth in the taxpayer's bank accounts, the errors in his income tax returns should have been sufficiently obvious that “a reasonable man of even limited education and experience, especially one who was apparently a very successful businessman and investor, should have noticed.”[79]

The Court stated that for a gross negligence penalty to be applicable pursuant to section 163(2) “there appears to be a higher degree of culpability required, involving either actual knowledge or gross negligence, than is the case under section 152(4)...where mere negligence seems to be sufficient.”[80] Furthermore, “[g]ross negligence must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not.”[81]

The Court held that the taxpayer did not “knowingly” make misstatements. “It noted that the taxpayer had a grade five education, who worked and paid tax in a language that was not his first language. While concluding that the taxpayer had been negligent, the Court was unwilling to find that the taxpayer's negligence reached the standard of gross negligence. The Court held that “while it may have been naive for him to trust his bookkeeper...I do not think it was gross negligence for him to fail to challenge the bookkeeper with respect to the business computations...However egregious the errors committed by the bookkeeper..., it is quite conceivable that they were not in fact noticed by the [taxpayer] and his neglect in not noticing them fell short of constituting gross negligence.”[82]

Hine v. R. 2012 TCC 295[83]

This case concerned the assessment of gross negligence penalties against a taxpayer whose spouse prepared the business records and tax returns for the taxpayer's business of buying and selling houses. In preparing the taxpayer's return, the spouse failed to report $157,965 in business income on his 2006 tax return. The spouse's error caused a loss of $131,653 to be claimed in respect of the 2006 taxation year.

The Minister reassessed the taxpayer and imposed gross negligence penalties. While the tax arising from the reassessment was less than $5,200, the gross negligence penalty exceeded $28,000.

On appeal, the TCC cancelled the gross negligence penalties. It found that the taxpayer relied completely on his spouse to keep proper business records and prepare his tax returns. The spouse had a background in financial accounting, and her previous manager testified that he had no reservations about her skill set in accounting and financial management. As well, the spouse called the CRA multiple times to determine how to report the business income.

The spouse testified that her error was caused by the fact that the taxpayer's lawyer had provided certain documents required for the preparing of the income tax return only a few days before the filing deadline. The TCC accepted that although "logical suspicions" were raised, neither the taxpayer nor the taxpayer's spouse were indifferent with respect to reporting of income. The TCC held that gross negligence penalties were not appropriate because the taxpayer and the spouse "meant to be diligent and accurate in the way they reported the income."

Rohani v. R. 2009 CarswellNat 229[84]

This case concerned a taxpayer who claimed credits in respect of a charitable donation of $9,000. The Minister issued a notice of reassessment to reduce the taxpayer's charitable donations to $2,127 and to add a gross negligence penalty. The taxpayer admitted that she erred in reporting the charitable donations on her income tax return. However, she testified that the error resulted from a major depressive disorder and the multiple medications that she was taking for her condition.

The TCC allowed the taxpayer's appeal against the gross negligence penalties. The Court noted that section 163(2) imposes a "higher burden" than simple negligence. It held taxpayer's conduct must be judged against her background.[85] The Court accepted that the taxpayer's depressive disorder was responsible for the error on her tax return. Accordingly, the Court concluded that the taxpayer's conduct did not rise to the level of gross negligence.[86]

Rui De Couto v. R. 2013 TCC 198[87]

This case concerned a taxpayer who was the sole shareholder, officer and director of a corporation that operated an aluminium door and window installation business. The taxpayer's wife prepared and kept the books and records for the business. The taxpayer appealed reassessments that had been issued in respect of three taxation years, two of which were outside the normal reassessment period. In these reassessments, the Minister assessed considerable

shareholder benefits to the taxpayer for all three of the taxation years and imposed gross negligence penalties. The taxpayer argued that the shareholder benefits assessed were either reimbursed personal expenses of the company borne by the taxpayer or shareholder loan repayments of capital initially advanced to the company by the taxpayer and repaid by the company on a tax-free basis.

The TCC held that "[a]lthough this is not a case of the [taxpayer] deliberately trying to deceive, it nonetheless remains the case where no probative records, evidence or documents could reliably identify the source, recipient or beneficiary of any moneys paid". This circumstance was found to have arises arose as a direct result of the "incessant and prolific commingling of personal, business and other accounts, investments and assets without any consistent or reflective record keeping."[88]

Based on its findings of fact, the TCC held that it was appropriate for the Minister to assess taxation years that were outside the normal reassessment period. It stated that the taxpayer's omissions represented carelessness, if not neglect

In reviewing the issue of gross negligence penalties, the TCC considered *Venne v. R.*(see above) and noted that the different standards apply to the assessment of taxation years that are outside the normal reassessment period and the assessment of gross negligence penalties.[89]

The TCC found that the taxpayer and his spouse had "limited business acumen, language facility, education and managerial background" and that "they were clearly confused and failed to understand their obligations."[90] The TCC also found that the taxpayer's poor records did not appear to be the result of "advertent acts of deceit, deliberate omissions or culpable intention on the part of the [taxpayer]."[91] Accordingly, the TCC concluded that gross negligence penalties should not be assessed.

Hougassian v. R. 2007 TCC 293[92]

This case concerned a taxpayer who reported only $985 of the $275,435 of interest income that he had earned in a year. The taxpayer's total income for the year was approximately $3.1 million. The Minister reassessed him to include $275,435 of interest income in his income and to impose a gross negligence penalty in relation to the unreported interest income.

The TCC upheld the gross negligence penalties that had been assessed to the taxpayer. In deciding that such penalties were appropriate, the Court noted both the magnitude of the omission and the fact that the taxpayer had earned substantial interest income on the same account the previous year.[93] Finding that it was blatantly obvious that the amount reported was too low, the Court held that the taxpayer's conduct amounted to "more than simple carelessness."[94] "It showed an indifference as to whether the ITA was complied with or not."[95]

The TCC found that the taxpayer's gross negligence was not mitigated by reliance on a tax preparer, stating "[a]ny quick review of the line items in the tax return would have identified the fact that the interest was understated."[96]

Lacroix v. R. 2007 TCC 376, 2008 FCA 241[97]

This case concerned a taxpayer who was reassessed as a result of a net worth analysis. As a result of this analysis, the Minister concluded that the taxpayer had unreported income totalling $145,667 for the 1997 taxation year, $231,570 for the 1998 taxation year, $155,333 for the 1999 taxation year, and $26,103 for the 2000 taxation year. The Minister reassessed the taxpayer for all four taxation years (two of which were beyond the normal reassessment period) and assessed gross negligence penalties.

The taxpayer argued that the source of the allegedly unreported income was a loan that was granted to him by the father of a child he had saved from drowning.. This explanation was not accepted by the TCC based on the implausibility of the testimony. The TCC also concluded that Minister had discharged the burden of proof and was, therefore, entitled to reassess beyond the normal reassessment period and impose gross negligence penalties.[98]

On appeal, the Federal Court of Appeal, upheld the TCC's ruling. In its reasons, the Court stated that the rejection of the taxpayer's explanation for the discrepancy between his net worth and his reported income did not in itself "justify a reassessment beyond the statutory period or warrant the assessment of a penalty."[99] However, the Court stated that if a taxpayer earns unreported income and does not provide a credible explanation for the discrepancy between his net worth and his reported income, the Minister has discharged the burden of proof within the meaning of section 152(4)(a)(i) and 163(2).[100]

Baynham v. R. 1997 CarswellNat 1630[101]

This case concerned two spouse who loaned money to a development company in order to finance its townhouse development project. The borrower paid interest and a bonus. Neither reported the interest or the bonus in their income. The Minister reassessed the taxpayers on the basis that the bonus was on account of income, not capital, and imposed gross negligence penalties.

The TCC dismissed the taxpayers' appeal. It held that the bonus was on account of income and that the taxpayers were liable for the gross negligence penalties. In the gross negligence penalty analysis, the TCC found that the taxpayers did not include the amounts in their income and made no indication in their income tax returns that they had received such amounts.[102] The TCC also found that "they took no steps whatsoever, at any time, to file an amended return or to indicate in any way to the Minister that they had received any unreported amounts until after the Minister's agents had contacted them."[103]

The TCC noted that the taxpayers had reported interest and capital gains before and "therefore should reasonably have been aware as to the requirement to report them even if they had an honest and reasonable belief that the larger amounts were a "capital gain" rather than "income.'"[104] The TCC also commented on the fact that the unreported income "was very substantial in relation to their other income" and that it "should have been realized by any reasonable taxpayer that such amounts would at least have to have been reported."[105] The TCC then concluded that the taxpayers "acted with such want of care that it amounted to no care at all and that amounted to 'gross negligence' on the facts of this case."[106]

Villeneuve v. R. 2002 CarswellNat 4746, 2004 CarswellNat 141[107]

This case concerned a taxpayer who was approached by a CRA employee with a tax scheme. Pursuant to the scheme, the taxpayer received an income tax refund of over $12,000 in respect of found taxation years on the basis of incorrect as to marital status and the number dependent children. The taxpayer paid the CRA employee a 2/3 commission on the refund. He was surprised at the amount of the refund, and at one point told the CRA employee "to let the matter drop because it made no sense."[108] However, he nevertheless still deposited the refund into his bank account and paid the commission.

The Minister reassessed beyond the normal assessment period and imposed gross negligence penalties. The total amount owing was over $43,000. The Tax Court held that the Minister was entitled to assess beyond the normal reassessment period. However, it cancelled the gross negligence penalties on the grounds that the taxpayer's actions stemmed from thoughtlessness, unawareness or an error in judgement rather from wrongful intent. The Federal Court of Appeal allowed the Minister's appeal on the issue of gross negligence penalties.

The Federal Court of Appeal held that the trial judge "failed to consider the concept of gross negligence that may result from the wrongdoer's wilful blindness."[109] The Federal Court of Appeal stated that the evidence showed that the taxpayer acquiesced and participated in a fraudulent tax scheme. The taxpayer's acquiescence and participation "was an essential link in the realization of that scheme." The Court stated, "It is simply impossible not to conclude that this was wilful blindness and consequently gross negligence."[110]

Findlay v. R. 1997 CarswellNat 615, 2000 CarswellNat 954[111]

The taxpayer incorporated his video store business, transferred assets from himself to his company and filed a section 85 rollover election form. This resulted in capital gains of $135,000, but the taxpayer's tax preparer did not report the capital gains. The taxpayer testified that he reviewed his income tax return before signing and filing it.[112] The taxpayer testified that he did know that the transaction created a capital gains liability and therefore did not realize that line 127 had to be filled in.[113] The taxpayer's tax preparer was unable to provide an explanation except to say that "it was missed."[114]

The Minister reassessed the taxpayer and imposed gross negligence penalties. These penalties were upheld by the Tax Court but were reversed on appeal to the Federal Court of Appeal.

The Tax Court of Canada held that the filing of an incorrect income tax return does not automatically amount to gross negligence.[115] However, the TCC held that the taxpayer's tax preparer's gross negligence was attributable to the taxpayer since he ought to have known that the capital gains had to be included in income.[116] In coming to this conclusion, the TCC noted that the taxpayer was a businessperson who had advice from accountants and lawyers about incorporation, who was made aware of the advantages and disadvantages of incorporation and had discussed the intricacies of the section 85 roll-over with professionals.[117] It

The Federal Court of Appeal reversed the TCC ruling and allowed the taxpayer's appeal. The Court held that the TCC erred in law in concluding that the gross negligence of the taxpayer's tax preparer was attributable to the taxpayer.[118] It noted that the TCC "appears to have shifted to the [taxpayer] the burden of showing that he was not liable for the gross negligence of the tax preparer." This is "contrary to the provisions of subsection 163(2) of the *ITA*."[119]

PART VII -- MANAGING THE STATUTE BARRED AUDIT AND THE GROSS NEGLIGENCE ASSESSMENT

7.01 THE STATUTE BARRED STANDARD OF CARE

The *College Park* decision and *Aridi* decision are examples of what Justice Hogan called the divided case law with respect to the taxpayers' assertions that they did not act negligently. The divided nature of the decisions reflects the fact that negligence, as a legal concept, is not reducible to a mathematical formula.

If the standard of care is unqualified (the "***College Park* Standard**") because of the remedial purpose of the legislation then taxpayer conduct must be interpreted in light of that remedial purpose.

If the "***Aridi* Standard**" applies, then the remedial purpose of the legislation is not emphasized. The conduct of the taxpayer is compared to the conduct of a prudent person. A finding of negligence would mean that the taxpayer has acted imprudently.

7.02 ARGUING STATUTE BARRED STANDARDS

Most tax disputes are settled at the audit and objection stage of proceedings. The CRA auditor can find any number of decisions that support a low threshold for opening statute barred years. The taxpayer can cite decisions that call for a higher standard. The default is that CRA opens statute barred years where an auditor finds errors in those years. The state of the law allows the CRA to open those years for review even if the errors do not amount to negligence.

(1) Arguments for the *College Park* Standard

Taxpayers should be advised of the argument the CRA could take in opening a statute barred year. Bowie J. clearly makes the argument for the *College Park* standard in the decision. Opening a statute barred year only authorises the Minister to collect tax that would otherwise be payable. The mere passage of time should not prevent the Minister from collecting the correct amount of tax. Furthermore, the ITA does not explicitly require that the Minister prove negligence. Subsection 152(4) requires that the Minister prove "neglect" or "carelessness." If Parliament had required a negligence standard of care, the ITA would arguably state that is the standard.

The taxpayer should be advised that the *College Park* standard of care is not applied by all Tax Court Judges. As well, it is difficult to describe a meaningful distinction between negligence, carelessness and neglect.

(2) Arguments for the *Aridi* Standard

The taxpayer has to make two arguments: (1) the *Aridi* Standard should apply; and, (2) the taxpayer's actions were not negligent. Of course, the CRA would have to acknowledge that the *Aridi* Standard might apply and would try to prove the actions of the taxpayer were negligent in the circumstances.

Auditors and appeals officers can be swayed by compelling legal arguments. I am not so bold as to assert that the following paragraphs contain every good argument for the *Aridi* Standard. Competent tax litigators will come up with myriad arguments for that standard of care. I think that most arguments will include the following.

(a) The Importance of Limitation Periods

The *College Park* standard of care could essentially result in limitation periods being written out of the ITA. As a general principal limitation periods apply in a tax context. In *Markevich v. Canada*[120], the Crown argued that there was no limitation period in respect of the collection of debts because the ITA did not impose any limitation period. Justice Major confirmed that the rationales for imposing limitation periods in litigation also apply in a tax context. The imposition of limitation periods are based on rationales of certainty, evidence and diligence.[121] Limitation periods apply in criminal prosecutions and in civil litigation.

Under the *British Columbia Limitation Act*[122], a plaintiff must commence civil action within two years (for most claims). The two year period starts from the date that the claim was discoverable. Section 8 of the *Limitation Act* provides that a civil claim is discoverable on the day on which the person who wants to bring the claim first knew of the claim, or reasonably ought to have known of the claim. This knowledge means that the plaintiff has become aware that injury, loss, or damages has occurred, and that the loss was caused by or contributed to by an act or omission of the defendant.

Under the *Criminal Code of Canada*[123], there are generally no limitation periods for indictable offenses.[124] The criminal code does set out a six month limitation period for summary conviction proceedings.[125] Subsection 786(2)[126] provides that no summary conviction proceeding should be instituted more than six months after the time when the subject matter of the proceedings arose, unless the prosecutor and the defendant so agree.

The policy rationales for the limitation periods are commonly understood to be diligence, evidentiary and certainty (see *M.(K.) v. M.(H.),*[127] *Peixeiro v. Haberman*[128] and *Novak v. Bond*[129] for civil litigation and P.G. Barton, "*Why Limitation Periods in the Criminal Code*?"[130] for a discussion of the policy rationales for limitation periods.

If the *College Park* standard of care applies then tax liabilities would have the same status as indictable offenses under the Criminal Code.

(b) The Minister Can Deny Requests to Reduce Tax

Pursuant to subsection 152(4.2) of the ITA individuals and testamentary trusts may request that the Minister reassess beyond the normal reassessment period. Corporations and inter vivos trusts cannot make the application. The requested adjustments are limited to Part I tax amounts. The CRA policy guidelines[131] indicate that relief will be granted in situations where a refund or reduction of tax would have been made had the return or request been filed on time.

The point is the Minister retains control over opening statute barred years to decrease tax liability and only some taxpayers can make the requests. The fisc, therefore, may benefit from the carelessness of taxpayer filings. Based on the reasoning in *College Park*, taxpayers should not be denied a proper reduction of tax by the passage of time. If every mistake or error is a result of

carelessness or neglect, the Minister should not have the power to deny taxpayer requests.

(c) Balancing the Duty of Care

The ITA does not impose a duty of care on CRA auditors. Subsection 152(1) of the ITA requires the Minister, with all due dispatch, to examine tax returns and assess the tax payable, and pursuant to subsection 152(2), to send a Notice of Assessment to the taxpayer. Assessments, subject to being varied or vacated on an objection or appeal and subject to a reassessment, are valid and binding, notwithstanding any errors, defects of omissions (subsection 152(8)).

This is not to say that all CRA auditors act with impunity in conducting audits. The fact that most audits proceed according to a familiar script is a pretty good indicator that the CRA holds its employees to a certain standard of conduct.

Until recently, the common law did not impose a duty of care on CRA auditors. In Canada the relatively straightforward *Donaghue v. Stevenson* duty of care test has been modified into a two-stage test[132] known as the *Anns/Cooper test*. *Leighton v. Canada (Attorney General)* sets out the Anns/Cooper Test as follows:

> The *Anns/Cooper test* has two stages: (1) whether the relationship between the parties justifies the imposition of a duty of care on the defendant; and (2) whether there are residual policy considerations that militate against recognizing a novel duty of care.[133]

A 2013 article, by John Bevacqua, reviewed the history of negligence claims against the CRA and concluded that "all Canadian negligence claims by taxpayers against the CRA have failed at the first stage of the *Anns/Cooper test*".[134] Bevacqua then cites a series of Canadian cases where the courts have refused to find a sufficiently proximate relationship to impose a duty of care.

In *Leighton*, a shareholder alleged that losses were suffered as a result of the CRA's delay in correcting errors in the assessment of the taxpayer's company. The Court found the shareholder was not in a close enough relationship to the company to impose a duty.

In *783783 Alberta Ltd. v. Canada (Attorney General)*,[135] the taxpayer complained that a CRA auditor had allowed a non-resident competitor to claim expenses that should have only been available to Canadian resident corporations and thereby gave the non-resident competitor an unfair business advantage that harmed the Canadian corporation. The Alberta Court of Appeal found that there was no duty of care imposed on auditors based on the assessment of a separate group of taxpayers.[136]

In *McCreight v. The Attorney General*,[137] a firm of accounting advisors sued the CRA in respect of a flawed audit and fraud investigation against the accounting firm, for advice the accountants had given to various clients. Patterson J held that the relationship between the auditors and the advisors was inherently adversarial. That relationship is contrary to there being a proximity such that it would create a duty of care.[138]

In *Canus Fisheries Ltd. v. Canada (Customs & Revenue Agency)*,[139] Hood J. concluded that any duty owed by the CRA auditor was owed to the Minister. The Minister's duty is owed to Parliament and to all taxpayers generally. There is no duty of care owed by an auditor to an individual taxpayer under the ITA.[140] Recently this absolute bar has been called into question.

First in Quebec, the Cour superiéure du Quebec in *Groupe EnicoInc. V. Quebec*[141] granted $4 million in damages to two taxpayers that were subjected to an abusive audit. The finding was based on fault and responsibility to third parties under Quebec civil law, not on the common law duty of care.

In British Columbia, two recent decisions may indicate an increasing judicial reluctance to allow the CRA to avoid the supervision of the judiciary. The decisions are valuable because the courts examine the duty of care owed by CRA auditors.

In *Neumann v. Canada (Attorney General)*[142] the CRA was sued under the tort of "negligent investigation." The British Columbia Court of Appeal (BCCA) overturned the trial decision. However, the BCCA did not do so on the basis that auditors do not owe a duty of care. The BCCA found that the arguments regarding duty of care were not properly made at trial and decided to proceed on the "footing" that such a duty exists.[143]

Ryan JA. provided an extensive quote from the leading decision on "negligent investigation" in the context of a police investigation. Starting at paragraph 32, Ryan J. says as follows.

> After concluding that the police owe a duty of care to a suspect in *Hamilton-Wentworth*, McLachlin C.J. next considered the standard of care. Giving due recognition to the discretion police retain in a police investigation, the Chief Justice articulated the standard of care as "the standard of the reasonable police officer in like circumstances." McLachlin C.J. summed it up in this way at para 73:
>
> > I conclude that the appropriate standard of care is the overarching standard of a reasonable police officer in similar circumstances. This standard should be applied in a manner that gives due recognition to the discretion inherent in police investigation. Like other professionals, police officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of reasonableness. The standard of care is not breached because a police officer exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. The standard is not perfection, or even the optimum, judged from the vantage of hindsight. It is that of a reasonable officer, judged in the circumstances prevailing at the time the decision was made - circumstances that may include urgency and deficiencies of information. The law of negligence does not require perfection of professionals; nor does it guarantee results. [Attribution omitted.] Rather, it accepts that police officers, like other professionals, may make minor errors or errors in judgment which cause unfortunate results, without breaching the standard of care. The law distinguishes between unreasonable mistakes breaching the standard of care and mere "errors in judgment" which any reasonable professional might have made and therefore, which do not breach the standard of care. [Citation omitted.] [Emphasis added.]...

> ...[38] Given all of this, and the discretion an investigator is permitted to exercise, I am of the view that there was no evidence to go to the jury that the CRA was negligent in seeking and executing the search warrant in this case....

In 2014 the British Columbia Supreme Court again addressed the duty and standard of care owed by CRA auditors in *Leroux v. Canada (Revenue Agency)*[144] Humphries J. provided a thorough review of the *duty of care* case law, but distinguished the facts before her from those decisions and found that a duty of care exists.[145]

With respect to the standard of care, the Court determined as follows[146].

> Using analogies from other cases such as *Hill*, as well as the helpful discussion of this issue in *Canus*, it seems reasonable to accept that the standard of care appropriate for [the auditors] is that of a reasonably competent tax auditor in the circumstances.

The reference to "*Hill*" by the court is a reference to the *Hamilton Wentworth* decision that was canvassed by the BCCA in *Neumann*. Humphries J. adopts that analytic framework for the review of the conduct of the auditors in the audit of Mr. Leroux and found that the audit was not conducted negligently.

Justice Humphries reviewed the conduct of the CRA auditors in determining that gross negligence penalties applied in the circumstances. The judicial analysis is particularly interesting because the Court touches on the applicable standards that should apply to a determination of gross negligence. The Court finds that the auditor's assessment of gross negligence penalties was negligent in the circumstances and sums up the breach as follows.[147]

> ...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.

Leroux and *Neumann* are valuable for two reasons. First, the decisions are an examination of the other end of the scale in reviewing tax filings. Demanding perfection from taxpayers when they file their taxes is at one end of the scale. Holding auditors to no duty of care in reviewing those filings is at the other end. The courts in *Neumann* and *Leroux* recognise that allowing CRA auditors to act with impunity is unacceptable. Demanding perfection from taxpayers is also unacceptable.

The decisions are also valuable because they answer a question left unanswered in *Aridi*. Are all mistakes negligent? Investigators are not expected to be perfect. They are allowed to operate within certain range of conduct before their actions will be deemed to be negligent. This is only a recognition that reasonable people can make mistakes.

Auditors review the actions of taxpayers. Audit results sometimes contain errors. Basing a standard of care for taxpayers on a simplistic "what is good for the goose is good for the gander" is facile. That is not the right analysis. No one would suggest, for example, that patients have a reciprocal duty of care to their doctors. It is fair to ask if there is something common to "the standard of care" that applies across groups. This is not a goose and gander analysis. It is a search for some commonality in the standard of care that applies to a reasonable person in a

variety of circumstances.

To paraphrase Humphries J. in *Leroux*, using analogies from other cases such as *Hill*, as well as the helpful discussion of this issue in *Canus*, it seems reasonable to accept that the standard of care appropriate for a particular taxpayer is that of a reasonably competent taxpayer in the circumstances.

(3) Application to the Facts.

After convincing the CRA that a negligence standard is appropriate for opening statute barred years the taxpayer still has to prove that their conduct was not negligent in the circumstances. *Aridi*, when combined with *Leroux* and *Neumann* provide a general framework for analysing the conduct of the taxpayer.

In *Aridi* Hogan J. found three commonalities in taxpayer conduct that justified opening statute barred years. Those findings can be framed as audit questions.

1. Did the taxpayer carefully examine the tax returns before signing them?
2. Could the taxpayer have easily noticed the existence of the misrepresentation if the taxpayer had asked questions or taken the trouble to do a more thorough analysis?
3. Did the taxpayer know, given the situation, that there was a misrepresentation?[148]

Leroux and *Neumann* add a fourth factor that Hogan J. did not have to consider since he found that Mr. Aridi had not made a mistake in filing his taxes.

4. If there was an error was it an unreasonable mistake breaching the standard of care or a mere "errors in judgment" which any reasonable taxpayer might have made and therefore, which do not breach the standard of care?

Each of the questions invites an analysis of the relevant facts. It is certainly far more work than accepting that statute barred years can be reopened even where a taxpayer makes an innocent mistake. Also, since there is no agreed standard for reopening statute barred years there is a good chance that any arguments that the taxpayer was not negligent will fall on deaf ears since the CRA is not bound to a negligence standard based on the state of the law.

7.03 MANAGING GROSS NEGLIGENCE ASSESSMENTS

Most tax disputes are resolved without proceeding to trial. Gross negligence penalties are routinely assessed where an audit reopens statute barred years. Taxpayers sometimes face a situation when there is no disagreement that income has been under reported in a statute barred year.

The reasons for failing to report that income do not, at least in the advisors mind, amount to gross negligence on part of the taxpayer. The cost of disputing the penalty in tax court can leave the taxpayer in a position where they decide to accept the penalty even though their advisor feels that the penalty is unwarranted.

Department of Justice lawyers are well aware of the reverse onus of proof that applies to the assessment of gross negligence penalties. Even if the taxpayers had no success in convincing the CRA Audit Division and Appeals Division that gross negligence penalties should not apply, a

costly trial maybe avoided if DOJ counsel is made aware of the Appellant's position early in the litigation process.

In some cases, substantive tax issues are in dispute. Usually, those substantive issues must be resolved before the parties can come to an agreement on whether gross negligence penalties should apply. As discussed below there may be reasons for the taxpayer to delay making any submissions early in the dispute process.

There is less advocacy in this final section of the paper than in the previous section concerning reopening statute barred years. CRA auditors and appeals officers sometimes express frustration with the actions of legal counsel in gross negligence penalty disputes. Hopefully, some of the information provided below will explain the actions of legal counsel and lower the level of distrust that CRA auditors feel when taxpayers refuse to enter into negotiations on the issue of gross negligence penalties.

Other legal counsel may disagree with the following approach. I look forward to receiving their hate mail and advise that it will be graded for grammar and content.

(1) Initial Actions. Sometimes the taxpayer must stay silent.

(a) If an audit includes statute barred years, assume that gross negligence penalties will be included in any audit proposal letter. The taxpayer and advisor should be cautious from the outset in explaining taxpayer actions.

(b) The auditor will need to prove "carelessness" to reopen a statute barred year. The taxpayer should be advised of the likelihood of the assessment of gross negligence penalties. A concurrent assessment of gross negligence penalties is commonplace for two reasons.

(c) The "carelessness" standard of care in the ITA is unclear. The negligence standard is also unclear. Without clarity it might be a short leap from negligence to gross negligence. Consider the reasoning of Hogan J., in *Aridi* and the three common factors found in cases where the courts have concluded that a taxpayer has been negligent in their tax filings.

(i) Did the taxpayer carefully examine the tax returns before signing them?

(ii) Could the taxpayer have easily noticed the existence of the members of misrepresentation if the taxpayer asked questions or taken the trouble to do a more thorough analysis?

(iii) Did the taxpayer know, given the situation, that there was a misrepresentation?

It is not unusual to find those tests used to justify the imposition of gross negligence penalties.

(d) Gross negligence in tax law differs from gross negligence in civil law and in criminal law in a very fundamental way. In tax law, wrongdoers profit

from their actions. In civil law and criminal law, there may be some indirect financial benefit to the wrongdoer from not expending the resources necessary to meet the standard of care, but there is no direct connection between the actions of the wrongdoer and the wrongdoer's wallet. It should be no surprise that taxpayer errors are viewed suspiciously.

(e) Taxpayers should not make submissions about their conduct at any time where the possibility of gross negligence have been identified by their own advisor or by the CRA auditors. The only exception to this "rule" is if the advisor has determined that the taxpayer's conduct is clearly exculpatory. Over the years, several CRA auditors express surprise at my advice to clients not to make submissions on gross negligence penalties at the audit stage. There are three reasons for this approach.

(i) Most importantly, the difference between gross negligence and criminal tax fraud is paper thin. Since the taxpayer is only under a civil audit, his or her Charter rights may not engage. In other words, taxpayer statements can be used against them in a criminal trial. It is not unheard of for a taxpayer's attempts to explain away gross negligence penalties to lead to a referral to the CRA criminal investigations group.

(ii) Psychology 101 -- By the time an audit proposal letter is forwarded, it is safe to assume that the auditor has discussed the issuance of gross negligence penalties with the team leader and they have concluded that gross negligence penalties are appropriate in the circumstances. Where someone's mind is made up, there is often no point trying to change it. In cognitive psychology, this inflexibility is labeled as cognitive bias or confirmation bias It is not a trait that is exclusively found in CRA auditors and team leaders. Anyone who has ever tried to win an argument with their spouse or a teenage child would be aware of the pervasiveness of the limits of human reasoning.

(iii) The CRA has the onus. The taxpayer is not obligated to assist the CRA in meeting that onus. Sometimes the court will find that the CRA has not met that onus where the auditor has only speculated about the source of income.[149] At other times, the courts have found that a taxpayer's inability to explain various audit conclusions as evidence of gross negligence.[150]

(f) After the audit is closed and the dispute is at the objections stage, the taxpayer should request that the Appeals officer forward a copy of the Penalty Report.

(g) The Penalty Report should be interpreted in light of the gross negligence penalty case law.

(h) Any taxpayer explanations of the error need to be reviewed by the advisor before submitting them to the CRA. While the likelihood of the Appeals division sending a file to the Investigations division is much lower, no one should assume that it cannot happen.

(2) Using the Audit Manual

The audit penalty report will likely reference the factors the CRA says should be examined before assessing gross negligence penalties. Those factors are set out in the CRA audit manual[151] (the "**Manual**"). It makes sense to use the Manual to frame the discussion about gross negligence penalties. At least everyone will have a similar frame of reference. The Manual's directions to auditors on the assessment of gross negligence penalties are troublesome. Here are some of the items that one might consider bringing to the attention of the appeals officer assigned to the file. *My comments are in italics.*

In reference to the assessment of gross negligence penalties under subsection 163(2) of the *ITA*, the Manual says

> Section 163(2) of the *ITA* covers a set of facts which "clearly indicates":
>
> > 1. that the taxpayer knew or **ought to have known** that an offence was committed under this section; or,
> >
> > 2. that the taxpayer acted so negligently that the way in which the taxpayer handled their affairs amounted to gross negligence.[152]
> >
> > "**Knowingly**" as used in section 163(2) of the *ITA* implies that a taxpayer knew or **ought to have known** that the amount of tax paid was less than the amount that the person should have paid, or that the amount of the tax refund was greater than the amount that the person was eligible to receive.[153]
> >
> > "**Knew**" means actual knowledge – that a taxpayer "deliberately or intentionally acted in such a manner."[154] "Ought to have known" does not mean actual knowledge, but means that a taxpayer "**had in effect the means of knowledge**."[155]

The use of the phrase "ought to have known" is misleading for gross negligence penalties. The terminology is more consistent with the negligence standard in civil law. "Had in effect the means of knowledge" is not at all helpful to an auditor tasked with assessing gross negligence penalties. The legal test is more strict than the CRA audit manual describes.

> > "Gross negligence" as used in section 163(2) of the *ITA* means "negligence of a conspicuous magnitude."[156] It implies that "there is a marked departure from the standard by which a reasonably careful person would prepare their tax return."[157] It has been described as "that entire want of care which will raise the presumption of conscious indifference to the consequences." Negligence has been described as "only a conclusion of law from acts of omission or commission on the part of a person on whom a duty is cast ... It must relate always to some circumstance of time, place or person on whom is imposed a duty to take care[158]

The problem with that description of gross negligence is obvious. It assumes the standard of care expected of taxpayers when filing their tax returns is well understood. It provides a further description "want of care" which is confusing at best and then applies a description of "negligence" not gross negligence. That definition would confuse any reader.

(3) The Gross Negligence Checklist

The audit manual contains a non-exhaustive list of factors to be examined in determining whether gross negligence penalties should be assessed.[159] *My comments are in italics.*

1. Materiality of the false statement or omission

> The greater the materiality of the false statement or omission, the greater is the potential for gross negligence. The materiality of the omission is insufficient on its own to justify gross negligence penalties. [160]

Materiality in isolation is not relevant. It can be evidence of constructive knowledge, or willful blindness. Forgetting to report a large amount of income is difficult for a taxpayer to justify. This is different than believing that the amount does not have to be reported or reporting it incorrectly.

2. Taxpayer's knowledge of tax matters

> The CRA should evaluate the taxpayer's education, general knowledge, specific knowledge of the *ITA* and their income. The CRA should also evaluate the taxpayer's books and records.[161]
>
> The auditor should be sure that the taxpayer could not reasonably claim that the false statement or omission was made **innocently** and unintentionally.[162] The facts used to substantiate the penalty should be sufficient to rebut any assertion that the false statement in a tax return was made innocently and unintentionally, having regard to the taxpayer's knowledge and experience in tax matters.[163]
>
> If the understatement of tax was an "innocent mistake" and "**reasonable care** was taken to file a correct return" the CRA will not impose a penalty.[164]

The use of the term "innocent mistake" implies that anything other than an innocent mistake will justify the gross negligence penalty. That is not the test. Reasonable care in filing a tax return is also a test for "negligence" not gross negligence.

The error must be the result of recklessness or result from a failure to act even though the taxpayer must have known about the error.

Occasionally auditors assume that taxpayer's have a sophisticated knowledge of tax if they make a lot of money. That statement is as true as the statement that people who are knowledgeable about tax must be rich.

3. Taxpayer's involvement in preparing the return

> Among other things, this factor concerns the degree of the taxpayer's involvement in the maintenance of the books and records, and in the preparation of the income tax return and other documents. It also concerns "the taxpayer's awareness of the relationship between the [books and] records and the amounts reported."[165]
>
> "The assessment of a penalty can be more readily justified when it can be demonstrated from the records and interviews that the taxpayer participated in all the tax planning or preparation of returns required by...the *ITA*. On the other hand, the application of the penalty may be appropriate even through the taxpayer failed to examine or understand the return if there are sufficient other circumstances that support the application of the penalty."[166]

Generally, a more involved a taxpayer should have a lower risk of a gross negligence assessment. Willful blindness is easier to assert if the taxpayer does not take any care in the preparation of the tax returns. If the taxpayer has been heavily involved the

preparation of a return, mistakes are more likely to be made innocently or negligently.

4. Number of sources of taxable income

> The greater the number of similar sources of taxable income, the more plausible it becomes that a source may be been overlooked.[167]

This conclusion should apply whether or not the sources are similar or disparate.

5. Nature of the False Statement or Omission

The nature of the false statement: for example, would the omission or false statement have been obvious to a taxpayer/registrant exercising normal care in the preparation of a return or other document for the purposes of the ETA and/or the ITA? When a major shareholder's return is reassessed, the auditor should keep in mind that a majority shareholder usually controls their income from the corporation and consequently should be aware of the amount of income from this source.

The use of the term "obvious" invites an auditor to apply a negligence standard to the error. The case law on willful blindness applies a "knew or must have known" test.

6. Taxpayer's history of contact with the CRA

> The CRA considers the history and contacts with the CRA that should have alerted the taxpayer that more care should be taken in completing and filing a tax return. Does this review indicate that a tax return has been previously similarly adjusted by the CRA and that the taxpayer has been warned that a recurrence could result in the imposition of a penalty?[168]

This factor has only limited application. The fact that a taxpayer has been audited previously is not relevant. The penalty is not assessed based on the taxpayer's character. However, evidence that a taxpayer has been assessed on a similar matter previously is evidence that the taxpayer has the requisite knowledge of their filing obligations. Absent a compelling explanation from the taxpayer, a gross negligence assessment is likely justified.

7. Taxpayer's history of compliance

> When the taxpayer has normally filed returns in a timely manner and made payments on time, there is a presumption that the person has acted responsibly and with a degree of care in tax matters. A taxpayer's history of compliance should be taken into consideration when deciding if a penalty should be applied.[169]
>
> "As a general rule, the taxpayer will be given the benefit of the doubt and no penalty will be assessed where it appears that the taxpayer was confused about the reporting of an amount and it is the first time a penalty is being considered."[170]

Again, the taxpayer's history is not relevant to the assessment of gross negligence penalties unless the taxpayer makes the same mistake repeatedly. A complete lack of care might put the taxpayer into the category of gross negligence from recklessness. However, in other spheres of law, a finding of recklessness means is predicated on an assume baseline of knowledge to measure the actions of the wrongdoer against.

8. Signature on the tax return

> A taxpayer **may be negligent** by signing a return without ensuring that the information reported is accurate and complete. However, a signature does not automatically make the taxpayer liable to a penalty. Other evidence is required to support the assessment of a penalty.[171]
>
> The fact that a taxpayer did not sign the tax return does not provide relief from the responsibility for its accuracy, unless the taxpayer can establish that it was prepared and filed without their knowledge or consent.[172]
>
> A taxpayer may be penalized even if a return is filed unsigned or if it is signed by someone else on behalf of the taxpayer where other evidence supports the assessment of a penalty.[173]

The audit manual describes the wrong standard of care. The penalty is not applied for negligent actions. It is difficult to equate signing a return, or failing to do so with gross negligence. It is usually irrelevant. For example, if a taxpayer fails to report a $500,000 capital gain, nothing turns on whether or not they signed their tax return. This instruction may be in the Manual because some auditors were using the signature on the return to justify gross negligence penalties.

9. Taxpayer's Explanation

> The auditor should try to rebut each point raised by the taxpayer/registrant for not applying the penalty. In addition, the auditor must decide whether the taxpayer/registrant's explanation is plausible and whether it is consistent with the facts of the case.
>
> The facts used to substantiate the penalty should be sufficient to rebut any assertion that the **false statement in a person's return was made innocently and unintentionally**, having regard to the taxpayer/registrant's business, profession, knowledge and experience in tax matters.[174]

If the explanation is plausible and supported by the facts a gross negligence penalty should not be assessed. The reasons for rejecting the taxpayer's explanation should be communicated to the taxpayer. The use of the phrase "innocently and unintentionally" imposes a higher standard of conduct than is warranted for the imposition of gross negligence penalties. The error must be reckless or made with knowledge or constructive knowledge of the error.

(4) Further Submissions

Critiquing the Manual without support will not get the dispute resolved. As well, similar fact patterns will give advisors and appeals officers a better understanding of how a tax court judge would consider the error that is in issue. A summary of interesting and important decisions was provided above.

Comments from the judiciary help frame the dispute at the audit stage. The following is a list of judicial observations about gross negligence penalties. These comments might be useful in convincing the auditor that the Manual may not always properly describe the law.

1. In *Corriveau v. R.*, the TCC stated that the burden on the CRA is a "heavy one."[175] In *R. v. Lust*, the TCC stated that it is "greater than on a balance of probabilities" and "closer to the criminal onus under the *Criminal Code* than it is to a balance of probabilities."[176]

Those comments should viewed in light of comments from the SCC that the burden in civil matters is always "on a balance of probabilities."[177]

2. In *Farm Business Consultants, Inc. v. R.*[178] the TCC noted that "[c]onduct that warrants reopening a statute-barred year does not automatically justify a penalty..."[179] although "[c]onduct of the type contemplated in paragraph 152(4)(a)(i) may in some circumstances also be used as the basis of a penalty under subsection 163(2), which involves the penalizing of conduct that requires a higher degree of reprehensibility."[180]

3. The TCC held that "the routine imposition of penalties by the Minister is to be discouraged"[181] – "a penalty may be imposed only where the evidence clearly warrants it"[182] and that "a court must be extremely cautious in sanctioning the imposition of penalties under subsection 163(2)."[183] It also held that "although a civil standard of proof is required, if a taxpayer's conduct is consistent with two viable and reasonable hypotheses, one justifying the penalty and one not, the benefit of the doubt must be given to the taxpayer and the penalty must be deleted."[184] ... "if the evidence is consistent with both the state of mind justifying a penalty under section 163(2) [of the *ITA*] and the absence thereof...it would mean that the Crown's onus had not been satisfied."[185]

4. *Udell v. Minister of National Revenue*[186] The Exchequer Court of Canada commented on the verbs used in the provisions assessing gross negligence penalties. It held that "made" "involve[s] a deliberate and intentional consciousness on the part of the [taxpayer] to the act done." It also held that "participated in, assented to or acquiesced in" "connotes an element of knowledge on the part of the [taxpayer] and that there must be concurrence of the [taxpayer's] will..., or a tacit and silent concurrence therein."[187]

5. In *DeCosta v. R.*[188] the TCC referred to *Udell v. Minister of National* Revenue. It held that "the question in every case" is whether "the negligence was so great as to justify the use of the somewhat pejorative epithet 'gross'."[189] It then held that in drawing the line between "ordinary negligence" and "gross negligence" the following factors must be considered: 1. The magnitude of the false statement or omission in relation to the income declared; 2. The opportunity the taxpayer had to detect the error; and 3. The taxpayer's education, background and apparent intelligence.[190] No single factor predominates – "each must be assigned its proper weight in the context of the overall picture that emerges from the evidence."[191]

6. In *Venne v. R,*[192] *the Court held that* subsection 163(2) of the *ITA* only authorizes the imposition of a gross negligence penalty "where there is a high degree of blameworthiness [*sic*]"[193] and that for the CRA to impose a penalty under subsection 163(2) of the *ITA* "a higher degree of culpability is required."[194] "Gross negligence must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not."[195] Importantly, the Federal Court also noted that there seems to be a certain element of subjectivity recognized in the case law with respect to assessing the knowledge or gross negligence of a taxpayer.[196]

7. There are two important Federal Court of Appeal cases on wilful blindness in the context of section 163(2) of the *ITA*. In *Villeneuve v. R.*, the Federal Court of Appeal held that even if a taxpayer does not have actual knowledge of a false statement, if he or she is wilfully blind, he or she will be deemed to have that knowledge.[197] (In other words, knowledge of a false statement will be imputed if the taxpayer is wilfully blind.) In *Panini v. R.*, the Federal Court of Appeal discussed the meaning of wilful blindness in the context of section 163(2) of the *ITA*. It held that "the law will impute knowledge to a taxpayer who, in circumstances that dictate or strongly suggest that an inquiry should be made with respect to his or her tax situation, refuses or fails to commence such an inquiry without proper justification."[198]

8. In *897366 Ontario Ltd. v. R.*,[199] the TCC held that the imposition of a gross negligence penalty "requires a serious and deliberate consideration by the taxing authority of the taxpayer's conduct.[200] It stated that "[i]t cannot be overemphasized that penalties may only be imposed under section 285 [of the *Excise Tax Act*] in the clearest of cases, and after an assiduous scrutiny of the evidence."[201] (The wording of section 285 of the *Excise Tax Act* is identical to the wording of section 163(2) of the *ITA*.)

PART VIII -- FINAL COMMENTS

The law of negligence is well developed in Canada. The reasonable person test is not difficult to understand in the abstract. Most people believe that they can find the "reasonable person" just by looking in the mirror. The premise of this paper at the start of the research process was that finding a reasonableness standard for filing tax returns was a necessary precursor to describing behaviour that would fit the description of gross negligence.

Surprisingly, a robust history of case law regarding negligence does not automatically lead the courts to an easy understanding of the meaning of gross negligence. In civil law and criminal law, the definition of gross negligence appears to be left purposefully vague by the courts.

Gross negligence case law allows wrongdoer behaviour to fit into two categories. In the first category, the wrongdoer knew or must have known about the harm that would result from their actions. In the second category, the wrongdoer is presumed to have sufficient skills and their actions are so reckless that the court is able to assume that the wrongdoer was indifferent to the harm that would result from their conduct.

In tax law, the standard of conduct expected from taxpayers in filing their tax returns is unclear. Some tax court judges equate carelessness with the rules of negligence; while others have determined that innocent mistakes fit within the definition of carelessness. The result of this difference of opinion is that the limitation periods for reopening statute-barred years are easily bypassed by CRA auditors. Arguably, those auditors are not incorrect for opening statute-barred years for even the most innocent of taxpayer errors.

In order to properly dispute the reopening of statute-barred taxation years, an advisor must first argue that carelessness should be equated with negligence. The advisor must then argue that the taxpayer's actions were not negligent in the circumstances. This position is supported by much of the case law and is more consistent with the idea of imposing a normal reassessment period in the first place. If all errors and inaccuracies are considered careless, then all such errors and inaccuracies would be subject to reassessment.

With respect to gross negligence penalties, the Tax Court has been able to function quite well without an agreed upon standard of negligence in tax filings. In hindsight, it is possible to have no agreement on the meaning of negligence but to have a general agreement about the kind of behaviour that warrants punitive measures. The results of most of the Tax Court decisions confirming the issuance of penalties seem fair and consistent with the law. The conduct of the taxpayers in those decisions is usually so strange that it is fair to ask what the taxpayer is doing in court.

The problem with gross negligence under the ITA comes at a much earlier stage in the dispute process. When the possibility of gross negligence penalties comes up in an audit, a prudent advisor will not rush to explain his or her client's conduct. The onus to prove penalties is on the CRA. Taxpayers are not required to assist the CRA in meeting that onus.

More importantly, any time gross negligence penalties are being contemplated, an advisor should be aware that the file might be transferred to the criminal investigations group of the CRA. Prudence dictates that the taxpayer should assume the worst and remain silent on the matter of gross negligence penalties until the conclusion of the audit.

Gross negligence penalty reports are typically based upon instructions in the CRA audit manual. The published, but redacted, CRA audit manual provides some useful information for auditors, but is also confusing at times and can be interpreted as inviting CRA auditors to apply a negligence standard to the imposition of gross negligence penalties.

To defeat a gross negligence penalty assessment, the advisor must attack the conclusions in the gross negligence penalty report. This is best done by pointing out the flaws in the CRA Penalty report ,the Manual and by using case law to buttress the taxpayer's assertions that gross negligence penalties are not warranted. However, it is obvious that by undertaking that analysis, advisors may come to the conclusion that their clients' conduct was indeed grossly negligent. In those circumstances, the best advice that might be given to a client is to say nothing, accept the penalties, and be thankful that the matter was not referred to the criminal investigations group.

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[1] This was in response to a question, not part of a paper, so it would not be in the written materials.

[2] Kay Gray, Frank Quo Vadis, Lorna Gray & Mickey Sarazin, "Tax Administration Panel" (2012 British Columbia Tax Conference, 25 September 2012).

[3] And, apparently, my Muse.

[4] See Jeremy Horder, "Gross Negligence and Criminal Culpability" (1997) 47 UTLJ 495.

[5] In the first year law of school, several months of course study are devoted to the law of negligence. There are many texts and articles written on the subject. Complex legal topics are not easily distilled.

[6] *Blyth v Birmingham Water Works Co* (1856), 156 ER 1047 (Eng Exch).

[7] *Donoghue v Stevenson*, [1932] AC 562 (UK HL).

[8] *Proving negligence or breach of statutory duty*, online: Lexis PSL

<www.lexisnexis.com/uk/lexispsl/personalinjury/synopsis/448:449/Establishing-legal-liability/Proving-negligence-or-breach-of-statutory-duty>.

[9] See for example *Westcoast Energy Inc v R*, [1991] 1 CTC 471 (FCTD) [*Westcoast Energy*], aff'd (1992), 92 DTC 6253 (FCA).

[10] *Black's Law Dictionary*, 5th ed, *sub verbo* "inadvertence".

[11] *Shandloff v City Dairy Ltd*, [1936] OR 579 (ON CA) at para 16, citing *Donoghue v Stevenson*, [1932] AC 562 (PC) at p 618-620.

[12] *Black's Law Dictionary*, 5th ed, *sub verbo* "neglect".

[13] *Black's Law Dictionary*, 5th ed, *sub verbo* "recklessness".

[14] *R v Elless*, 2007 BCSC 737 at paras 130 [*Elless*], citing *Sansregret*, *supra* note 2 at para 22.

[15] The author will refer to the standard as "carelessness". The higher standard "fraudulent" is not relevant and the case law does not distinguish between neglect and carelessness.

[16] Robert Kopstein & Rebecca Levi, "When Should the Court Allow Reassessments Beyond the Limitation Period?" (2010) 58:3 Can Tax J 475.

[17] *College Park Motors Ltd v R*, 2009 TCC 409 at para 20 [*College Park Motors*].

[18] *Aridi v HMQ*, 2013 TCC 74 (TCC [General Procedure]) [*Aridi*].

[19] Michelle Moriartey & Andrew Majawa, "Current Cases" (2010 British Columbia Tax Conference, 20 September 2014).

[20] *Ibid*.

[21] *College Park Motors*, *supra* note 17 at para 9.

[22] *Ibid*.

[23] *Ibid* at para 11.

[24] *Ibid* at para 19.

[25] *Ibid* at para 20.

[26] On a related matter, Hogan J also concludes that the phrase "person filing the return" in paragraph 152(4)(a) of the *ITA* refers to a person listed in subsection 150(1) of the *ITA*. He concludes that paragraph 152(4)(a) of the *ITA* does not apply to the professionals who prepare returns. The negligence of those professionals cannot be attributed to the taxpayer on an agency basis. See *Aridi*, *supra* note 18 at paras 25-29.

[27] *Ibid* at para 35.

[28] *Ibid* at paras 46-48.

[29] *Ibid* at para 43.

[30] *Ibid* at para 50.

[31] For example, see the analysis in *McKellar v. R.*, 2007 CarswellNat 1249, 2007 TCC 266.

[32] CA Wright, "Gross Negligence" (1983) 33 UTLJ 184.

[33] Gerald HL Fridman, *The Law of Torts in Canada in Canada*, 2d ed (Toronto: Carswell, 2002)

at 402.

[34] *Kingston (City) v Drennan* (1897), 27 SCR 46 (SCC), 1897 CarswellOnt 21 (SCC) [*Drennan*].

[35] *Ibid* at para 55.

[36] *Ibid* at para 60.

[37] *Holland v Toronto (City)*, [1927] SCR 242 (SCC), full decision at 59 OLR 628 at 631 (SCC) [*Holland*].

[38] See headnote, *ibid*.

[39] *Drennan*, *supra* note 34 at 634.

[40] *Seymour v Maloney and Car and General Insurance Corporation Ltd*, [1955] 1 DLR 824 (NS SC) [*Seymour*].

[41] The assumption of this legislation was that gratuitous passengers in vehicles should not have the right to sue drivers for simple negligence. Instead, the passenger had to show that the driving was so poor as to be deemed grossly negligent.

[42] *Seymour*, *supra* note 40 at 830.

[43] *McCulloch v Murray*, [1942] SCR 141 (SCC) [*McCulloch*].

[44] The trial was before a jury. The facts they relied upon are not provided.

[45] *McCulloch*, *supra* note 43 at 143.

[46] Wright, *supra* note 32.

[47] *Ibid* at p 200.

[48] Lewis N Klar, *Tort Law*, 5th ed (Toronto: Carswell, 2012) at 371.

[49] *Crinson v Toronto (City)*, 2010 ONCA 44 [*Crinson*].

[50] *Ibid* at para 46.

[51] *Ibid* at para 47.

[52] *Ibid* at para 53.

[53] Horder, *supra* note 4 at 496.

[54] *R c Gosset*, [1993] 3 SCR 76 (SCC) at para 37 [*Gosset*].

[55] *Ibid* at para 49.

[56] For commentary on the issues, see, for example: Don Stuart, "F(J): Three Degrees of Negligence", Case Comment on *R v F(J)*, 2008 SCC 60, (2008) 60 CR-ART 240 (Criminal Reports (Articles))

[57] For a detailed review of judicial reasoning under both methods, see Horder, *supra* note 4.

[58] *R v Hundal*, [1993] 1 SCR 867 (SCC).

[59] *Ibid* at 889. The SCC determination that a gross departure from the standards of a reasonably prudent person is criminal negligence is semantically the same as saying that behaviour that is a gross departure from the conduct of a prudent person is "gross negligence."

[60] *Ibid* at 888-889.

[61] *R v Beatty*, [2008] 1 SCR 49 (SCC) [*Beatty*].

[62] *Ibid* at para 6.

[63] *Ibid* at para 7.

[64] *Ibid* at para 8.

[65] *Ibid* at para 32.

[66] *R v Tutton*, [1989] 1 SCR 1392 (SCC).

[67] *Ibid* at 1409.

[68] *R v F(J)*, [2008]3 SCR 215 (SCC).

[69] On the charge of failing to provide the necessaries of life the Court found that the Crown was bound to establish that the defendants actions amounted to a marked departure from the conduct from a reasonably prudent parent in the circumstances where it was objectively foreseeable that the failure to provide the necessaries of life would lead to a risk of danger to life.

In respect of criminal negligence, the Crown was obligated to show that the defendants conduct represented a marked *and substantial* departure from the conduct of a reasonable prudent parent in the circumstances.

[70] *Ibid* at para 7.

[71] *Ibid* at para 78.

[72] *Crinson*, *supra* note 49.

[73] *Drennan*, *supra* note 34.

[74] Searched Westlaw's online LawSource caselaw database for cases heard at the British Columbia Supreme Court, between 2004-2014, which mentioned the phrase "gross negligence". This search returned 119 cases. Of those 119 cases, **32** dealt with the actual issue of gross negligence. Searched Westlaw's online LawSource Canadian Abridgment TAX database, in both the Income Tax and Goods & Services Tax subsets, for cases dealing with the issue of gross negligence penalties. Of those cases, **224** occurred between 2004-2014.

[75] See note 33.

[76] *Venne v R*, [1984] CTC 223 (FCTD), 1984 CarswellNat 210 [*Venne*].

[77] *Ibid* at para 16.

[78] *Ibid* at para 17.

[79] *Ibid* at paras 17-22.

[80] *Ibid* at para 6.

[81] *Ibid* at para 37.

[82] *Ibid* at para 38.

[83] *Hine v R*, 2012 TCC 295, 2012 CarswellNat 3018 [*Hine*].

[84] *Rohani v R*, 2009 TCC 88, 2009 CarswellNat 229 [*Rohani*].

[85] *Ibid* at para 8.

[86] *Ibid* at paras 8 and 9.

[87] *Rui De Couto C/O Alco Windows Inc v R*, 2013 TCC 198, 2013 CarswellNat 2067 [*Rui De Couto*].

[88] *Ibid* at para 13.

[89] *Ibid* at para 17.

[90] *Ibid* at para 19.

[91] *Ibid* at para 20.

[92] *Hougassian v R*, 2007 TCC 293, 2007 CarswellNat 1256 [*Hougassian*].

[93] *Ibid* at para 7.

[94] *Ibid* at paras 7, 11.

[95] *Ibid* at para 11.

[96] *Ibid* at para 16.

[97] *Lacroix c R*, 2007 TCC 376, 2007 CarswellNat 5211.

[98] *Ibid* at para 20.

[99] *Lacroix c R*, 2008 FCA 241 at para 9.

[100] *Ibid* at para 32.

[101] *Baynham v R* (1997), 98 DTC 1169 (TCC), 1997 CarswellNat 1630 [*Baynham*].

[102] *Ibid* at para 93.

[103] *Ibid* at para 93.

[104] *Ibid* at para 94.

[105] *Ibid* at para 96.

[106] *Ibid* at para 97.

[107] *Villeneuve c R* (2002), 2004 DTC 2156 (TCC [Informal Procedure], 2002 CarswellNat 4746 (TCC [Informal Procedure]).

[108] *Ibid* at para 9.

[109] *Villeneuve v R*, 2004 FCA 20, 2004 CarswellNat 1937 (FCA) at para 6 [*Villeneuve*].

[110] *Ibid* at para 8.

[111] *Findlay v R*, [1997] 3 CTC 2010 (TCC), 1997 CarswellNat 615 (TCC).

[112] *Ibid* at paras 28, 73.

[113] *Ibid* at paras 24, 27, 73.

[114] *Ibid* at para 36.

[115] *Ibid* at paras 66, 89.

[116] *Ibid* at para 95.

[117] *Ibid* at para 91.

[118] *Findlay v R*, [2000] 3 CTC 152 (FCA), 2000 CarswellNat 954 (FCA) at para 26.

[119] *Ibid* at para 27.

[120] *Markevich v Canada*, 2003 SCC 9 [*Markevich*].

[121] *Ibid* at para 19.

[122] *Limitation Act*, SBC 2012, c 13.

[123] *Criminal Code*, RSC 1985, c C-46.

[124] Except for treason, see *Criminal Code*, *ibid* at s 48(1).

[125] Summary offences are less serious offences. The maximum penalty for a summary offence is usually a $5,000 fine and/or six months in jail. Some summary offences have higher maximum sentences. They include breaches of a probation order. Indictable offences are more serious offences and include theft over $5,000, break and enter, aggravated sexual assault and murder. Maximum penalties for indictable offences vary and include life in prison. Some indictable offences have minimum penalties. For an explanation of the differences, see JusticeBC, *Criminal Justice Information and Support*, online: <http://www.justicebc.ca/en/cjis/index.html>.

[126] *Criminal Code*, *supra* note 123 at s 786(2).

[127] *M(K) v M(H)*, [1992] 3 SCR 6 (SCC).

[128] *Peixeiro v Haberman*, [1997] 3 SCR 549 (SCC).

[129] *Novak v Bond*, [1999] 1 SCR 808 (SCC).

[130] PG Barton, "Why Limitation Periods in the Criminal Code?" (1998) 40 Crim LQ 188 at 190. See also Sanjeev S Anand, "Should Parliament Enact Statutory Limitation Periods for Criminal Offences?" (2000) 44 Crim LQ 8.

[131] Canada Revenue Agency, Information Circular IC 92-3, "Guidelines for Refunds Beyond the Normal Three Year Period" (18 March 1992).

[132] See *Cooper v Hobart*, 2001 SCC 79.

[133] *Leighton v Canada (Attorney General)*, 2012 BCSC 961 at para 50.

[134] John Bevacqua, "Suing Canadian Tax officials for Negligence: An Assessment of Recent Developments" (2013) 61:4 Can Tax J 895.

[135] *783783 Alberta Ltd v Canada (Attorney General)*, 2010 ABCA 226 [*783783 Alberta*].

[136] *Ibid* at para 44.

[137] *McCreight v Canada*, 2012 ONSC 1983 [*McCreight*].

[138] *Ibid* at para 62.

[139] *Canus Fisheries Ltd v Canada (Customs & Revenue Agency)*, 2005 NSSC 283 [*Canus*].

[140] *Ibid* at para 87.

[141] *Groupe Enico inc c Québec (Agence du revenu)*, 2013 QCCS 5189.

[142] *Neumann v Canada (Attorney General)*, 2011 BCCA 313 [*Neumann*].

[143] *Ibid* at para 31.

[144] *Leroux v Canada Revenue Agency*, 2014 BCSC 720 (BC SC) [*Leroux*].

[145] *Ibid* at para 309.

[146] *Ibid* at para 311.

[147] *Ibid* at para 348.

[148] In Leroux (BCSC), Justice Humphries equates a "must have known" standard with gross negligence. The terminology used by Hogan J. is more consistent with wilful blindness.

[149] *Ibid. Leroux* at para 342-355. Humphries J. found that the CRA auditor's conclusions about the source of funds in a bank account was mere speculation and not proof of gross negligence.

[150] *Ibid Lacroix.* The Federal Court of Appeal found that the taxpayer's inability to explain the difference between their reported income and the result of the next worth reassessment as evidence of gross negligence.

[151] Canada Revenue Agency, *CRA Audit Manual, Chapter 28.0 – Penalties*, (2012) [*CRA Audit Manual*].

[152] *Ibid* at s 28.4.2.

[153] *Ibid*.

[154] *Ibid*.

[155] *Ibid*.

[156] *Ibid*.

[157] *Ibid*.

[158] *Ibid*.

[159] *Ibid* at s 28.4.4.

[160] *Ibid*.

[161] *Ibid*.

[162] *Ibid*.

[163] *Ibid*.

[164] Canada Revenue Agency, Information Circular 73-10R3 "Tax Evasion" (13 February 1987) at para 48.

[165] *CRA Audit Manual, supra* note 151 at s 28.4.4.

[166] *Ibid*.

[167] *Ibid*.

[168] *Ibid*.

[169] *Ibid*.

[170] *Ibid*.

[171] *Ibid*.

[172] *Ibid*.

[173] *Ibid*.

[174] *Ibid* at 28.4.8.

[175] *Corriveau v R* (1998), [1999] 2 CTC 2580 (TCC), 1998 CarswellNat 2792 (TCC), at para 24 [*Corriveau*]. Although subsequent cases have stated that *Corriveau* stands for the proposition that the burden on the CRA regarding the imposition of a gross negligence penalty is a heavy one, it appears as though the Tax Court of Canada in this case was referring to the burden regarding assessment beyond the normal assessment period.

[176] *Lust v R*, 2009 TCC 577, 2009 CarswellNat 3722 (TCC) at para 23.

[177] C. (R.) v. McDougall, 2008 CarswellBC 2041, 2008 SCC 53

[178] *Farm Business Consultants Inc v R*, [1994] 2 CTC 2450, 1994 CarswellNat 1107 (TCC), aff'd (1996), 96 DTC 6085 (FCA).

[179] *Farm Business Consultants* (TCC), *supra* note 178 at para 27.

[180] *Ibid*.

[181] *Ibid*.

[182] *Ibid*.

[183] *Ibid*.

[184] *Ibid*.

[185] *Ibid*.

[186] *Udell v Minister of National Revenue*, 70 DTC 6019 (Exch Ct), 1969 CarswellNat 331 (Exch Ct).

[187] *Ibid* at paras 49-50.

[188] *DeCosta v R*, 2005 TCC 545, 2005 CarswellNat 2311 (TCC).

[189] *Ibid* at para 9.

[190] *Ibid* at para 11.

[191] *Ibid*.

[192] *Venne, supra* note 76.

[193] *Ibid* at para 40.

[194] *Ibid* at para 6.

[195] *Ibid* at para 37. See also *Sirois c R*, 96 DTC 3231 at para 13 (TCC held that indifference is

tantamount to burying one's head in the sand) and *Malleck v. The Queen*, 98 DTC 1019 at para 7 (TCC held that indifference means reckless or wanton).

[196] *Venne*, *supra* note 76 at para 36.

[197] *Villeneuve*, *supra* note 171 at para 6.

[198] *Panini*, *supra* note 201 at para 43.

[199] *897366 Ontario Ltd v R*, 2000 GTC 754 (TCC [Informal Procedure]), 2000 CarswellNat 382.

[200] *Ibid* at para 19.

[201] *Ibid*.

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