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A chilling account: North American and Australasian approaches to fears of over-defensive responses to taxpayer claims against tax officials

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Abstract

Judges frequently deny relief to taxpayers in claims against tax officials because of concerns about the possible adverse motivational effects on tax officials of imposing liability. In particular, there is a concern that the fear of being sued will result in tax officials becoming over-defensive in carrying out their tax administration duties. These over-defensive behaviours are often described as ‘chilling’ effects or ‘chill-factor’ concerns.

The inherent logical appeal of these chill-factor concerns is rarely subjected to the rigours of the rules of evidence or even to close academic scrutiny. Further, no attempt has been made to devise robust legal principles for appropriate judicial treatment of chill-factor concerns. This article addresses these deficiencies.

Specifically, Part 2 explains the main controversies surrounding the existence, nature and most appropriate weight to be afforded to chill-factor concerns in taxpayer claims against tax officials. Part 3 examines the judicial treatment of chill-factor concerns in taxpayer claims against tax officials in the United States, Canada, Australia, and New Zealand. Part 4 draws on the various approaches in each of these jurisdictions and, mindful of the controversies and complexities discussed in Part 2, sets out a series of guidelines to assist policy-makers and judges in determining the appropriate treatment of chill-factor policy concerns in taxpayer claims against tax officials.

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1. INTRODUCTION

Taxpayer claims against tax officials for harm caused by tax administration activities give rise to a number of complex public policy concerns which judges need to consider. One of the policy concerns most commonly raised to deny taxpayer recovery is the ‘chill-factor’ effect.² The nub of the chill-factor effect argument is that imposing legal liabilities on tax officials may result in a range of over-defensive responses. For example, in the face of increased risk of liability for incorrect advice provided to taxpayers, a revenue authority may cease providing taxpayers with even the most basic information or only provide that information after multiple expensive and time-consuming cross-checking procedures have been followed.³ Similarly, higher risk tax collection activities may be avoided for fear of being sued if a mistake is made.⁴ Over-defensiveness might also manifest itself in the form of tax authorities seeking to avoid difficult cases being brought before the courts. Otherwise willing people may also be deterred from becoming tax officials.⁵

Consequently, judges are often faced with submissions that taxpayer recovery in claims against tax officials should be denied due to chilling-effect concerns. This article examines cases in which such concerns have been raised in the United States, Canada, Australia and New Zealand and the judicial approaches to dealing with these concerns in those cases. These jurisdictions have been chosen as they represent significantly different approaches to the chill-factor issue. The aim is to distil from these differing approaches a number of guidelines for consistent and robust judicial treatment of chill-factor concerns in tax cases.

Specifically, Part 2 elaborates on some of the controversies and complexities concerning the existence, nature and most appropriate weight to be afforded to chill-factor concerns in taxpayer claims against tax officials.⁶ An appreciation of these is essential to understanding the challenges facing judges in dealing with chill-factor policy concerns. Part 3 discusses the contrasting judicial approaches to dealing with

² Often also referred to as the ‘chilling’ effect or ‘over-defensiveness’ effect. These terms are used interchangeably in this article.

³ Such arguments have been used to defend Revenue powers to revoke or modify Revenue Rulings on a retroactive basis. See, for example, Edward Morse, ‘Reflections on the Rule of Law and “Clear Reflection of Income”: What Constrains Discretion?’ (1999) 8 *Cornell Journal of Law and Public Policy* 445, 490.

⁴ For example, falls in tax collection actions by the United State Internal Revenue Service in the 1990’s have been attributed to the threat of personal actions for damages against tax officials. See Christopher Pietruszkiewicz, ‘A Constitutional Cause of Action and the Internal Revenue Code: Can You Shoot (Sue) the Messenger?’ (2004) 54 *Syracuse Law Review* 1, 5. See also Seth Kaufman, ‘IRS Restructuring and Reform Act of 1998: Monopoly of Force, Administrative Accountability, and Due Process’ (1998) 50 *Administrative Law Review* 819, 827.

⁵ This concern was noted in *Harlow v Fitzgerald* 457 U.S. 800 (1982). In that case, the United States Supreme Court expressed concern about ‘the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.’ These comments were cited with approval in *Mitchell v Forsyth* 472 U.S. 511 (1985), 526.

⁶ For the purposes of this article, the examination extends to claims against tax officials in their personal capacities as well as claims against the Revenue.

chill-factor policy concerns in taxpayer claims against tax officials in the United States, Canada, Australia and New Zealand. Part 4 draws on these contrasting approaches and, mindful of the controversies and complexities discussed in Part 2, proposes a number of specific guidelines to assist policy-makers and judges to deal with chill-factor effect concerns in tax cases in a predictable and principled manner.

2. CHILL-FACTOR CONTROVERSIES AND COMPLEXITIES

The chill-factor effect, as with most public policy concerns, raises a number of complexities and controversies. These include fundamental questions about whether chilling effects are a real and observable phenomenon, and if they are, whether those effects should be feared. Debate also surrounds the appropriate weighing up of chill-factor concerns against any countervailing positive policy effects of imposing liability to taxpayers on tax officials. There are also questions about whether tax officials, in particular, respond in over-defensive ways to adverse judicial determinations and the form any such over-defensiveness might take. Judges need to be mindful of such issues in dealing with chill-factor concerns in tax cases. Hence, each of these complexities and controversies is elaborated below:

2.1 Is the chill-factor a real and observable phenomenon?

Some commentators question whether, despite its inherent logical appeal, the chill-factor effect is a real and observable phenomenon. This scepticism is fuelled by the limited number of empirical studies into the issue and the lack of uniformity in the results of those studies.⁷ For example, a United States study by Cordes and Weisbrod into the allocational impact of the imposition of liability on highway authorities found evidence of a ‘chill-factor’ phenomenon.⁸ In contrast, a study by O’Leary into the effect of judicial determinations on activities of the United States Environmental Protection Agency was less conclusive, finding both negative and positive motivational effects.⁹ A number of additional United States studies have reached similarly qualified conclusions.¹⁰ The Australasian empirical work is also equivocal. A 2004 Australian study by McMillan and Creyke into the effects of adverse judicial

⁷ These facts are lamented by the UK Law Commission in their recent consultation paper on administrative redress for citizens from public bodies. (The Law Commission, United Kingdom, *Administrative Redress: Public Bodies and the Citizen*, Consultation Paper No 187 (2008)). Similar comments were made by the Committee in their earlier report—See The Law Commission, Public Law Team, United Kingdom, *Monetary Remedies in Public Law: A Discussion Paper* (2004), [7.10]–[7.11].

⁸ See Joseph Cordes and Burton Weisbrod, ‘Government Behaviour in Response to Compensation Requirements’ (1979) 11 *Journal of Public Economics* 47.

⁹ See Rosemary O’Leary, ‘The Impact of Federal Court Decisions on the Policies and Administration of the US Environmental Protection Agency’ (1989) 41 *Administrative Law Review* 549.

¹⁰ Other United States studies with similarly qualified conclusions as to whether impact of judicial decisions on public bodies will be positive or negative include: Charles Johnson, ‘Judicial Decisions and Organisational Changes: Some Theoretical and Empirical Notes on State Court Decisions and State Administrative Agencies’ (1979) 14 *Law and Society Review* 27; and Bradley Canon, ‘Studying Bureaucratic Implementation of Judicial Policies in the United States: Conceptual and Methodological Approaches’ in Mark Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (2004).

review determinations on Australian government bodies¹¹ found that, aside from a few noted instances, there was no evidence of significant chilling effects flowing from adverse judicial review determinations.¹²

In addition to the variability and authority-specific nature of the results of the various studies, it is questionable whether the findings in any one jurisdiction would readily transfer to other jurisdictions. The seemingly contradictory results may also simply indicate that different public bodies will respond in different ways to potential chilling effect triggers. A further complication is that responses to adverse judicial determinations are likely to change over time as public service attitudes, policies and practices evolve and change, reducing the utility of any older studies.

The academic debate on the issue does little to resolve these empirical gaps and complexities. There is, however, qualified academic acceptance of the legitimacy of over-defensiveness concerns.¹³ Levinson, for example, acknowledges the validity of chill-factor concerns, but questions their potential impact, arguing that in many cases public authorities respond to political rather than economic ramifications.¹⁴

Others challenge chill-factor concerns on the basis that the extent and nature of any motivational impact of a particular judicial determination or legislative imposition of liability will depend upon the nature of the wrong to which that judgment or legislation relates. For example, over-defensive responses to torts imposing personal liability on officials may be more extreme than in cases where liability is imposed at an organisational level.¹⁵

Some also discount chill-factor concerns by distinguishing between short-term and long-term effects of over-defensive behavioural responses. For example, Roots suggests that such policy concerns are weak because they are short-term in effect. In

¹¹ Robin Creyke and John McMillan, 'The Operation of Judicial Review in Australia' in Mark Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact - International and Interdisciplinary Perspectives* (2004), 161.

¹² *Ibid* at 178, the authors note a particularly pertinent comment from one agency clearly indicating a view that chill-factor effects had resulted from an adverse judicial review outcome: 'The court's decision made the department super cautious about adhering to process. They adopted a no risk policy which increased the complexity of the statement of reasons process and made the system more expensive. The expectation of intense scrutiny by the courts meant that "a hell of a lot" more time was spent by the department on the process.'

¹³ The tortious academic literature on this issue is particularly voluminous. See, for example, Osborne Reynolds, 'The Discretionary Function Exceptions of the Federal Torts Claims Act' (1968) 57 *Georgetown Law Journal* 81, 121-123; Paul Craig and Duncan Fairgrieve, 'Barrett, Negligence and Discretionary Powers' [1999] *Public Law* 626, 635; Susan Kneebone, *Tort Liability of Public Authorities* (1998), 393; Keith Stanton et al, *Statutory Torts* (2003), 57; Harry Woolf, *Protection of the Public - A New Challenge* (1990), 60; Cornelius Peck, 'The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Exception' (1956) 31 *Washington Law Review* 207, 223; and Donal Nolan, 'Suing the State: Governmental Liability in Comparative Perspective' (2004) 67 *Modern Law Review* 844, 859-860.

¹⁴ Daryl Levinson, 'Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs' (2000) 67 *University of Chicago Law Review* 345.

¹⁵ See Peter Schuck, *Suing Government* (1983). This is a significant issue which is taken up in Part 4 in deriving guidelines for dealing with chill-factor concerns in taxpayer claims against tax officials.

the long-run, improvements in administrative decision-making resulting from imposing liability on public authorities outweigh any chilling effects.¹⁶

2.2 Weighing chill-factor concerns against countervailing policy effects

None of the preceding empirical work or academic commentary examines chill-factor concerns in a tax context. However, tax cases raise their own complexities. For example, where the chill-factor issue is raised in tax cases, judges need to weigh the possible adverse motivational effects of imposing liability on tax officials against possible countervailing positive motivational effects on taxpayers. These effects might offset any observable short-run chill-factor effects and lead to long-run overall improvements in tax administration through fostering voluntary compliance behaviour.

Unfortunately, though, just as there are no tax-specific studies into potential chilling effects on tax officials, there have also been no empirical studies of any possible positive motivational effects of taxpayer success in claims against tax officials. The most closely applicable studies are those examining possible links between taxpayer compliance and taxpayer perceptions of justice. Wenzel in his study of the impact of justice concerns on tax compliance notes the results of numerous studies, concluding that “taxpayers are less likely to be compliant with a tax system they consider unjust, unfair, and, thus, illegitimate”.¹⁷ To the extent that taxpayers might perceive unfairness or injustice in restricting the liability of tax officials due to chill-factor concerns, the effect may be a reduction in voluntary compliance behaviour. Conversely, positive compliance benefits might well flow from allowing taxpayers to succeed in claims against tax officials more often, despite any potential chill-factor concerns.

It may also be possible to extrapolate from studies linking sanctions imposed on taxpayers and the effect on compliance¹⁸ and to hypothesise on a possible positive link between greater ‘sanctions’ imposed on tax officials and the level of taxpayer compliance. It would, however, be a significant leap of faith to assert that the motivations and responses of taxpayers will be the same as the motivations and responses of tax officials.

Commentators such as Book also note the risks of drawing any concrete conclusions from the literature, pointing out the subtleties of tax administration and “the possibility that increasing post-assessment procedural protections may embolden non-compliance

¹⁶ As Roots has observed: ‘Do we deny compensation to the person aggrieved because, in the short term, administrative bodies are likely to be inhibited in their decision-making functions, or do we, accepting the risk of short term disruption and inhibition, focus on the long-term benefits of higher quality administrative action, the reduction of loss caused to individuals, and relief for those aggrieved, in both the short and long term, and allow compensation? Obviously, the latter option is the more equitable and definitely preferable.’ Lachlan Roots, ‘A Tort of Maladministration: Government Stuff-Ups’ (1993) 18 *Alternative Law Journal* 67, 71.

¹⁷ Michael Wenzel, ‘The Impact of Outcome Orientation and Justice Concerns on Tax Compliance: The Role of Taxpayers’ Identity’ (2002) 87(4) *Journal of Applied Psychology* 629, 629.

¹⁸ These studies conclude, somewhat unsurprisingly, that harsher sanctions might foster greater taxpayer compliance. The logic of such findings has been noted by Roth, Scholz and Witte: “The hypothesis that more certain or severe legal sanctions will encourage compliance with the law is consistent not only with ... economic theories ... but also with exchange theory in sociology.” See Jeffrey Roth, John Scholz and Ann Witte (eds), *Taxpayer Compliance: An Agenda for Research* (1989) vol 1, 91.

or, alternatively, increase compliance through a greater sense of public confidence in the fairness of procedures".¹⁹

2.3 Do tax officials respond over-defensively to adverse judicial determinations?

Few commentators have ventured to consider how or to what extent over-defensiveness might manifest itself in tax official conduct. Writers such as Schuck have, however, more generally speculated on the likely effects on 'street level' officials of imposing liability on them. Schuck points to four common forms of risk averse behaviour by public officials. These are: inaction,²⁰ delayed action,²¹ formalism through following formal procedures aimed at insulating the decision-maker against potential suit²² and changes in the character of decisions to those with lower attendant risks of suit than decisions that might otherwise have been made.²³

While Schuck's summary of possible chilling effects is not tax-specific, Schuck goes on to paint a vivid picture of the environment which might conceivably face a tax official and prompt such over-defensive behaviours:

His environment is characterized by pervasive uncertainty concerning what behavior is correct, a relatively high probability of error and potential for public harm, and unusually great opportunities for behavior that minimizes the risks to his personal interests ... He also faces significant uncertainties concerning the availability to him either of immunity or of devices to shift risks to others. As a result, the official's caution is likely to assume proportions that can reduce his willingness to pursue the objectives that his agency is required to advance.²⁴

This cost-benefit type of analysis of the motivations of public officials—this time with specific application to tax officials—is also advanced by Pietruszkiewicz who observes:

For the revenue agent or a revenue officer, there can be no benefit for incurring the risks taken in attempting to assess or collect taxes ... As a result, the cost-benefit analysis strongly favours risk aversion by a public servant.²⁵

Despite the logical appeal of such hypotheses, the potential motivators of tax officials which might bring about such risk aversion responses are difficult to predict. The response to the threat of liability to taxpayers may well manifest itself differently and to varying degrees depending on a wide range of factors. These include the level of authority and experience within the organisation of the relevant official, whether the

¹⁹ Leslie Book, 'The Collection Due Process Rights: A Misstep or a Step in the Right Direction' (2004) 40 *Houston Law Review* 1145, 1160.

²⁰ Peter Schuck, 'Suing our Servants: The Court, Congress, and the Liability of Public Officials for Damages' (1981) *Supreme Court Review* 281, 309-310.

²¹ *Ibid* 310.

²² *Ibid* 310-311.

²³ *Ibid* 311-312.

²⁴ *Ibid* 284-285.

²⁵ Christopher Pietruszkiewicz, above n 4, 64-65.

threat is of personal liability or liability at an organisational level,²⁶ the official's level of knowledge and understanding of the ramifications of adverse judicial outcomes, and the degree of legal certainty about the limits of potential liability of tax officials. It is easy to conceive of many more similar considerations which might be material to ascertaining the extent and likelihood of any over-defensive tax official response in any particular case.

There is also the broader philosophical question of whether protecting the Revenue requires taking *extra* care to avoid setting precedents which might generate over-defensive tax official responses. The question arises because any challenge to the activities of a revenue authority indirectly creates vulnerabilities in the funding of the other functions of State and important social initiatives of government. Accordingly, it could be argued that, in the taxation context, judges need to consider not only the direct ramifications of imposing liability on tax officials, but also potential flow-on effects on any of a range of other government activities and initiatives. As Cohen has noted, “[t]he cost may be borne by another department, a bureaucracy independent from the one whose actions are most directly associated with the injury”.²⁷

Of course, taken to its logical conclusion, such an argument could be used to resist imposing liability on tax officials in any circumstances. And no one seriously advocates endowing tax officials with absolute immunity from liability for all of their wrongs due to chill-factor concerns.²⁸ A line must, therefore, be drawn. The following Part discloses where that line has been drawn by United States, Canadian, Australian and New Zealand judges.

3. NORTH AMERICAN AND AUSTRALASIAN JUDICIAL APPROACHES TO CHILL-FACTOR CONCERNS

Despite the controversies and complexities surrounding the chill-factor effect outlined in the preceding Part, judges are frequently called upon to adjudicate arguments about potential chill-factor effects of imposing liability on tax officials. This Part examines the contrasting judicial approaches adopted in United States, Canada, Australia and New Zealand.

3.1 United States judicial approaches to chill-factor concerns

The chill-factor effect and the possible adverse effects of it were first judicially noted in the United States in 1788 in *Respublica v Sparhawk*,²⁹ a case which is widely

²⁶ The relevance of this issue is explored further in Part 4.

²⁷ David Cohen, ‘Suing the State’ (1990) 40 *University of Toronto Law Journal* 630, 647.

²⁸ United States judges, in particular, have acknowledged that some principles, such as some Constitutionally protected rights, should take priority over tax collection and administration activities. For example, the United States Court of Appeal observed in *National Commodity and Barter Association National Commodity Exchange v Gibbs* 886 F.2d 1240 (10th Cir. 1989), at 1248, that “...while the comprehensive scheme of the Internal Revenue Code should not be indiscriminately disrupted by the creation of new remedies, certain values, such as those protected by the first and fourth amendments, may be superior to the need to protect the integrity of the internal revenue system.”

²⁹ 1 U.S. 357 (1788). The case involved an unsuccessful application for relief by the plaintiff, Sparhawk, for goods seized by the State for protection in anticipation of a British invasion of Philadelphia but which, notwithstanding these efforts, ultimately fell into the hands of the invading British in any event.

attributed with reinforcing the doctrine of sovereign immunity in the United States.³⁰ However, the first detailed consideration came over 150 years later, in *Gregoire v Biddle*³¹, a case concerning the malicious detention of a Frenchman during the Second World War. In that case, Justice Learned Hand struggled with weighing up potential ‘monstrous’ outcomes of letting loss caused by malicious public servants go unpunished, against the public good of not submitting innocent public officials to the fear of being sued. Ultimately, however, chill-factor concerns were determinative with His Honour concluding that “it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation”.³²

Clearly influential in the reasoning was the fact that the case involved a challenge to governmental officers exercising judicial functions.³³ United States courts have subsequently refined the distinction between judicial or prosecutorial functions of public officials and other functions—with chill-factor concerns being afforded greater weight in cases involving the former. Consequently, in *Mitchell v Forsyth*³⁴ the Supreme Court rejected a chill-factor argument that the Attorney-General should be afforded immunity from suit when exercising national security functions. The Court distinguished national security functions from judicial functions, with the Court observing that “..the mere threat of litigation may significantly affect the fearless and independent performance of duty by actors in the judicial process..”³⁵ but would not have the same effect on non-judicial functions. This line of reasoning has been used to support affording immunity from suits in cases alleging wrongful prosecution by United States Internal Revenue Service (IRS) officers exercising prosecutorial powers.³⁶

In the tax context, the interest in chill-factor arguments has been renewed in recent years in cases considering constitutional damages claims against tax officials. In *Bivens v Six Unknown Named Federal Agents of Federal Bureau of Narcotics*³⁷ (*Bivens*) the United States Supreme Court created a constitutional damages action allowing citizens whose constitutional rights have been infringed by a public officer to

In order to illustrate the dangers of over-defensive conduct in public officials the Court, at 363, referred to the following extract from Clarendon’s History: “...the Lord Mayor of London, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down 40 wooden houses, or to the re- moving the furniture, &c. belonging to the Lawyers of Temple, then on the Circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt.”

³⁰ Ibid 363.

³¹ 177 F.2d 579 (1949).

³² Ibid 581.

³³ The Court observed, *ibid* at 580, (citing *Yaselli v Goff* 12 F.2d 396 (1926), 406) that “[t]he public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the Government should speak and act freely and fearlessly in the discharge of their important official functions.”

³⁴ 472 U.S. 511 (1985). This case is authority for the principle that United States Attorneys-General do not enjoy absolute immunity from suit.

³⁵ Ibid 522.

³⁶ See, for example, *Stankevitz v IRS* 640 F.2d 205 (1981) applying the precedent set in *Butz v Economou* 438 U.S. 478, 508-17 (1979).

³⁷ 403 U.S. 388 (1971).

sue that officer personally for damages, even where there is no statutory avenue of relief.³⁸

However, courts have struggled with potential chill-factor effects of allowing such claims to proceed against IRS officers.³⁹ For example, in *Vennes v An Unknown Number of Unidentified Agents of the United States*⁴⁰ the majority, referring to the risks of extending the availability of *Bivens* relief to taxpayers, observed:

Expanding *Bivens* in this fashion would have a chilling effect on law enforcement officers and would flood the federal courts with constitutional damage claims by the many criminal defendants who leave the criminal process convinced that they have been prosecuted and convicted unfairly.⁴¹

There was a similar result in *National Commodity and Barter Association, National Commodity Exchange v Gibbs*⁴² (*Gibbs*). However, in *Gibbs*, the door was left open for a potential *Bivens* action in the tax context with the Court pointing out the need for competing public policy interests to be weighed up in determining whether to allow taxpayer relief:

... while the comprehensive scheme of the Internal Revenue Code should not be indiscriminately disrupted by the creation of new remedies, certain values, such as those protected by the first and fourth amendments, may be superior to the need to protect the integrity of the internal revenue system.⁴³

Clearly, this approach envisages that there may be situations where the risk of generating an adverse chill-factor effect through imposing liability on tax officials may be justified. Unfortunately, however, clear guidelines to delineate when chill-factor concerns should be considered prohibitive in taxpayer *Bivens* actions are yet to emerge and United States judges tend not to elaborate on their chill-factor concerns when they raise them.⁴⁴

It is evident, though, that chill-factor concerns weigh more heavily on the minds of United States judges where personal liability of tax officials is in question. For

³⁸ In *Carlson v Green* 446 U.S. 14 (1980), at 18, the Supreme Court summarised the availability of *Bivens* relief in these terms: “the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.”

³⁹ Leave to bring action is typically denied. See, for example, *Capozzoli v Tracey* 663 F.2d 654 (5th Cir. 1981); and *Morris v United States* 521 F.2d 872 (9th Cir. 1975).

⁴⁰ 26 F.3d 1448 (8th Cir. 1994).

⁴¹ *Vennes*, *ibid* [13]. This was notwithstanding the extreme behaviour of the tax officials in question in that case. Scott summarises the extreme facts in this case as follows: ‘Undercover IRS employees furnished \$100,000 in cash to the plaintiff, who lost it. The employees apparently did not like the idea of trying to explain the loss, and instead attempted to recover the money by threatening to dismember the plaintiff’s children. The threats forced the plaintiff into drug and weapons offenses in an attempt to satisfy the employees. The plaintiff claimed that the threats were a denial of due process.’ See Ridgeley A. Scott, ‘Suing the IRS and its Employees for Damages: David and Goliath’ (1996) 20 *Southern Illinois University Law Journal* 507, 561.

⁴² 886 F.2d 1240 (10th Cir. 1989).

⁴³ *Ibid* 1248.

⁴⁴ The case law is far from settled with writers such as Pietruszkiewicz asserting that “a *Bivens* remedy may or may not be available depending on the Circuit in which the case is litigated...” Christopher Pietruszkiewicz, above n 4, 55.

example, Biggers J in *Baddour Inc. v United States*⁴⁵ in dismissing the taxpayer's claim for damages for a wrongful levy of his property by a tax official observed that "creation of a damages remedy ... resulting in the personal liability of Internal Revenue Service employees would serve to hamper the ability of such employees to perform a function that is a difficult one and one that is vital to our nation".⁴⁶

3.2 Canadian judicial approaches to chill-factor concerns

Generally speaking, Canadian judges have been far more nuanced and sceptical in their approach to chill-factor concerns than their United States counterparts. For example, in *Nelles v Ontario*⁴⁷ (*Nelles*), a case involving allegations of malicious prosecution against the Canadian Attorney-General, Lamer J in delivering the leading judgment of the Canadian Supreme Court, described the 'chilling effect' argument as "largely speculative".⁴⁸

In the most detailed and considered analysis of chill-factor concerns of any of the cases cited in this article, Lamer J also acknowledged the limited force of chill-factor arguments in situations where proving a claim involves demonstrating improper motive or malice of a public official rather than simply an error in the exercise of discretion or judgment.⁴⁹ According to Lamer J, to do otherwise would effectively give officials a "license to subvert individual rights".⁵⁰

In the tax context, chill-factor effects in Canada have received judicial attention in a spate of recent actions involving taxpayer tortious claims against the Revenue. For example, in *783783 Alberta Ltd v Attorney-General (Canada et al)*⁵¹ the Alberta Court of Appeal relied in part on chill-factor concerns to deny taxpayer relief. The taxpayer plaintiff had claimed damages for Revenue Canada's failure to apply certain tax deductibility rules correctly in assessing the tax liabilities of one of the plaintiff's overseas competitors. This error resulted in the taxpayer losing its competitive advantage from being a Canadian resident. In rejecting the taxpayer's claim, the Court of Appeal noted that to do otherwise would mean "[s]ignificant resources would have to be diverted to dealing with inquiries and complaints about the application of particular rules of taxation ...".⁵²

In *Canadian Taxpayers Federation v Ontario (Minister of Finance)*⁵³ the plaintiff sought to bring a claim alleging a negligent misrepresentation by the Minister of Finance in breaching a pre-election commitment not to introduce the Ontario Health

⁴⁵ 802 F.2d 801 (5th Cir. 1986).

⁴⁶ Ibid 807-808.

⁴⁷ [1989] 2 SCR 170.

⁴⁸ Ibid 197.

⁴⁹ His Honour surmised, *ibid* at 197, that "...in cases of malicious prosecution we are dealing with allegations of misuse and abuse of the criminal process and of the office of the Crown Attorney. We are not dealing with merely second-guessing a Crown Attorney's judgment in the prosecution of a case but rather with the deliberate and malicious use of the office for ends that are improper and inconsistent with the traditional prosecutorial function".

⁵⁰ Ibid 195.

⁵¹ 2010 ABCA 226.

⁵² Ibid [48].

⁵³ (2004) 73 O.R. (3d) 621.

Premium. Roleau J referred to a number of policy reasons in rejecting the plaintiff's claim including chill-factor concerns:

Imposing a duty of care in circumstances such as exist in the present case would have a chilling effect ... Once elected, members would be concerned about the representations they made during their election campaigns and would not consider themselves at liberty to act and vote in the public interest on each bill as it came before the legislature. In my view, therefore, it would be unwise to impose a duty of care in such circumstances.⁵⁴

In *Leighton v Attorney-General of Canada*⁵⁵ the taxpayer alleged (among a range of other claims), that the Canada Revenue Agency (CRA) had been negligent in its approach to an audit of the taxpayer's company. Fisher J disposed of the plaintiff's claim on proximity grounds and hence, did not need to deal at length with policy concerns. However, His Honour alluded to the relevance of such concerns by referring to "residual policy considerations that would militate against recognizing a duty of care in this case ...".⁵⁶

The chill-factor argument has received a less sympathetic hearing in other tax cases—more consistent with the skeptical and nuanced approach taken by Lamer J in *Nelles*. For example, in *Sherman v Canada (Minister of Internal Revenue)*⁵⁷ Layden-Stevenson J agreed with the taxpayer's contention that "the chilling effect on future investigations is not a valid reason to refuse disclosure".⁵⁸ That case involved a claim for access to statistics about tax collection assistance activity between CRA and the United States IRS which CRA had refused to release to the taxpayer plaintiff. This approach is consistent with the approach to the chill-factor taken in *Rubin v Canada Minister of Transport*⁵⁹ in which the chill-factor argument opposing release of information was described as "nebulous". Canadian judges have generally taken the view that in such cases, the public interest in disclosure and the positive effect on service standards of the greater accountability to the public fostered by disclosure outweighs any potential chilling effect of disclosure.

3.3 Australasian judicial approaches to chill-factor concerns

In Australia, the possible chilling effect on the provision of information was acknowledged as a concern by Brennan J in *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979*.⁶⁰ His Honour observed in that case that:

To impose a legal duty of care on the unsolicited and voluntary giving of any information and advice on serious or business matters would chill

⁵⁴ Ibid [71].

⁵⁵ 2012 BCSC 961.

⁵⁶ Ibid [58]. Fisher J concluded that a relationship of proximity sufficient to support a prima facie duty of care did not exist in this case, hence there was no need to comprehensively consider whether any policy reasons otherwise precluded the establishment of such a duty.

⁵⁷ [2004] F.C. 1423.

⁵⁸ Ibid [16].

⁵⁹ [1998] 2 F.C. 430.

⁶⁰ (1986) 162 CLR 340.

communications which are a valuable source of wisdom and experience for a person contemplating a course of conduct.⁶¹

Unfortunately, His Honour did not elaborate on this chill-factor argument. However, Brennan J did elaborate in *Northern Territory v Mengel*⁶², confirming that chilling-effect concerns should be afforded less weight in cases where malicious or deliberate intent of a public official is alleged. In situations where liability for public official behaviour falling short of malice (and more akin to negligent behaviour) is sought to be impugned, chill-factor concerns should be given greater consideration.⁶³ This approach parallels the Canadian approach of Lamer J in *Nelles v Ontario*⁶⁴ and in the recent spate of negligence cases against CRA discussed above. However, Australian judges have generally been far less considered in their treatment of chill-factor concerns than their Canadian or United States counterparts.

For example, in the tax context, the Australian High Court directly, but briefly, discussed the issue in *Pape v Federal Commissioner of Taxation*⁶⁵ (*Pape*). In that case, the Australian Commissioner of Taxation argued that the taxpayer's argument in seeking to place constitutional limits on the power of appropriation contained in the Australian Constitution 'would cause Parliament constantly to be "looking over its shoulder and being fearful of the long term consequences" if it made an appropriation outside power.'⁶⁶ Heydon J rejected the argument, observing that "[t]he occasional declaration that federal legislation is invalid does not cause the progress of government to be unduly chilled or stultified".⁶⁷ Neither the Australian Commissioner in making the argument, nor Heydon J in rejecting it, raised any evidence to justify their respective views.

This lack of detailed consideration of the chill-factor argument is also evident in New Zealand case law, even where its validity has been accepted. A good recent example is *Ch'elle Properties (NZ) Ltd v Commissioner of Inland Revenue*.⁶⁸ In that case, which concerned a claim of negligence against the New Zealand Commissioner of Inland Revenue, one of the grounds for rejection of the plaintiff's claim was on the basis of chill-factor concerns. Keane J affirmed the views expressed in *Rolls Royce New Zealand Ltd v Carter Holt Harvey*⁶⁹ that "[t]here is a legitimate public interest in regulatory bodies being free to perform their role without the chilling effect of undue vulnerability to actions for negligence".⁷⁰

⁶¹ Ibid 372.

⁶² (1995) 185 CLR 307.

⁶³ To date all cases alleging malicious conduct by Australian tax officials have failed, typically due to the difficulties of proving malicious intent. Equally, all tortious claims against the Australian Commissioner of Taxation have been summarily dismissed. Hence, the distinction advanced by Brennan J is yet to be applied or discussed in a tax case.

⁶⁴ [1989] 2 SCR 170.

⁶⁵ (2009) 238 CLR 1.

⁶⁶ Ibid 205-206, relying on *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 418 per Murphy J who asserted that a narrow construction of the provision would have a "chilling effect...on governmental and parliamentary initiatives."

⁶⁷ Ibid 208.

⁶⁸ [2005] NZHC 190.

⁶⁹ [2005] 1 NZLR 324.

⁷⁰ Ibid [35].

Again, as in *Pape*, there was no judicial discussion of the merits of any chill-factor concerns. This lack of judicial analysis characterises the Australasian approach to dealing with chill-factor concerns. Troublingly, it has been judicially conceded in Australia that policy concerns such as chill-factor concerns have ‘intruded’ in some tax cases, heightening the need for guidelines for dealing with such issues in a consistent and principled manner.⁷¹ This is the challenge taken up in Part 4 below.

4. GUIDELINES FOR DEALING WITH CHILL-FACTOR CONCERNS

The examination of the relevant case law in the preceding Part reveals a number of differing judicial approaches to chill-factor concerns. These diverse approaches deal to varying degrees with the complexities and challenges discussed in Part 2. It is, however, possible to formulate a number of guidelines from this multi-jurisdictional analysis to aid judges and policy-makers in dealing with chilling-effect concerns in a principled and legally consistent manner, irrespective of the jurisdiction in which they operate. Four such guidelines are set out and elaborated below:

4.1 Chill-factor effects and individual tax official liability

The chill-factor effect should be afforded greater weight where the cause of action imposes personal liability on individual tax officials. We have seen, for example, that chilling-effect fears are often raised in United States *Bivens* Constitutional damages actions. These actions involve claims against individual officers. If officials are prone to react in an over-defensive manner they are more likely to do so where personal liability is at stake. Hence, extra caution is required in such cases to prevent triggering over-defensive responses to adverse outcomes.

However, the approach must be more nuanced than simply accepting chill-factor concerns as determinative whenever the taxpayer suit is against an individual tax official. This is because some personal actions against public officials involve high and difficult evidentiary hurdles for taxpayers to overcome in order to proceed with their suit. For example, torts such as the tort of misfeasance in public office and the tort of malicious prosecution require the plaintiff to discharge the onus of demonstrating that the relevant official has acted maliciously and deliberately. As Lamer J observed in Canada in *Nelles v Ontario*, proving such claims is notoriously difficult and there are numerous other ‘built-in’ deterrents to bringing such actions such as adverse costs orders for filing frivolous or vexatious claims.⁷²

Accordingly, an honest official acting rationally has little to fear from suit and should not be expected to react in an over-defensive manner to the potential for these types of suits. Equally, dishonest officials should not be permitted to escape liability on the basis of general policy concerns that their honest colleagues might react over-defensively. The weighing up of policy interests clearly militates against such a result. Doing otherwise risks granting tax officials a ‘licence’ to behave maliciously or dishonestly.⁷³

⁷¹ Gaudron and Gummow JJ in *Commissioner of Taxation v Payne* (2001) 177 ALR 270, 281.

⁷² [1989] 2 SCR 170, 197.

⁷³ As alluded to by Lamer J in *Nelles v Ontario*, *ibid*.

Conversely, in cases where negligent or innocent mistakes have been made causing taxpayer harm the potential chilling effects of imposing liability should be afforded greater consideration. There is a common thread among the judicial comments in each of the jurisdictions examined to this effect. In particular, we have seen that chilling-effect concerns feature prominently in negligence cases against tax officials in Australasia and Canada.⁷⁴

In summary, therefore, significant evidentiary weight should be afforded to chill-factor fears in those cases where: (1) liability on individual officers is proposed; *and* (2) where that liability is for lower standards of misbehaviour, such as negligent or other unintentional mistakes. This approach would bring together current threads of judicial reasoning evident across the jurisdictions examined. It also would compel judges to expressly recognise that, given the controversies and complexities surrounding chilling-effect concerns, these concerns should not be dealt with as an ‘all or nothing’ proposition.

4.2 Chill-factor effects and judicially-generated uncertainty

The chill-factor effect should be afforded greater evidentiary weight in cases in which allowing a claim to proceed would result in generating legal uncertainty as to the potential for tax officials to be sued. The logic behind this principle stems from the fact that the chill-factor effect represents a concern about *over*-defensive responses - not defensive behaviour *per se*. Consequently, it is easy to appreciate the potential for officials to respond in an over-defensive manner where their potential exposure to liability is uncertain or indeterminate, even when those officials are acting rationally. As observed in Part 2, uncertainty characterises the environment where over-defensive responses are most likely to result.⁷⁵

Hence, where a comprehensive legislative code for dealing with taxpayer complaints exists, judges should be cautious about setting precedents which introduce uncertainty by extending tax official liability outside of these legislative parameters. It is understandable, therefore, that in cases in the United States involving *Bivens* damages claims judges have referred to the potential chill-factor effects of second-guessing Congress and introducing a cause of action which Congress, via the Internal Revenue Code, may have intended to displace.⁷⁶

The same caution should be applied where taxpayer success would create exceptions to well established limits of liability.⁷⁷ Doing otherwise simply creates an environment

⁷⁴ It will be recalled that many of the cases which have overtly discussed chill-factor concerns referred to in Part 3 concerned allegations of negligence by public officials.

⁷⁵ See, for example the comments of Schuck referred to above at n 24.

⁷⁶ There is also Canadian authority for such an approach being taken in relation to unjust enrichment claims involving tax legislation, albeit in the context of discussion of the ability to raise an unjust enrichment claim in cases of non-compliance with statutory time frames set out in tax legislation. See *British Columbia Ferry Corp v MNR* [2001] 4 FC 3. See also the discussion of this case by Beninger in Michael Beninger, ‘Taxpayer Rights: Emerging Legal Techniques’ (Paper presented at the 52nd Annual Canadian Tax Foundation Conference, Toronto, 24-27 September 2000), [10.8].

⁷⁷ This recommendation is consistent with the tortious approach in countries such as Canada and Australia of requiring express consideration and weighing up of public policy concerns where the imposition of a duty of care in novel circumstances is proposed. Both countries derive their approaches from the United Kingdom *Anns* two-stage approach (so-named after *Anns v Merton Borough Council*

where tax officials can legitimately fear the potential for frequent and indeterminate liability.⁷⁸ As Pietruszkiewicz, referring to current uncertainty surrounding the ability of taxpayers to recover damages from tax officials in the United States, has observed: “The sword of Damocles does exist; however, it does little more than deter Internal Revenue employees from carrying out their duties”.⁷⁹

4.3 Chill-factor and the policy/operational distinction

Greater weight should be afforded to chilling-effect concerns in cases involving challenges to discretionary/policy functions as distinct from purely operational/administrative activities of tax officials. There is an inherent logical appeal in ensuring that tax officials are not over-defensive in exercising legislatively sanctioned discretions such as decisions whether to prosecute tax offenders, how to interpret various tax provisions and how to apply limited tax administration funds.⁸⁰ In contrast, it is much more difficult to sustain an argument for avoiding over-defensive responses to challenges to purely operational functions such as administrative activities undertaken to implement policy or discretionary decisions.

The reasoning behind this distinction is that many of the operational functions of revenue authorities are similar to those of any other large business—basic clerical and/or mechanical and repetitive tasks carried out by low level employees and aimed at implementing higher level policies and decisions. Such activities are characteristically procedural. In the long run, defensive responses to liability for malfunctions in these operational tasks are likely to result in improvements in the carrying out of these procedural tasks.⁸¹ Disproportionately-defensive responses pose little direct threat to the revenue base.

It is conceded that distinguishing between discretionary and operational functions will be difficult in some cases.⁸² however, this does not detract from the potential utility of the distinction for a number of reasons. First, the discretionary/operational distinction is familiar to jurists in each of the jurisdictions examined.⁸³ For example, in the United

[1977] 2 All ER 492) which expressly requires public policy to be considered at the second stage of the analysis.

⁷⁸ Indeterminate liability or ‘floodgates’ arguments go hand-in-glove with chill-factor concerns and are frequently discussed together by judges. See, for example, two Canadian examples cited in Part 3: 783783 *Alberta Ltd v Attorney-General (Canada) et al* 2010 ABCA 226 and *Nelles v Ontario* [1989] 2 SCR 170 and the United States Supreme Court comments in *Vennes v An Unknown Number of Unidentified Agents of the United States* 26 F.3d 1448 (8th Cir. 1994) cited above at n 41.

⁷⁹ Christopher Pietruszkiewicz, above n 4, 67-68.

⁸⁰ United States judges have specifically expressed concern that fear of suit may inhibit discretionary action. See, for example, the comments of the United States Supreme Court in *Harlow v Fitzgerald* 457 U.S. 800 (1982) reproduced above at n 5.

⁸¹ This is consistent with the analysis of chill-factor concerns by Roots as summarised in Part 2 above.

⁸² As has been famously judicially observed: “It would be difficult to conceive of any official act, no matter how directly ministerial that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail.” *Ham v Los Angeles County* 46 Cal App 148 (1920), 162. These comments have been picked up and applied in a number of other jurisdictions—most famously by Lord Slynn in the United Kingdom in *Barrett v Enfield London Borough Council* [2001] 2 AC 550 who observed, at 571, that “even knocking a nail into a piece of wood involves the exercise of some choice or discretion...”.

⁸³ As one United States commentator has pointed out: “[T]he terms “planning” and “operational” are indefinite; the problem of drawing a line remains. But all interpretations involve drawing distinctions.

States the distinction is contained in s421 of the *Federal Tort claims Act of 1948*,⁸⁴ legislation which aims to delineate the limits of immunity from suit in tort of Federal officials in that country.⁸⁵ A similar distinction has been used in Australia, Canada and New Zealand as an appropriate guide for determining when a public authority owes a tortious duty of care.⁸⁶

Second, the distinction is broad enough to encapsulate distinctions which, as noted in Part 3, have already been recognised in jurisdictions such as the United States and Canada between prosecutorial and judicial functions – which are characteristically discretionary – and other administrative functions.⁸⁷ Finally, and perhaps most pertinently, the distinction has been described as specifically aimed at limiting potential chill-factor effects of imposing liability on the State by permitting ‘suits for ordinary torts while not chilling government activities...’⁸⁸

4.4 Chill-factor and countervailing policy effects

Potential chill-factor effects should be weighed up against possible countervailing positive effects on tax administration activities of imposing liability on tax officials. As noted in Part 2 of this article the existence and extent of any chilling effect from imposing liability on public officials is far from clear and universally accepted. Hence sound legal analysis demands that judges considering what weight to afford to chill-factor concerns should engage in this weighing-up process.

The preceding three guidelines are essentially examples of this type of weighing-up process. A prime example is the need to weigh possible over-defensive effects against the prospect of providing immunity from suit to tax officials who have acted with dishonesty or malice toward a particular taxpayer. In those circumstances, the likely adverse consequences for taxpayer morale and trust and confidence in tax administrators of leaving the harm caused by such behaviour un-remedied is likely to outweigh any possible wider over-defensive effects of imposing liability on the offending official.

However, a specific guideline is required to emphasise that judges should always engage in some consideration of countervailing possible positive consequences of

The present situation is aided by terms which have a considerable history of application. They have been used, with varying degrees of consciousness...’ Reynolds, above n 13, 129.

⁸⁴ *Federal Tort Claims Act of 1948*, 28 USC Pt IV Ch 171 (1948). Hink & Schutter have extensively detailed the relevance of the policy/operational distinction in respect of the *Federal Tort Claims Act* noting that: “Section 421 of the *Federal Tort Claims Act* sets out a number of classes of claims as to which the United States does not waive its immunity. The most important of these is a non-waiver of claims based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government...” Heinz Hink and David Schutter, ‘Some Thoughts on American Law of Government Tort Liability’ (1965-1966) 29 *Rutgers Law Journal* 710, 721-722.

⁸⁵ Consequently, the distinction has generated a great deal of judicial discussion in the United States. See, for example, *Dalehite v United States* 346 US 15 (1953); *Indian Towing Co v United States* 350 US 61 (1955); and, more recently, *United States v Gaubert* 499 US 315 (1991).

⁸⁶ Following the precedent set in the landmark United Kingdom case of *Anns v Merton London Borough Council* [1977] 2 All ER 492. For a detailed discussion see Stephen Bailey and Michael Bowman, ‘The Policy-Operational Dichotomy—Cuckoo in the Nest’ (1986) 45 *Cambridge Law Journal* 430, 431-436.

⁸⁷ See, for example the comments of the United States Supreme Court in *Mitchell v Forsyth* 472 U.S. 511 (1985) reproduced (in part) above at n 35.

⁸⁸ Ridgeley A. Scott, above n 41, 520.

imposing liability on tax officials whenever the question of a possible chilling effect of so doing is raised. The case law examined in Part 3 shows that most judges do not presently expressly engage in any such weighing-up process.

In the tax context, at a minimum, whenever chill-factor concerns are raised to resist imposing liability on tax officials, judges should always attempt to weigh up these concerns against other possible positive motivational effects such as: (1) possible positive effects on taxpayer morale and compliance of allowing recovery against tax officials; and (2) possible short term and long term improvements in tax administration service standards and efficiency which might result from imposing liability on tax officials. While, as noted in Part 2, there is presently significant uncertainty surrounding these issues, similar uncertainties surround the chill-factor effect itself. Further, this sort of judicial consideration may provide a trigger for legislative attention and further empirical work to be undertaken to resolve these uncertainties.

5. CONCLUSION

From the outset this article has acknowledged the significant complexities and controversies surrounding the existence of any chill-factor effect, the extent to which potential over-defensive behaviour should be a concern in the tax context and how potential chilling effects might manifest themselves in the tax context. The analysis shows that presently the only certainty is the absence of empirical evidence which could be used to confidently predict positive *or* negative motivational effects of imposing liability on tax officials. Consequently, courts considering taxpayer claims against tax officials should resist dealing with chilling effect concerns in any cursory manner.

In addition, the case law examined in this article reveals that there is little uniformity in the judicial treatment of chill-factor concerns in tax cases. Judicial approaches vary from unqualified acceptance to outright rejection and most positions in between. Few judges in any of the jurisdictions examined have ventured to subject chill-factor concerns to the rigours of the rules of evidence. Nevertheless, taken together, a number of common threads can be drawn from these differing judicial approaches which can lead to a more legally robust and predictable approach to dealing with chill-factor concerns.

This article has extrapolated these threads and set them out as a series of four basic guidelines for judges and policy-makers. None of these guidelines is a perfect solution in every case. Further, in most cases more than one of the guidelines would need to be applied to satisfactorily address the issue. This is an unsurprising result as public policy concerns are typically incapable of being addressed in a single formulaic manner. Chill-factor concerns are no exception.

However, the guidelines set out in this article address the present fundamental problems associated with dealing with chill-factor considerations purely on a discretionary case-by-case basis. As one Australian judge has observed:

To apply generalised policy considerations directly, in each case, instead of formulating principles from policy and applying those principles, derived

from policy, to the case in hand, is, in my view, to invite uncertainty and judicial diversity.⁸⁹

The proposed guidelines also encourage a more detailed and nuanced approach to dealing with chill-factor concerns. Over time, a body of judicial commentary will develop to aid all tax administration stakeholders in understanding their rights and responsibilities. They may also serve as a primer for future empirical testing of the validity of various chill-factor fears and to assist tax administrators and policy makers in foreseeing possible over-defensive behaviour and minimising the harm of such behaviour.

⁸⁹ Stephen J in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529, 567.