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Evaluating Canadian Tax Remission Orders:
A Debt Relief Vehicle for Taxpayers

Tax remission orders, although rare, serve important functions in the Canadian tax system. This paper draws from a comprehensive study of federal tax remission orders issued between 1998 and 2017. It presents general findings about remission orders in that time period, including remission order applications, their reported costs, and the number of remission orders issued. The paper identifies the five most common categories of reasons cited for granting remission orders. It then applies tax policy analysis to assess the two most frequent reasons for granting remission orders: to provide debt relief for financial hardship and/or extenuating circumstances, and to provide remedies for government errors and delays. This study also highlights concerns about the federal tax remission order system and provides recommendations for improving its fairness, transparency, and accountability.

[Insert French Abstract]

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Introduction

I. *Remission orders under the spotlight*

Tax remission orders are described as the last chance for federal tax debt relief in Canada. Words like “exceptional”¹ and “extraordinary”² are used to convey their rarity and the slim chance of success when applying for a remission order. Taxpayers may apply for relief from interest and penalties under the Canada Revenue Agency’s (CRA) Taxpayer Relief Program,

1. Thorsteinssons LLP, “Remission Orders: A Primer” (26 September 2012), online (blog): <www.thor.ca/blog/2012/09/remission-orders-a-primer/> [perma.cc/22NA-SZ5M].

2. Canada Revenue Agency, “CRA Remission Guide” (October 2014) at 1, 4, 5 [*CRA Remission Guide*].

but remission orders are generally the only mechanism to forgive the underlying tax debts outside bankruptcy, once there is no further avenue to dispute the tax amount owed.³ Remission orders can also provide tax refunds or rebates that would otherwise be unavailable because statutory deadlines have passed.

Remission orders are issued by the Governor in Council, under the *Financial Administration Act*, and on the recommendation of a Minister.⁴ Perhaps due to their rarified status, remission orders have attracted little study, with the last comprehensive assessment of remission orders published in 1986.⁵ Despite the unusual nature of tax remission orders, this paper argues that they serve important functions in the Canadian tax system. Remission orders frequently act as a subsidy to taxpayers facing financial hardship and/or extenuating circumstances. They also provide relief from tax debts incurred due to government errors or delays, or when taxpayers experience unintended results of legislation. Where money was paid but no tax owed, remission orders can be used to provide restitution to taxpayers. While uncommon in recent decades, remission orders were historically used to provide subsidies to certain industries or projects.

This paper turns both an empirical and tax policy spotlight onto tax remission orders, drawing from a comprehensive study of federal tax remission orders issued between 1998 and 2017. It presents general findings about remission orders in that time period, including the number of remission orders issued, their reported costs, and remission order applications. This paper identifies the most common categories of reasons cited for granting remission orders. It then applies tax policy analysis to assess the two most frequent reasons provided for granting remission orders: 1) to provide debt relief for financial hardship and/or extenuating circumstances, and 2) to provide remedies for government errors and delays.

1. *Remission orders as a tax policy instrument*

This paper argues that where remission orders are issued for granting debt relief for financial hardship and/or extenuating circumstances, they generally constitute tax expenditures and should be analyzed using the tax expenditure framework. Significant issues are highlighted as to the fairness of access to remission orders, the administration and compliance burden

3. Note that there are exceptions including taxes on contributions by non-residents to TFSAs and RRSPs and on overcontributions to those plans, although these are arguably more akin to penalties.

4. *Financial Administration Act*, RSC, 1985, c F-11 [FAA].

5. H Arnold Sherman & Jeffrey D Sherman, "Income Tax Remission Orders: The Tax Planner's Last Resort or the Ultimate Weapon?" (1986) 34:4 Can Tax J 801.

of the remission order system, and whether they are the best instruments for granting tax debt relief. Better instrument choices include extending the taxpayer relief program beyond interest and penalties to include relief for tax debts, or allowing settlements of tax debts for less than the amounts owed.

When remission orders are issued as relief for government errors and delays, this paper argues that they are addressing a technical tax problem, such as the application of tax rules. For these remission orders, the technical criteria are best suited to evaluate the role that the remission order is playing. Remission orders can help identify tax rules whose complexity makes them difficult to administer. Where the tax authorities repeatedly make the same error, trends in remission orders can be instructive as to staff training needs. Limited access to remission orders raises equity and rule of law concerns for taxpayers seeking redress for incorrect action by the government. Some remission orders issued for government errors or delays are not related to technical tax issues. Rather, these remission orders can highlight problems with the design and distribution of tax expenditure programs.

This study also identifies concerns about the administration of tax remission order applications. The number of remission order applications and their outcomes should be tracked and disclosed to increase transparency and better inform taxpayers about this remedy. Based on recent case law, the CRA appears to be interpreting the statutory provisions for granting remission orders too narrowly. The lack of awareness of remission orders as a remedy raises access to justice concerns. It is unclear if the remission order system provides sufficient procedural fairness safeguards, such as allowing taxpayers to respond to concerns about deficits in their remission order applications. More broadly, the paper proposes annual reporting on tax remission orders, which outline the orders' reasons, objectives, and costs, much like yearly tax expenditure reporting. This would increase the transparency and accountability of the remission order system.

2. Reconsidering remission orders and tax debt relief

A lengthy period has passed since the last published study of Canadian tax remission orders. H. Arnold Sherman and Jeffrey D. Sherman's 1986 study sorts the reasons for granting remission orders into three major categories: compassion, equity, and political or policy purposes. At the time of the Sherman and Sherman study, there were no taxpayer relief provisions, as these were only introduced as part of the Taxpayer Relief Package in 1991, which allowed taxpayers to ask for relief of interest and penalties

for taxation years back to 1985.⁶ Prior to taxpayer relief, remission orders were the only (albeit still rare) option for obtaining relief from all tax related debts, where no further mechanism existed to dispute the amount owed.⁷

The twenty-year period from 1998 to 2017 covered by the present study provides a fresh assessment of remission orders after the introduction in 1991 of a remedy for taxpayer relief from interest and penalties. The Sherman and Sherman remission order study also occurred before the GST was introduced in 1991. This paper evaluates remission orders in the income tax, GST, and excise tax context, and then analyzes them from a tax policy perspective.

This paper contributes to recent discussions in Canadian tax scholarship on debt relief for taxpayers. These discussions have focused on assessing the current Canadian practice of settlements on a principled basis and debating the merits of introducing Offers in Compromise that can reduce a taxpayer's overall debt.⁸ This paper adds an additional perspective by providing a detailed study of remission orders and their role as a tax debt forgiveness mechanism. It also adds an analysis of remission orders to discussions amongst Canadian tax scholars about retroactive tools in tax, including retroactive tax legislation and rectification.⁹

6. This relief period was further extended to the 1980 through 1984 taxation years by a remission order, but with a deadline for those applications set for the end of 1992. See Edwin G Kroft, "Update on Income Tax Audit and Collection Issues" in *1992 British Columbia Tax Conference* (Toronto: Canadian Tax Foundation, 1992) 6:1–32 at 13; Ian Crosbie, "Amended Returns, Refunds, and Interest" in *2012 Tax Dispute Resolution, Compliance, and Administration Conference Report* (Toronto: Canadian Tax Foundation, 2013) 27:1–33 at 23-24; Denis A Hickey, "The Fairness Package, Solicitor Client Privileges and Seizures, the Canadian Charter of Rights and Freedoms" in *1993 Prairie Provinces Tax Conference* (Toronto: Canadian Tax Foundation, 1993) 12:1–40 at 1-2.

7. See Crosbie, *supra* note 6 at 23-24; Morley Hirsch, "Fairness Package Update" in *Report of Proceedings of Fiftieth Tax Conference, 1998 Conference Report* (Toronto: Canadian Tax Foundation, 1999), 24:1–32 at 8-9; Robert M Beith, "Fairness Package" in *Report of Proceedings of Forty-Fourth Tax Conference, 1992 Conference Report* (Toronto: Canadian Tax Foundation, 1993), 7:1–10 at 8.

8. Daniel Sandler & Colin Campbell, "Catch 22: A Principled Basis for the Settlement of Tax Appeals" (2009) *Can Tax J* 762; Saul Templeton, "A Defence of the Principled Approach to Tax Settlement" (2015) 38:1 *Dal LJ* 29; Colin Jackson, "The Case for a Canadian Offer-in-Compromise Program" (2015) 40:2 *Queen's LJ* 643; Colin Jackson, "Settlement and Compromise in Canadian Income Tax Law Since Carter" in Kim Brooks, ed, *The Quest for Tax Reform Continues: The Royal Commission on Taxation Fifty Years Later* (Toronto: Carswell, 2013) 295.

9. See Catherine Brown & Arthur J Cockfield, "Rectification of Tax Mistakes Versus Retroactive Tax Laws- Reconciling Competing Visions of the Rule of Law" (2013) 61:3 *Can Tax J* 563 at 579-580; Benjamin Alarie, "Retroactivity and the General Anti-Avoidance Rule" in David G Duff & Harry Erlichman, eds, *Tax Avoidance in Canada after Canada Trustco and Matthew*, (Toronto: Irwin Law Inc, 2007) 197; Geoffrey Loomer, "Taxing Out of Time: Parliamentary Supremacy and Retroactive Tax Legislation" (2006) 1 *Brit Tax Rev* 64.

II. *Remission orders in the Canadian tax system*

The power to remit tax, penalties, and related interest is provided to the Governor in Council under subsection 23(2) of the *FAA*.¹⁰ Other debts, such as federal child tax benefits, can be remitted under subsection 23(2.1). Remission can be full or partial and may be conditional on the taxpayer taking or not taking specified actions.¹¹ The Public Accounts of Canada lists amounts relating to remission orders, as required by subsection 24(2) of the *FAA*. The remission provisions allow for much discretion, providing that the Governor in Council may issue a remission order if collecting the amount would be “unreasonable or unjust,” or, more broadly, if the Governor in Council considers a remission order to be “in the public interest.”¹²

Remission orders are generally only considered when there are no other recourses for addressing a tax liability within the federal tax system, after avenues for appealing tax amounts have expired or been unsuccessful.¹³ For the purposes of this paper, consideration of bankruptcy as a tool for debt forgiveness is excluded. Future studies should turn their attention to the role of remission orders within the larger eco-system of tax debt relief both within and outside the tax system.¹⁴ Remission orders may also be used as part of a settlement of ongoing tax disputes, or to implement agreements with governments or international bodies. The CRA requires that taxpayers must first be considered for relief from interest and penalties before a remission order request will be contemplated.¹⁵ For taxpayer

10. *FAA*, *supra* note 4. Note that this paper also addresses remission orders issued under subsection 23(2.1) of the *FAA*, where the orders related to matters such as employment insurance and the Canada Pension Plan. See also Tim Clarke, Wayne Antle & Hong Nguyen, “Civil Penalties Under the Income Tax Act and HST: Taxpayer Relief Provisions” in *2012 Tax Dispute Resolution, Compliance, and Administration Conference Report* (Toronto: Canadian Tax Foundation, 2013), 20:1–33 at 24, 28.

11. *FAA*, *supra* note 4, ss 23(3)–(6).

12. *Ibid*, ss 23(2)–23(2.1).

13. See e.g. Amanda Doucette & Jayson Peace, “Best Practices for People who are Practising Tax” in *2014 Prairie Provinces Tax Conference* (Toronto: Canadian Tax Foundation, 2014), 13:135 at 26.

14. For a discussion of the range of instruments available for tax debt forgiveness in Canada and within bankruptcy law, see Colin Jackson, *Settlement, Compromise, and Forgiveness in Canadian Tax Law* (LLM Thesis, Dalhousie University Faculty of Law, 2013) [unpublished]; Sandler, *supra* note 8. For a discussion of tax debt forgiveness in the United States, see Shu-Yi Oei, “Taxing Bankrupts” (2014) 55:2 Boston College L Rev 375; Shu-Yi Oei, “Who Wins When Uncle Sam Loses? Social Insurance and the Forgiveness of Tax Debts” (2012) 46:2 UC Davis L Rev 421.

15. *CRA Remission Guide*, *supra* note 2 at 5.

relief requests for interest and penalties beyond the statutory 10-year limit, remission orders remain the only available mechanism for relief.¹⁶

Refund interest is not available on amounts paid through remission orders, although interest paid or payable on tax amounts owing can be remitted. The CRA's position is that there is no mechanism to provide refund interest under the *FAA*.¹⁷ In *Canada (Attorney General) v Imperial Oil Resources Ltd*, the Federal Court of Appeal agreed that there is no statutory entitlement to refund interest on a remission order, even where it remits tax already paid.¹⁸ In *Pacific Vending Ltd v R*, the court determined that it had no jurisdiction to vary a remission order by ordering refund interest, but noted the injustice to taxpayers who lost the use of their funds for a substantial period.¹⁹ The value of the use of such funds by the government can be significant, and there is a strong fairness argument for refund interest where the government is unjustly enriched by mistaken payments of tax. A statutory amendment may be necessary to address this issue.

III. *Remission orders, 1998–2017: General findings*

1. *Methodology*

This paper draws from a comprehensive study of tax remission orders issued during the twenty-year period between 1998 and 2017. The core focus is on remission orders concerning income tax, GST, and excise taxes issued under the remittance powers of section 23 of the *FAA*.²⁰ Also included are remission orders related to Canada Pension Plan contributions and Employment Insurance premiums. Remission orders dealing solely with customs tariffs and duties were excluded from the study.²¹

This study also reviewed the statements of the Public Accounts of Canada from 1998–2017, in order to establish the approximate amounts

16. *Income Tax Act*, RSC, 1985, c 1 (5th Supp), s 220(3.1); *Excise Tax Act*, RSC, 1985, c E-15, ss 281.1(1)–281.1(2) [*ETA*]. For remission orders granted that cite the inability to obtain relief through the taxpayer relief provision due to the 10-year limit passing, see *Gerald Wolcoski Remission Order*, SI/2001-43, (2001) C Gaz II, 627; *Horst Schenk Remission Order*, SI/2007-74, (2007) C Gaz II, 1747; *Jerry Mathews Remission Order*, SI/2006-92, (2006) C Gaz II, 642; *Michele McGhie Tax Remission Order*, SI/2011-84, (2011) C Gaz II, 2129.

17. *CRA Remission Guide*, *supra* note 2 at 8.

18. *Canada (AG) v Imperial Oil Resources Ltd*, 2009 FCA 325 at para 40 [*Imperial Oil*].

19. *Pacific Vending Ltd v R*, [2001] TCJ No 299 at para 7, [2001] GSTC 66.

20. *FAA*, *supra* note 4.

21. Softwood duty tariff refunds, for example, were excluded. See *Softwood Lumber Products Charge on Duty Deposit Refunds Remission Order, No 1*, SI/2007-13, (2007) C Gaz II, 49-50; *Softwood Lumber Products Charge on Duty Deposit Refunds Remission Order, No 2*, SI/2007-14, (2007) C Gaz II, 51–52. For a more detailed discussion of customs tariffs, see e.g. *Superior Auto Sales Inc v Canada (Department of National Revenue)*, [1997] 3 FCJ No 920, 72 ACWS (3d) 852 (TCC).

recorded for tax remission orders issued during that period.²² Again, the study excluded any amounts relating only to custom tariffs, but included amounts where custom tariffs were remitted as part of a remission order that also included excise taxes and/or GST/HST.

Based on these research parameters, in the twenty-year period between 1998 and 2017, there were 271 tax remission orders issued.²³ Note that subsequent amendments to remission orders were treated as part of the original remission order.

The study then identified the most common categories of reasons cited for issuing remission orders. Some further methodological notes are in order. The reasons assessed were cited in the remission orders themselves, or in their explanatory notes. Note that some remission orders provide more than one reason. For example, there are a number of orders citing both financial hardship and/or extenuating circumstances, as well as government errors or delays.²⁴ Of the 271 remission orders, several were “bulk” remission orders, where taxpayers are provided remission by way of a group remission order for “certain taxpayers,” but who are otherwise apparently not connected to each other.²⁵ Each of these bulk remission orders was treated as one remission order. It should also be noted that several remission orders provided no discernible reason, beyond describing the amounts being remitted and the parties.

The study also sought information from the Department of Finance and the Canada Revenue Agency as to the number of applications received for remission orders through Access to Information requests. The CRA has stewardship of most applications for tax remission orders, and the Minister of National Revenue is listed as the recommending Minister in 90

22. The methodology consisted of pulling all amounts from the Public Accounts of Canada that were listed as relating to tax remission orders. Best efforts were made for accuracy, but evidently there are risks of omission by human error. Note that the data in the Public Accounts of Canada is divided by financial year (April 1–March 31) rather than the calendar year.

23. There is no central repository for remission orders, historical and current. Reference was made to Orders-in-Council, drawing from the *Canada Gazette* and its archives. Evidently, such a task risks omission by human error, but as much care was taken as possible to include all applicable tax remission orders within the parameters set out in this paper.

24. See e.g. *Rosa Amorim Remission Order*, SI/2009-69, (2009) C Gaz II, 1713 [*Amorim Order*]; *Michael Renshaw Remission Order*, SI/2009-114, (2009) C Gaz II, 2448 [*Renshaw Order*]; *Jared Torgerson Remission Order*, SI/2009-44, (2009) C Gaz II, 1130 [*Torgerson Order*]; *Laura Speakman Remission Order*, SI/2010-92, (2010) C Gaz II, 2600 [*Speakman Order*]; *Eugene Skripkariuk Remission Order*, SI/2009-6, (2009) C Gaz II, 246 [*Skripkariuk Order*].

25. See e.g. *Certain Taxpayer Remission Order, 1997-5*, SI/98-31, (1998) C Gaz II, 696-697; *Certain Taxpayers Remission Order, 1998-2*, SI/98-121, (1998) C Gaz II, 3139-3141; *Certain Taxpayers Remission Order, 1999-2*, SI/99-124, (1999) C Gaz II, 2533-2534; *Certain Taxpayers Remission Order, 2000-1*, SI/2000-68, (2000) C Gaz II, 2024; *Certain Taxpayers Remission Order, 2000-2*, SI/2001-16, (2001) C Gaz II, 212.

per cent of the remission orders issued between 1998 and 2017. The CRA provided information on income tax, excise tax, and GST/HST remission order applications.

The Department of Finance was unable to provide such numbers through requests under the *Access to Information Act*, as no such data was available.²⁶ This is not surprising, as only 7 per cent of remission orders issued between 1998 and 2017 listed the Minister of Finance as the recommending Minister.²⁷ Remission orders are generally seen only as a last resort of the mechanisms available to address tax policy issues under the responsibility of the Department of Finance. With an average of just over one remission order issued by the Governor in Council per year based on the Minister of Finance's recommendation, the department is unlikely to have developed a tracking system for remission orders.

2. *Reasons for granting remission orders*

The study identified and grouped the most common reasons cited for granting remission orders into five categories:

- 1) Granting debt relief for financial hardship and/or extenuating circumstances;
- 2) Providing remedies for government errors and delays;
- 3) Respecting agreements with other governments;
- 4) Unintended impacts of legislation; and

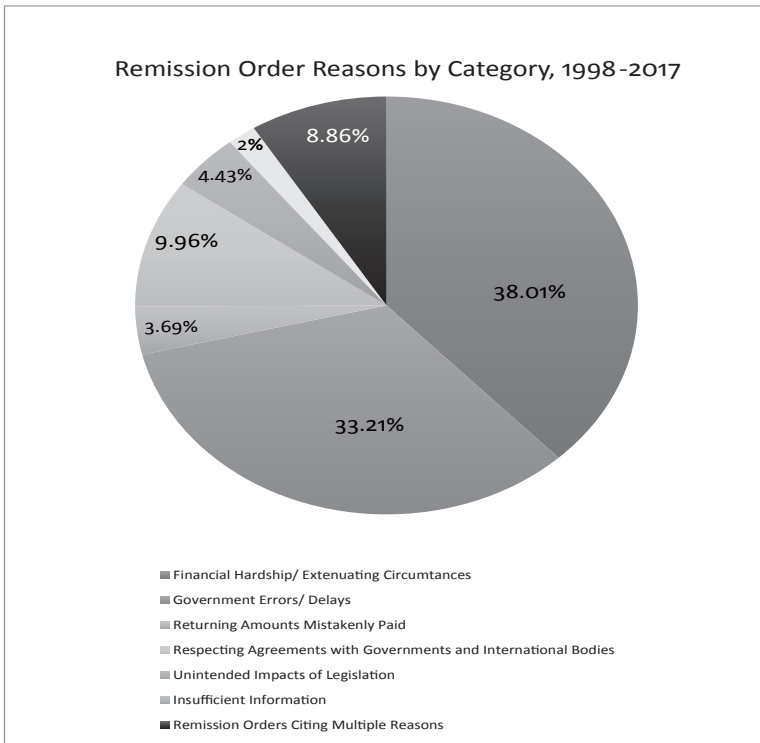
26. Department of Finance, Email Correspondence (29 August 2018) (on file with author).

27. See *Honeywell Remission Order*, SI/98-59, (1998) C Gaz II, 1739; *Commission for Environmental Cooperation Remission Order (Part IX of the Excise Tax Act)*, SI/99-79, (1999) C Gaz II, 2133-2134; *Commission for Environmental Cooperation (Executive Director) Remission Order (Part IX of the Excise Tax Act)*, SI/99-80, (1999) C Gaz II, 2135-2136; *Nisga'a Final Agreement Indian Remission Order*, SI/2000-39, (2000) C Gaz II, 1057-1058; *Order Respecting the Remission of a Portion of the Tax Paid by Patricia Merkel under Part IX of the Excise Tax Act in Respect of Her Purchase of a Bare Land Unit*, SI/2001-56, (2001) C Gaz II, 869-870; *Secretariat of the Convention on Biological Diversity Remission Order (Part IX of the Excise Tax Act)*, SI/2001-28, (2001) C Gaz II, 442-443; *Alexander First Nation Treaty Land Entitlement Remission Order*, SI/2003-124, (2003) C Gaz II, 1964-1965; *Certain School Authorities (GST/HST) Remission Order*, SI/2007-98, (2007) C Gaz II, 2314-2317; *Vera Henderson Income Tax Remission Order*, SI/2008-62, (2008) C Gaz II, 1387; *Hema-Quebec (GST/HST) Remission Order*, SI/2008-100, (2008) C Gaz II, 2221; *Oak Ridges Moraine Land Exchange Income Tax Remission Order*, SI/2010-17, (2010) C Gaz II, 393-400; *Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games (GST/HST) Remission Order*, SI/2010-10, (2010) C Gaz II, 215-216; *BlackBerry Limited Income Tax Remission* SI/2014-1, (2014) C Gaz II, 121-124; *British Columbia Forestry Revitalization Remission Order*, SI/2013-1, (2013) C Gaz II, 242-244; *British Columbia Indemnity Interest Remission Order (HST)*, SI/2014-76, (2014) C Gaz II, 2529-2530; *Remission Order in Respect of a Transfer of a Sahtu Dene and Metis Settlement Corporation's Assets under a Self-Government Agreement*, SI/2015-45, (2015) C Gaz II, 1791-1794; *Certain Flights Charge and Tax Remission Order*, SI/2015-15, (2015) C Gaz II, 794-796.

5) Returning tax amounts mistakenly paid.²⁸

The pie chart below shows the reasons provided for granting remission orders, divided by category.²⁹

The most frequently cited reason was debt relief for financial hardship and/or extenuating circumstances, with 38.01 per cent citing this as a reason for issuing the order. The next most common reason was related to government errors and delays, with 33.21 per cent citing errors by the tax authorities or other government departments as a reason for issuing the order.



Of the other remission orders issued in this time period, 9.96 per cent cited agreements or settlements with other governments or international bodies as a reason for issuing the remission order. These remission orders

28. Note that some remission orders could not be categorized due to insufficient information provided in the reasons for granting the remission order, and some cited multiple reasons, as discussed above in section I(1) Methodology.

29. Percentages shown are rounded to the second decimal.

describe the need to implement agreements with provincial governments, international bodies,³⁰ and Indigenous groups.³¹

8.86 per cent of the remission orders cited multiple categories of reasons, with the most significant overlapping categories being the combination of financial hardship and/or extenuating circumstances together with providing remedies for government errors and delays.³²

Addressing unexpected results of legislation was presented as a reason in 4.43 per cent of the remission orders. These remission orders generally addressed problems with technical tax provisions, providing a remedy for tax debts arising from the unanticipated application of tax rules.³³

The last most common reason cited was returning tax amounts mistakenly paid, with 3.69 per cent of remission orders presenting this as a reason for the remission order being granted. Most of these constituted restitution of tax amounts wrongly paid, with the remission orders offering the means for a refund after a statutory deadline had passed.

3. *Remission orders in the public accounts of Canada*

The total amount listed in the Public Accounts of Canada for the tax remission orders *issued* between 1998 and 2017 is approximately \$744

30. *Commission for Environmental Cooperation Remission Order (Part IX of the Excise Tax Act)*, SI/99-79, (1999) C Gaz II, 2133-2134; *Commission for Environmental Cooperation (Executive Director) Remission Order (Part IX of the Excise Tax Act)*, SI/99-80, (1999) C Gaz II, 2135-2136; *Commission for Environmental Cooperation (Director) Remission Order (Part IX of the Excise Tax Act)*, SI/99-81, (1999) C Gaz II, 2137-2138; *British Columbia Indemnity Interest Remission Order (HST)*, SI/2014-76, (2014) C Gaz II, 2529-2530; *Order Amending the Visiting Forces and Visiting Forces Personnel Alcoholic Beverages Remission Order*, SI/2009-90, (2009) C Gaz, 1956-1957, as amended by SI/2013-8, (2013) C Gaz II, 379-380; *Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games (GST/HST) Remission Order*, SI/2010-10, (2010) C Gaz II, 215-216.

31. *Nisga'a Final Agreement Indian Remission Order*, SI/2000-39, (2000) C Gaz II, 1057-1058; *Indian Settlement Remission Order (2000)*, SI/2000-69, (2000) C Gaz II, 2025-2028; *Champagne and Aishihik First Nations (GST) Remission Order*, SI/2000-102, (2000) C Gaz II, 2428-2429; *Little Salmon/ Carmacks First Nation (GST) Remission Order*, SI/2000-103, (2000) C Gaz II, 2430-2431; *Selkirk First Nation (GST) Remission Order*, SI/2000-101, (2000) C Gaz II, 2426-2427; *Teslin Tlingit Council (GST) Remission Order*, SI/2000-104, (2000) C Gaz II, 2432-2433; *Tr'ondëk Hwëch'in (GST) Remission Order*, SI 2000-99, (2000) C Gaz II, 2422-2423; *Treaty Land Entitlement (Manitoba) Remission Order*, SI/2001-1, (2001) C Gaz II, 106-108 as amended by SI/2003-167, (2003) C Gaz II, 2713-2714 and SI/2009-31, (2009) C Gaz II, 755; *Office of the Interim Commissioner of Nunavut Remission Order*, SI/2000-70, (2000) C Gaz II, 2029-2030; *Vuntut Gwitchin First Nation (GST) Remission Order*, SI/2000-100, (2000) C Gaz II, 2424-2425; *Remission Order in Respect of a Transfer of a Sahtu Dene and Metis Settlement Corporation's Assets under a Self-Government Agreement*, SI/2015-45, (2015) C Gaz II, 1791-1794.

32. Amounting to 5.83 per cent of the 8.86 per cent of remission orders citing more than one category of reasons.

33. See e.g. *Quebec Domestic Help Charities Remission Order*, SI/2011-100, (2011) C Gaz II, 2658-2659; *Certain Recreational Camps Remission Order*, SI/2010-47, (2010) C Gaz II, 1415-1416; *Coin-Operated Devices (Streamlined Accounting Users) Remission Order*, SI/2003-166, (2003) C Gaz II, 2711-2712; *Coin-Operated Devices Remission Order*, SI/99-21, (1999) C Gaz II, 736-737.

million.³⁴ Note, however, that this amount includes the approximately \$507 million remission order granted to BlackBerry Limited in 2013 in the form of an extension of its carry-back period for non-capital losses and investment tax credits due to a shortened tax year.³⁵ The *BlackBerry Remission Order* is almost five times larger than the next highest remission order of \$136,000,000, which was granted as part of an indemnity agreement between the British Columbia government and the federal government relating to the HST.³⁶

The cost of remission orders is not necessarily limited to the year that they are issued. Some remission orders are valid on an ongoing basis, and amounts may fluctuate from year to year. For example, the *Syncrude Remission Order* was issued in 1976 to support the Syncrude oil sands project in Alberta, and expired in 2003.³⁷ It was nonetheless one of the highest tax remission amounts listed in the Public Accounts of Canada in 1998–2017, for a total of \$684 million.³⁸ Since it was issued in 1976, its amounts were excluded from this study.

Most remission orders include a statement as to their cost, or estimated cost, in the remission order or its explanatory note. Of the 271 tax remission orders, 43 did not provide their cost or a cost estimate. For some, the cost is likely excluded because the government is remitting tax wrongfully paid, such as where provincial sales tax was accidentally remitted to the federal government.³⁹ For other orders where no estimate is provided, the cost may be difficult to estimate. Where such information is unavailable, information within the remission order or its explanatory note should

34. For the archived PDF versions of the Public Accounts of Canada from 1995 to 2017 see Government of Canada, “Public Accounts of Canada (PDF) Archive: Public Works and Government Services Canada”, online: <epe.lac-bac.gc.ca/100/201/301/public_accounts_can/pdf/index.html> [perma.cc/V3VJ-YYPU], remission amounts are found in vol 2 part 2 s 3 1995–2003, vol 3 s 3 2004–2005, and in vol 3 s 2 2005–2017.

35. See Amanda SA Doucette, “Remission Order Advances Payment of BlackBerry Tax Refund” (2014) 4:2 Can Tax Focus 2 at 2-3; *BlackBerry Limited Income Tax Remission* SI/2014-1, (2014) C Gaz II, 121–124 [*BlackBerry Remission Order*].

36. *British Columbia Indemnity Interest Remission Order (HST)*, SI/2014-76, (2014) C Gaz II, 2529–2530.

37. See *Syncrude Remission Order*, SI/76-66, (1976) C Gaz II, 1581–1583; *Imperial Oil*, *supra* note 18; *Imperial Oil Resources Ltd v Canada (AG)*, 2014 FC 838; *Imperial Oil Resources Ltd v Canada (AG)*, 2016 FCA 139.

38. Amounts remitted under the Syncrude Order can be found in the public accounts listed *supra* note 34. Amounts in the years following can be attributed to filing and assessment delays, etc., see OECD, “Inventory of Estimated Budgetary Support and Tax Expenditures for Fossils Fuels 2013” (28 January 2013) at 91, online: *Library of the Organisation for Economic Cooperation and Development* <dx.doi.org/10.1787/9789264187610-en> [perma.cc/AK97-J5LJ].

39. See e.g. *VF Imagewear Inc Remission Order*, SI/2007-73, (2007) C Gaz II, 1746; *Pattison Sign Group, A Division of Jim Pattison Industries Ltd Remission Order*, SI/2010-37, (2010) C Gaz II, 877.

provide some explanation, particularly given the lack of parliamentary oversight over remission orders.

4. *Remission order applications*

The appropriate Minister makes recommendations regarding remission orders to the Governor in Council. For tax remission orders, this is usually the Minister of Finance or the Minister of National Revenue. The Minister of Finance is generally responsible for considering tax policy-related remission orders, or remission orders aimed at a larger target group of taxpayers.⁴⁰ Such policy remission orders typically relate to carrying out political agreements, subsidizing political priorities, or addressing the unintended impacts of legislation. Only 18 of the 271 tax remission orders (7 per cent) issued from 1998 to 2017 list the Minister of Finance as the recommending Minister to the Governor in Council.

The CRA is responsible for considering remission orders that relate to relief for specific taxpayers. This represents most remission orders issued between 1998 and 2017, with the Minister of National Revenue listed as the referenced Minister in 244 of the 271 tax remission orders (90 per cent).⁴¹ Of the remaining 9 tax remission orders (3 per cent), seven did not reference a Minister,⁴² one cited the Minister of Human Resources and Skills Development,⁴³ and the other cited the Minister of Public Safety and Emergency Preparedness.⁴⁴

Once a Governor in Council issues a tax remission order, it will be administered by the CRA, regardless of the Minister responsible for recommending the order.

40. Chia-yi Chua & Guy A Gagnon, "Rectification and Judicial Correction: Practical Issues" in *Report of Proceedings of the Sixty-Third Tax Conference, 2011 Conference Report* (Toronto: Canadian Tax Foundation, 2012), 34:1–58 at 49-50.

41. In three of those remission orders, the Minister was referenced along with other Ministers. See *Janet De La Torre Remission Order*, SI/2017-81, (2017) C Gaz II, 3620 and *Milca Kwangwari Remission Order*, SI/2017-82, (2017) C Gaz II, 3621, which list the Ministers of Employment and Social Development and National Revenue, and the President of Treasury Board. *Amina Daher Remission Order*, SI/2013-46, (2013) C Gaz II, 1286 lists the Ministers of Human Resources and Skills Development and National Revenue.

42. *Telesat Canada Remission Order*, SI/99-82, (1999) C Gaz II, 2139–2140; *Certain Taxpayers Remission Order, 2001-1*, SI/2001-58, (2001) C Gaz II, 872-873; *Line Lajeunesse and Eduardus AT Merks Remission Order*, SI/2002-148, (2002) C Gaz II, 2593-2594; *Certain Taxpayers Remission Order, 2003-1*, SI/2003-123, (2003) C Gaz II, 1963; *Donald Potter Income Tax Remission Order*, SI/2004-32, (2004) C Gaz II, 251-252; *David Lynds Income Tax Remission Order*, SI/2005-40, (2005) C Gaz II, 1031; *McIntyre Lands Income Tax Remission Order*, SI/2005-128, (2005) C Gaz II, 3162-3163.

43. *Overpayments of Canada Education Savings Grants Remission Order*, SI/2008-69, (2008) C Gaz II, 1616-1617.

44. *Yosuke Kawasaki Remission Order*, SI/2015-70, (2015) C Gaz II, 2530-2533.

a. *The role of the CRA in considering remission requests*

The CRA is the main body that considers direct applications from taxpayers for the remission of tax, penalties, and interest. It generally deals with applications for remission from specific persons, although it will sometimes recommend a remission order targeted at a group of people in the same situation.⁴⁵ The CRA's internal guidelines describe the review process for remission order applications and the criteria that the CRA considers when making recommendations.

The CRA Remission Guide outlines the following general characteristics that have supported the granting of remission orders:

- Extreme hardship;
- Financial setback coupled with extenuating factors;
- Incorrect action or advice on the part of CRA officials; and
- Unintended results of the legislation.⁴⁶

The CRA's guidelines are non-binding, and the guide emphasizes that each particular case must be considered on its facts.

Once applicants submit their remission order request, it is unclear how much a taxpayer is consulted as their file is considered. Case law indicates that the CRA may not be obliged to contact taxpayers when their application is lacking. In *Jarrold v Canada Revenue Agency*, the Federal Court of Canada determined that there was no obligation to contact the applicant for further information,⁴⁷ as there is no prescribed process under the *FAA* as to how the Minister should handle remission order requests. In *Matthew v Canada (Attorney General)*, on the other hand, the Federal Court noted that in reviewing a remission request, the remission analyst attempted to contact the taxpayer for further information.⁴⁸

The consideration of remission order applications by the CRA goes through several tiers.⁴⁹ When they are submitted to a CRA field office, a recommendation is made and sent to one of the two departments responsible for assessing remission order files. The Remissions and Delegations Section of the Legislative and Policy Directorate considers income tax remission requests. The Excise and GST/HST Rulings Directorate assesses requests for the remission of GST/HST and Excise taxes. After reviewing a file, the responsible department presents the case to the Headquarters Remission

45. See *CRA Remission Guide*, *supra* note 2 (potential applicants are described by the CRA as including “taxpayers, GST/HST registrants (including registrant and non-registrant rebate claimants), excise duty and tax licensees, or former FST licensees” at 2 (footnote 3)).

46. *Ibid* at 9.

47. *Jarrold v Canada Revenue Agency*, 2015 FC 153 at paras 27-28.

48. *Matthew v Canada (AG)*, 2017 FC 538.

49. *CRA Remission Guide*, *supra* note 2 at 2-4.

Committee and makes recommendations. The Headquarters Remission Committee then makes a recommendation to the Assistant Commissioner, Legislative Policy and Regulatory Affairs Branch.

If the Headquarters Remission Committee provides a negative recommendation and the Assistant Commissioner agrees, the applicant's only recourse is to apply to the Federal Court of Canada for judicial review. The courts have shown considerable deference to CRA decisions to issue a negative recommendation.⁵⁰ They have nonetheless asserted that the CRA's internal remission guide is for guidance only, and should not limit the statutory discretion to issue remission orders when collecting the tax or penalty is unreasonable or unjust, or otherwise not in the public interest.

If the Headquarters Remission Committee supports a positive recommendation, the request will continue through the review process to the Assistant Commissioner, the Commissioner, the Minister, and ultimately, if positive, to the Privy Council Office.

b. *Remission order application numbers and success rates*

A significant number of administrative errors arose in the first decade following the introduction of the GST in 1997, as shown in the table below. The data shows a downward trend in Excise and GST/HST tax remission requests received during the 2008–2018 period. The downward trend may reflect an increased administrative and taxpayer understanding of the GST and its rules. It may also be attributed in part to the introduction of a legislative relief mechanism for GST rebate applications submitted after the statutory deadline, for which relief was previously only available by remission order. This particular GST issue was the subject of a number of remission orders and is discussed in further detail below.

50. See e.g. *Waycobah First Nation v Canada (AG)*, 2011 FCA 191 at paras 26-28 [*Waycobah*]; *Germain v Canada*, 2012 FC 768; *Frank Arthur Investments Inc v Minister of National Revenue*, 2014 FC 336; *Internorth Ltd v Minister of National Revenue*, 2019 FC 574. See also Clara Pham, "FC emphasizes sparing use of tax remission orders in Internorth case" (17 July 2019), online: *RSM Tax Alert* <rsmcanada.com/our-insights/tax-alerts/fca-emphasizes-sparing-use-of-tax-remission-orders-in-internorth.html> [perma.cc/P8WF-CAX8].

*Excise and GST/HST Rulings Directorate Remission Files, 1997–2018*⁵¹

Time Period	Requests Received	Granted	Refused	Withdrawn	Otherwise Dispersed
1997–2007	186	73	85	7	21
2008–2018	91	24	53	10	4

The Remissions and Delegations Section of the Legislative and Policy Directorate responsible for income tax remission requests was only able to provide the number of cases presented to the Remission Committee over the last three years, as shown below:

*Remissions and Delegations Section—Legislative Policy Directorate
Income Tax Remission Order Information*⁵²

Fiscal Year	Number of cases presented to Remission Committee
2015–2016	23
2016–2017	21
2017–2018	19

The data provided by each remission order department is difficult to analyze because of the reporting differences. However, the data indicates that income tax remission requests may represent a considerably larger workload than the workload carried by the Excise Tax and GST/HST division. Based on the average number of income tax remission cases presented in the three years provided (an average of 21 remission cases per year), approximately 420 income tax remission cases may have been presented to the Remission Committee during the twenty-year period between 1998 and 2017. The Excise and GST/HST Rulings Directorate reported 277 remission requests as received between 1997 and August 2018.

For transparency reasons, both divisions should regularly collect and disclose workload data so as to allow taxpayers to assess the number of remission requests and the likelihood of success with an application. Data collecting and classification as to the general nature of income tax, excise tax, and GST/HST remission requests would also be valuable. This would

51. Canada Revenue Agency, Reply to Request A-2018-103191 under *Access to Information Act* (17 August 2018); Canada Revenue Agency, Reply to Request A-2018-103192 under *Access to Information Act* (17 August 2018) (both replies are on file with author). It is assumed that the data relates to fiscal years ending March 31. Note that the data for 2008–2018 excludes 17 remission cases in their current workload. The data also excludes a number of other remission orders, including those relating to Indian Settlement Remission Orders, Indian Treaty Land Remission Orders, and policy remission orders.

52. Canada Revenue Agency, Reply to Request under *Access to Information Act* (29 August 2018) (on file with author).

allow the Minister of Finance, the CRA, and the public to track the use of the remission order mechanism. There are a number of instances where data tracking (and disclosure) could inform legislative measures. For example, as discussed below, the repeated use of remission orders to provide the GST Housing Rebate after a statutory deadline passed ultimately resulted in a legislative amendment allowing the Minister to accept applications after the deadline.

Similarly, several remission orders were used to provide relief from interest accrued on tax debts incurred prior to the ten-year period before a taxpayer applied for taxpayer relief under subsection 220(3.1) of the *Act*.⁵³ Based on its interpretation, that relief was not statutorily available under subsection 220(3.1) of the Act, and remission orders were considered by the CRA to be the only mechanism available for relief. Following the decision in *Bozzer v The Queen* that interpreted the statute as allowing relief for interest accrued within the ten-year period regardless of the timing of the tax debt, the use of remission orders to provide such relief was no longer necessary.⁵⁴ A better tracking and disclosure system for remission orders may have pushed the CRA or the Minister of Finance to reinterpret or revise subsection 220(3.1), perhaps through pressure from the tax community as to the basis for granting relief to some and not others.

c. *The role of the courts*

The courts have no jurisdiction to issue remission orders. The Federal Court of Canada's powers are limited to judicial review where a remission order is not recommended. When considering tax appeals, the Tax Court of Canada is limited to vacating or varying the assessment of the Minister, or dismissing the appeal. The Tax Court of Canada may, at its discretion, advise a taxpayer of the remission order remedy.⁵⁵ At times, the Tax Court of Canada has gone further, explicitly recommending that the Minister consider granting a remission order.⁵⁶ When the Tax Court

53. See *Mildred Jacobs Remission Order*, PC 2011-482, March 25, 2011 (SI/2011-24); *Jacqueline Doskoch Remission Order*, PC 2010-1595, December 9, 2010 (SI/2010-94); *Cynthia Carlson Remission Order*, PC 2010-1594, 9 December 2010 (SI/2010-93); *Susan Gill Remission Order*, PC 2011-279, 3 March 2011 (SI/2011-19).

54. *Bozzer v The Queen*, 2011 FCA 186.

55. See e.g. *Gollner v R*, 2009 TCC 346 at para 11; *Evergreen Forestry Services Ltd v R*, [1999] GSTC 35, 99 GTC 3130 (TCC) at para 25; *Zubic v R*, 2004 TCC 533 [*Zubic*]; *Beutler Hands On Massage v R*, 2007 TCC 371.

56. See *Nelson Consulting Services Ltd v R*, [2002] GSTC 122, 2003 GTC 506 (TCC) [*Nelson*]; *Coulter v R*, 2004 TCC 510; *Evasion Hors Piste Inc c R*, 2006 TCC 477; *Gagné-Lessard Sports Inc v R*, 2007 TCC 300; *Danette Electrical Engineering Services Inc v R*, [2001] GSTC 71, 2001 GTC 453 (TCC) [*Danette*]; *Smedley v R*, 2003 DTC 501, [2003] 2 CTC 2658 (TCC); *Sterling Business Academy Inc v R*, [1998] GSTC 130, 99 GTC 3038 (TCC); *Khan v R*, [2002] 4 CTC 2444, 2002 CanLII 1004 (TCC); *Westcan Malting Ltd v R*, [1998] GSTC 34, 98 GTC 2103 (TCC).

recommends remission orders, these recommendations are non-binding.⁵⁷ On some occasions, following the Court's recommendations, the taxpayer ultimately received a remission order, particularly where the tax authorities committed an error in advising the taxpayers.

A number of court recommended remission orders related to the GST/HST, highlight the challenges with administering and complying with the legislation. In *Nelson Consulting Services Ltd v R*, for example, a consulting business failed to collect and remit HST based on incorrect advice provided by the tax authorities.⁵⁸ The remission order issued for \$24,417.40 in taxes, penalties, and interest cited the recommendation of the Tax Court.⁵⁹ In *Evasion Hors Piste Inc v R*, relying on the advice of a government official, the taxpayer failed to follow the correct procedures in exports to a non-resident, and as a result, owed GST on the goods.⁶⁰ The explanatory note for the remission order for \$34,487.88 notes that it "responds to the Court's strong recommendation that a remission order be provided."⁶¹

It is unclear what the process is for both the Minister and the taxpayer when the Tax Court recommends a remission order. Taxpayers who pursue an appeal to the Tax Court may have limited resources to marshal a remission request following the dismissal of their appeal. André Gallant found that 44 per cent of cases decided by the Tax Court in 2005 involved self-represented litigants.⁶² The hope is that follow-up to cases where the Court recommends remission do not rely solely on the goodwill of overworked counsel and the persistence of often under-resourced taxpayers.

IV. Debt relief for financial hardship and extenuating circumstances

Remission orders providing debt relief for financial hardship and/or extenuating circumstances was the most common category of reasons cited for granting a remission order. In the 271 remission orders evaluated,

57. See *Almadhoun v Canada*, 2018 FCA 112 at paras 32-34.

58. *Nelson*, *supra* note 56.

59. *Nelson Consulting Services Limited Remission Order*, SI/2004-149, (2004) C Gaz II, 1754 [*Nelson Order*].

60. *Evasion Hors Piste Inc v R*, 2006 TCC 477.

61. *Evasion Hors Piste Inc Remission Order*, SI/2009-89, (2009) C Gaz II, 1955. In similar circumstances, a remission order of \$49,238.92 was granted to another taxpayer who did not follow the proper export procedures when selling goods to non-residents and relied on the wrongful advice of a government official. Again, the explanatory note cites the court's strong recommendation. See *Gagné-Lessard Sports Inc v R*, 2007 TCC 300. *Gagné-Lessard Sports Inc Remission Order*, SI/2009-71, (2009) C Gaz II, 1715. See also *Danette*, *supra* note 56; *Danette Electrical Engineering Services Inc Remission Order*, SI/2003-169, (2003) C Gaz II, 2716.

62. André Gallant, "The Tax Court's Informal Procedure and Self-Represented Litigants: Problems and Solutions" (2005) 53:2 Can Tax J 333.

103 (38.01 per cent) listed a reason that falls under this category. These reasons used words including financial hardship, financial setback, extreme hardship, and circumstances beyond the control of the taxpayer.

Most of the remission orders under this theme (and indeed, most remission orders generally) provide very little in the form of reasons.⁶³ From the brief reasons provided, however, relief for a variety of circumstances was described, including:

- Relief from tax, interest, and penalties for taxpayers with an income level so low that paying the tax debt would cause extreme hardship;⁶⁴
- Remission of child tax benefits paid in excess of the amounts entitled, where repayment would cause extreme hardship;⁶⁵
- GST rebates, where deadlines were missed due to extenuating circumstances including health reasons;⁶⁶
- Remission of the income tax debt of a bankrupt who misappropriated funds from investors, to be paid out as partial repayment to the defrauded investors;⁶⁷ and
- Remission of tax debts incurred due to circumstances outside the taxpayers' control.⁶⁸

Some of these remission orders relate to existing tax expenditure programs, such as those extending the deadline for GST rebate applications for

63. See e.g. *Certain Taxpayer Remission Order, 1997-5*, SI/98-31, (1998) C Gaz II, 696-697; *Certain Taxpayers Remission Order, 1998-2*, SI/98-121, (1998) C Gaz II, 3139-3141; *Certain Taxpayers Remission Order, 1999-2*, SI/99-124, (1999) C Gaz II, 2533-2534; *Certain Taxpayers Remission Order, 2000-1*, SI/2000-68, (2000) C Gaz II, 2024; *Certain Taxpayers Remission Order, 2000-2*, SI/2001-16, (2001) C Gaz II, 212.

64. See e.g. *Léopold Bouchard Remission Order*, SI/2007-52, (2007) C Gaz II, 669; *Yvonne Townshend Remission Order*, SI/2007-107, (2007) C Gaz II, 2511; *Catherine Bland Remission Order*, SI/2009-7, (2009) C Gaz II, 247; *Denise Gagnon Remission Order*, SI/2011-113, (2011) C Gaz II, 2907; *Réne Héroux Remission Order*, SI/2012-33, (2012) C Gaz II, 1260; *Claude Montreuil Tax Remission Order*, SI/2012-22, (2012) C Gaz II, 1068.

65. *Xiu Que Hong Remission Order*, SI/2013-10, (2013) C Gaz II, 382.

66. *Andrés Wines Ltd Remission Order*, SI/99-38, (1999) C Gaz II, 1214; *Pattison Sign Group, A Division of Jim Pattison Industries Ltd Remission Order*, SI/2010-37, (2010) C Gaz II, 877; *M-I Drilling Fluids Canada, Inc. Remission Order*, SI/2016-61, (2016) C Gaz II, 4130; *Merril McEvoy-Halston Remission Order*, SI/2003-30, (2003) C Gaz II, 631; *Certain Individuals Remission Order, 2003*, SI/2004-26, (2004) C Gaz II, 166; *Robert Blair Remission Order*, SI/2001-49, (2001) C Gaz II, 749; *Carl Rideout Remission Order*, SI/99-84, (1999) C Gaz II, 2142; *Alfredo Maida and Maria Maida Remission Order*, SI/2002-137, (2002) C Gaz II, 2276; *Parmjit Cheema Remission Order*, SI/2002-134, (2002) C Gaz II, 2273. *Robert Barr Remission Order*, SI/2002-133, (2002) C Gaz II, 2272; *Karen Fraser and Ian Schofield Remission Order*, SI/2002-138, (2002) C Gaz II, 2277.

67. *Investors in the Norbourg and Evolution Funds Remission Order*, SI/2012-43, (2012) C Gaz II, 1615.

68. See e.g. *Lorie Armalis Remission Order*, SI/2016-9, (2016) C Gaz II, 403; *Pierre Dupuis Remission Order*, SI/2008-17, (2008) C Gaz II, 318; *Christian Legault Remission Order*, SI/2014-20, (2014) C Gaz II, 727; *Lorie A Poirier Remission Order*, SI/2009-26, (2009) C Gaz II, 600.

fairness reasons.⁶⁹ Missed deadlines for the GST Housing Rebates due to extenuating health or other personal reasons were the subject of a number of court cases and remission orders.⁷⁰ Another recurring reason for remission orders for the GST Housing Rebate related to taxpayers being provided incorrect advice about the deadline by tax authorities.⁷¹ Ultimately, a legislative amendment was introduced in 2007 to allow the Minister to provide discretionary relief from the deadline.⁷² The GST Housing Rebate remission orders demonstrate how the remission system can serve as an alert to problems with the legislative framework of a program and may be the only mechanism to provide a remedy prior to legislative change.

Remissions of tax amounts owed due to financial hardship or extenuating circumstances constitute subsidies to certain taxpayers because of sympathetic conditions. Likewise, defrauded investors repaid using tax amounts owed by the perpetrator, or taxpayers exempted from repaying child tax benefits that exceeded the amounts they were entitled to, are receiving subsidies through the tax system.⁷³

As subsidies through the tax system, remission orders for financial hardship and/or extenuating circumstances require an analysis using the tax expenditure framework identified by Stanley Surrey.⁷⁴ This analysis assesses the objectives of the remission order against the budgetary criteria to evaluate its effectiveness, the fairness of its distribution, the

69. The GST rebates are listed as tax expenditure in Department of Finance Canada, *Report on Federal Tax Expenditures: Concepts, Estimates and Evaluations*, (Ottawa: Government of Canada Publications, 2018) at 36, online (pdf): <<https://www.fin.gc.ca/taxexp-depfisc/2018/taxexp-depfisc18-eng.pdf>> [perma.cc/K535-4RHT] [*Report on Federal Tax Expenditures*].

70. For cases, see e.g. *Snider v R*, [2002] GSTC 44, 2002 GTC 177-61 (TCC); *Didkowski v R*, [2001] GSTC 22, 2001 GTC 308 (TCC); *Lair v R*, 2003 TCC 929; *Zubic*, *supra* note 55; *Slovak v R*, 2006 TCC 687. For remission orders, see e.g. *Robert Alarie Remission Order*, SI/98-75, (1998) C Gaz II, 1942; *Sayda Fournier Remission Order*, SI/2001-22, (2001) C Gaz II, 377; *Robert Blair Remission Order*, SI/2001-49, (2001) C Gaz II, 749; *Tracy Pellerin Remission Order*, SI/2001-106, (2001) C Gaz II, 2541; *Certain Individuals Remission Order, 2003*, SI/2004-26, (2004) C Gaz II, 166; David Sherman, “256, New Housing Rebate for Owner-Built Homes,” *David Sherman’s Analysis* (TaxNet Pro, 2015) (on file with author).

71. See e.g. *Sharon Waldron Remission Order*, SI/99-85, (1999) C Gaz II, 2143; *Leo Vandenbrand Remission Order*, SI/2000-107, (2000) C Gaz II, 2490; *Dianne Moroz Remission Order*, SI/2001-14, (2001) C Gaz II, 210; *Henryk Berezowski Remission Order*, SI/2001-21, (2001) C Gaz II, 376; *Maurice and Jean Didkowski Remission Order*, SI/2001-104, (2001) C Gaz II, 2539; *James and Lois Hildebrand Remission Order*, SI/2002-68, (2002) C Gaz II, 987.

72. *ETA*, *supra* note 16, s 256(3)(b). The provision was retroactive to 2002.

73. See e.g. *Investors in the Norbourg and Evolution Funds Remission Order*, SI/2012-43, (2012) C Gaz II, 1615-1617; *Xiu Que Hong Remission Order*, SI/2013-10, (2013) C Gaz II, 382.

74. Stanley S Surrey, *Pathways to Tax Reform: The Concept of Tax Expenditures* (Cambridge: Harvard University Press, 1973).

administrative and compliance burdens it imposes, and the choice of a remission order to deliver the subsidy.⁷⁵

1. *Debt relief as a tax expenditure*

Applying the tax expenditure criteria, the use of remission orders as the chosen vehicle to help taxpayers in situations of financial hardship and/or extenuating circumstances is a troubling policy instrument choice. First, it is difficult to identify the objective of each respective remission order. Little information is provided in remission orders or their explanatory notes, likely weighing an obligation to disclose the reason for granting the taxpayer relief against the need to respect taxpayer privacy. Second, while a remission order may be effective in relieving the debt of a particular taxpayer, the resources required to apply for a remission order, the unlikelihood of success, and the many tiers of approval required make it a rather ineffective vehicle for distributing subsidies to taxpayers in difficulty.

Third, the administrative and compliance burdens of the remission order system are heavy, and the fairness in the distribution of these subsidies is questionable. It is unclear how taxpayers in financial difficulty and/or facing extenuating circumstances learn of a possible remedy through remission orders, but it seems unlikely that CRA collections agents are uniformly advising taxpayers in difficulty of this alternative recourse. This raises the question—how many taxpayers are in similar circumstances to those granted remission, but unaware of the possibility of applying for tax debt relief by remission?

a. *Restrictive interpretation of the statute*

Another distribution concern is that the CRA may be interpreting the remission provisions more restrictively than required under the current statutory language, further limiting access to remission orders. The *FAA* provides that the Governor in Council may remit amounts where their collection would be “unreasonable or unjust,” or if the remission is “in the public interest.”⁷⁶ *Waycobah First Nation v Canada (Attorney General)*⁷⁷ involved a dispute about whether HST needed to be collected on purchases on the reserve. The original amount owed was \$1.3 million, but eventually grew to \$3.4 million. Waycobah First Nation had reached a compliance

75. Neil Brooks, “Policy Forum: The Case Against Boutique Tax Credits and Similar Expenditures” (2016) 64:1 Can Tax J 65 at 96.

76. *FAA*, *supra* note 4.

77. *Waycobah*, *supra* note 50. See also Mike Harris, “Administrative Discretion and Remission Orders” (2011) 1:3 Can Tax Focus 3 at 34.

agreement with the CRA, which resulted in waiving some interest and penalties, but did not comply with the agreement.

Waycobah First Nation's application for recommendation for a remission order was refused. In considering its request for judicial review, the Federal Court of Canada described the community's financial situation as being one of an impoverished community, with significant basic infrastructure needs, and whose ability to improve its circumstances were seriously limited by its tax debt.⁷⁸ The court found that while the Waycobah First Nation did face extreme hardship, non-compliance may also be considered in assessing whether to grant a remission order, and the Minister had weighed a number of different factors in refusing remission.

It is difficult to understand the decision by the Minister not to recommend remission in this case. Debt relief for Waycobah First Nation would be in the public interest. Its failure to collect HST relied on the understanding that its sales on reserve were tax exempt, which had been the subject of dispute before the courts.⁷⁹ Tax exemptions for Indigenous people in Canada are complicated matters that have been the subject of much litigation.⁸⁰ Regarding the Waycobah First Nation's history of non-compliance, once a taxpayer owes a significant debt, the ability to comply with its (growing) tax debt obligations can become a near impossibility.

A restrictive application of the guidelines may be overly limiting access to tax debt relief for some taxpayers, where collecting such debts would be unreasonable or unjust, or where debt relief would be in the public interest. Without further information about the number of applicants for remission orders, the reasons for their applications, and the related success rates, it is difficult to assess the fairness of access to this tax debt relief vehicle.

b. *Expanding taxpayer debt relief*

There are alternative policy instruments that could more efficiently and fairly deliver subsidies to taxpayers in financial difficulty and/or facing extenuating circumstances. Most obvious is the taxpayer relief program that provides successful applicants with relief from interest and penalties in certain circumstances, including where financial hardship is demonstrated and in cases involving errors or delays by the tax authorities.⁸¹

78. *Waycobah*, *supra* note 50 at para 5.

79. *Pictou v Canada*, 2003 FCA 9.

80. See e.g. *Bastien Estate v Canada*, 2011 SCC 38; *Dubé v Canada*, 2011 SCC 39; *Dickie v The Queen*, 2012 TCC 242, 2014 FCA 40; Clarke, *supra* note 10 at 28.

81. Canada Revenue Agency, Information Circular IC07-1R1 "Taxpayer Relief Provisions" (18 August 2017).

While the inability to obtain relief from an undisputed underlying tax debt (outside bankruptcy) may be a principle of our Canadian tax system, remission orders are an active exception to this rule. The taxpayer relief program could be expanded to provide relief for underlying tax debts, likely increasing the fairness of access to tax debt relief. The requirements for such relief could be more stringent than relief for interest and penalties. This instrument choice would rely on existing administrative structures and procedures, including an internal appeal mechanism and procedural fairness protections.⁸²

Another alternative is to allow Offers-in-Compromise in the Canadian tax system, as proposed by Colin Jackson.⁸³ He proposes a case-by-case system to determine if some debt relief is possible, with the compromise based on the taxpayer's ability to pay. This would promote equity and aid in the collection of tax debts. Saul Templeton raises objections to this alternative instrument for tax debt relief, and expresses concerns that Offers-in-Compromise would expand Ministerial discretion in the tax system.⁸⁴ There may well be serious issues to address with allowing compromise settlements of tax debts or with an expanded taxpayer relief program. Shu Yi Oei evaluates the distributive consequences of tax debt forgiveness and considers who bears the costs of such expenditures, including the taxpayer's other creditors, other compliant taxpayers, and the public carrying a larger collective burden.⁸⁵ She argues, however, that debt forgiveness for taxpayers in financial difficulty may be reconceptualized as payments from a social insurance program for debts in certain circumstances, with the premiums paid by taxpayers or through less government expenditures.⁸⁶ In the absence of any such measures, however, remission orders for tax debt relief continue to be issued yearly and are by no means a more transparent or fairer remedy.

Tax expenditures have been described by Neil Brooks as "usually badly designed spending measures."⁸⁷ This characterization rings accurate when assessing the use of remission orders as a tax expenditure to provide tax debt relief for those facing financial hardship and/or extenuating circumstances. Not only do remission orders do poorly when assessed across the budgetary criteria for tax expenditures, but also these

82. *Ibid.*

83. Jackson, *supra* note 8. See also Richard Yasny, "Federal Tax Garnishment" (2012) 20:1 Can Tax Highlights 10 at 10-11.

84. Sandler, *supra* note 8; Templeton, *supra* note 8 at 53-54, 65-66.

85. Oei, *supra* note 14.

86. *Ibid.* at 426.

87. Brooks, *supra* note 75 at 96.

expenditures are generally not included in the annual expenditure report issued by the federal government. Instead, remission order amounts are buried in the Public Accounts of Canada, providing even less transparency and accountability.

V. *Government errors or delays*

Government errors or delays is the second most common category of reasons for granting a remission order, cited as a reason in 33.21 per cent of remission orders issued between 1998 and 2017. At times, tax authorities' errors or delays are cited in combination with other factors, such as financial hardship.⁸⁸ As with other remission orders, insufficient information is provided to fully ascertain the circumstances for each order, but some general data is available.

For remission orders that specified government error or delay as the sole reason for granting the order in the twenty-year period, 65.6 per cent related to the application of the GST/HST. The high number likely relates to the GST's introduction in 1991, and the data shows a declining number of remission order applications relating to GST in the 2009–2018 period.⁸⁹ Still, the large number of remission orders addressing GST/HST reflects the tax's administrative and compliance complexity.⁹⁰

Some of the reasons provided regarding incorrect advice or errors relating to GST/HST by the tax authorities included:

- The recipient relied on erroneous information from the tax authorities as to the tax treatment of computer courses;⁹¹
- The recipient did not register for GST based on misleading information from the tax authorities, which resulted in her not being able to claim the GST paid on jewelry imported from the United States;⁹²
- The recipient did not collect and remit tax on the sale of horses, based on the incorrect information from the tax authorities;⁹³
- The recipient did not collect tax on psychometric services, based on the incorrect information provided by the tax authorities;⁹⁴ and

88. See e.g. *Amorim Order*, *supra* note 24; *Renshaw Order*, *supra* note 24; *Torgerson Order*, *supra* note 24; *Speakman Order*, *supra* note 24; *Skripkariuk Order*, *supra* note 24.

89. See *Access to Information Act* requests, *supra* note 51

90. Canada, Department of Finance Canada, *Annual Financial Report of the Government of Canada Fiscal Year 2016-2017* (Ottawa: Department of Finance, 2017), online (pdf): <www.fin.gc.ca/afr-rfa/2017/afr-rfa-2016-2017-eng.pdf> [perma.cc/K7DK-GKEY] at 16. Note that GST only represented 11.7 per cent of the revenues collected by the federal government in the 2016–2017 fiscal year.

91. *Nelson Order*, *supra* note 59.

92. *Jiang Jewellery Inc Remission Order*, SI/2005-39, (2005) C Gaz II, 1030.

93. *Kyle Blaney Remission Order*, SI/2005-7, (2005) C Gaz II, 287.

94. *George Sicz Remission Order*, SI/2005-44, (2005) C Gaz II, 1347.

- The recipient failed to collect and remit tax on waste collection services, due to misleading information from the CRA.⁹⁵

For income tax remission orders, the information provided regarding errors committed by the tax authorities included:

- A CRA auditor failed to advise the taxpayers that they could amend an election and obtain an exemption on capital gains owed on the disposition of property;⁹⁶
- The CRA's action led a taxpayer to believe that his child support payments were deductible;⁹⁷
- The CRA made an error in calculating the tax payable;⁹⁸
- The CRA's actions led a puppeteering festival to believe that it did not have to withhold tax on payments to troupe members;⁹⁹ and
- Incorrect advice by the CRA led taxpayers to incur additional interest.¹⁰⁰

1. *Errors in applying technical rules*

Remission orders citing government error or delay are frequently issued to provide a remedy for incorrect advice or information as to the application of technical tax rules. These remission orders are acting as an administrative mechanism to correct the tax authorities' application of technical tax rules, such as the tax base, the tax unit, and the tax system's administrative rules. In such cases, the correct analytical framework to apply is the technical tax criteria of equity, neutrality, and simplicity.¹⁰¹

From an equity perspective, remission orders provide a necessary tool to remedy government error or delay. A remission order can help address horizontal equity issues, where a similarly placed taxpayer is treated differently simply due to being provided the wrong information by tax authorities. At the same time, many similarly placed taxpayers who were misled by CRA advice may not have access to a remission order.

95. *Laurie's Recycling & Waste Services Inc Remission Order*, SI/2009-58, (2009) C Gaz II, 1439.

96. *Karen Smedley and George Smedley Remission Order*, SI/2004-33, (2004) C Gaz II, 253.

97. *Brian Alm Remission Order*, SI/2002-158, (2002) C Gaz II, 2788.

98. *ATA Woodworking Inc Remission Order*, SI/2005-78, (2005) C Gaz II, 2216.

99. *ManiganSes, Festival international des arts de la marionnette Remission Order*, SI/2005-41, (2005) C Gaz II, 1032.

100. *Daniel J Egan Remission Order*, SI/2015-55, (2015) C Gaz II, 2245; *Evan Warden Remission Order*, SI/2010-95, (2010) C Gaz II, 2603; *Hazret Keskin Tax Remission Order*, SI/2011-104, (2011) C Gaz II, 2663.

101. See Kim Brooks, "Delimiting the Concept of Income: The Taxation of in-Kind Benefits" (2004) 49:2 McGill LJ at 255; Allison Christians, "Introduction to Tax Policy Theory" (29 May 2018), online: *Social Science Research Network* <ssrn.com/abstract=3186791> [perma.cc/RUW2-ZZF6]; OECD, G20, "Addressing the Tax Challenges of the Digital Economy, Action 1–2015 Final Report," *OECD/G20 Base Erosion and Profit Shifting Project*, (Paris: OECD, 2015) at 20-22, online: <dx.doi.org/10.1787/9789264241046-en> [perma.cc/V4MQ-V93R].

The Auditor General of Canada's 2017 Fall Report on the CRA's call centres found that 30 per cent of the information provided by agents was incorrect.¹⁰² Some of that misinformation is unlikely to lead to serious consequences, and there may be a number of opportunities to correct taxpayers' resulting actions before a remission order is the only available remedy. Still, it is likely that some taxpayers obtaining incorrect advice are left without recourse, incognizant of the possibility of applying for remission orders.

There is also a significant concern that the CRA is self-policing whether their government errors or delays are sufficient to justify remission orders.¹⁰³ Most taxpayers are unlikely to apply for a remission order unless they are advised of this remedy. The Auditor General's 2017 Fall Report also found that the CRA significantly underestimated its own error rates,¹⁰⁴ highlighting that the CRA is not always best placed to assess its own errors and offer remedies to taxpayers. Higher net worth individuals may also be better able to access remission orders based on the knowledge and advice of their legal counsel. Colin Campbell outlines the economic barriers to mounting an income tax appeal.¹⁰⁵ The remission order system raises similar access to justice issues, particularly given that remission orders are generally a last resort after appeal mechanisms are exhausted.

From a simplicity perspective, the remission order system is unknown to many taxpayers, and information on how to access it is relatively unavailable. Remission order applications require detailed reasons and supporting documents, and a package is best put together with the CRA remission order guidelines in mind. Even if taxpayers know of the remission order remedy, many taxpayers may not be in a position to marshal a strong application. The administrative burden of remission orders appears cumbersome, with many government officials involved before the application even reaches the Minister, and a further path to follow with the Governor in Council if an order is recommended.

Despite these concerns, remission orders are an important mechanism for addressing CRA errors or delays in circumstances where no other remedy is available. Some immediate issues could be addressed by making further information available about the remission order process, and by

102. Office of the Auditor General of Canada, "Report 2—Call Centres—Canada Revenue Agency" in *2017 Fall Reports of the Auditor General of Canada to the Parliament of Canada* (21 November 2017) at 2.33, 2.39, 2.45, online: <www.oag-bvg.gc.ca/internet/English/parl_oag_201711_02_e_42667.html> [perma.cc/5CUM-J67E] [*Auditor General's 2017 Report*].

103. Lisa Handfield, "Relying on Incorrect CRA Information" (2013) 3:2 *Can Tax Focus* 3 at 3.

104. *Auditor General's 2017 Report*, *supra* note 90 at 2.33, 2.45.

105. Colin Campbell, "Access to Justice in Income Tax Appeals" (2012) 63 *UNBLJ* 445.

allowing the CRA Ombudsman to make recommendations for remission orders directly to the CRA remission departments. Further training of CRA agents to prevent errors would also be an effective prevention mechanism.

More broadly, however, there is already a program available that provides remedies for CRA errors and delays. The taxpayer relief program, as discussed above, could be expanded to provide relief for underlying tax debts. Where wrongful action by the CRA was responsible for a taxpayer debt, the taxpayer relief program has years of experience assessing taxpayers' relief requests. This would also avoid the additional burden of requiring that taxpayers are first considered for eligibility under the taxpayer relief program for interest and penalties before they can be considered for tax debt remission.

2. *Errors in administering expenditure programs*

Certain remission orders for CRA errors or actions do not address an incorrect application of technical tax rules. Instead, these remission orders relate to errors or delays in providing access to tax expenditure programs such as GST Housing rebates, or childcare benefits.

From a tax expenditure analysis perspective, these remission orders help identify administrative or compliance problems with a program, or issues regarding the fairness of a subsidy's distribution. For childcare benefits, for example, the Tax Court of Canada has criticized the CRA for providing benefits to certain ineligible impoverished women, ultimately putting them in situations of extreme hardship when they were required to and unable to repay the benefits.¹⁰⁶ A number of remission orders have been issued to address such errors.¹⁰⁷ It is unclear whether administrative complexity is causing difficulties in limiting the availability of the subsidy to eligible recipients, but it does not appear to be target efficient. Indeed, it appears to be causing potential harm to ineligible recipients, with remission orders as the main mechanism for redressing CRA errors. The hope is that the number of remission orders relating to this administrative issue has led the CRA to become more diligent in assessing whether individuals qualify for the benefit.

106. *Bituala-Mayala v The Queen*, 2008 TCC 125, “[...] I do wish to criticize a lack of care on the part of some CRA officials, whose errors have repercussions for persons who are unfamiliar with Canadian laws, in this case a single mother with few financial resources who does not deserve to be treated in this manner” (*ibid*, at para 8).

107. *Nelly Bituala-Mayala Remission Order*, SI/2009-55, (2009) C Gaz II, 1147; *Amina Daher Remission Order*, SI/2013-46, (2013) C Gaz II, 1286; *Yolande Laurence Remission Order*, SI/2014-77, (2014) C Gaz II, 2531; *Milca Kwangwari Remission Order*, SI/2017-82, (2017) C Gaz II, 3621; *Janet De La Torre Remission Order*, SI/2017-81, (2017) C Gaz II, 3620.

For the GST Housing Rebate, complexity problems led the CRA to repeatedly offer incorrect advice about the program. A responsive legislative amendment now provides the Minister with the ability to accept late applications, and one presumes the information available to CRA agents and the public was also improved to clarify the program's deadline requirements.

Conclusion

Improving the remission order system

Remission orders, although rare, play an important role in the Canadian tax system. This paper sought to demystify tax remission orders by providing empirical data and by highlighting the tax policy functions of remission orders. It also reveals significant concerns with the current remission order system, which are identified by applying the appropriate tax policy criteria. Yet the problems with remission orders are also easily identified through another principle that underpins the tax system and the legal system at large: the rule of law. Under the principles of the rule of law, laws should have clarity, publicity, and certainty.¹⁰⁸ Access to remission orders is lacking on all counts. Allison Christians emphasizes that taxpayer rights are key to balancing the state's authority to tax, and examines the federal government expression of the fundamentals of taxpayer rights in Canada's non-binding Taxpayer Bill of Rights.¹⁰⁹ The Bill's articulation of a taxpayer's administrative rights, rights to accountability, and the right to be informed are particularly underserved by the remission order system in Canada.

At a minimum, further information should be made available to taxpayers about remission orders as a remedy. The CRA's wide discretionary power in referring and evaluating remissions orders relating to its own errors is troublesome. Further efforts should be made available to advise taxpayers of the remission order request process, including through the Taxpayers' Ombudsman. Consistent procedural fairness safeguards should be applied during the remission order evaluation process. This is particularly important given the limited information publicly available about how remission orders are evaluated and the high number of self-represented taxpayers in the Canadian tax system. This paper also

108. Catherine Brown & Arthur Cockfield, "Rectification of Tax Mistakes Versus Retroactive Tax Laws- Reconciling Competing Visions of the Rule of Law" (2013) 61:3 Can Tax J 563 at 579-580.

109. Allison Christians, "Taxpayer Rights in Canada" in César Alejandro Ruiz Jiménez, ed, *Derecho Tributario Y Derechos Humanos/Tax Law and Human Rights* (17 October 2016), online: <ssrn.com/abstract=2797381> [perma.cc/3F9B-6V6Y].

highlighted the need for the tracking and disclosure of the number of remission order requests and their success rates.

A review of tax remission order case law reveals the reluctance of the CRA and the Minister of National Revenue to recommend remission orders. The tax authorities may be over-fettering their discretion in applying the statutory test, leaving some taxpayers without a remedy under the tax system, given that Canada does not allow settlements in compromise for tax debts. Consideration should be given to adding the ability to grant tax debt relief to the existing taxpayer relief program for interest and penalties; this would allow the system to rely on existing procedural fairness safeguards and increase transparency and access to tax debt relief. Alternatively, the federal government should revisit other alternatives for tax debt relief, such as compromise settlements. It is not a principled position to refuse tax debt relief except in those exceptional circumstances where taxpayers are advised, or somehow become aware, of the remission order remedy. Too many fairness questions arise about access to this subsidy for debt relief or remedy for CRA errors or delays.

An annual report on remission orders

This paper concludes with a final proposal to improve the remission order system. Around the world, countries publish a yearly report of their tax expenditures. Canada began to do so in 1979, and has reported on personal and corporate income tax expenditures as well as those related to GST since 1994.¹¹⁰ There is no such comprehensive annual report on remission orders. The information about remission orders issued each year must be gleaned from the Public Accounts of Canada report and by reviewing Orders-in-Council for that year. The reasons provided for remission orders are sparse, and their objectives often unclear.

A report on remission orders should be issued annually, which outlines the remission orders issued and the costs of remission orders in that year. It should state the objectives and reasoning for the remission orders granted, and identify action steps to address recurring issues, such as the unintended impact of legislation and errors by tax authorities. The Canadian tax system and taxpayers in difficulty require increased accountability and transparency from the tax remission order system.

110. *Report on Federal Tax Expenditures*, *supra* note 69 at 5.

