Recent Developments in Tax Litigation, Tax Administration, International Compliance and Voluntary Disclosures

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Recent Developments in Tax Litigation, Tax Administration, International Compliance and Voluntary Disclosures

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Summary

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1. New Federal Trends

1. New Federal Trends

1.1 Budgets and Programs

1.1 Budgets and Programs

- Ted Gallivan[1], Toronto Star, March 20, 2017

"*This is a more aggressive CRA*"

"*There are some actors who need that threat of a jail term to stop, or they actually physically have to be locked up in jail...*"

[1] Assistant Commissioner, International, Large Business and Investigations Branch, Canada Revenue Agency

1.1 Budgets and Programs

New money for CRA

- Budget 2013

  $15 Million over five years (Economic action plan 2013)

  - Combating International tax evasion and aggressive tax avoidance
  - Launch the Stop International Tax Evasion Program
  - Increasing compliance and audit efforts and activities to combat international tax evasion and aggressive tax avoidance

1.1 Budgets and Programs

New money for CRA

- Budget 2013

Stop International Tax Evasion Program (Launched on January 15, 2014)

- Aimed at reducing international tax evasion and avoidance
- Target high-income taxpayers who attempt to evade or avoid tax using complex international legal arrangements
- New "Whistleblower" Program: pay reward to an individual for international-type information which results in total additional assessments exceeding $100,000 in federal tax (a number of other countries that are members of OCDE already provide rewards for the information regarding taxpayer non-compliance)

1.1 Budgets and Programs

New money for CRA

- Budget 2014
  (Economic action plan 2015)
  - Address international aggressive tax avoidance
  - Improve tax integrity and strengthen tax compliance
  - Enhance the fairness of the tax system

1.1 Budgets and Programs

New money for CRA

- Budget 2015

  $141.7 Million over five years (Economic action plan 2015)

  - Combat aggressive tax avoidance in Canada by the largest and most complex business entities
  - Address additional cases that have been identified through the enhanced risk assessment systems to further combat aggressive tax avoidance – domestically and internationally

1.1 Budgets and Programs

New money for CRA

- **Budget 2016**

  $444.4 Million over five years

  (Budget 2016: Chapter 8 – Tax Fairness and a strong financial sector)

  - Hiring additional auditors and specialists
  - Developing robust business intelligence infrastructure
  - Increasing audit activities
  - Improving the quality of investigative work that targets criminal tax evaders

1.1 Budgets and Programs

New money for CRA

- **Budget 2017**

  An additional $523.9 Million over five years

  (Budget plan 2017: Chapter 4 – Tax fairness for the middle class)

  - Increasing audit activities
  - Hiring additional auditors and specialists with a focus on the underground economy
  - Developing robust business intelligence infrastructure and risk assessment systems to target high-risk international tax and abusive tax avoidance cases
  - Improving the quality of investigative work that targets criminal tax evaders

1.1 Budgets and Programs

New money for CRA

- Budget 2018

  $90.6 Million over five years (Budget 2018: Chapter 1 - Growth)

  - Address additional cases that have been identified through enhanced risk assessment systems, both domestically and internationally

1.1 Budgets and Programs

- Immediate access to inbound and outbound bank transfers in excess of $10,000
- New tax treaties with automatic exchange of information
- Coordination of criminal investigations with Joint Chiefs of Global Tax Enforcement (J5)
- Exchange of data from multinational large Corporations
- “Whistleblower” Program for international tax evasion

1.1 Budgets and Programs

CRA "Whistleblower" Program

- Since January 2014
  - $29 Million identified
  - 500 denunciations
  - 379 taxpayers audited
  - 31 Whistleblowers already compensated

1.1 Budgets and Programs

Sample of CRA Programs

- Related Party Initiative (RPI)
- "Postal Code" audits
- Requests to major service providers (Hydro-Québec, Rona, etc.) to obtain data about their "business customers"

1.1 Budgets and Programs

Related Party Initiative

- High net worth individuals (> $50 Million)
- Shift towards "*team audit using a holistic approach for an economic group*" (vs singling out one or two entities in the group)
- Special interest for the role of personal trusts, private foundations, partnerships, offshore activities and foreign and domestic corporations
- Travelling teams

1.1 Budgets and Programs

"Postal Code" Audits

- Now in full operation
- Pre-audit steps often performed:
  - Identification of banks, properties, vehicles
  - Equifax and other credit reports
- Potential *Jarvis* issues?

1.1 Budgets and Programs

CRA claiming increased results from audit programs

- 2011-2012 $8 Billion
- 2016-2017 $12.6 Billion
- 2017-2018 $13.6 Billion

1.1 Budgets and Programs

Increased CRA results

- As per CRA, out of $13.6 Billion amount for 2017-2018:
  - $7.9 Billion for Internet, large businesses and foreign compliance
  - $2.9 Billion for tax avoidance and abusive tax planning

1. New Federal Trends

1.2 Voluntary Disclosures and foreign compliance audits

1.2 Voluntary Disclosures and foreign compliance audits

- New CRA Program has become very difficult for practitioners and their clients
- 2nd review (cancellation of VDP ?) due in March 2020
- RQ reviewing their own program, no final decision yet
- RQ making technical adjustments to their practices to adapt to new CRA rules

1.2 Voluntary Disclosures and foreign compliance audits

New Voluntary Disclosure rules

- No more anonymous file opening
- Now required to have completed the whole process (retrieval of information, accounting analysis, preparation of amended returns and payment) before even opening file

1.2 Voluntary Disclosures and foreign compliance audits

New Voluntary Disclosure rules

- Impossible to know status (limited --- no interest relief --- or general --- partial interest relief) before filing
- ALL unreported income for ALL years must be reported, using estimates where required
- Approach not clear for initial capital

1.2 Voluntary Disclosures and foreign compliance audits

Revenu Quebec's Approach

- RQ was already taxing capital based on its approach
- RQ, for the time being, making minor technical changes
- RQ monitoring federal results before deciding if will follow new CRA approach

1.2 Voluntary Disclosures and foreign compliance audits

- "Old" unfinished Voluntary Disclosures sometimes dealt with as if new rules applied

- Audits initiated in selected files, to add supplementary years to previously accepted Voluntary Disclosures (under the old rules)

1.2 Voluntary Disclosures and foreign compliance audits

- More detailed and pointed questions are asked by CRA for unfinished "old" files (origin of funds, whether possible to estimate income, etc.)

- Case-by-case approach for the moment, no specific rule

1.2 Voluntary Disclosures and foreign compliance audits

Audits for more years after acceptance of Voluntary Disclosure

- CRA does NOT consider that acceptance of Voluntary Disclosure led to agreement with taxpayer estopping CRA from assessing taxpayer for other years
- Changes made to CRA acceptance letter over the years

1.2 Voluntary Disclosures and foreign compliance audits

Audits for more years after acceptance of Voluntary Disclosure

CRA Standard Acceptance letter (2015)

Our acceptance of the disclosure covers the 2003 to 2014 taxation years. Please note that the VDP has not verified the accuracy of the information you have provided in this disclosure and the Canada Revenue Agency reserves the right to open these years for audit or verification in the future.

1.2 Voluntary Disclosures and foreign compliance audits

Audits for more years after acceptance of Voluntary Disclosure

CRA Standard Acceptance letter (2017)

Our acceptance of the disclosure covers only the 2006 to 2011 tax years and is based on the information you sent us. We can later audit or verify any information for the tax years relating to this voluntary disclosure.

As well, we can reassess any tax year, not just those included in this disclosure, if we find you misrepresented the facts because of neglect, carelessness, willful default, or fraud.

1.2 Voluntary Disclosures and foreign compliance audits

Audits for more years after acceptance of Voluntary Disclosure

- Other factors militate in favor of existence of an agreement
  - Declared purpose of VDP is to enable taxpayer "*to come forward and correct past omissions*"
  - VD has to be "*complete*" to be accepted
  - VDP Manual provides that VDP agent has to make comprehensive analysis of "*completeness*" and "*number of years issue*" to make a "*decision*"

1.2 Voluntary Disclosures and foreign compliance audits

Audits for more years after acceptance of Voluntary Disclosure

- Only a handful of cases so far, mostly involving:
  - Foreign banks with "leaks"
  - Large amounts
  - Audits further to bank transfers after completion of VD
- Bitter litigation expected

1.2 Voluntary Disclosures and foreign compliance audits

Audits for more years after acceptance of Voluntary Disclosure

- Forum for litigation not clear
  - Immediate Judicial Review before Federal Court?
  - Appeal against assessments before Tax Court of Canada?
- Penalties and interest for additional years:
  - Full amount?
  - Same deal as for VD?
  - *Bozzer* rule
  - Possible Judicial Review?

1.2 Voluntary Disclosures and foreign compliance

VD Jurisprudence so far

- ***Gauthier* v. *MNR*, 2017 FC 1173**:
  - Taxpayer with accepted VD lost trying to s from assessing prior years
  - Wrong recourse? (injunction vs judicial revi

1.2 Voluntary Disclosures and foreign compliance audits

VD Jurisprudence so far

- ***Berger* c. *ARQ*, 2014 QCCS 3280 and 2016 QCCA 226**
  - Taxpayer got caught with foreign account (no VD)
  - Request for detailed information (RQ had limited information)
  - Taxpayer invoked *Jarvis* and right to silence
  - Taxpayer lost: no investigation YET

1.2 Voluntary Disclosures and foreign compliance audits

VD Jurisprudence so far

- ***4053893 Canada Inc.* v. *MNR*, 2019 FC 51**:
  - Taxpayer owned Corp 100%
  - Taxpayer non-filer since 2006
  - Corp non-filer since 2003
  - Taxpayer received personal CRA request to file
  - Taxpayer phoned CRA, was told request for Corp would eventually follow

1.2 Voluntary Disclosures and foreign compliance audits

VD Jurisprudence so far

- ***4053893 Canada Inc.* v. *MNR*** (cont'd):
  - Corp opened VD after phone call
  - CRA refused VD, because consequence of audit of related party
  - CRA did not indicate how the personal audit would lead it to the Corp
  - CRA decision cancelled by Federal Court for lack of transparency

1. New Federal Trends

1.3 Audit powers of CRA and their limits

1.3 Audit powers of CRA and their limits

BP Canada Energy Company v. *MNR*, 2017 FCA 61

- Accountants' worksheets evaluating the tax risks as required by Securities Commission reporting
- CRA written policy not to request worksheets needs to be respected
- Compliance with Securities' laws: need for transparency to protect public
- Taxpayer not required to self audit

1.3 Audit powers of CRA and their limits

***MNR* v. *Atlas Tubes Canada ULC*, 2018 FC 1086**

- JMC (US parent of Atlas) acquires another Corporation (LSI)
- Some assets of LSI end up in Atlas after post-closing reorganization
- CRA wants "tax diligence report" prepared for LSI in advance of acquisition, as it might be relevant to its Atlas audit
- EY report includes analysis of LSI tax risks in the event of a CRA audit

1.3 Audit powers of CRA and their limits

MNR* v. *Atlas Tubes Canada ULC (cont'd)

- FC concludes that the request in *BP* was "*prospective*" and general, while the Atlas request was made "*in the context of an active audit of particular issues*"
- Accordingly, the demand "*meets the applicable threshold of relevance*" and must be accepted

1.3 Audit powers of CRA and their limits

MNR v. *Hydro-Québec*, 2018 FC 622

- Decision targets requests to third-parties for information about taxpayers (business customers of Hydro-Québec)
- Interesting decision, as the Court refuses the CRA's request despite:
  - The fact that Hydro-Québec was not challenging the request
  - The test prescribed by the ITA being quite flexible
  - The jurisprudence usually being favorable to the Crown ever since the ITA rules have become more flexible

1.3 Audit powers of CRA and their limits

MNR* v. *Hydro-Québec (cont'd)

- CRA Requirement:

  "The Canada Revenue Agency (CRA) wishes to obtain from Hydro-Québec a list of all the legal or natural persons identified as business customers who are charged a general rate, excluding legal or natural persons subject to residential rates and (federal, provincial and municipal) government agencies (hereinafter the customer list)."

1.3 Audit powers of CRA and their limits

MNR v. *Hydro-Québec* (cont'd)

Decision

- Group is hard to identify, as there are too many classes of tariffs charged by Hydro-Québec
- Information pertaining to identity (rather than consumption statistics) requested is "outside the scope" of the information needed to verify compliance

1.3 Audit powers of CRA and their limits

MNR* v. *Hydro-Québec (cont'd)

Decision

- Too far from the test "*to verify compliance with the duties and obligations set out in the ITA*"

- NB: RQ has access to that information through its "*Croisement de fichiers*" program and frequently uses it (e.g., "vacant units" in an income-producing property)

1.3 Audit powers of CRA and their limits

***MNR* v. *RBC Life Insurance Company*, 2013 FCA 50**

- Request for information about "10-8" life-insurance policies
- Initially authorised after an *ex parte* hearing

1.3 Audit powers of CRA and their limits

MNR v. *RBC Life Insurance Company* (cont'd)

- CRA hadn't disclosed all the essential facts:
  - CRA did not communicate an internal opinion recognizing that the tax-planning was compliant with the law
  - The request was a strategy to "send a message to the industry" as a way to paralyse the use of such policies rather than aiming to conduct an audit of the participants
- Order cancelled, which lead to an amendment of the ITA. Such requests are no longer *ex parte*

1.3 Audit powers of CRA and their limits

MNR v. KPMG LLP, 2016 FC 1322

KPMG wished to have the order authorizing the MNR to require information from KPMG cancelled. The order would force KPMG to disclose information about unidentified clients, including their identity and additional documents

KPMG essentially supported that the judge should make use of his discretionary power to exempt KPMG from such an order, since an accountant "shall not disclose any confidential information concerning the affairs of any client, former client, employer or former employer." (Rule 208 of Chartered Professional Accountants of Ontario's *Code of Professional Conduct*)

1.3 Audit powers of CRA and their limits

MNR* v. *KPMG LLP (cont'd)

- The Court rejects KPMG's argument:
- *"Indeed, cancelling or varying Justice Noël's Order based on KMPG's concerns regarding confidentiality would appear to be inconsistent with Parliament's intent in enacting s. 231.2"*
- Request rejected

1.3 Audit powers of CRA and their limits

Rona Inc. v. *MNR*, 2017 FCA 118

Rona appeals an order authorizing the CRA to Request information from Rona regarding its commercial customers

- Rona essentially supports that the trial judge erred in his use of his discretionary power
- After considering the government officials' behavior, the trial judge concluded that their reprehensible behavior was insufficient to justify rejecting the CRA's Request for information (the government officials had previously visited Rona pretending to be entrepreneurs)

1.3 Audit powers of CRA and their limits

Rona Inc. v. ***MNR*** (cont'd)

In the case at hand, Rona did not convince the Federal Court of Appeal that the trial judge erred in his use of his discretionary power :

> *"Even if the criteria set out in the ITA are met, the judge has discretionary authority to remedy certain abuses, depending on the circumstances"*

- The Appeal is rejected

1.3 Audit powers of CRA and their limits

***MNR* v. *Bank of Montreal* (Federal Court T-1528-17)**

***MNR* v. *Royal Bank of Canada* (Federal Court T-1529-17)**

***MNR* v. *Toronto-Dominion Bank* (Federal Court T-1530-17)**

- Three Canadian Banks hold registries about transactions realized in Canadian dollars accounts by an Israeli financial institution named Bank Hapoalim B.M

1.3 Audit powers of CRA and their limits

***MNR* v. *Bank of Montreal*, *MNR* v. *Royal Bank of Canada*, *MNR* v. *Toronto-Dominion Bank* (cont'd)**

- MNR wishes to force the Banks to disclose a list of Canadian Taxpayers that made deposits or withdrawals from the bank accounts at the Bank Hapoalim B.M to verify if those Taxpayers complied with the duties and obligations set out in the ITA

- Request granted

1.3 Audit powers of CRA and their limits

MNR v. *PayPal Canada Co.*, 2017 CarswellNat 6671

- CRA wished to access information and documents regarding transactions realised through PayPal's online platform
- Group of individuals targeted was limited to the individuals and corporations that possessed a commercial PayPal account
- CRA wished to obtain all the information regarding annual transactions for a period of four years

1.3 Audit powers of CRA and their limits

MRN v. *PayPal Canada Co.* (cont'd)

- PayPal's privacy policy as well as the absence of a minimal amount for each transaction were insufficient reasons to reject the CRA's Request for information
- The requested information was available to PayPal's computer system
- Request granted

1.3 Audit powers of CRA and their limits

***MRN* c. *Les Développements Béarence Inc.*, 2019 CF 22**

- Interesting case concerning demands and Requirements by CRA

- Discusses whether taxpayers can only be compelled to submit existing documents or whether they can be compelled to spend money and/or efforts to prepare additional documents

1.3 Audit powers of CRA and their limits

MRN* c. *Les Développements Béarence Inc. (cont'd)

- Small land development operation with between 50 and 130 accounting transactions
- Very basic books; "Notice to reader" financial statements

1.3 Audit powers of CRA and their limits

MRN* c. *Les Développements Béarence Inc. (cont'd)

- CRA Requirement for 2012 to 2015 initially not respected
- Court order issued
- Documents submitted
- CRA claims that documents are insufficient and requests "contempt of Court" verdict

1.3 Audit powers of CRA and their limits

MRN* c. *Les Développements Béarence Inc. (cont'd)

- Court order required the submission for 2012 to 2015 of:
  - General Ledger for the period
  - Excel file containing all daily transactions
  - Report of transactions per account for all accounts mentioned in trial balance

1.3 Audit powers of CRA and their limits

MRN* c. *Les Développements Béarence Inc. (cont'd)

- CRA claims that documents not all in required format and not containing ALL required information
- Taxpayer claims that it submitted all available information and that it could not be compelled to create information that did not exist at the time of the CRA Requirement
- Taxpayer claims that CRA has all it needs to complete its audit, including further information available at RQ

1.3 Audit powers of CRA and their limits

MRN* c. *Les Développements Béarence Inc. (cont'd)

[12] *Le but du paragraphe 231.2(1) de la loi est de permettre à l'ARC de déterminer la dette fiscale, rien de plus, rien de moins. Ceci m'amène à poser une question fondamentale : est-ce que l'ARC a le droit de demander que Béarence dépense de l'argent pour fournir des renseignements dans un format demandé par l'ARC lorsque ces renseignements sont déjà fournis et disponibles dans un autre format? Ma réponse est « non », pour la seule raison que le format des renseignements n'a aucun impact sur la détermination de l'endettement.*

1.3 Audit powers of CRA and their limits

MRN* c. *Les Développements Béarence Inc. (cont'd)

[13] (…) *À mon avis, ni l'ARC ni cette Cour ne peut imposer le format dans lequel les renseignements doivent être fournis à l'ARC, pourvu que tous les renseignements nécessaires pour déterminer l'endettement fiscal soient fournis.*

1. New Federal Trends

1.4 Significant awards of Court Costs in taxation matters

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1.4 Significant awards of Court Costs in taxation matters

- In Court cases, winning party normally is entitled to recover Court Costs
- In general, based on a "Tariff", which represents a small fraction of actual fees and costs, plus some disbursements (e.g., expert's report)
- However, subsection 147(3) of Tax Court of Canada Rules (General Procedure) gives TCC discretion to award more
- More and more cases with substantial awards
- Range between 25% and 75% of actual fees

1.4 Significant awards of Court Costs in taxation matters

147 (1) The Court may determine the amount of the costs of all parties involved in any proceeding, the allocation of those costs and the persons required to pay them.

(2) Costs may be awarded to or against the Crown.

1.4 Significant awards of Court Costs in taxation matters

(3) In exercising its discretionary power pursuant to subsection (1) the Court may consider

- **(a)** the result of the proceeding
- **(b)** the amounts in issue
- **(c)** the importance of the issues
- **(d)** any offer of settlement made in writing
- **(e)** the volume of work
- **(f)** the complexity of the issues

1.4 Significant awards of Court Costs in taxation matters

(g) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding

(h) the denial or the neglect or refusal of any party to admit anything that should have been admitted

(i) whether any stage in the proceedings was

- **(i)** improper, vexatious, or unnecessary, or
- **(ii)** taken through negligence, mistake or excessive caution

(i.1) whether the expense required to have an expert witness give evidence was justified given

- **(i)** the nature of the proceeding, its public significance and any need to clarify the law
- **(ii)** the number, complexity or technical nature of the issues in dispute, or
- **(iii)** the amount in dispute; and

(j) any other matter relevant to the question of costs.

1.4 Significant awards of Court Costs in taxation matters

(3.1) Unless otherwise ordered by the Court, if an appellant makes an offer of settlement and obtains a judgment as favourable as or more favourable than the terms of the offer of settlement, the appellant is entitled to party and party costs to the date of service of the offer and substantial indemnity costs after that date, as determined by the Court, plus reasonable disbursements and applicable taxes.

1.4 Significant awards of Court Costs in taxation matters

(3.2) Unless otherwise ordered by the Court, if a respondent makes an offer of settlement and the appellant obtains a judgment as favourable as or less favourable than the terms of the offer of settlement or fails to obtain judgment, the respondent is entitled to party and party costs to the date of service of the offer and substantial indemnity costs after that date, as determined by the Court, plus reasonable disbursements and applicable taxes.

1.4 Significant awards of Court Costs in taxation matters

(3.3) Subsections (3.1) and (3.2) do not apply unless the offer of settlement

(a) is in writing;

(b) is served no earlier than 30 days after the close of pleadings and at least 90 days before the commencement of the hearing;

(c) is not withdrawn; and

(d) does not expire earlier than 30 days before the commencement of the hearing.

1.4 Significant awards of Court Costs in taxation matters

(3.4) A party who is relying on subsection (3.1) or (3.2) has the burden of proving that

(a) there is a relationship between the terms of the offer of settlement and the judgment; and

(b) the judgment is as favourable as or more favourable than the terms of the offer of settlement, or as favourable or less favourable, as the case may be.

(3.5) For the purposes of this section, ***substantial indemnity costs*** means 80% of solicitor and client costs.

1.4 Significant awards of Court Costs in taxation matters

Case	Reference	Issue	Amount at stake	Comments
Alta Energy Luxembourg S.A.R.C.	2018 TCC 152 and 2018 TCC 235	Application of subsection 13(4) of Canada-Luxembourg Tax Treaty and GAAR	Capital gain over $380 Million	Request of $1,630,645, representing 75% of "selected" fees, plus disbursements
				Award of $1,192,513 (50% of "selected" fees, plus disbursements)
				5-day trial
				First and complex challenge of Treaty provision

1.4 Significant awards of Court Costs in taxation matters

Case	Reference	Issue	Amount at stake	Comments
2078970 Ontario Inc.	2017 TCC 173 and 2018 TCC 141 and 2018 TCC 214	Rule 58 application for pre-trial determination	$33,876,914 of expenses	Taxpayer asked for $194,038, representing 50% of fees up to drafting of Rule 58 Application and 75% thereafter
				Justice Canada accepted that 20-25% would be reasonable
				Court awarded 50% of Rule 58 fees ($66,593 on $133,185)
				Use of Rule 58 was praised

1.4 Significant awards of Court Costs in taxation matters

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Case	Reference	Issue	Amount at stake	Comments
Loblaws Financial Holdings Inc.	2018 TCC 182 and 2018 TCC 263	Income from Foreign Bank	$473,422,613 of FAPI	Justice Canada asking for fees of $457,756 ($15,500 per Tariff, 30% of fees and 100% of disbursements)
				No special Costs awarded
				Loblaw had to win every issue to succeed
				Loblaw won each issue but one
				No compromise by Justice Canada on any issue

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1.4 Significant awards of Court Costs in taxation matters

Case	Reference	Issue	Amount at stake	Comments
Cameco	No ruling yet	Transfer pricing	$500 Million of income	No decision yet
				Cameco asking for award of $38,437,157 (70% of "adjusted" fees and 100% of $17,9 Million of disbursments)
				Claim that total litigation costs were $57 Million

1. New Federal Trends

1.5 Use of "Proceeds of crime" provisions

1.5 Use of "Proceeds of crime" provisions

- Usually, assessment amounts are not payable until first level Court decision (except DAS, GST/QST/HST, etc.)
- Possible "seizure before judgment" pursuant to Section 225.2 ITA and Section 17.0.1 TAA
- Now recent CBC report stated that CRA is also planning to use Criminal Code "Proceeds of crime" provisions where applicable (CBC Website, Elizabeth Thompson, December 10, 2018, 4 AM EST)

2. New Provincial Trends

2. New Provincial Trends

2.1 More tax evasion investigations and requests for jail time in most cases

2.1 More tax evasion investigations and requests for jail time in most cases

- RQ now has over 30 prosecutors
- Jail terms are becoming more commonplace
- See List for recent examples

2.1 More tax evasion investigations and requests for jail time in most cases

Case	Reference	Provincial Tax involved	Total Fines	Jail Terms	Comments
Agence du revenu du Québec c. Leizerovici #1	2017 QCCQ 11252	$65,283 of taxes	$363,219	18 months	• Case involving Jewish General Hospital
Agence du revenu du Québec c. Leizerovici #2	2018 QCCQ 1459	Substantial	$100,000	27 months	• ITCs and ITRs on >$6 Million of false invoices • By consent, other taxpayers absolved • In addition to #1 sentence
Rocco Carbone	500-61-435307-161 Judgement on November 30th, 2018	Approximately $385,000 of taxes	$1,391,659	18 months	• By consent • Same Judge as #1 • Unremitted taxes and use of false invoices
Ryan Langtry	Unpublished Judgement on November 28th, 2018	$78,061 of income tax and $57,046 of GST/HST	$68,000	9 months	Rental and construction income not reported

2.1 More tax evasion investigations and requests for jail time in most cases

Case	Reference	Provincial Tax involved	Total Fines	Jail Terms	Comments
Jeff Dyck	2018 MBCA 33	$2.37 Million of income tax	$2.37 Million	36 months	Trial judge fined taxpayer only $1M, fine was re-established to minimum amount in Appeal
Jiang 7 Co.	2017 BCPC 111	#1 $96,000 #2 $51,000 #3 $75,000	$96,000 $51,000 $75,000	6 months 6 months 6 months	Sentence consecutive to a 12- month fraud sentence
Mori	2017 ONSC 1551	$224,000	$168,000	12 months	3 X 4 months, consecutive
Millar	2017 BCSC 402	$36,000	$24,000	6 months	Part of a larger fraud accusation, for which an additional 2 years was pronounced
Steinkey	2017 ABQB 378	#1 $164,000 #2 $322,000	$164,000 $322,000	18 months (conditional sentence "house arrest") 22 months (conditional sentence "house arrest")	Defendants tried to withdraw their guilty plea before sentencing

2. New Provincial Trends

2.2 Attempts to "criminalize" or to at least increase the consequences of tax avoidance

2.2 Attempts to "criminalize" or to at least increase the consequences of tax avoidance

March 2017 Report from the "Committee on Public Finance" regarding the use of tax havens

- Recommends to "criminalize" tax avoidance for businesses and their advisors (#24, 34 and 35)
- Recommends to increase the sanctions in tax avoidance cases and cases involving GAAR (#19 to 27)

2.2 Attempts to "criminalize" or to at least increase the consequences of tax avoidance

"Tax Havens: Tax Fairness Action Plan" (November 2017)

- Penalty in GAAR cases (Quebec only) increased from 25% to 50%
- Prescription of 6 years instead of 3 years
- Penalty of 100% of the fees received for the professional who acts as "*promoter*" of the scheme (was 12.5%)
- New proposed legislation had been tabled, but could not be adopted before the Fall election
- Now awaiting CAQ

2.2 Attempts to "criminalize" or to at least increase the consequences of tax avoidance

- Lost of right to obtain government contracts (AMF/AMP authorization) for:
  - The business itself
  - The professional who advised it and his/her firm
- Awaiting CAQ (no draft legislation tabled before Fall election)

2.2 Attempts to "criminalize" or to at least increase the consequences of tax avoidance

- Details still unknown
- Possible to avoid the sanctions by making a "preventive disclosure"
- No "admission of guilt" can be invoked by RQ
- Possible conflict between the client and the professional, if they disagree on the filing of a "preventive disclosure"

2. New Provincial Trends

2.3 New Quebec "Whistleblower" Program

2.3 New Quebec "Whistleblower" Program

- Complements Federal program, which targets international information

- Details of Quebec program now published in Bulletin ADM-8 issued on June 18, 2018

2.3 New Quebec "Whistleblower" Program

- Applies to GAAR and "sham" cases, other than those already covered by Federal program

- Tax impact must be at least $100,000

2.3 New Quebec "Whistleblower" Program

- Maximum remuneration of 15%, depending on the quality of the information, the extent to which it is nominative, the level of cooperation and the value of the information for RQ

- Other form of remuneration may be contemplated if information is not nominative

2.3 New Quebec "Whistleblower" Program

- Individuals only
- Remuneration is taxable
- Withholding at source of tax
- No anonymous denunciation

2.3 New Quebec "Whistleblower" Program

- Beneficiaries and advisors involved in subject transactions are excluded
- Possible exemption for "non participating" beneficiaries
- Taxpayers who have committed tax offenses or other criminal offenses in the past are excluded
- Public servants and members of police forces are also excluded

2.3 New Quebec "Whistleblower" Program

- In principle, the identity of the "whistleblower" is protected
- Possible exceptions, however, for example when testimony of "whistleblower" is required

2. New Provincial Trends

2.4 *1068754 Alberta Ltd. c. Agence du Revenu du Québec*, 2018 QCCA 8

2.4 *1068754 Alberta Ltd. c. Agence du Revenu du Québec*, 2018 QCCA 8

- Alberta Trust established for benefit of Quebec residents
- RQ wants access to Trust bank records in Alberta branch of Banque Nationale du Canada
- RQ Requirement sent directly to Alberta branch, as per Bank Act requirements
- Taxpayer alleges illegal "extra-territorial" action by RQ

2.4 *1068754 Alberta Ltd. c. Agence du Revenu du Québec*, 2018 QCCA 8

- CAQ sees service upon Alberta branch as service in general to Banque Nationale du Canada, which has Headquarters in Quebec
- Demand not extra-territorial
- Appealed to Supreme Court by Taxpayer; case heard in January 2019

3. Recent cases of interest

3. Recent cases of interest

3.1 Rectification or cancellation of transactions: a new twist

3. Recent cases of interest

3.1.1 Brief review of general principles in AES and Jean Coutu decisions

3.1.1 Brief review of general principles and AES and Jean Coutu decisions

- Rectification of transactions initially a *Common Law* concept
- No similar concept in the *Civil Code*
- In Quebec, *Civil Code* allows for cancellation, if the consent of the parties has been compromised as a result of an error:
  - pertaining to a principal consideration of the contract
  - that is not "inexcusable"

3.1.1 Brief review of general principles and AES and Jean Coutu decisions

- Decisions *ARQ* v. *Services Environnementaux AES inc.*, 2013 SCC 65 and *ARQ v. Riopel*, 2013 SCC 65 had remedied the Quebec vacuum by using the "*negocium*" and "*instrumentum*" concepts

- Correction of a note in *AES* (error in calculating the ACB in the process of a capital reorganization)

- Change of the order in which two transactions took place in *Riopel* (share transfer and note)

3.1.1 Brief review of general principles and AES and Jean Coutu decisions

Different situation in ***Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)***, 2016 SCC 55

- Transaction had mainly commercial purposes, as it was desired to eliminate the negative investor perception resulting from fluctuations in exchange rates, which modified the value of its investment in an American subsidiary

- General objective that the operations undertaken to correct the problem should not trigger tax consequences

3.1.1 Brief review of general principles and AES and Jean Coutu decisions

Jean Coutu Group (PJC) Inc. v. ***Canada (Attorney General)*** (cont'd)

- Operations undertaken created unforeseen FAPI consequences
- Two additional steps needed to be added to the sequence of transactions to avoid the FAPI problem

3.1.1 Brief review of general principles and AES and Jean Coutu decisions

Jean Coutu Group (PJC) Inc. v. ***Canada (Attorney General)*** (cont'd)

Supreme Court decision:

- "*Instrumentum*" correctly reflected the transactions agreed upon by the parties to accomplish a principally commercial objective
- "*General* " tax objective is not sufficient to enable the parties to modify a transaction retroactively
- In such a case, the addition of steps would be "*retroactive tax planning*"

3. Recent cases of interest

3.1.2 Decision in *St-Pierre* c. *Canada*, 2018 CAF 144

3.1.2 Decision in *St-Pierre*

- Cancellation rather than modification

- Taxpayer appears to have had the benefit of both sides of the retroactivity concept

3.1.2 Decision in *St-Pierre*

- Classical case of wrong calculation of CDA
- Request to cancel the dividend and to order shareholders to reimburse the amount of the dividend
- Request granted by the Superior Court

3.1.2 Decision in *St-Pierre*

- CRA wishes to apply subsection 15(2) ITA ("loan to a shareholder"), due to the fact that several years had passed since the payment of the dividend
- Taxpayer alleges that:
  - There never was a loan or advance, with the result that subsection 15(2) ITA is not applicable
  - Despite the fact that the dividend was cancelled retroactively by the Court, the obligation to reimburse the amount only exists from the date of the judgment

3.1.2 Decision in *St-Pierre*

- FCA accepts all the arguments of the Taxpayer :
  - No loan
  - The obligation to reimburse only arose when the judgment was issued
  - The refund was then made in a timely manner
  - Thus, subsection 15(2) ITA is not applicable (danger that CRA will consider applying subsection 15(1) ITA in the future?)

3.1 Rectification or cancellation of transactions: a new twist

3.1.3 *Jean Bourgault* c. *La Reine*, 2019 CCI 6

3.1.3 *Jean Bourgault* c. *La Reine*

- Individual purchased shares of real estate Corporation previously held by Holdco
- Holdco extracted all value before the sale (in excess of $1 Million) and Corporation was left with land of little value, with considerable efforts required to recover any money

3.1.3 *Jean Bourgault* c. *La Reine*

- Sale contract was poorly drafted
- Provides that Holdco as Vendor is to receive commissions for its assistance in eventual sales (50% of first $300,000 and 30% of any exceeding amount)
- Seems to say that sale proceeds are $1 plus the commissions

3.1.3 *Jean Bourgault* c. *La Reine*

- Commissions of $271,000 eventually paid to Holdco for true services
- CRA attempting double taxation:
  - Commission income for Holdco
  - Shareholder benefit pursuant to subsection 15(1) ITA for Individual (as Corporation paid "purchase price" on his behalf)

3.1.3 *Jean Bourgault* c. *La Reine*

- "Rectification" procedure before Superior Court corrected the contract
- CRA auditor notified of procedure, but CRA not officially made party to the procedure
- CRA accordingly claims that it was not bound by the Superior Court Judgment

3.1.3 *Jean Bourgault* c. *La Reine*

TCC Judgment:

- CRA is right that it is not bound by Judgement
- Judgment is however a good indication of the true intent of the parties
- No intent to confer a subsection 15(1) ITA benefit
- Intent was for the purchase price to be $1

3.1.3 *Jean Bourgault* c. *La Reine*

Interesting argument pleaded by Taxpayer:

> [36] *La jurisprudence a établi la nécessité d'un élément intentionnel pour conclure à l'application du paragraphe 15(1) sauf lorsque les deux conditions suivantes sont réunies : (1) les circonstances sont telles que l'actionnaire ou la société « aurait dû savoir » qu'un avantage avait ainsi été conféré; et (2) ni la société, ni l'actionnaire n'ont rien fait pour rectifier l'octroi de cet avantage. Ces deux conditions ne sont pas présentes dans le cas présent.*

3. Recent cases of interest

3.2 Cancellation of interest and penalties

3.2 Cancellation of interest and penalties

***Parmar* v. *Canada (Attorney General)*, 2018 FC 912**

- Discretionary power to cancel interest and penalties pursuant to subsection 220(3.1) ITA
- Judicial review by Federal Court

3.2 Cancellation of interest and penalties

Parmar v. ***Canada (Attorney General)*** (cont'd)

- Canpar is a builder of residential properties
- Lender demanded payment on a bad project
- New Lender accepted to lend money, on the condition that the Corporation transfers title of the property to its shareholders

3.2 Cancellation of interest and penalties

Parmar v. *Canada (Attorney General)* (cont'd)

- Taxpayers believed that:
  - Canpar remained the beneficial owner and the transfer was only a "paper transfer" to satisfy the new Lender
  - No income tax was accordingly owing on the "transfer"
  - No GST/HST were owed on this transaction between related parties
- Canpar continued to pay some expenses in relation to the Property

3.2 Cancellation of interest and penalties

Parmar* v. *Canada (Attorney General) (cont'd)

- CRA:
  - Assessed both GST/HST and income tax
  - Assessed "gross negligence" penalties

3.2 Cancellation of interest and penalties

Parmar* v. *Canada (Attorney General) (cont'd)

- After rejection of objections:
  - Taxpayer appealed GST/HST to TCC
  - No appeal filed for income tax (alleged negligence of representative)

3.2 Cancellation of interest and penalties

Parmar* v. *Canada (Attorney General) (cont'd)

- Taxpayer lost legal argument that there was no real transfer
- However, TCC cancelled the GST/HST penalty, as it accepted that the taxpayers legitimately believed that no taxes would be owed until the property was transferred to arm's length parties

3.2 Cancellation of interest and penalties

Parmar* v. *Canada (Attorney General) (cont'd)

- Taxpayer then made "fairness request" to CRA, to have income tax penalty cancelled, despite lack of appeal
- CRA twice rejected the request
- Taxpayer sought "Judicial Review" by Federal Court

3.2 Cancellation of interest and penalties

Parmar* v. *Canada (Attorney General) (cont'd)

- Judicial Review is not an appeal
- Standard of review is not "correctness", but rather "reasonableness"

3.2 Cancellation of interest and penalties

Parmar* v. *Canada (Attorney General) (cont'd)

- "Reasonableness" has special meaning:
  - Existence of justification, transparency and intelligibility within the decision-making process
  - Whether the decision falls "*within a range of possible, acceptable outcomes which are defensible in respect of the facts and law*"

3.2 Cancellation of interest and penalties

Parmar v. ***Canada (Attorney General)*** (cont'd)

- Par, 87 of Information Circular IC07-1R1 states the following:

  [87] *Generally, the CRA will not reassess a statute-barred return if a request is made because of a court decision. (…) Where a taxpayer has chosen not to take advantage of his or her right of objection or appeal for a tax year, request made to reassess a statute-barred return based only on the result of an appeal by another taxpayer or by the same taxpayer will not be granted under subsection 152(4.2)*

3.2 Cancellation of interest and penalties

Parmar **v. *Canada (Attorney General)*** (cont'd)

- Decision relied mainly on par. 87 of IC07-1R1
- Therefore, although harsh, the decision was reasonable

3. Recent cases of interest

3.3 Tax strategies involving charitable donations

3.3 Tax strategies involving charitable donations

- Two recent cases seem to indicate that Courts are not receptive to tax strategies involving donations
- As soon as advantages are to be gained from the decision to donate, Courts have been quick to conclude that a fundamental part of donation is lacking, the intention to donate (« *animus donandi* »)
- The decision in *Fonds de Solidarité des travailleurs du Québec (F.T.Q.)* c. *La Reine*, 2018 CCI 3 applies that concept in a particularly severe manner

3.3 Tax strategies involving charitable donations

Markou v. *The Queen*, 2018 TCC 66

- Donation "Program"
- Real contribution is between 30% and 32% of the amount donated
- Loan from a subsidiary of the promoter makes up for the difference (loan is over 20 to 25 years, without interest)

3.3 Tax strategies involving charitable donations

Markou v. *The Queen* (cont'd)

- Two additional loans ranging from 10 to 17% to pay a "security deposit" to the lender as well as a "loan transaction fee" and to buy a "deposit accretion insurance policy"

- Possibility to reimburse the whole loan to the lender at any time by assigning to it the "security deposit" and the "deposit accretion insurance policy"

3.3 Tax strategies involving charitable donations

Markou v. *The Queen* (cont'd)

- There seems to be a circularity of the funds
  - The charitable foundation hands over most of the proceeds from donations to a registered charity that combats terrorism and to an American university
  - Two of the beneficiaries would then buy intellectual property and equipment from a Corporation from the BVI for a cost that largely exceeds the FMV
  - A commission is paid to the promoter as he acted as a solicitor for charitable donations

3.3 Tax strategies involving charitable donations

Markou v. *The Queen* (cont'd)

- Total donations from Markou: $11 Million
- Portion of the donations paid by Markou: $3.52 Million
- Earlier unfavorable decision was rendered in *Maréchaux* v. *La Reine*, 2009 TCC 587 and 2010 FCA 287

3.3 Tax strategies involving charitable donations

Markou v. *The Queen* (cont'd)

- Main argument relates to the total amount of the donation
- Secondary argument relates to the amount of the donation that was "paid cash" (similar rulings made on that basis in the past)

3.3 Tax strategies involving charitable donations

Markou v. *The Queen* (cont'd)

- Taxpayer loses on all grounds, due to the absence of a pure intention do donate.
- The tax planning allowing for a larger tax advantage than the amount actually contributed to the donation led the Court to that conclusion.
- It was unnecessary to analyse he GAAR argument from the CRA

RAVINSKY RYAN LEMOINE
S.E.N.C.R.L.
AVOCATS

3.3 Tax strategies involving charitable donations

***Fonds de solidarité des travailleurs du Québec (F.T.Q) c. La Reine*, 2018 CCI 3**

- Huge amounts in play: $7,188,435 in 2008 and $2,078,922 $ in 2009
- Circumstances surrounding the attempts to salvage Abitibi-Consolidated Inc.'s paper factory in Chandler that closed in 1999

3.3 Tax strategies involving charitable donations

Fonds de solidarité des travailleurs du Québec (cont'd)

First attempt(2000-2001)

- Fonds created a subsidiary that bought the factory as well as some equipment
- The attempt ended up failing

3.3 Tax strategies involving charitable donations

Fonds de solidarité des travailleurs du Québec (cont'd)

Second attempt (2001-2004)

- Sale of the subsidiary's assets to a new limited partnership
- The Fonds is one of the limited partners of this new LP
- Modernization works become too expensive and the general partners must be placed under the protection of the CCAA
- Unsuccessful search to find new investors

3.3 Tax strategies involving charitable donations

Fonds de solidarité des travailleurs du Québec (cont'd)

Third attempt (2005)

- Only solution: sale of the factory to a SDEIC created by the municipality of Chandler
- Fonds and others commit to lend money to the SDEIC to finance the acquisition and the expenses of the factory for two years while waiting for the revival of the factory

3.3 Tax strategies involving charitable donations

Fonds de solidarité des travailleurs du Québec (cont'd)

Third attempt (2005)

- If the factory was to be sold:
  - Proceeds of the sale would be used to reimburse the lenders in accordance with proportions that were agreed upon
  - If a new LP was to be formed, the Fonds morally commits to "negotiate in good faith", to acquire a participating interest in the new LP with the loan reimbursement proceeds

3.3 Tax strategies involving charitable donations

Fonds de solidarité des travailleurs du Québec (cont'd)

Failure of the process

- In 2007, admission of failure and sale of the factory (no new LP in sight) to a third party
- Fonds decides to donate the loan reimbursement proceeds to the City (the City is able to receive donations)
- Fonds is freed from its obligation to acquire a participating interest in a new eventual LP

3.3 Tax strategies involving charitable donations

Fonds de solidarité des travailleurs du Québec (cont'd)

Arguments of the Fonds:

- Charitable donation is valid, the Fonds divested itself of the amount of loan reimbursement proceeds in an irrevocable manner
- Alternatively, it is a business expense, as its payment notably aimed to:
  - Maintain the Fonds' credibility as an investor
  - Maintain the image of the Fonds before the general public and its shareholders
  - Maintain the Fonds' reputation as a socially responsible investor
  - Comply with the expectations of the market and the public in regards to its socio-economic role
  - Demonstrate its commercial probity

3.3 Tax strategies involving charitable donations

Fonds de solidarité des travailleurs du Québec (cont'd)

TCC Decision:

- No charitable donation. The material element and the intention to donate are both absent
- The main objective of the payment was to free the Fonds of its obligation to acquire a participating interest in an eventual new LP
- The cancellation of this obligation is a consideration for the payment, which is accordingly not a donation

3.3 Tax strategies involving charitable donations

Fonds de solidarité des travailleurs du Québec (cont'd)

TCC Decision:

- In the absence of any evidence, the consideration had a FMV equal to the cost of the participation the Fonds would have been required to subscribe in a new eventual LP
- The Court did not examine the fact that the Fonds divested itself from the eventual value of its eventual participation, which it will never receive due to the donation
- The fact that no new LP was "in sight" was also not considered by the Court

3.3 Tax strategies involving charitable donations

Fonds de solidarité des travailleurs du Québec (cont'd)

TCC Decision:

- The argument that the payment was also made to preserve the Fonds's reputation and to play a socio-economic role in accordance with its main mission was rejected. The Court concluded that the main goal of the payment was to be freed from the commitment to participate in an eventual new LP
- The Court does not, however, consider the fact that even in that alternative, there is a link between the payment made by the Fonds and its business affairs

3. Recent cases of interest

3.4 ABIL on amount paid for Director's liability

3.4 ABIL on amount paid for Director's liability

- Another bad decision, ***Grubner*** **v. *The Queen*, 2018 TCC 39**

- See also:
  - Trottier c. SMRQ, [2003] R.D.F.Q. 292
  - Poirier v. The Queen, [2001] 1 CTC 2253

3.4 ABIL on amount paid for Director's liability

Grubner* v. *The Queen (cont'd)

- Taxpayers paid in excess of $600,000 directly to CRA for GST liability as Directors
- No loan registered in books of Corporation, although general increase in loan account per financial statements
- General hope and vague discussions to recover the money through the eventual sale of the Corporation and/or its assets

3.4 ABIL on amount paid for Director's liability

Grubner v. *The Queen* (cont'd)

- Four issues to get ABIL:
  - Payment must be a loan to the Corporation (debt owed to the Taxpayers)
  - Loan must have been made "for the purpose of earning income" (subparagraph 40(2)(g)(ii) ITA)
  - Loan must have carried on an active business at some point in the 12 preceding months (paragraph 39(1)(c) ITA)
  - Loan must have become unrecoverable during the year (paragraph 50(1)(a) ITA)

3.4 ABIL on amount paid for Director's liability

Grubner v. *The Queen* (cont'd)

- Court not sure that subrogation resulting from a payment to the CRA is a debt owed by the Corporation to the Directors, in the absence of Loan documents or entries
- Arguments about unrecoverability and hope to recover (to establish income-earning intent) self destruct
- Vague possibilities not enough to serve as evidence of intent to earn income

3.4 ABIL on amount paid for Director's liability

Grubner* v. *The Queen (cont'd)

- *A contrario*: Archived IT-239R2

- Acceptance of position as Director could have been interpreted in the same light as "personal guarantee" given at a time the Corporation had profit potential

3. Recent cases of interest

3.5 *Callidus* case

3.5 *Callidus* case

Facts

- *Callidus* was a secured creditor of a Corporation
- Corporation had collected but failed to remit GST and HST, although it was deemed to hold that amount in trust for the Crown due to section 222 of the ETA
- Corporation went bankrupt
- *Callidus* received funds in the bankruptcy procedures due to being a secured creditor
- Crown did not receive funds in the bankruptcy procedures

3.5 *Callidus* case

Canada v. *Callidus Capital Corporation*, 2017 FCA 162

- Crown claims it should have received funds in priority to secured creditors, due to the deemed trust mechanism created by the ETA
- Therefore, Crown claims *Callidus* should be liable for the amount the Corporation owed to the Crown, as it received funds the Crown should have received in priority
- The Majority of the FCA agrees with the Crown's claim and allows its Appeal

3.5 *Callidus* case

Callidus Capital Corp. v. *Canada*, 2018 SCC 47

- The FCA decision is cancelled by the Supreme Court
- The Supreme Court allows the Appeal according to the FCA's dissenting judge's opinion
- The deemed trust created by section 222 of the ETA is eliminated with bankruptcy due to subsection 222(1.1)
- The Crown has no priority for the amounts the bankrupt creditor failed to remit, it must stand in line with the rest of the unsecured creditors
- The only priorities the Crown has over secured creditors is for deductions at source and unemployment owed

Recent developments in tax litigation, voluntary disclosures and international compliance

THANK YOU!