

# TAX COUNSEL

## REQUIREMENTS AND SEARCHES - A GUIDE TO DISCLOSURE

Canada Customs and Revenue Agency (formerly Revenue Canada) has some powerful tools at its disposal for investigating the affairs of taxpayers. In addition to regular audit powers pursuant to s. 231.1 of the *Income Tax Act* (the "*ITA*"), CCRA can force the production of documents and information through:

- a notice procedure; or
- an inquiry; or
- a search of premises, with judicial authorization; or
- seizure of documents, also with judicial authorization.

The relevant sections of the *ITA* are as follows:

231.2(1) & 231.6(1) Power of Required Production of Documents and Information

231.2(1)

"Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act, by notice served personally or by registered or certified mail, require that any person **provide, within such reasonable time as is stipulated in the notice,**

- a) **any information** or additional information, including a return of income or a supplementary return; or
- b) **any document."**

231.6(2)

"Notwithstanding any other provision of this Act, the Minister may, by notice served personally or by registered or certified mail, require that a person resident in Canada or a non-resident person carrying on business in Canada **provide any foreign based information or document."**

231.3(1) Power of Search & Seizure

"A judge may, on *ex parte* application by the Minister, **issue a warrant** in writing **authorizing any person named therein to enter and search** any building, receptacle or place for any document or thing that may af-

ford evidence as to the commission of an offence under this Act **and to seize** the document or thing and, as soon as practicable, bring it before, or make a report in respect of it to, the judge or, where the judge is unable to act, another judge of the same court to be dealt with by the judge in accordance with this section."

231.4(1) Power of Inquiry

"The Minister may, for any purpose related to the administration or enforcement of this Act, **authorize any person**, whether or not the person is an officer of the Department of National Revenue, **to make such inquiry as the person may deem necessary** with reference to anything relating to the administration or enforcement of this Act." (emphasis added).

These powers, derived by statute, and allowing the intrusion of the state on the privacy of individuals, tend to be strictly interpreted and limited by the Courts. As guardians of our clients' private information we must be sure to comply with the law but not disclose more than is required. It is important, when walking this tightrope, to know the limits of CCRA's authority and to react accordingly.

In this discussion we will focus on the notice requirements of s. 231.2 of the *ITA* and the search and seizure process under s. 231.3 of the *ITA* or the *Criminal Code*.

When given a notice under s. 231.2 of the *ITA*, "any person", regardless of the inconvenience, must within a reasonable time provide to CCRA the requested information or documents, provided that they relate to the administration or enforcement of the *ITA*.

A professional who receives a requirement notice pursuant to s. 231.2 should consider the following courses of action:

- Ask the name of the person about whom the information is sought. If the persons are an unnamed group or class of individuals, then ask for the judicial authorization for the notice. If there is no such judicial authorization, then  
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# A GUIDE TO DISCLOSURE (continued)

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- CCRA is not entitled to the information (s. 231.2(2) and (3)).
- Ask the reasons for the requirement notice. It must be for a purpose related to the administration and enforcement of the *ITA*.
- Notify the taxpayer. Inform him of your obligations and advise him to contact his lawyer.
- Be cognizant that you have a reasonable time to respond to the notice. (What is reasonable will depend on the circumstances, but Courts have held requirements for information within 10 days to be unreasonable).
- Consider notifying legal counsel for advice and to review any privilege issues.

If you are at the receiving end of a search warrant you will not have the luxury of time afforded under the Requirement Notice process. A warrant is issued by a Judge who is satisfied by affidavit evidence that it is likely that

- an offence has been committed and
- evidence of the commission of the offence will be found in the places named in the warrant.

A major consideration is that a warrant entitles CCRA to documents only, NOT information. This is because of the criminal aspect of investigations which reach this stage and the rights of our clients to silence.

The following guidelines should be followed after receiving service of a search warrant:

- Obtain the names and authorizations of all persons involved in the search. Photocopy their documentation, if possible.

- Appoint one person to carry on all communications. Have a second person present during all conversations.
- Determine who is the object of the investigation. Contact that client to advise of the search and to obtain instructions. In the absence of instructions to cooperate, your duty is to follow the terms of the warrant precisely.
- Contact legal counsel who should attend at the search location. (Under s. 232 of the *ITA*, a lawyer can assert a privilege claim).
- Review the warrant and photocopy it. Check to verify that it is correct on its face and to determine any limitations to the authority granted.
- Request a copy of the affidavit supporting the warrant (the officials need not have it with them at the time of the search).
- Each official involved in the search should be accompanied and observed at all times.
- Each of your employees involved should keep detailed notes including all requests and conversations, the documents seized and the names of those seizing them.

It is important that all of your employees know and understand these guidelines and the reasoning behind them. Your own knowledge is of little value if your receptionist answers all the investigators' inquiries before you become involved. The only real way to be prepared for a search warrant or requirement notice is to have a written protocol detailing your responses and professional responsibilities. If assistance is required to ensure a complete protocol, consult legal counsel.



Suite 100 - 10328 - 81 Avenue  
Edmonton, Alberta  
Canada T6E 1X2

Tel (780) 439-7171  
Fax (780) 439-0475

Prowse & Chowne, North America's first ISO 9002 certified law firm, provides sound business law advice and litigation counsel. Prowse & Chowne works closely with its clients and their professional advisors to ensure clients achieve their tax objectives in a manner that makes legal, financial and business sense.

*To ensure you receive a monthly copy of Tax Counsel, please forward your contact information (including name, company, complete address, telephone and fax numbers, and e-mail address) to Donald Mallon by fax (780) 439-0475 or by e-mail [taxcounsel@prowsechowne.com](mailto:taxcounsel@prowsechowne.com).*

Donald P. Mallon, BSc LLB, a partner in Prowse & Chowne, is a seasoned litigator with over 20 years of experience. Focusing on administrative and tax litigation, he draws upon his courtroom and negotiation skills to effectively represent individual and business taxpayers in disputes with Revenue Canada.



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