

TAX COUNSEL

THE BIND THAT TIES – AN EXAMINATION OF ACCOUNTANTS' DUTIES AND RIGHTS

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Accountants, like other professionals, are often pulled in several directions at once. They have contractual duties imposed upon them by their clients and, to the extent those duties are not specifically set out in their contracts, they are standardized by rules of professional conduct. Specifically, accountants owe a duty to their professional organizations, to each other and, to a limited extent, to other professionals. As well, they have duties forced upon them by operation of law at the hands of Revenue Canada and ultimately the Tax Court of Canada. Given the number of duties imposed and the diverse directions from which they come, it isn't surprising that occasionally they conflict.

One duty imposed upon accountants is that of confidentiality.

Tax planning is, by its nature, a private matter. Most communications between a client and an accountant, and much of the consequent work product, are confidential. Unauthorized disclosure of those communications by an accountant can bring civil liability and professional sanction.¹

On the other hand, Revenue Canada employs a rather nosy bunch. They believe – sometimes justifiably – that some taxpayers, left to their own devices, will fail to disclose revenue or pay the appropriate tax. So Revenue Canada regularly seeks confidential information from taxpayers' accountants. Its demands often prevail over a taxpayer's rights to privacy.

Revenue Canada gains the information it seeks through a powerful arsenal of investigative 'weapons' provided to it through the *Income Tax Act* and other legislation. They include:

- S.231(1) *ITA* Power of Inspection
- 231.2(1) & 231.6(1) *ITA* Power of Required Production of Documents and Information

- 231.3(1) *ITA* Power of Search & Seizure
- 231.4(1) *ITA* Power of Inquiry
- 487(1) *Criminal Code* Power of Search & Seizure

Legislated pen work is truly more powerful than the sword. Yet it can also be used as a shield. For instance, legislation that grants to the state power over individuals must be strictly interpreted. Further, confidentiality can be almost absolute if brought under the veil of privilege. Finally, all legislation is tempered by the rights offered to individuals under the *Canadian Charter of Rights and Freedoms*.²

When faced with one of Revenue Canada's investigative weapons, professionals acting for a taxpayer must ask, "What is the purpose of the investigation?" Revenue Canada's powers under s. 231 are limited to "any purpose related to the administration or enforcement of the *Act*". Notwithstanding the broad language in s. 231, the purpose for which these powers can be used remains narrow.³ Our Courts have interpreted this phrase to apply only to the tax liability of a specific person or persons, or verification of compliance with the *Act* by a specific person or persons. Any investigations with a purpose outside these narrow parameters are improper.

In newsletters to come we will examine in more detail Revenue Canada's statutory powers and appropriate responses by taxpayers and their representatives.

¹ I.C.A.A. Code of Ethics – Rules of Professional Conduct s. 210

² Part I, *Constitution Act*, 1982, enacted as Sch. B to the *Canada Act*, 1982, (U.K.) 1982, c.11

³ *Canadian Bank of Commerce v. A.G. Canada* 62 DTC 1237 (S.C.C.)

James Richardson & Sons v. The Queen 82 DTC 6204 (F.C.A.)

R. v. Bruyneel 86 DTC 6119 (B.C.C.A.)

McKinlay Transport 90 DTC 6243 (S.C.C.)

ACCOUNTANTS AS EXPERTS –

BE CAREFUL OUT THERE!

"The accountant's role and protected status can change when he or she provides reports relied upon by the Court."

Most cases that come before the Tax Court require some amount of accounting-related testimony. As well, expert accounting testimony can be required in other proceedings, for instance civil and criminal trials on issues such as business valuation, GAAP and forensic investigations.

Be prepared. The law is clear that where an accountant's services are required either in contemplation of, or during litigation, *all* communications, drafts, working papers and other documents prepared for those purposes are privileged.¹

Privilege involves the right of a person and the duty of some witnesses to withhold otherwise relevant and admissible evidence from the Court. Privilege provides a safe environment for free and uninhibited communications so that effective legal guidance by counsel can be given.

An accountant recruited as an expert to assist counsel in litigation acts as the agent of the solicitor or his/her client. Like them, the accountant is protected by the privilege resulting from that solicitor-client relationship. However, the accountant's role (and so his/her protected status) can change when he/she provides reports relied upon by the Court. At this point, the accountant is no longer an agent, but rather, an independent expert with no alliances.

Accountants in that situation are subject to cross-examination on all facets of their reports. The Court may even ask to see first drafts of reports, as well as the initial written instructions from counsel. The key to whether these documents must be produced to the Court is whether they are or may be relevant to matters of substance contained in the expert's evidence or to the accountant's own credibility. If the documents in question meet one of these criteria, then the Court may well order that they be produced. On the other hand, if it is unfair or inconsistent to require such production then it will likely not be ordered.²

Knowing this, the accounting expert and his/her instructing counsel must always be mindful of the possibility that their communications may some day be made public in the courtroom. It's another reminder to conduct oneself according to the highest professional standards.

1 *Nova v Guelph Engineering*, (1984) 30 Alta L.R. (2d) 183 (Alta C.A.)

2 *Olson (Stuart) Construction Inc. v. Sawridge Plaza Corp. et al.* (1996) 195 A.R. 94 (Alta Q.B.); *Vancouver Community College v. Phillips et al.* [1987] 20 B.C.L.R. (2d) 289 (B.C.S.C.)



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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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