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Are Courts Curtailing the CRA's Audit Powers?

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In its recent decision in *Minister of National Revenue v Cameco Corporation*, the Federal Court of Appeal ("**FCA**") held that the Canada Revenue Agency ("**CRA**") does not have the power to compel taxpayers under audit to attend oral interviews pursuant to paragraph 231.1(1)(a) of the *Income Tax Act*.

The FCA's decision is the latest in a series of appellate court decisions that have rejected the CRA's expansive views of its audit powers. In 2016, a unanimous panel of the Supreme Court of Canada found in *Canada (Attorney General) v Chambre des notaires du Québec*, that the CRA's power to request or compel lawyers to turn over their accounting records, notwithstanding that such records may contain information normally covered by solicitor-client privilege, was unconstitutional. The next year, in *BP Canada Energy Company v Minister of National Revenue*, the FCA observed that the CRA's broad powers to require and compel taxpayers to produce records related to their uncertain tax positions are not without restriction, and that CRA can't force taxpayers to reveal their "soft spots".

No one can credibly argue that the CRA does not need broad powers to compel the production of documents or information, given the nature of Canada's self-assessing tax system. That said, the CRA often overreaches, by requesting information it already has or obviously does not need, for example. Inasmuch as *Cameco, Chambre des notaires,* and *BP Canada* set the outer bounds of the CRA's audit powers and demonstrate that judiciary's recognition that Parliament has not given the CRA limitless powers, the decisions are a positive development for taxpayers.

However, the FCA made the point (more than once) that its decision in *Cameco* does not mean that the CRA can never compel a taxpayer to attend an oral interview. In fact, the FCA practically invited the CRA to argue in a future case that paragraph 231.1(1)(d) of the Act, either alone or in conjunction with paragraph 231.1(1)(a), empowers the CRA to compel taxpayers to attend oral interviews. Why the Attorney General of Canada ("**AGC**") argued that the phrase "inspect, audit or examine" in paragraph 231.1(1)(a) of the *Act* alone permits the CRA to compel taxpayers to attend oral interviews is unknown. The AGC may have been better served to argue (assuming the facts could support such an argument) that, after reviewing the taxpayer's books and records pursuant to paragraphs 231.1(1)(a) and (b), the CRA's view was that it was necessary to compel the taxpayer to attend and answer questions under paragraph 231.1(1)(d) of the Act. In addition, the FCA explicitly acknowledged that it remains open for Parliament to provide the CRA with a specific power to compel taxpayers to attend oral interviews.

For these reasons, it is too early to speculate on the long-term impact of the FCA's decision in *Cameco*, let alone hail it as a panacea. The judicial treatment that *BP Canada* has received is instructive in this regard.

As noted above, in *BP Canada*, the FCA held that the CRA could not compel a taxpayer to produce its uncertain tax positions so that future CRA audits would be cost-efficient. The Court also observed that taxpayers could not be compelled to reveal their "soft-spots" or otherwise "self-audit". The decision was described as a great victory for taxpayers, and was relied on by the taxpayer in *Canada (Minister of National Revenue) v Atlas Tube Canada ULC*, where the CRA sought access to what were, in effect, Atlas Tube's uncertain tax positions. The taxpayer resisted the CRA's demand, in part, on the basis that producing the document sought by the CRA would effectively give the CRA a "roadmap" for future audits, contrary to *BP Canada*, and that it could not be compelled to reveal its soft spots.

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The Federal Court Judge in *Atlas Tube* rejected the taxpayer's arguments, and quickly distinguished *BP Canada* on its facts. Since the CRA sought information from Atlas Tube in relation to an ongoing audit on particular issues, rather than as a roadmap to make future audits more cost-efficient, the Federal Court ordered the taxpayer to produce the document sought, notwithstanding that it contained "soft spots". Subject to the decision on appeal, *Atlas Tube* may have markedly diminished the precedential value of the *BP Canada* decision.

The enthusiasm for *Cameco* may be similarly tempered by a future the Federal Court decision where paragraph 231.1(1)(d) of the Act is in play, or if Parliament responds to the decision by amending the Act so the CRA can compel anyone under audit to attend an interview. It is simply too early to tell.

In my view, the primary takeaway from *Cameco, Chambre des notaires,* and *BP Canada* is that the Courts will ensure the CRA exercises its audit powers within the bounds established by Parliament, evidenced by the language in the Act. This appears to be particularly so where the CRA overreaches in an audit, whether by seeking highly sensitive information in order to reduce the costs of future audits, or by seeking to compel 25 people to attend interviews so the CRA can learn what it already knows.

However, these are hardly the "everyday" situations most taxpayers experience while under audit. Taxpayers must remember that Parliament, through its use of expansive language, has granted the CRA very broad audit powers, and that Courts are generally hesitant to disturb the CRA's determination of who it audits and what information, access or assistance it needs to complete its audits. Taxpayers are advised to consult experienced tax dispute counsel at the earliest opportunity so that during an audit they provide the CRA with all the assistance required by law, and nothing further. ■