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The CRA's New Power to Compel Oral Interviews

Authors: Brian Bloom, Élisabeth Robichaud and Sammy Cheaib

The Canada Revenue Agency (CRA) can now require taxpayers or any other person to answer "all proper questions" and provide all reasonable assistance for any purpose relating to the administration or enforcement of the *Income Tax Act* (ITA), including by submitting to oral questioning at a place designated by the CRA.[1]

In this bulletin, we comment on the scope of the CRA's new power to compel oral interviews, which became effective on December 15, 2022.

Background

Although it is not standard audit practice for the CRA to demand that taxpayers and their agents submit to oral interviews in the course of tax audits, the CRA will sometimes do so, especially during transfer pricing audits and, more recently, during audits initiated under the related-party initiative (RPI). Such a CRA demand was recently considered in *Minister of National Revenue v Cameco Corporation*[2] (*Cameco*), in which the Federal Court of Appeal (FCA) held that, although oral interviews are not prohibited, the ITA does not authorize the CRA to compel taxpayers to submit to interviews.[3] Hence, following the *Cameco* decision, the CRA continued to conduct oral interviews with the important nuance that the taxpayer's prior consent to such an interview was now clearly required.

Statutory Authority to Conduct Oral Interviews

In response to the *Cameco* decision, the 2021 federal budget proposed amendments to section 231.1 of the ITA to broaden the CRA's audit powers. These amendments were substantively enacted in Bill C-32 and came into force upon royal assent on December 15, 2022.

Generally, prior to these amendments, section 231.1 of the ITA authorized the CRA to inspect a taxpayer's books, records and property inventories. The CRA could enter a taxpayer's premises or places of business and require any person on such premises to provide reasonable assistance in the CRA's inspection of books, records and property inventories.

Bill C-32 amends section 231.1 of the ITA. One of the most substantive changes is contained in amended paragraph 231.1(1)(d) of the ITA, which now requires a taxpayer or any other person to provide the CRA with "all reasonable assistance" and to answer "all proper questions" relating to the administration or enforcement of the ITA. Moreover, under amended subparagraph 231.1(1)(d)(i), the CRA can now require any person to attend "any place designated by the CRA," or attend by videoconference or by another form of electronic communication, in order to submit to oral questioning.

Note too that the CRA can now compel any person to answer questions in writing in any form specified by the CRA. Generally, all persons are now required to provide the CRA with "all reasonable assistance with anything the [CRA] is authorized to do" under the ITA.[4] Although our focus here is on the CRA's power to conduct oral interviews, comments similar to those made below apply equally to these other new rules, whose scope has yet to be established by the courts.

Departure from Prior Audit Practice

The CRA's new power to compel taxpayers to undergo oral interviews and attend any designated place for this purpose (akin to law enforcement officers' power to bring an arrested individual to a police station to undergo questioning) departs from previous standard audit practice in a manner that is – in our view – unwarranted, as a matter of both policy and practice.

It is well established that a tax audit should be a collaborative process in which, as a corollary to the taxpayer's duty to provide all reasonable assistance, the CRA should treat the taxpayer courteously and with consideration, having due regard to its "core values" of integrity, professionalism, respect and collaboration.[5] Accordingly, in most income tax audits, long-established standard practice has been for the CRA to request, in writing, any information relevant to an audit under either section 231.1 or 231.2 of the ITA, and for taxpayers to cooperate by providing such information in writing within a reasonable time. This practice helped to ensure that taxpayers were able to provide complete and accurate information along with any relevant supporting documentation, as well as to seek and obtain all needed assistance to do so. Where a taxpayer refused to comply with a valid demand made by the CRA pursuant to section 231.1 or 231.2 of the ITA, the Federal Court could, on a summary application from the CRA, issue a compliance order under section 231.7 of the ITA to compel an answer; in addition, the taxpayer would face the risk of committing a penal offence and being held liable on summary conviction under section 238 of the ITA.

Furthermore, prior to the enactment of amendments to section 231.1, if the CRA faced a recalcitrant taxpayer when opting to conduct an oral interview, it would not be rendered "toothless," as noted by the FCA in *Cameco*. Indeed, when a taxpayer refused to answer a question, the CRA could (and still can) make inferences and assumptions, and assess the taxpayer on the basis of those assumptions. Such assessments are deemed to be valid and binding unless and until reversed on appeal, in which case the onus rests on the taxpayer to demolish the factual assumptions.

Therefore, one could certainly argue that these existing very broad audit and assessment powers already give the CRA the de facto ability to compel oral interviews when necessary, considering the potential adverse consequences for taxpayers who fail to comply with such (occasional) requests.

It is therefore unclear why the CRA would now also need police-like powers to interrogate any person and, furthermore, to require that person to attend any place designated by it, as part of its ordinary audit function. Indeed, there appears to be no reason, in policy or practice, to favour answers given orally over answers given in writing. The CRA's audit function serves...to audit. An audit is neither a court hearing nor a criminal investigation. Auditors are not trained to hear oral evidence or opine on the credibility of a witness. And they should certainly not be employing oral interviews to trick taxpayers into giving inculpatory answers or unwittingly waiving legal privilege. Accordingly, we hope that the CRA will maintain its standard audit practice of requesting information in writing, despite its new powers. Oral interviews should be reserved for certain specialized audits, such as transfer pricing audits. Indeed, *Cameco* was a transfer pricing case.

Limits to the Power to Conduct Oral Interviews

Despite the broad statutory language in new section 231.1 of the ITA relating to the CRA's power to conduct oral interviews, this power may be more limited than it initially appears. In our view, these limits are both contained in the text of the provision itself and flow from taxpayers' established civil and constitutional rights.

Limits in the text of section 231.1

The text of new paragraph 231.1(1)(d) of the ITA reveals that the CRA's power to conduct oral interviews is limited by both the "reasonable assistance" and "proper question" standards. While the courts have previously examined these terms under former versions of section 231.1 of the ITA, their scope under this new version remains to be determined.

For example, courts may see the following as unreasonable within the meaning of new paragraph 231.1(1)(d): interview requests that are disproportionately onerous in light of the issues or amounts at stake; that are disruptive to the taxpayer's business; or that are highly unlikely to yield information relevant to a CRA audit. Moreover, courts may see the following as not being proper within the meaning of new paragraph 231.1(1)(d): repetitive, leading, speculative or argumentative questions; questions that are clearly irrelevant or that are asked in an intimidating manner; and questions that could reveal privileged information.

Protection of *Charter* Rights

The CRA's power to compel oral interviews, in particular when conducted at any place designated by it, should be understood in the context of – and attenuated by – individuals' established constitutional rights under the *Canadian Charter of Rights and Freedoms* (*Charter*).

Requiring an individual to attend an interview, especially one that is scheduled to occur at a particular place and time designated by the CRA, arguably constitutes a form of detention. Indeed, the courts have established that detention may include situations in which individuals are not only physically detained but experience a "psychological compulsion," in the form of a reasonable perception that they are not free to go and must comply with the direction or demand to avoid being held liable. On this point, we note that section 238 of the ITA provides that any person who contravenes section 231.1 is guilty of an offence and is liable on summary conviction, in addition to any penalty otherwise provided, to a fine of between $1,000 and $25,000 and to imprisonment for a term not exceeding 12 months.

If submitting to oral interviews constitutes a form of detention, this could trigger a series of robust *Charter* protections, including the guarantee in section 7 not to be deprived of liberty except in accordance with the principles of fundamental justice; the right against arbitrary detention in section 9 of the *Charter*; the right to retain and instruct counsel without delay and to be informed of that right; and to have the validity of the detention determined by way of habeas corpus under section 10 of the *Charter*.

Solicitor-Client Privilege

Furthermore, requiring taxpayers to undergo an oral interview without having the opportunity to consult with their legal representatives would pose a serious threat to the protection of solicitor-client privilege (SCP), a constitutional and fundamental civil and legal right. Taxpayers often rely on legal advice in tax matters, given the complexity of the ITA and the breadth of audit requests, and cannot be expected to know which information is protected by SCP.

If the CRA's power to conduct oral interviews is exercised without due consideration to taxpayers' right to consult their legal representatives, such power risks giving rise to unintended communication of information protected by SCP or, for that matter, other types of privileged information. This raises the further issue of what remedy is appropriate when privileged information is so obtained by the CRA in violation of taxpayers' constitutional rights.

We would note, however, that there is nothing in the amended provisions that explicitly prevents taxpayers from attending a mandatory interview with their advisers, including legal advisers, or that authorizes the CRA to exclude such advisers from an interrogation.

Moving Forward: With Great Power Comes Great Responsibility

Until the courts delineate the limits to this heavy-handed new power, clear administrative guidelines by the CRA would be welcome on (i) the circumstances in which oral interviews may be appropriate and (ii) the manner in which they may be conducted.

In this regard, and until such CRA guidelines are available, we suggest that CRA auditors and taxpayers adopt best practices designed to ensure that the CRA's power to conduct oral interviews is exercised reasonably and in a proper manner. These practices could include the following:

- favouring written questions over oral interviews as a general information-gathering tool unless the nature of the audit clearly calls for oral interviews, as in the case of auditors seeking to conduct or verify a functional analysis in the course of transfer pricing audits;
- scheduling oral interviews well in advance, at a place and time mutually agreed upon by the CRA and the individual being interviewed;
- ensuring that the questions are provided to individuals with sufficient prior notice to allow them to prepare complete answers by consulting the relevant documents and seeking assistance from their tax advisers and legal counsel;
- ensuring that the interviewed individuals are provided with all opportunities to be accompanied throughout the interview by any persons they choose, including their tax advisers and legal counsel;
- ensuring that the interviewed individuals are made aware of their right to take notes and record the interview; and

- ensuring that individuals are not compelled to answer questions that they are incapable of answering and, consistent with undertakings given on discovery in civil proceedings, ensuring that individuals are given the opportunity to provide complete answers, whether orally or in writing, after the interview once they have properly informed themselves.

We believe that these common sense measures would not only ensure the reasonable exercise of the CRA's power to conduct oral interviews but also improve the efficiency of the CRA interview process by providing adequate opportunities to taxpayers to share proper, accurate and complete information. It is in the interests of both the CRA and taxpayers to ensure that the audit is conducted efficiently, fairly and within the confines of the law and that the information provided by taxpayers to the CRA is correct.

Regardless of whether the CRA adopts our suggestions, given the uncertainty triggered by these substantive changes to the CRA's audit powers, taxpayers who fear that the CRA's power to conduct oral interviews is being exercised unreasonably or improperly should seek legal counsel.

[1] The CRA exercises the power conferred upon the Minister of National Revenue by the ITA.

[2] 2019 FCA 67.

[3] Read our contemporaneous discussions on the *Cameco* decision and its immediate impact on the conduct of audits at The CRA Cannot Compel Oral Interviews During an Audit and CRA's Audit Powers Have Limits.

[4] New subparagraph 231.1(1)(d)(ii) and new paragraph 231.1(1)(e) of the ITA.

[5] See CRA's Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer.

Key Contacts: Brian Bloom and Élisabeth Robichaud

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