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In this article, the author discusses recent developments and court cases that illustrate the Canada Revenue Agency's efforts to expand its powers to obtain taxpayer information.

In the last few years, the Canadian tax community has seen a steady increase in the exercise of the Canada Revenue Agency's powers to demand and obtain taxpayer information. Those powers, as set out in the Income Tax Act (Canada), are broad: For a self-assessment system such as Canada's to be effective and fair, tax authorities need access to the relevant facts that allow them to identify and understand the transactions the taxpayer has entered into.

However, the CRA has become increasingly assertive in testing the limits of its information-gathering powers, in terms of both the volume and sensitivity of information sought. The result has been growing litigation over CRA demands, most notably regarding:

- the scope of the CRA's statutory powers to obtain information under ITA section 231.1 and 231.2;
- when a court should exercise its discretion to grant the CRA a compliance order under ITA section 231.7 forcing a taxpayer to comply with a CRA demand for information;
- the CRA's ability to require taxpayers to submit to oral questioning during an audit; and
- the scope of lawyer-client privilege that protects from disclosure documents or communications the CRA would otherwise be able to demand.

There are several recent examples of that kind of litigation, including *BP Canada Energy Co. v. Minister of National Revenue*, 2017 FCA 61 (2017), *rev'g* 2015 FC 714 (2015), and *Minister of National Revenue v. Cameco Corp.*, 2019 FCA 67 (2019), *aff'g* 2017 FC 763 (2017), discussed below.[1]

Other examples include *Zeldap Corp. v. The Queen*, 2015 TCC 78 (2015), in which the CRA successfully forced a taxpayer to answer written questions regarding the contents of tax-sensitive discussions it had with its accountant when the court concluded the discussions were not protected by litigation privilege.[2]

In *Iggillis Holdings Inc. and Ian Gillis v. Minister of National Revenue*, 2018 FCA 51 (2018), *rev'g* 2016 FC 1352 (2016), the Federal Court of Appeal reaffirmed the existence of a common interest privilege in Canada. It also overturned a compliance order granted to the CRA that would have required the taxpayer to disclose a tax planning memorandum prepared by legal counsel for the parties to a transaction and shared between them, disagreeing with the lower court that there

[1] For prior analysis, see Steve Suarez, "Canadian Appeals Court Denies CRA Demand for Taxpayer's UTP List," *Tax Notes Int'l*, Apr. 24, 2017, p. 288; "Canada Revenue Agency Declares Open Season on Taxpayer Information," *Tax Notes Int'l*, July 13, 2015, p. 143; and "Canada Revenue Agency's Demand for Oral Interviews of Taxpayer's Employees Refused by Court," *Tax Notes Int'l*, Aug. 28, 2017, p. 901.

[2] For prior analysis, see Steve Suarez, "Canada Revenue Agency Forces Taxpayer to Disclose Discussions With Accountant," *Tax Notes Int'l*, May 11, 2015, p. 553.

was no lawyer-client privilege over the memorandum.[3]

In *Minister of National Revenue v. Atlas Tube Canada ULC*, 2018 FC 1086 (under appeal to the Federal Court of Appeal), the CRA successfully compelled disclosure of a tax diligence report identifying potential tax exposures prepared by an accounting firm for the purchaser of a Canadian target corporation.[4]

The common thread in those proceedings is the CRA's relentless thirst for taxpayer information. It has been particularly eager to access sensitive subjective analysis of potential soft spots in tax positions taken by taxpayers, whether in the form of an uncertain tax position list, planning memoranda, tax diligence reports identifying and quantifying possible exposures, or mere discussions about potential tax exposures.

BP Canada

For many in the tax community, the most alarming example was the demand for the taxpayer's UTP list in *BP Canada*. In refusing to force the taxpayer to turn over a list of UTPs prepared as part of the financial statement preparation process, which the CRA wanted to use as a road map for future audits, the Federal Court of Appeal (FCA) said the real question was whether ITA section 231.1(1) allowed general and unrestricted access to that information. That access would essentially amount to performing the CRA's audit function for it, as opposed to being a specific inquiry on a question the CRA had raised based on its own audit analysis.

Moreover, the FCA was clearly troubled that the CRA's demand essentially went beyond the bounds of even its own administrative policy on accessing tax accrual working papers. That policy stated that "although not routinely required, officials may request tax accrual working papers," and that "officials will not be influenced by" any subjective analyses, comments, or opinions in the information or documentation reviewed. The obvious question was why the CRA would so persistently demand subjective analysis that it purported not to be influenced by.

The result of the CRA's pushing the envelope on its information-gathering powers was precedent of broad application that the agency quite likely wishes had not been created. In particular, *BP Canada* establishes that:

- ITA section 231.1(1) is not as broad as a literal reading of its text might suggest. In cases of overreach, courts can and will go beyond a mechanical reading of the words and instead engage in a purposive interpretation to achieve a result consistent with Parliament's intention and the ITA as a whole.
- The CRA is legally obligated to exercise restraint in seeking tax accrual working papers.
- While taxpayers must give the CRA some degree of assistance, that does not encompass what amounts to self-audit, being compelled to reveal its soft spots, or performing core audit functions.
- Courts generally should not exercise their discretion (such as in deciding whether to grant a compliance order) to produce a result in the CRA's favor contrary to its own administrative policy.

Essentially, the CRA's attempts to move the goal posts on the scope of its information-gathering powers invited a judicial response establishing taxpayer-friendly precedent — and that was exactly the outcome.

Cameco

The FCA's recent decision on the CRA's right to conduct oral interviews produced a similar result. The lower court's decision denying the CRA a compliance order concluded that ITA section 231.1(1) "is not so wide as to compel an indeterminate number of people for oral interviews" or provide the minister of national revenue "with an unlimited right to conduct oral interviews of Cameco employees." Understood as such, it was not a loss with far-reaching implications for the Crown. Arguably, the scope of the decision might have been limited to its somewhat "unique and compelling facts," in that

[3] On October 10, 2018, the Supreme Court of Canada dismissed the Crown's application for leave to appeal. For prior analysis, see Suarez, "Canadian Appeals Court Reaffirms Common Interest Privilege," *Tax Notes Int'l*, Apr. 2, 2018, p. 221.

[4] For prior analysis, see Suarez, "Canadian Court Orders Disclosure of Accounting Firm Diligence Report in *Atlas Tube*," *Tax Notes Int'l*, Dec. 24, 2018, p. 1283.

the CRA was asking for oral interviews on subject matter (transfer pricing) already before the Tax Court of Canada in actual litigation for earlier tax years[5] and demanding an extraordinary number of interviews of a taxpayer that had otherwise complied with all its demands.

But the CRA chose to appeal to the FCA — and one suspects that given the result, it may regret having done so. In its decision, the FCA went materially beyond the facts to conclude that the CRA's primary information-gathering provision (ITA section 231.1(1)) is fundamentally constrained so as to exclude oral interviews generally (other than in narrow circumstances). While all three appeal justices ruled in favor of Cameco, two did so on the broad basis that ITA section 231.1(1) simply does not encompass oral questioning. Writing for the majority,[6] Justice Donald J. Rennie said that in applying the modern approach to statutory interpretation:

> [12] Paragraph 231.1(1)(*a*) cannot be interpreted so as to permit the Minister to compel oral interviews of a taxpayer or its employees concerning its tax liability. Neither the text, nor the context nor the legislative history of paragraph 231.1(1)(*a*) supports the Minister's position.
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> . . .
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> [34] Having regard to the legislative history, I do not agree with the Minister's submission that the word "audit" in paragraph 231.1(1)(*a*) itself confers a general power to compel oral answers with respect to tax liability. The result would be a power significantly broader than that set out in section 231.4, without any of its procedural safeguards, and would be contrary to Parliament's intention.

Rennie noted that the text and legislative history of the ITA itself, as well as other statutes, made clear that express language is used when Parliament intends a person to be required to answer oral questions. Moreover, he said the FCA's interpretation is consistent with the principle established in *BP Canada* that although auditors are entitled under ITA section 231.1(1)(d) to be provided with all reasonable assistance, they "cannot compel taxpayers to reveal their soft spots."

Rennie was clearly unpersuaded by the government's argument that the ability to question taxpayers and demand answers was critical to the CRA's function in a self-assessing system. He pointed out that the ITA provides the CRA with several investigative tools:

> [28] I also agree with the Minister that all taxpayers should fully cooperate with reasonable requests arising in the course of an audit. However, the fact that I have concluded that the Minister does not have the power to compel a taxpayer to answer questions at the audit stage does not mean that the audit power has been rendered toothless in the face of recalcitrant taxpayers. It remains open to the Minister to make inferences when no answer is given. The Minister is also free to make assumptions and to assess on that basis. The tax liability arising from the Minister's assessment is statutorily deemed to be valid and binding (subject to appeal or reassessment) (s. 152(8)), and in any appeal in the Tax Court of Canada, the onus rests with the taxpayer to destroy any factual assumptions the Minister has made (*Sarmadi v. Canada*, 2017 FCA 131 at para. 31). The Minister may also demand that large corporate taxpayers such as Cameco pay 50 [percent] of the assessed tax immediately [as a condition of appealing the re-assessment] (s. 225.1(7)).

Whether or not the ability to conduct oral questioning on audit is necessary or appropriate (a policy question on which the FCA expressed no view), the ITA simply does not provide for it, the FCA concluded.

[5] The taxpayer expressed concern, not unreasonably, that the proposed use of the CRA's audit powers in later, unassessed years was effectively an end run around the constraints that applied to the CRA's ability to obtain information through the litigation discovery process applicable to earlier tax years that had already been reassessed on the same issue and were in the process of being litigated in the Tax Court (for comments on that litigation, see Suarez, "The *Cameco* Transfer Pricing Decision: A Victory for the Rule of Law and the Canadian Taxpayer," *Tax Notes Int'l*, Nov. 26, 2018, p. 877).

[6] The remaining justice found for the taxpayer on the grounds that the trial judge had committed no error on the facts of this case in declining to issue a compliance order, obviating the need to rule on the more general issue of the scope of ITA section 231.1(1).

The result, then, is an appellate-level precedent that will prevent the CRA from forcing taxpayers to undergo oral interviews on audit as a general matter, as opposed to a lower-level judgment that reached that result on Cameco's own unique and compelling facts. That is a significant reversal for the Crown, particularly in the area of transfer pricing, in which oral interviews to establish the functions and risks of entities in a multinational group are key for audit strategy. Whether the CRA will begin asking the same questions in written form to gather the information it seeks through oral questioning remains to be seen.

However, just because the CRA might not have a legal right to compel taxpayers to submit to oral interviews doesn't mean those interviews will stop. Both taxpayers and tax authorities have an interest in good working relationships and in providing the CRA with the information it needs to do its job. Oral discussion will often be the most efficient way to request and provide information. And as the FCA noted in *Cameco*, the CRA always has the power to simply make reasonable assumptions and proceed to reassess, effectively shifting the burden to the taxpayer to disprove the CRA's assumptions (and incur the costs of contesting the reassessment). Conversely, there are often legitimate reasons why a taxpayer would object to oral questioning and prefer to convey information in written form. There will always be times when the parties disagree on what information is necessary and whether oral questioning is the right format for information the CRA is rightly entitled to. As such, the practical effect of *Cameco* could be to inject more balance into the taxpayer-CRA relationship and encourage the CRA to be more circumspect in terms of the information-gathering burden it places on taxpayers and what format it deems correct.

In any event, the decision's focus on the scope of the CRA's powers to require taxpayers to provide information under ITA section 231.1(1) as being largely (if not exclusively) limited to documents would suggest two things. First, taxpayers should consider the costs and benefits of maintaining documents beyond what the ITA specifically requires. Second, when possible, documents that are created should be generated under lawyer-client privilege to protect them from disclosure to tax authorities and others.

The FCA's reiteration of its prior statement in *BP Canada* that audits cannot be conducted so as to compel taxpayers to reveal their soft spots is also noteworthy. That important concept is becoming firmly entrenched as a source of guidance for how the Canadian tax system should be administered, and *Cameco* removes any question of it being of limited application or a product of unique facts. The *BP Canada* principle will continue to be cited when questions arise about the scope of the CRA's ability to compel disclosure of sensitive taxpayer information.

AD-19-02

On March 21 (shortly before the release of the FCA's decision in *Cameco*), the CRA posted an updated version of AD-19-02, its administrative policy on obtaining taxpayer information. The stated purpose of AD-19-02 is to update the CRA's administrative policy following the FCA decision in *BP Canada* and the lower court's decision in *Cameco*.

The updated policy on oral interviews states that pending a final decision in *Cameco*, the CRA can continue to have oral discussions with taxpayers and request that individuals be interviewed. According to AD-19-02, "If a taxpayer refuses to be interviewed, the Department of Justice should be consulted concerning a possible compliance application." Following the FCA's decision in *Cameco*, the CRA can certainly continue to request taxpayer interviews, but compliance proceedings to compel them would appear out of the question.[7]

Other aspects of AD-19-02 are also of interest. The previous version of the CRA policy statement contained a lengthy section on lawyer-client privilege (both solicitor-client privilege and litigation privilege, summarized in the appendix to this article) that included a clear statement on the primacy of privileged communications[8] and an extensive section on procedures for resolving privilege claims. That entire section was omitted from AD-19-02 and replaced with a single

[7] Other references in AD-19-02 to the CRA conducting oral examinations should similarly be read in light of the subsequent FCA decision in *Cameco*.

[8] "The CRA cannot compel production of material that is subject to solicitor-client privilege or litigation privilege."

paragraph in the portion of the document addressing tax accrual workpapers:

> A taxpayer may claim that the tax accrual working papers include information subject to solicitor-client privilege. The CRA cannot compel production of privileged communications. Communications between the taxpayer and its lawyer seeking or providing legal advice on whether or not the taxpayer is required to claim a reserve would typically be privileged. Whether or not a taxpayer receives legal advice concerning its tax reserve, a taxpayer reporting a tax reserve will make a determination as to which uncertain tax positions to include in the reserve. The taxpayer's list of uncertain tax positions that relates to the tax reserve in their financial statements is not a privileged document. A taxpayer also has the right to waive privilege over privileged communications.

That change suggests that the CRA is indeed more frequently encountering situations in which taxpayers are resorting to self-help by preparing tax provisions for financial statement purposes on a lawyer-client privileged basis.[9] The quoted text correctly acknowledges that lawyer-client communications and advice on potential tax exposures and possible reserves would typically be privileged. However, the subsequent statement that a UTP list regarding tax reserves would not be privileged even if based on privileged legal advice is very much open to question — and likely to be the subject of future litigation if the CRA seeks to assert it. Canadian courts have often expressed how fundamental lawyer-client privilege is to the Canadian legal system, and it would not be surprising to see them look unfavorably on an attempt to circumvent or chip away at the protection afforded to bona fide legal advice summarized in an issues list. When the underlying work product has been properly generated so that it is covered by lawyer-client privilege, there is no obvious reason why a UTP list would not be privileged.

Apart from the privilege question, the section in AD-19-02 addressing tax accrual workpapers includes several statements of interest. It makes the general statement that fundamentally the CRA needs facts, not the taxpayer's subjective analysis, to fulfill its mandate, and that when full factual disclosure is made, the CRA "may be" willing to forgo demanding advisers' analyses of taxpayers' transactions:

> CRA officials must be objective when reviewing any information or documentation obtained during an examination. It is important not to be influenced by any subjective analyses, comments, or opinions contained in the information or documentation reviewed. While CRA officials may, in certain circumstances, request a list of what the taxpayer has determined to be its uncertain tax positions, in considering the structures and transactions outlined, CRA officials should perform their own research and analysis in forming the basis of any reassessment. Provided all the relevant facts of the transactions are disclosed, including the taxpayer's purpose or purposes in undertaking a transaction or series of transactions, exclusions of their advisors' analysis of the legal and tax effects of the transactions may be accommodated.

Taking that statement at face value, the CRA should be commended for acknowledging the difference between facts and subjective analysis. Tax authorities are indeed at an informational disadvantage relative to the taxpayer, necessitating rules that require them to have information-gathering powers. They are most certainly not at an analytical disadvantage, however, possessing a small army of knowledgeable and experienced auditors and technical specialists with access to expert legal advice from the Justice Department and the unique ability to see transactions and tax planning from taxpayers across the country. From that perspective, the statement in AD-19-02 that the CRA doesn't need to see taxpayers' subjective analyses so long as it receives all the substantive facts and documents is both entirely appropriate as a policy matter and a positive development for which the CRA should be given credit.

[9] That is, by having a tax lawyer rather than an accountant prepare the relevant analysis (there is no accountant-client privilege in Canada).

When, then, does the CRA believe it can fairly demand to see tax accrual workpapers? AD-19-02 sets out the agency's revised administrative policy:

> Tax accrual working papers can be requested where they are relevant to a specific item under audit.
>
> Tax accrual working papers, particularly the list of uncertain tax positions, can also be requested to identify audit issues in the context of an ongoing audit. This can be done in circumstances where CRA officials determine there is a higher risk of non-compliance. Factors that may be considered include the taxpayer's past level of compliance, the existence of large unexplained tax reserves, and the potential tax-at-risk.
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> In recognizing and measuring the effect of tax uncertainties for financial reporting purposes, there is a fundamental assumption that the tax authority will examine the tax treatment of these uncertainties, and have full knowledge of the related information when making those examinations. Hence access to tax accrual working papers may be necessary in certain cases in determining whether these positions as reported in the taxpayer's tax return are in fact allowable under the ITA.
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> . . .
>
> Where the criteria outlined in the communiqué are met, the CRA considers that it retains the right to request tax accrual working papers, including a list of uncertain tax positions. A request for the taxpayer's list of uncertain tax positions in these circumstances is not a request that the taxpayer self-audit. The CRA may audit transactions underlying these positions and will make its own determination as to the tax effects of the transactions.

It is obvious that the CRA put thought into that policy statement. Given that the court in *BP Canada* was clearly concerned with the CRA having gone beyond its own administrative policy, it is unsurprising to see AD-19-02 set out a broader, not narrower, policy: If nothing else, the CRA doesn't want to find itself explaining to courts its demands for UTPs that don't comply with its own guidelines.

To be fair, *BP Canada* cannot be read as saying the CRA can never compel disclosure of tax accrual workpapers; on the contrary, the FCA made clear that the case was about the CRA seeking general and unrestricted access to that information.[10] As a starting point, the court expressed understanding for the idea that if unexplained, large "tax at risk" amounts could constitute a legitimate line of inquiry for a CRA auditor:

> [70] The record reveals that the auditor began the 2005 audit by conducting a review of various issues identified by using conventional auditing techniques. A series of inquiries led to a request for the "original supporting working papers" for specified entries in a particular account under review. The source documents to be produced in response to this query were BP Canada's Tax Reserve Papers (see paragraph 9 above).
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> [71] BP Canada agreed to give the auditor a redacted version of its Tax Reserve Papers which showed the "tax at risk" amounts associated with its uncertain tax positions. This satisfied the auditor's initial concern. However, the "tax at risk" amounts were such that the issue "evolved into something bigger". . . . The auditor observed that the "tax at risk" amounts were "materially bigger" than those which were proposed to be added to BP Canada's income for the year As a result, a decision was made to seek the disclosure of the uncertain tax positions which gave rise to the "tax at risk" amounts for 2005.

[10] *BP Canada*, para. 67 (internal cites omitted):

> The issue in this case is not whether the information revealed by BP Canada's Tax Reserve Papers could be accessible under the Act. After all, everyone is agreed that it is, if required, in order to respond to a specific inquiry made in the context of an audit. The disclosure of the redacted version of BP Canada's Tax Reserve Papers in response to the query made about the accounting entries attests to this. The real issue is whether subsection 231.1(1) allows general and unrestricted access to this information, if this is indeed what was sought and authorized in this case.

> . . . The redacted Tax Reserve Papers provided for 2006 and 2007 reflect "tax at risk" amounts that exceed those disclosed for 2005. . . .
>
> [72] I am not at liberty to identify the "tax at risk" amounts, because this information is protected by a publication ban issued by the Federal Court, which is binding on this Court. . . . It suffices to say that the gap between these amounts and those proposed to be assessed is such that one can understand why the auditor, after coming upon this information, would have felt justified to insist on the production of BP Canada's uncertain tax positions.
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> [73] However, as it turned out, this became a non-issue as BP Canada was able to demonstrate that the situation was the opposite of what it appeared to be, *i.e.*, BP Canada's "tax at risk" amounts were actually much smaller than the amounts underlying the auditor's risk assessment.

However, *BP Canada* also makes clear that if a taxpayer is willing and able to reasonably address the CRA's concerns regarding the size of tax-at-risk amounts without unrestricted disclosure of its tax accrual workpapers, that should be the end of the matter. Read against the backdrop of *BP Canada* and interpreted accordingly, the reference in AD-19-02 to "the existence of large unexplained tax reserves, and the potential tax-at-risk" as a basis for demanding UTP lists is plausible as a way of initiating a dialogue with the taxpayer without necessarily leading to compulsory disclosure of tax accrual workpapers.[11]

It is unclear where the principle that the CRA can demand to see tax accrual workpapers "if required, in order to respond to a specific inquiry made in the context of an audit"[12] collides with the principle that taxpayers are not required to self-audit and cannot be compelled to reveal their soft spots. How much work must the CRA have done on its own to rise to the level of making a specific inquiry, as opposed to merely asking taxpayers to give the agency a head start on the audit by handing over its UTP list? AD-19-02 seems to suggest that when there is higher risk of noncompliance, the CRA can demand UTP lists to identify issues for audit, which it will then analyze on its own.[13]

It is questionable whether that general statement is consistent with *BP Canada*, and most taxpayers would disagree with the CRA's statement that being forced to provide a UTP list (even in limited circumstances) does not amount to self-audit.[14] However, AD-19-02 would at least seem to require the CRA to establish something substantive beyond its own convenience before demanding UTP lists, and to that extent should be viewed as a meaningful step forward.

Whether the "heightened risk of noncompliance" standard the CRA is proposing before demanding tax accrual workpapers complies with the FCA's "unwritten rule without clearly defined boundaries"[15] against taxpayers being forced to reveal their soft spots remains to be seen. AD-19-02 states that to develop a consistent practice across Canada, for one year, starting March 21, 2019, CRA auditors making requests for tax accrual workpapers must refer the case to an internal national early warning system. That seems like a laudable objective in terms of creating consistency, as well as a logical practice to ensure that requests for tax accrual workpapers are made only when appropriate.

Conclusion

Recent developments regarding the CRA's powers to obtain taxpayer information demonstrate that there are still many areas in which the law and CRA administrative policy are unclear and potentially contentious. By

[11] Indeed, the CRA's statement that the fact that financial statement reserves for tax exposures are quantified on the assumption that tax authorities will review those issues means that it "may be necessary" for the CRA to see a UTP list seems highly questionable as a basis for requiring a taxpayer to disclose its UTP list.

[12] *BP Canada*, para. 67.

[13] AD-19-02: "Tax accrual working papers, particularly the list of uncertain tax positions, can also be requested to identify audit issues in the context of an ongoing audit."

[14] *Id.* "Where the criteria outlined in the communiqué are met, the CRA considers that it retains the right to request tax accrual working papers, including a list of uncertain tax positions. A request for the taxpayer's list of uncertain tax positions in these circumstances is not a request that the taxpayer self-audit."

[15] *BP Canada*, para. 83.

understanding what those laws and policies are, taxpayers can consider and respond to CRA demands in a timely and efficient way that gives the agency what it fairly needs (and can compel disclosure of) to do its job without unnecessarily creating potential misunderstandings.

Taxpayers should keep several principles in mind:

- Think carefully about creating and keeping documents beyond what is necessary to comply with relevant legal requirements.
- When possible, discussions, correspondence, research, and analysis (including UTP preparation) of tax issues should be conducted such that lawyer-client privilege will attach and thereby preclude the CRA from being able to compel disclosure. While the CRA's new administrative policy on tax accrual workpapers is a commendable step forward, taxpayers would be well advised not to put themselves in a position of relying on a new and developing administrative policy on exercising restraint over sensitive tax information.
- To avoid an inadvertent waiver of privilege, transmission of privileged information should be kept to a minimum and made only after legal advice is obtained — and then in such a manner as to make clear the taxpayer is maintaining its claim of privilege.
- When faced with a CRA request for oral interviews, before responding, taxpayers should consider which information will be provided, and in what format (written or verbal). When oral interviews might be granted, taxpayers should ask for a list of questions beforehand (which might help the taxpayer determine what the most effective response format will be).
- Taxpayers should genuinely try to provide the CRA with whatever factual information or documents it would reasonably need to audit transactions. There is little to be gained from picking a needless fight with the CRA (litigating compliance orders is costly and time consuming), and as both *BP Canada* and *Cameco* show, taxpayers who have tried to address the CRA's requests for information in a genuine and substantive way are more likely to get the benefit of the doubt from courts.
- When a request for a UTP list has been received, the taxpayer should ask for a clear explanation of the reasons for the request and how it complies with AD-19-02. If the auditor's concerns can be fairly addressed through other means or with a redacted version of the document, that should be considered a potential response.
- CRA requests for the taxpayer's subjective analysis of tax issues should be referred to counsel for consideration, both on whether those materials are protected by privilege and whether the request is consistent with the CRA policy in AD-19-02 distinguishing between factual information and subjective analysis and stating that CRA auditors are "not to be influenced by any subjective analyses, comments or opinions contained in the information or documentation reviewed." In general, disclosure of subjective analysis should be the exception rather than the rule.

It is important to understand what the CRA genuinely needs to do its job, what it can force taxpayers to provide, what alternatives to a particular demand might exist for meeting the CRA's needs, and what the practical result of deciding to push back on a CRA demand is likely to be.

(Appendix is on the next page.)

Appendix. Lawyer-Client Privilege in Canada

	Solicitor-Client Privilege	Litigation Privilege
Purpose	Allow candid discussion of legal rights and obligations (protects *relationship*).	Allow investigation and preparation of case for litigation (protects *process*).
Requirements	Communication/document: • made between a lawyer and the lawyer's client; • intended to be confidential; and • made for the purpose of seeking or giving legal advice.	Communication/document: • made in the course of or in anticipation of litigation; and • made for the dominant purpose of that litigation.
Duration	Indefinite.	Until conclusion of litigation (including related litigation).
Third-party communications may be included	Only if third party acting as agent of client/lawyer in obtaining or delivering lawyer's legal advice.	Yes if otherwise meeting litigation privilege requirements.

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