

MAY 3, 2024

The Proposed Enhancement of the CRA's Audit Powers, Part One: Under Penalty of Perjury

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The following article was originally published in *Law360 Canada*.

Budget 2024 proposes to substantially bolster the Canada Revenue Agency's (CRA) audit powers, underscoring the increasing burden on taxpayers to comply with information requests and the consequences of non-compliance. The proposals include harsher penalties for non-compliance, expanded rules for what courts may order in such cases and rules requiring taxpayers to give oral or written responses under oath.

This article is part one of a series that discusses Budget 2024's expansions to the CRA's audit powers and the implications for taxpayers. In this part, we discuss the pivotal proposal to authorize the CRA to require that oral interviews or written statements be made under oath or affirmation, what this entails for taxpayers and why proactively engaging a tax lawyer may mitigate the risk of future legal complications.

Interviews and Affidavits Under Oath or Affirmation

Until recently, the CRA did not possess the power to compel taxpayers to submit to oral interviews or to provide written responses to audit questions in a specified form. This changed on Dec. 15, 2022, when new enactments empowered the CRA to require a taxpayer or any other person to (i) meet in person or by video conference to answer questions orally; or (ii) answer questions in writing in any form specified by the CRA (i.e., by producing a chart, presentation, spreadsheet, etc.).

Budget 2024 goes further, proposing the addition of s. 231.41 to the *Income Tax Act*, RSC, 1985, c 1 (5th Supp.), which authorizes the CRA to include in a requirement or demand for information served on a taxpayer that information (oral or written) or documents be provided under oath or affirmation or by affidavit (which is a sworn written statement):

231.41. A requirement or notice sent or served on a person under section 231.1, 231.2 or 231.6 may require that the person provide any answers to questions, information or documents sought by the Minister under those sections orally, under oath or affirmation, or by affidavit.

For Canadian taxpayers, the implications of this proposal are significant. The requirement to provide information under oath or affirmation adds a layer of legal gravity to the audit process, potentially increasing the consequences of providing false or incomplete information.

Moreover, the scope of this authority raises significant concerns. The CRA is not limited to requesting oaths or sworn declarations from the taxpayer or their designated representatives. Rather, any person may be compelled to provide a formal oath or declaration. The implications of such an expansion are considerable, as it is a notable increase in the CRA's reach, potentially affecting a wider circle of persons who might be drawn into these matters.

Offence for Giving a False Statement Under Oath

Most taxpayers may be unaware or may not fully appreciate what it means to give responses under oath or solemn affirmation or by affidavit. In certain cases, making a false statement under oath or solemn affirmation or by affidavit with an intent to mislead is an indictable offence (known as perjury) under the *Criminal Code*, RSC, 1985, c. C-46, the punishment for which is imprisonment for a term not

exceeding 14 years (ss. 131 and 132 of the *Criminal Code*). This offence can arise even where the false statement was committed outside of a judicial proceeding (e.g., a court proceeding), so giving a false statement during a CRA audit could still be a criminal offence (subsection 131(2) of the *Criminal Code*).

The law on perjury is beyond the scope of this article, but in general, a conviction for perjury requires proving beyond reasonable doubt that:

- the defendant gave a statement that was *false*;
- the defendant *knew* the statement was false; and
- the defendant gave the statement with *intent to mislead*.

It is unclear why Finance proposed such expansive and draconian powers. The budget materials do not note any specific challenges faced by the CRA nor describe any problematic behaviour or aggressive tax planning that Finance may be seeking to curtail by this proposed enactment.

Equally concerning is the lack of clear guidance from Finance on the limitations, if any, that will govern the use of these new powers nor any assurances that they will be reserved only for situations where non-compliance or credibility is a genuine concern. The lack of safeguards may ultimately lead to unfair treatment and result in inequities for taxpayers. It also raises concerns that these new powers could be applied in a manner that is disproportionate to their intended purpose.

Canada may have been inspired by other jurisdictions in proposing this new regime. For example, the U.S. Internal Revenue Service has the authority to summon a taxpayer or any other person deemed proper to produce books and records and provide testimony under oath. The failure to appear for a summons may result in a fine or imprisonment under the *Internal Revenue Code* (*Internal Revenue Code*, § 7210). The Australian Tax Office can similarly require taxpayers to give information or evidence under oath or affirmation, and failure to comply may result in a fine or imprisonment (*Taxation Administration Act 1953*, sections 8C-8D).

Uncertainties Ahead

Leaving aside the risk of a criminal offence, giving a statement under oath raises other legal concerns for taxpayers. Could a statement under oath make it easier for the CRA to support an allegation of misrepresentation or gross negligence? Will taxpayers need to make a formal withdrawal of or an amendment to a statement that is later found to be false or misleading or otherwise be held to such statements? Will such sworn statements be introduced in the Tax Court of Canada during a tax dispute, and if so, could they be admissible as evidence and what is their effect? Or would these statements constitute hearsay and could solely be used to impeach a taxpayer's credibility?

These are only some of the questions raised by the proposed powers, and courts in jurisdictions whose tax authorities are currently empowered to obtain information under oath have already been grappling with such issues of admissibility, procedural fairness and constitutional protection. Legal analysis at an early stage will be imperative to inform how taxpayers can best act and respond.

Proactively Protecting Taxpayers' Rights

As a practical matter, taxpayers should consider the early involvement of legal counsel when facing a tax audit, particularly if there is a possibility of answering questions under oath or affirmation. Legal representation can be crucial in preserving these rights throughout the audit process to avoid unwanted legal issues later in the dispute.

Lawyers can also play a pivotal role in preparing taxpayers for interviews conducted under oath or affirmation. For instance, lawyers can advise how to balance answering a question in a manner that is responsive to what is being asked while disclosing no more than appropriate and maintaining legal rights and privileges.

Taxpayers may have received legal advice in connection with matters related to the audit, such as advice concerning family and estate planning, corporate reorganizations or personal tax. Such legal advice is protected from disclosure by solicitor-client privilege. However, if taxpayers disclose privileged information during an interview or in a sworn statement, they may inadvertently waive this privilege, which may also lead to a loss of privilege on other related advice.

By engaging a lawyer from the outset, taxpayers can ensure that any privileged advice, information and documents are meticulously reviewed and remain confidential, to prevent unintended disclosure. It is crucial to remember that in Canada, unlike in the United States, advice from accountants does not enjoy the same protection from disclosure as legal advice.

In addition, certain non-privileged information or documents do not need to be provided to the CRA because doing so would amount to an unwarranted “self-audit” by the taxpayer. Similarly, certain questions may not need to be answered as they may not be relevant or proper in the circumstances. Your legal adviser can assist with reviewing whether any requested information or documents may fall within this category.

Importance of Initial Responses to Queries

Finally, it is important to put your best foot forward and provide clear responses early in the audit process. The initial stages of an audit are critical — subsequent changes or corrections to these responses are much more difficult to make and more likely to be scrutinized.

This is recognized in the CRA’s Audit Manual, which states that “comments and statements made by a taxpayer at the beginning of the audit or during the initial interview often carry more weight than statements made at a later point in the audit.” (Government Publications — CRA Audit Manual, 2020-09 — CRA Income Tax Audit Manual, section 13.2.2.) This is even more important if a tax dispute escalates to litigation in the Tax Court of Canada. The proactive engagement of legal counsel can provide taxpayers with a strategic advantage during a tax audit. It ensures the protection of their legal rights, the confidentiality of privileged information, and the effectiveness of their communication with tax authorities.

Conclusion

Budget 2024 does not introduce new fines, penalties or punishments for giving a false statement under oath or in an affidavit, so it is not altogether clear what the consequences will be for taxpayers who give false statements. Perhaps the CRA will prosecute taxpayers under the *Criminal Code*, perhaps not.

The absence of clear consequences could suggest a lack of intent on the part of the CRA to pursue criminal prosecution for dishonesty in taxpayer interviews or statements, but it could also be a strategic move designed to instill a sense of caution amongst taxpayers to promote greater compliance and honesty during interactions with the CRA. If so, this strategy may backfire — rather than encouraging more open, frank and forthright responses during interviews or written responses given under oath, taxpayers may be wary of inadvertently misstating a fact and, instead, may be inclined to reveal less than necessary or give more non-committal answers.

In sum, the effectiveness of these measures will likely hinge on how the CRA communicates its enforcement intentions and whether it can strike a balance between deterring unwanted behaviours and fostering a co-operative relationship with taxpayers.

Budget 2024 has set the stage for a more assertive CRA. Taxpayers must be cognizant of these changes and consider the benefits of early legal counsel to safeguard against any inadvertent missteps in their interactions with the agency. Stay tuned for further insights in this series, where we will examine additional aspects of the CRA’s enhanced audit powers and their ramifications.

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