An Offer You Can’t Refuse:
The Genesis and Evolution of Compliance Orders under Section 231.7 of the Income Tax Act and Procedural Alternatives to the Legislation

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March 9, 2012
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I. **An Offer You Can’t Refuse**

A man moves from Sicily and finds paradise in Canada. Had a good trade as owner of a funeral home, made a good living. The police protected him; there were courts of law; and he didn’t need the help of lawyers. Then suddenly he gets an intimidating type-written letter from the Canada Revenue Agency (the “CRA”), then another. Soon he is served, having been given only five days’ notice beforehand, with a piece of paper that says a court has ordered full disclosure of all his financial records, access to his crematorium and casket showroom for an inventory review and an appraisal of his wife’s jewellery, on pain of contempt, fines and imprisonment. Now he approaches a lawyer, not with respect or friendship, but with only these words on his lips: “Don Lawyer, give me justice.”

The CRA is pitiless in its pursuit of information, and it is justified in being so. The trade-off is such that taxpayers must disclose their income and apply any credits and deductions they deem applicable in their own discretion without CRA oversight, while the CRA has expansive powers to verify that disclosure. Taxpayers are not given the opportunity to self-report because they are trustworthy; instead, and ironically in this case, it is an exercise in the management of limited resources. The CRA claims that the reason it performs audits is “to ensure the fairness and integrity of our self-assessment tax system. We do this by making sure that tax returns and claims are prepared properly, and that taxpayers receive all the amounts to which they are entitled”, and no doubt the amounts to which the government is entitled as well.¹ The CRA has therefore been granted the power to audit a taxpayer’s filing, under section 231.1 of the Income Tax Act² (the “Act”), “for any purpose related to the administration or enforcement” of the Act. Audits require access to virtually all information which could have been used to support the

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¹ Canada Revenue Agency, Tax Guide RC4188 Rev. 10, “What you should Know about Audits” (publication date unknown).
² *Income Tax Act*, R.S.C. 1985, (5th Supp) c.1, s. 231.1(1) [hereafter referred to as “The Act” in these footnotes].
filing, and if such access is not granted, the CRA will be content to make you an offer that you can’t refuse, if for no better reason than the fact that you will likely not even be there to refuse it.

The purpose of this paper is to explore the origin, interpretation and problems with Compliance Orders under section 231.7 of the Act (the “Section”), which allows the courts to grant the CRA an *ex parte* order on summary application forcing the taxpayer to “provide any access, assistance, information or document sought by the Minister [of National Revenue]”, with non-compliance punishable by contempt proceedings, fine and imprisonment.³ Furthermore this paper will demonstrate how Parliament must balance this broad power conferred on the CRA for the administration of its duties with the procedural obligations inherent in the administration of justice. The paper will show how Compliance Orders were a measure that was squeezed into the Act, with little debate, buried in an omnibus amendment to the Act and several other acts of Parliament. It will go on to analyze how such a remarkably brief section with remarkably broad powers has elicited such few challenges in the courts, and how the courts have responded to those challenges. The paper will then canvass the opinions of the Section in the legal and academic communities and how the language of the Section compares with similar legislation in other jurisdictions. Finally, the paper will discuss how changes could be made to the Section so that the CRA power to obtain *ex parte* Compliance Orders on Summary application in accordance with section 231.7 of the Act is subject to an objective legal test which adheres to the basic principles of procedural fairness.

³ The Act, ss. 231.7(1) and 238(1)-(2).
II. Slipping Through the City Gates

The Section was introduced as part of an amendment to the Act with the short title “Income Tax Amendments Act, 2000”, noted as Bill C-22 (the “Bill”). The section about Compliance Orders was one which escaped the opposition’s scrutiny during debate, having been dwarfed by the issue of the then Liberal Government’s proposed $100 billion in tax cuts over five years, and the nature of those cuts as challenged by the official opposition, the Canadian Alliance. The section about Compliance Orders was buried on page 465 of the 515 page amendment, and was not addressed in debate. Instead, the legislation slipped casually through the city gates undetected by the guards who sought to vigilantly expose any weakness in the Bill. The Section was given Royal Assent, along with the rest of the Bill, on June 14, 2011.

The Section is meant to buttress sections 231.1 and 231.2 which grant “authorized” CRA inspectors the power to perform inspections of any information or property of the taxpayer, or request additional documentation or information for inspection, respectively. The language of the Section reads as follows:

On summary application by the Minister, a judge may … order a person to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 if the judge is satisfied that
(a) the person was required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so; and
(b) in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)).

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4 Bill C-22, an act to amend the Income Tax Act, the Income Tax Application Rules, certain acts related to the Income Tax Act, the Canada Pension Plan, the Customs Act, the Excise Tax Act, the Modernization of Benefits and Obligations Act and another act related to the Excise Tax Act, 1st Sess., 37th Parl., 2000.
5 House of Commons Debate, No. 044 (5 April 2001) at 1330-1340 (Hon. Peter Milliken).
6 An Act to amend the Income Tax Act, the Income Tax Application Rules, certain Acts related to the Income Tax Act, the Canada Pension Plan, the Customs Act, the Excise Tax Act, the Modernization of Benefits and Obligations Act and another Act related to the Excise Tax Act, R.S.C. 2001, c. 17, s. 183.
7 The Act, ss. 238.1 and 238.2.
8 Ibid., s. 231.7(1).
The above subsection (1) is limited only by its subsections and some case law; though other sections in the Act are available to further bolster its strength and penalties for non-compliance.

The Section goes on in subsections (2) to (5) to impose several restrictions on the order that may be granted in subsection (1): the person against whom the order is sought must receive five days’ notice; the court may impose restrictions as it sees fit; violation of the order is punishable by contempt proceedings; and the decision may be appealed, although appeal does not suspend the existing order.9 Furthermore, section 238 of the Act imposes further powers and penalties for non-compliance: the court may make further orders to enforce compliance, and may levy a fine of “not less than $1,000 and not more than $25,000” and up to a year in prison.10 Indeed these are ominous deterrents to non-compliance, especially where the documents are not in the hands of the person from whom the information is being sought.

Section 231.1(1) states that inspections may be conducted of any information in the hands of a taxpayer “or of any other person that relates to or may relate to” the tax return at issue.11 The burden or producing information is so stringent that, almost four years to the day since the Section was adopted, the CRA released its revised information circular on the retention and destruction of books and records (the “Circular”).12 The Circular takes the reader through best practices in keeping and disposing of books and records relevant to tax returns, and the information that should be made available to the CRA in the event of an audit. The last page of the forty paragraph document contains a summary of the penalty provisions, a cold warning, or more appropriately a harbinger, akin to waking up next to a decollated stallion.

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9 Ibid., ss. 231.7(2)-(5).
10 Ibid., ss. 238(1)-(2).
11 Ibid., ss. 231.1(1).
With this backdrop the courts began hearing the first cases in opposition to these orders, approximately two years after the Section came into force. Their foray into the interpretation of the Section led to a belaboured excavation into the procedural depths of the Act rather than the principles of procedural fairness.

III. The Rules of the Family

The court cases on the Section are few in number, and lack any substantial or significant interpretation of the Section. Instead, they expound the limited statutory protections in an effort to side-step interpreting the rules that Parliament entrenched in the document. The cases illustrate how the courts, either by fear or lack of understanding, were hesitant to challenge what they regarded as the explicit will of the legislature. Even judgments that clearly showed contravention with constitutional principles of fundamental justice were carefully worded so as not challenge the validity of the Section.

i. Never Tell Anyone outside the Family what you’re Thinking

Only one case so far has raised a constitutional challenge to the Section, and its absurd conclusion has left the issues it was meant to address unresolved in Canada. In 2010, *Chambre des Notaires*¹³ was argued before the Quebec Superior Court, resulting in a perplexing holding that leaves much unresolved. In Quebec, notaries have similar obligations with respect to protection of privileged information between notary and client, obligations which are analogous to solicitor-client privilege (the “Privilege”). The association representing notaries, the Chambre des Notaires du Quebec, brought a motion to the Court for a declaratory judgment that,* inter

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alia, the section was unconstitutional in accordance with section 8 of the Charter of Rights and Freedoms (the “Charter”), which protects against unreasonable search and seizure.\(^{14}\)

In its holding the Court considered a ten part test to determine when the Privilege can be circumvented under section 1 of the Charter, as promulgated by the Supreme Court of Canada (the “SCC”) in *Lavallee*.\(^{15}\) *Lavallee* was a criminal case which dealt with the issue of whether a search was unreasonable within the meaning of section 8 of the Charter, where a specific section of the *Criminal Code of Canada*\(^{16}\) specified an arguably burdensome procedure for asserting the Privilege.\(^{17}\) The section in question severely limited the time for application and assertion of the Privilege, and the SCC held that the restrictions around asserting the Privilege, in this case, were constitutionally valid.\(^{18}\) In its reasons for judgement, the SCC stated that:

> we must ask whether Parliament has taken all required steps to ensure that there is no deliberate or accidental access to information that is, as a matter of constitutional law, out of reach in a criminal investigation.\(^{19}\)

Clearly this case applied to criminal investigations; however, the Court in *Chambre des Notaires* alienated this distinction and applied it in the civil context of the Act.

The Court analyzed a potpourri of decisions, dicta and analogy. After a contrived analysis, the Court summarized its decision as follows:

> these decisions indicate that the situation is not different from that of a person who relies on a professional of any kind in respect of their professional relationship, which is implicitly one of his duty to confidentiality. It follows that in both the conceptual and the generic, the dichotomy between civil law and criminal law should not exist as to the existence, prima facie, the right to professional secrecy.\(^{20}\)


\(^{19}\) *Ibid.* at para. 25.

\(^{20}\) [2010] R.J.Q. 2069 at paras. 77-78 (Note: as this case was reported only in French, the cited language above was translated by the author of this paper from the original French, which read as follows: “À cet égard, toutes ces
The Court subsequently held that “there is no reason ... to draw a distinction between the
criminal law to civil.” This opened the door for the Court to “push the button” on the Section,
albeit in a surprisingly innocuous fashion.

The Court found three major flaws with the Section, coupled with section 231.2 of the
Act, which allowed the Court to strike the Section down, though in a limited way. First, the
Court held that, since notices were sent directly to the notaries, the holder of the Privilege did not
have a chance to defend it; second, the five day notice period in subsection (2) of the Section is
unreasonably short; and third, “[q]ue les exceptions permettant d’y passer outre doivent être
rarissimes et n’être utilisées qu’en dernier recours”, in other (English) words, that the Act did not
demonstrate that violating the Privilege should only be used as a last resort. The reasoning
seemed sound until the judgment’s conclusion served to obfuscate its application.

The Court concluded that sections 231.2, 231.7 and 232(1) of the Act were inoperative;
however, only as they apply to “notaries and lawyers in the province of Quebec”. The Court
therefore agreed that Privilege allows solicitors and clients to keep their communications “within
the family”, but that protection is relegated only to the Quebecois family, and not the rest of
Canada. This is an absurd result given that the Act is a federal statute; however, it remains to be
seen how this decision will be treated on appeal. In the mean time, a rare smattering of cases
continues to trickle-in to address other aspects of the operation of the section.

décisions révèlent que la situation n’est pas différente de celle d’une personne qui poursuit un professionnel, quel
qu’il soit, à l’égard de leur relation professionnelle, ce qui implicitement relève celui-ci de son devoir de
confidentialité. Il s’ensuit que de façon conceptuelle et générique, la dichotomie entre le droit civil et le droit
criminel ne doit pas exister quant à l’existence, prima facie, du droit au secret professionnel.”
21 Ibid. at para. 80 (“[q]u’il n’y a pas lieu ... de tracer une distinction entre le droit en matière criminelle d’en
matière civile.”
22 Ibid.
23 Ibid. at para. 125 (this language is the author’s translation from the original French which reads: “notaires et des
avocats de la province de Québec”).
ii. No Judges in your Pocket

There have been few, if any, cases which have directly impacted the operation of the Section. The cases instead tend to elaborate on the textually evident protections built into the Section. One such example was the 2003 case *SML Operations*.\(^{24}\) In *SML Operations*, the CRA sent a letter to a corporation requesting further documentation under section 231.2 of the Act, pursuant to an investigation and audit. The letter was addressed to a particular individual who was identified as being an “officer, director, or agent” of the corporation.\(^{25}\) When that individual produced documents that were not satisfactory to the CRA, the agency threatened the individual with the prospect that he could be personally sanctioned for not producing additional documents under section 238 of the Act.\(^{26}\)

The Court in *SML Operations* dissected the sparse Section in order to determine what procedural elements were strictly required in order for the courts to authorize a Compliance Order. The Court’s analysis of the Section resulted in the following clarification of the required elements:

First, the Court must be satisfied that the person served with the requirement letter was required under subsection 231.2(1) of the Act to provide the information or documents sought by the Minister. Second, it must be shown to the Court that, although the person was required to provide the information or documents sought by the Minister, he or she did not do so. Third, the Court must be satisfied that the information or documents are not protected from disclosure by solicitor-client privilege.\(^{27}\)

It was the first element which allowed the individual to escape the wrath of the penalties for non-compliance.

\(^{24}\) *Canada (Minister of National Revenue) v. SML Operations (Canada) Ltd.*, [2003] F.C.J. No. 1111.


\(^{26}\) The Act, s. 238.

At the Vancouver Federal Court of Justice, the individual argued that, since the demand was made to “an officer, director or agent” of the corporation, he was not the person required to provide the information under section 231.2(1) of the Act, but in fact it was the corporation. The Court agreed, holding that:

In light of the uncertainty as to whether [that] requirement was addressed to the [corporation] or to [the individual], I am not satisfied that [this] condition has been met.\(^\text{28}\)

The fine procedural distinction drawn by this holding was one of the few instances where the court would weigh-in on the side of the rights of the individual in light of the expansive powers granted by the Section.

In addition, it has also been noted that “[i]t is also a defence that the person not have possession or control over the documents in question, where there is no bad faith or abusive behaviour”.\(^\text{29}\) The more popularly recognized jurisprudence on the Section leans more in favour of the CRA.

iii. **Enforcement to the Highest Bidder**

The most commonly referred to cases addressing the powers conferred by the Section are the *eBay* cases.\(^\text{30}\) In these cases the courts justify the result that the collection of tax dollars trumps the public moral interest in privacy: tax dollars are used to pay for “protection”, though in this case, much like the rackets of the *Cosa Nostra*, the threat is created by the one offering the protection.

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\(^{28}\) *Ibid.* at paras. 19.


\(^{30}\) *eBay Canada Ltd. v. Canada (Minister of National Revenue)*, 2008 FCA 141; 2008 FCA 348.
Www.ebay.com is a website where individuals can sell items to the public, either at fixed prices or in the form of an auction.\(^{31}\) It can be described as an online garage sale, only the sales are processed, recorded and ranked by the company facilitating the transactions. As a result, detailed records of all financial transactions exist. In addition, detailed rankings of each registered seller exist, depending on the quality of their merchandise, consumer feedback and volume of sales. For a tax agency this information is like gold, or at least helps increase its reserves thereof. In this case, the “golden” information was located on servers in the USA but was accessible by any of the subsidiaries, one of which was located in Burnaby, BC.\(^{32}\)

In 2006 the CRA made an *ex parte* application to the Federal Court under section 231.2(3) of the Act, which allows the court to force the production of information about unnamed persons by a third party where a two part test is satisfied: first, that the “person or group is unascertainable”; and second, “the requirement is made to verify compliance” with the Act.\(^{33}\) The “third party” in this case was eBay Canada Ltd. (the “Company”). The CRA targeted the “PowerSellers”, who were individuals with gross sales in excess of $1,000 per month, and the information being sought was of a highly-personal nature: “full name, userid, mailing address, billing address, telephone number, fax number and email address, and ... gross annual sales.”\(^{34}\) The order was granted and the Company appealed. The Company subsequently made a motion to stay the execution of the order pending appeal.

In determining whether the test for staying the order was met, namely whether there was an arguable case on appeal and irreparable harm in disclosing the information, the Court took a very sterile and short-sighted approach in its analysis. The parties consented to the first “arguable


\(^{32}\) 2008 FCA 141 at para.14.

\(^{33}\) The Act, s. 231.2(3).

\(^{34}\) 2008 FCA 141 at para.16.
case” element; however, the “irreparable harm” element was sorely under-argued. In fairness to the court, the Company’s argument, that “disclosure would render eBay Canada's appeal moot or futile”, was not the best or strongest argument that could be made.35 While the Company used cases that demonstrated that the disclosure of information by a third party would harm the person to which the information belonged as it would subject their personal affairs to audit, the SCC has recognized that the disclosure of personal information in and of itself is damaging.36 The Court therefore held that the harm in disclosing the personal information did not outweigh the benefit to the government in receiving the disputed information.

When the actual appeal occurred the Court addressed the question of whether the Company was able to produce information that was stored on servers outside of Canada.37 Since the information being requested was stored in the USA, the Company argued that section 231.2 of the Act was inapplicable, and instead that 231.638, the requirement to produce documents from a foreign jurisdiction, must be used.39 Furthermore, the Company argued that section 231.6 “does not authorize a requirement to be imposed for the production of foreign-based information relating to unnamed persons.”40 The Court candidly dismissed those arguments by reasoning that:

35 Ibid. at para. 29.
36 See e.g. H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General), 2006 SCC 13 at para. 122 (“Presumably, judicial review will be of limited use to a third party after the record has been disclosed insofar as the damage to privacy will already have occurred.”)
37 eBay Canada Ltd. v. Canada (Minister of National Revenue), 2008 FCA 348.
38 The Act, s. 231.6.
39 2008 FCA 348 at para. 15.
40 Ibid.
with the click of a mouse, the appellants make the information appear on
the screens on their desks in Toronto and Vancouver, or anywhere else in
Canada. It is as easily accessible as documents in their filing cabinets in
their Canadian offices. Hence, it makes no sense in my view to insist that
information stored on servers outside Canada is as a matter of law located
outside Canada .... Who, after all, goes to the site of servers in order to
read the information stored on them?\textsuperscript{41}

With these two judgments the courts reinforced the principle that the revenues of the CRA
“family business” must be protected, so you had better be sure to employ a good war-time
consigliere if you are planning to challenge the other Dons.

**IV. Advice from the Consigliere**

The scholarly analyses of the Section undertake the broad and daunting task of
attempting to survey related areas of tax law in Canada and other jurisdictions in order to unearth
exemptions and protections for the taxpayer. The obvious limitations are evident in the text of
the Section; for example, there is an increased obligation to obtain a search warrant where the
information being sought in a Compliance Order is located in a dwelling house.\textsuperscript{42}

In their paper addressing, inter alia, taxpayer fairness provisions, Krepes and Winters
identified two limitations to the CRA’s power to compel using Compliance Orders:

The only limitations are that there be a genuine inquiry into the tax
liability of a person and the information is not subject to solicitor-client
privilege. In effect the Minister can ask How and Why in addition to Who,
What and Where.\textsuperscript{43}

\textsuperscript{41} Ibid. at para. 48.
\textsuperscript{42} The Act, s. 231.1(2).
The authors went on to qualify this statement by making clear that “[o]f course, it is the answers to the How and Why questions that will give the CRA a roadmap to the transaction”, thus making the challenges moot in many cases.\(^{44}\)

Perhaps the most powerful defence to production is to claim that the information is privileged, as has been noted above and demonstrated in *Chambre des Notaires*. A problem arises, however, when a Compliance Order is used to force third-parties to produce privileged documents. In their article addressing this issue, Kreklewetz and Vipul assert that:

A lawyer may be sufficiently knowledgeable to assert this right on the client's behalf, but there may be practical problems if the documents that are potentially privileged at common law are in the possession of a non-lawyer third party served with a compliance order application.\(^{45}\)

The issue here is who needs to be notified: there is no requirement to notify any other parties of the request to produce or of the compliance order, other than the person being requested to do so. This results in an absurd procedural fairness loop-hole.

Further to this point is the issue of litigation privilege as it applies to taxpayers and third-parties, and to what documents it can apply. In one scholarly article the authors opined that:

Unlike solicitor-client privilege, which exists to safeguard the solicitor-client relationship, litigation privilege exists to protect the integrity of the adversarial system. If an adversary were granted access to a person's thoughts with respect to the strength of that person's case or preparations for trial, the adversarial system would be seriously undermined.\(^{46}\)

The authors further noted that, while the Canadian courts have affirmed the proposition that “no privilege extends to communications between taxpayers and their non-legal advisers”\(^{47}\), the system in the United States is quite different: “unlike the United States, Canada has not

\(^{44}\) *Ibid.*


legislated a separate tax practitioner’s privilege with respect to tax preparation documents.\footnote{Ibid.} In 2005 a special task force struck by the Canadian Institute of Chartered Accountants attempted to highlight the value of protecting accountant and auditor working papers, recommending that:

the CRA adopt a clear national policy of requesting working papers and information only in exceptional and well-defined circumstances in order to preserve important values-open and frank communication between auditors, accountants, and their clients (which is critical to the proper functioning of the self-assessment tax system and to an atmosphere of disclosure and compliance), and access to the information required for high-quality audits ....\footnote{Paul Hickey, “Audit Working Paper Requests” (Canadian Tax Foundation, Canadian Tax Highlights, January 2005).}

A mere five years later the CRA did create such a policy; however, it has no legal effect on the power conferred by the Act.\footnote{Canada Revenue Agency, Policy Statement, “Acquiring Information from Taxpayers, Registrants and Third Parties” (31 May 2010), online:<http://www.cra-arc.gc.ca/tchncl/cqrngnfrmn/menu-eng.html>.} It should be noted that even with the existence of separate legislation, the American courts have taken a strictly textual interpretation of the law, and have held that documentation relevant to a tax authority audit, even if prepared by an auditor or accountant who would otherwise be covered by the privilege, is not so protected unless explicitly created in anticipation of actual, not potential, litigation.\footnote{United States vs. Textron Inc., 577 F.3d 21 at 27 (1st Cir. 2009).}

Canadian courts have responded in a similar way to the American courts; they have been diligent in enforcing the procedural safeguards to the letter where they are textually evident in the Act. As has been noted in one article surveying the case law in this area, “Strict compliance with the procedural requirements of the Act” has been exercised in such cases as where the Compliance Order placed an “[u]nreasonable time limit for requiring the provision of information” and where the “[i]nformation collected or sought to be collected [did] not relate to
the administration or enforcement of the Act but [was] the product of a “fishing expedition”\(^\text{52}\). One explanation for this is that the Tax Court of Canada has limited jurisdiction which restricts it from making equitable judgments, thus forcing it to take a strict textual approach to interpretation.\(^\text{53}\) While the strict textual interpretation taken by the Canadian courts does seek to enforce the will of the legislature, the courts in other jurisdictions with similar statutory tax regimes have approached the same issues in a slightly different way.

Other common law jurisdictions have adopted legislation with the same powers to produce as those found in the Section. The American similarities and differences were briefly addressed above. The Australian *Income Tax Assessment Act\(^\text{54}\)* (the “Australian Act”) provides for broad powers to inspect and compel documents, permitting that the tax authority shall:

> at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of this Act, and for that purpose may make extracts from or copies of any such books, documents or papers. ... The Commissioner may by notice in writing require any person, whether a taxpayer or not, including any officer employed in or in connexion with any department of a Government or by any public authority: (a) to furnish the Commissioner with such information as the Commissioner may require; and (b) to attend and give evidence before the Commissioner.\(^\text{55}\)

Though the penalties in the Australian Act are no less draconian than the Canadian legislation, their legislation does allow for some consideration, such as travel expenses, to be granted to individuals compelled to give information.\(^\text{56}\) Furthermore, the “broad legislative authority is


\(^{53}\) Tax Court of Canada Act, RSC 1985, c T-2, s. 12.

\(^{54}\) *Income Tax Assessment Act 1936* (Cth.), ss. 263(1).

\(^{55}\) *Income Tax Assessment Act 1936* (Cth.), ss. 263(1), 264(1).

\(^{56}\) *Income Tax Assessment Act 1936* (Cth.), s. 264(3).
tempered by a policy of restraint”, evidenced by the guidelines that the Australian Taxation Office has published.\textsuperscript{57}

A somewhat different approach is taken by the United Kingdom. Its tax legislation incorporates an objective standard as a requirement for the exercise of investigative tactics:

\begin{quote}
An officer of Revenue and Customs may by notice in writing require a person ... (a) to provide information, or (b) to produce a document, if the information or document is \textbf{reasonably required} by the officer for the purpose of checking the taxpayer’s tax position... [or] for the purpose of checking the tax position of another person whose identity is known to the officer.\textsuperscript{58}
\end{quote}

Furthermore, it may not compel a third-party without obtaining the consent the taxpayer and that of a tribunal:

\begin{quote}
An officer of Revenue and Customs may not give a third party notice without (a) the agreement of the taxpayer, or (b) the approval of the First-tier Tribunal.\textsuperscript{59}
\end{quote}

The UK approach is by far, and quite explicitly, the most reasonable. By virtue of its language it incorporates basic elements of fundamental fairness that allows the courts to grip at something more powerful than the strict language of the text of the legislation, and further imposes effective restraint against an otherwise unbridled police power.

\section{Listening to Reason}

As has been demonstrated above, the courts are hesitant to bend or stretch the law in this area. The Act is a long, complex and meticulously crafted document. That fact alone is \textit{prima facie} evidence that Parliament intended for the document to be a static document, until further amended by the legislature itself. The common law is designed to allow the courts to fill gaps in the law created by situations that were not anticipated by the legislature; however, the Act is so

\textsuperscript{57} P. Lindsay and M. Robinson, “Requirements to Produce Documents and Information: Policy and Practice” Canadian Tax Foundation Conference Report, 2008) at 12:8.

\textsuperscript{58} Finance Act 2008 (U.K.), 2008, c.1, schedules 36.1(1) and 36.2(1) (emphasis added).

\textsuperscript{59} Finance Act 2008 (U.K.), 2008, c.1, schedule 36.3 (1).
well contrived that the courts are understandably hesitant to substitute its language with their own.

Although the courts play the role of gap-fillers, they also play the role of protectors of rights. Legislation often builds-in objective tests or procedural exit hatches, safe-havens or safe-harbour provisions, all designed to protect those subject to enforcement from having their rights infringed, and equally to restrain the government from exercising excessive authority which could lead to a violation of rights. In some cases the Charter can be interposed as a barrier between the individual and the government. In other cases, where the Charter may not apply, the courts can read-in such protections, such as inserting an objective standard.

As was demonstrated above, the UK tax legislation pre-empts the need for such judicial activism by having anticipated that, given the excessive nature of the powers conferred by the legislation, the courts would be justified in reading-in an objective standard and notice provisions in order to restrain the power conferred on the agency charged with administering the tax legislation. No such protections exist in the Section, and despite the fact that the Section is remarkably Spartan in its drafting and procedure, the courts have been demonstrably hesitant to exercise their right to review.

The Parliamentary record shown above demonstrates that the Section was buried in an abstruse and controversial amendment. The debate surrounding that amendment focussed on cuts to subsidies and deductions, which by no surprise dominated the debate in a chamber fraught with concern over financial, as opposed to procedural, burdens on its members’ constituents. Regardless of any debate, the Party which had introduced the legislation had majority control and effectively projected the bill into law.
The courts have not reacted any more impressively. As was shown above, the first and only constitutional challenge to the Section was met with an apprehensive and shamefully timid half-judgement. The Court in *Chambre des Notaires* exercised its power of judicial review in an awkwardly discriminatory way, leaving the question of whether the Section is in fact unconstitutional not definitively answered. The only times when the court was willing, or even able, to exercise its abstemious ability to restrain the government have been when the government did not follow the explicit, albeit exiguous, procedural requirements.

Just as the courts have been hesitant to intercede in the operation of the Section where the language is explicit, the opposite is the case where the legislation is explicit. The cases illustrate that, even where a small change in the government’s position would have brought it into compliance, the courts are willing to strike down the action and grant costs where explicit procedural requirements have not been met. This places a heavy burden on legislators to ensure that proper procedural protections are afforded to the taxpayer. Perhaps the courts are forgetting their obligation to ensure procedural fairness is safeguarded; or perhaps they just give the legislature too much credit. In any case the legislature must recognize its dependency on the judiciary for these types of actions and build-in the types of clauses that exist in the UK legislation, or else rely on the apprehensive courts to read-in these standards and be subject to criticism.

The scholarly critique on these points is a cacophony of noncommittal and inconclusive observations which have little regard or anticipation for the future of the Section. The authors describe the few exceptions and protections without suggesting how it can be changed or why it should be. Many accept that the Section grants excessive power; however, given that the Act itself contains a plethora of such powers which are regularly exercised by the CRA, it seems as
meaningless to challenge tax collection as it would to challenge death (being the other certainty in life).

Although the two certainties in life are death and taxes, it should be noted that the Canadian government, in promulgating universal socialized health care, takes a far more lenient and active position on preventing death for as long as possible than it does in protecting its citizens from excessive tax authority powers. Without incorporating taxpayer procedural protections into the legislation such as those in the UK legislation, or having an active judiciary which is willing to read these protections into the legislation, taxpayers are vulnerable to these excessive powers, and are subject to the Corleonian “offer you can’t refuse”. It is for these reasons that the CRA power to obtain *ex parte* Compliance Orders on Summary application under section 231.7 of the Act must be subject to an objective legal test which adheres to the basic principles of procedural fairness.
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