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CAN THE VOLUNTARY DISCLOSURE PROGRAM SURVIVE THE FEDERAL COURT OF APPEAL DECISION IN BOZZER V. THE QUEEN?

David H. Sohmer

The judicial approach to ambiguous legislative provisions is to be cautious and to frame the relevant issues narrowly. The job of tax litigation lawyers is to win and they are not concerned with the broader consequences of a victory. The CRA is concerned with the consequences of a particular policy only to the extent that they affect its efforts to ensure compliance. It is not surprising, therefore, that when the jurisprudential, administrative and statutory dots are connected, the result is often a picture which does not reflect the broader principles of consistency, predictability and fairness. The recent decision of the Federal Court of Appeal in the *Bozzer* case¹ is an example of this phenomenon and the unintended consequence may be to seriously undermine the Voluntary Disclosure Program (“VDP”).

Subsection 220(3.1) of the *Income Tax Act* authorizes the CRA to waive interest and penalties where an application for relief is made within 10 years after the end of a taxation year with respect to which relief is requested. The issue in *Bozzer* was whether interest relief was available for the 10-year period preceding the year in which a request for relief is filed notwithstanding the fact the taxation year in which the debt arose was outside the 10-year period. The Federal Court of Appeal found that the purpose of subsection 220(3.1) is to permit the Minister to waive or cancel interest or penalties so as to “allow for a common-sense approach in dealing with taxpayers who, because of personal misfortune or circumstances beyond their control, could not comply with a statutory requirement for income tax purposes”. The Court held that the 10-year rule refers to the years during which the interest accrued because this is “fair and, thus,

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¹ *Bozzer v. R.*, 2011 FCA 186, [2011] 5 C.T.C. 1, 2011 D.T.C. 5106.

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more consistent with the purpose of [subsection 220\(3.1\)](#)".

A consequence of the *Bozzer* decision is that the CRA can no longer pretend to administer its VDP on the basis that [subsection 220\(3.1\)](#) provides it with the statutory authority to relieve interest and penalties under the program.² Put bluntly, taxpayers who transfer funds to secret offshore accounts do not do so "because of personal misfortune or circumstances beyond their control" and these are not the taxpayers that Parliament intended to benefit in enacting [subsection 220\(3.1\)](#).

The *Bozzer* decision may have a salutary effect in that it may convince the CRA to base its VDP on a more solid legislative footing. The following provisions could be relied on.

1. [Subsection 152\(4\)](#) provides the Minister with the discretion to reassess after the "normal reassessment period" where the taxpayer filing the return "has made any misrepresentation that is attributable to neglect, carelessness

2 See Views 2008-06, "Voluntary Disclosures Program Guidelines", June 2008 at Section 1.3.

or willful default or has committed any fraud in filing the return". The Minister can waive tax and interest with respect to a statute-barred year by simply deciding not to reassess.

2. [Subsection 162\(10\)](#) and [section 163](#) provide for penalties (commonly referred to as "gross negligence penalties") which are applicable when a person "knowingly or under circumstances amounting to gross negligence" makes a false statement or omission in a return or in providing information. The application of these penalties is discretionary. It is important to note that a statute-barred year can be opened without assessing a gross negligence penalty because "neglect, carelessness, willful default or fraud in filing a return or supplying information" require a lower degree of participation or knowledge than does "gross negligence".³

Except for [subsection 220\(3.1\)](#), there does not appear to be any provision in the Act which permits the waiver or cancellation of late-filing penalties or interest.⁴ If the number of years to be reassessed under the VDP is limited to the 6-year period for which books and records must be retained⁵ and if only income actually earned and capital gains actually realized are taxed during the period, the aggregate amount of tax, interest and

3 "Questions and CRA Responses", in 2009 British Columbia Tax Conference Toronto: Canadian Tax Foundation, 2009, tab 16, at 16:10-11, Response to Question 7(d).

4 The following is one of the hypothetical scenarios considered by the Court in *Bozzer*:

"In January of taxation year X + 1, just before preparing the income tax return for taxation year X, the taxpayer is seriously injured in a car accident. In taxation year X + 1 – after going through a coma, enduring many operations, recovering slowly, dealing with physical and mental challenges, and going through years of rehabilitation and retraining – the taxpayer finally gets around to filing his tax return for taxation year X." (para. 32)

The 10-year limitation period in [subsection 220\(3.1\)](#) bars the Minister from cancelling a late-filing penalty with respect to year X. One of the glaring incongruities in the Act is that the Minister has the discretion to effectively waive penalties where the taxpayer files fraudulent returns on a timely basis but is deprived of discretion to waive a late-filing penalty in the hypothetical scenario.

The incongruity is attributable to an undisciplined response by the Department of Finance to the Supreme Court decision in *Markevich v. Canada*, [2003] 1 S.C.R. 94. The Supreme Court ruled that section 32 of the *Crown Liability and Proceedings Act* which provided for a 6-year limitation period, should be given residual application to the collection of taxes where the charging statute is silent. The Federal Court of Appeal in *Bozzer* acknowledged that there is no "plausible explanation for the ten year limitation period in the case of [subsection 220\(3.1\)](#)".

5 [Subsection 230\(4\)](#) ITA.

late filed penalties should not differ materially from the aggregate amount of tax and interest payable under the VDP as it is currently administered.⁶ By proceeding in this fashion, the Minister will no longer have to act outside the law in order to encourage taxpayers to comply with the law. It will also allow for a predictable set of outcomes which is an essential component of a successful VDP.

David H. Sohmer, a frequent contributor to The Canadian Taxpayer, is a shareholder of Spiegel Sohmer Inc., a Montreal law firm, and can be reached at dhsohmer@spiegelsohmer.com.

6 The current CRA policy is to assess all years for which there are business records and to waive 4 percent of interest for years beyond the normal reassessment period. This has encouraged a “don’t ask don’t tell” practice with respect to the number of years for which business records are available. A 6-year policy will avoid the moral ambiguity of the current practice and remove fears that the disclosure may be rejected because it is not complete.

SUPREME COURT DELIVERS MAJOR TAX WIN FOR INDIANS ON RESERVES

C. Yvonne Chenier

On July 22, 2011 the Supreme Court of Canada (SCC) issued two decisions¹ that clarify the tax exemption of interest income of an Indian earned on a reserve. Overturning the lower Courts,² the SCC found that interest income earned with the Caisse populaire Desjardins situated on a reserve was the personal property of an Indian on a reserve and accordingly exempt from taxation pursuant to s. 87 of the *Indian Act*.³ In both cases the Tax Court of Canada and the Federal Court of Appeal had held that this income was not exempt from taxation. Following previous cases, such as *Recalma v.*

Canada,⁴ the lower Courts’ reasoning was that financial institutions invest capital in the general economic mainstream and global capital markets that are not on a reserve. Therefore since the Caisse populaire Desjardins generated its revenues in the economic mainstream, income from the term deposit was not exempt from taxation. This reasoning was swept aside by the SCC.

The basic facts of the two cases were similar. In the *Bastien* case, Bastien was a status Indian who was born and died on the same reserve. Income from his business on the reserve was invested in certificates of deposit that paid interest into his savings account at the Caisse populaire Desjardins on that same reserve. In the *Dubé* case, Dubé earned interest income on term deposits at a Caisse populaire Desjardins located on a reserve that was not his own. It was not clear if his principal residence was on a reserve or what the source of his capital was but he owned real property off reserve. The key fact differences between the two cases did not have an impact on the reasoning of the majority.

The SCC analyzed the purpose of the s. 87 exemption (to protect the personal property of Indians situated on a reserve from taxation), the type of property covered (investment income is personal property) and the nature of taxation (taxed as income from property). The SCC put heavy emphasis on one of the connecting factors that it had set down in *Williams v. Canada*⁵ to come to the conclusion that the income was located on a reserve. That case had discussed the residence of the debtor as a traditional factor for the Court to consider. In the *Bastien* and *Dubé* cases, the debtor (the Caisse) was found to be resident on a reserve. It should be noted that in the *Dubé* case the reserve was not the same reserve as any reserve connected with Mr. Dubé. It was located on “a” reserve, the word used in the exempting legislation. The SCC further clarified that it was irrelevant whether the income generated was connected with the traditional way of Aboriginal life.

In cautioning that the form and substance of a transaction is key to determining the location of

1 *Bastien Estate c. Canada*, 2011 SCC 38, 2011 CarswellNat 2717 and *Dubé c. Canada*, 2011 SCC 39, 2011 CarswellNat 2719.

2 2009 FCA 108, 2009 CarswellNat 5362, 2010 D.T.C. 5054, affirming a decision of Angers J., 2007 TCC 625, [2008] 5 C.T.C. 2533, 2008 D.T.C. 4064 (T.C.C. [General Procedure]); and 2009 FCA 109, 2009 CarswellNat 2572, 2009 D.T.C. 5175, affirming a decision of Angers J., 2007 TCC 393, 2007 CarswellNat 5432, 2008 D.T.C. 4022 (T.C.C. [General Procedure]).

3 R.S.C. 1985, c. I-5.

4 (1998), 158 D.L.R. (4th) 59, [1998] 2 C.T.C. 403, 98 D.T.C. 6238 (Fed. C.A.).

5 [1992] 1 S.C.R. 877, [1992] 1 C.T.C. 225, 92 D.T.C. 6320.

the income, the SCC warned that any aggressive tax planning by Indian taxpayers may still be addressed. In the *Bastien* case it was clear that the property originated and was earning income on a reserve but in the *Dubé* case it was not clear where the capital had been generated that was the subject of the investment earning the interest income. The minority view in *Bastien* and the dissenting view in *Dubé* was that the Court was giving the connecting factor of the residence of the debtor (the Caisse) too much weight and that in itself was artificial and could lead to abuse. The dissenting Justices in *Dubé* felt that the origin of the property invested should have a connection with the reserve and pondered “tax planning” that might locate property on a reserve no matter where it originated with the effect of taking advantage of the income exemption. As it was alluded to in the dissent in *Dubé*, in this day and age of electronic transactions one can access their funds without going to any specific location in person so funds can be physically at a branch located where one chooses and accessed at a more convenient location. This fact alone may make the next batch of cases very interesting indeed.

C. Yvonne Chenier is legal counsel with Drache Aptowitz LLP in Calgary, Alberta. She can be reached at ychenier@drache.ca.

LAYTON STEPS DOWN TEMPORARILY

The announcement that Jack Layton was stepping down temporarily as the leader of the NDP clearly caught the media flat-footed. Almost as staggering to them was his physical appearance which, along with his speaking voice, had deteriorated badly since his last public meeting with them.

Strangely, we had an inkling of his health situation a few days before the announcement. We were speaking with somebody about official houses in Ottawa. The National Capital Commission wanted the Prime Minister to move out of 24 Sussex so extensive remodeling could be done. Somebody remembered that Michael Ignatieff, a year or so

ago, offered the Prime Minister the use of Stornoway in the interim. The PM turned it down as he did the remodeling request.

But the person who we were speaking with said that, except for a photo op of the Laytons moving into Stornoway in mid-June and a single garden party, the Laytons showed no sign of a real move into Stornoway which was in his words “being essentially mothballed”. And then he told us that the decision was not political posturing but was made because Layton was much, much sicker than was generally understood.

The second major surprise in the announcement was that he passed over the two deputy leaders and “suggested” that Nicole Turmel be named acting leader. She was elected Member of Parliament for Hull-Aylmer in 2011 and named national caucus chair for the official opposition. Subsequently, in a matter of two days she was endorsed by caucus and then by the NDP national board.

Turmel may be unknown to most Canadians but she has a very high profile in Ottawa because she was National President of the Public Service Alliance of Canada, the first woman to ever hold that position. This is the largest public service union and she was a hugely successful incumbent.

Layton expressed his plan to return to Parliament when the Commons resumes on September 19 but to suggest that there is widespread skepticism is to understate the case.

Most of the speculation has to do with whether a long-term or even permanent departure will erode the gains made by the NDP in the last election, particularly those in Quebec. It is fairly clear that those gains were not because of the party platform but were delivered on Layton’s coattails as he is by far (the competition wasn’t tough) the most charismatic of the federal leaders. What would his departure mean?

The answer of course will be four years coming though of course we’ll be bombarded with polls which purport to show what is happening.

In the shorter run, if Layton cannot return, the issue will be who becomes leader over the long haul. The party has a number of highly experienced potential candidates both from within the caucus and outside it. But it is hard to believe that any of the names which might be bandied about could achieve the kind of enthusiasm that Layton has engendered in his latter year or so as leader and particularly in the recent campaign.

But all that is speculation for the future. The next key date is September 19 and if Layton isn't back (and functioning at some reasonable level) serious thought will have to be given to a leadership campaign.

In the interim, all we can say is that we share the hopes of most Canadians for Layton's recovery. The loss of his presence would further weaken our political fabric. But more importantly, he is a good person who certainly merits the widespread hopes for complete recovery.

SUPREME COURT NOMINATIONS A LENGTHY PROCESS

When two positions for Supreme Court justices opened a couple of months ago, we had thought that the process would produce names fairly quickly to allow the judges to take their seats well before the next session of the Court commences in October. That may still happen but the process has become time consuming.

In the "old" days, all that happened is that the Prime Minister of the day would (presumably after advice internally) announce the names. But new and evolving procedures have been developed which will delay the process though we still believe that the new judges will take their seats before the October sittings.

In August, a select group of MPs started to narrow down a list of possible nominees. Conservative MPs Bob Dechert, Candice Hooppner and Brent Rathgeber, NDP MP Joe Comartin and Liberal Irwin Cotler will pare down a list of qualified candidates to six to replace two departing

justices from Ontario. Ian Binnie, 72, and Louise Charron, 60, are retiring this year.

The initial list was put together by Justice Minister Rob Nicholson in consultation with Prime Minister Harper, Chief Justice Beverley McLachlin and legal experts from Ontario.

The panel is reviewing each candidate's résumé, as well as their judgments and publications. They'll also consult with the Canadian Bar Association, the Law Society of Upper Canada and other prominent experts.

The government expects to get the six recommendations by the end of September, after which Harper and Nicholson will choose the final two nominees. In practical terms, the selection will still be that of the Prime Minister but it will have been clothed in a process which suggests some serious outside input.

The two nominees are to appear in front of an *ad hoc* parliamentary committee to answer questions before their appointments are finalized. Canada has little experience with this approach given that the only time it has happened before was with the nomination of Marty Rothstein where the public "vetting" was polite and, frankly, boring...the polar opposite to the American approach which tends towards the hostile and is often based on ideology...with many a nominee rejected for political reasons.

The talk is that Harper is looking for "conservative" judges, given a number of politically charged issues which will come before the Court in the near term, notably issues which will require the Court to decide what powers rest with the feds and which are provincial in nature. But the judges, depending upon various factors including their ages, will likely be sitting for many, many years and the nature of the cases they have to decide will of course be varied.

THE JUDICIARY AND THE CABINET

We have in the past six months seen an almost unprecedented upswing in tensions between some cabinet ministers and the senior judiciary...troubling at a time when the process to pick two new Supreme Court justices is under way.

The Chief Justice of the Supreme Court of Canada has added her voice to the legal profession's condemnation of Immigration Minister Jason Kenney, who sparked an uproar earlier this year on the issue of judicial independence.

In a speech to the CBA's governing council, Beverley McLachlin said:

I was certainly — and I think all judges were — very pleased when an issue arose earlier this year when a minister of the Crown seemed to suggest that some judges were insufficiently solicitous to government policy. We were very, very gratified to see your president writing a powerful public letter to the minister in question, reminding the minister of the importance of public confidence in an impartial judiciary, that bases its decisions on the law and not on government policy.

In a controversial speech last February to the law faculty at the University of Western Ontario, Kenney said Federal Court judges, who preside over immigration cases, weren't doing enough to help the government remove immigrants with alleged criminal pasts, and other unwanted refugees, from Canada.

He accused judges of delaying such cases in the Court, and of "heavy-handed" interference in decisions made by Immigration Department officials.¹

The comments were loudly condemned at the time by immigration lawyers and by Rod Snow, the CBA's president.

This sort of public fight does not augur well on the issue of judicial independence and will spur even more interest than usual in the naming of the top judges. The Chief Justice's comment were, for a top judge, brave but warranted.

¹ See the article at page 43 of this volume of *The Canadian Taxpayer*.

PROVINCIAL ELECTION LOG-JAM

Given the current trend of setting fixed election dates we wonder whether any of the provincial Legislatures took a look at long-range calendars when designating the dates...or perhaps they simply did not care what was happening in other provinces.¹

In the event, if you thought there was election fatigue in Canada, consider this. There will be a minimum of five provincial elections in the period October 3 to November 7...with three in just one week. Statutorily mandated election dates for this year are:

- Prince Edward Island (Oct. 3)
- Manitoba (Oct. 4)
- Ontario (Oct. 6)
- Newfoundland and Labrador (Oct. 11)
- Saskatchewan (Nov. 7)

And we might note that there are at least two other possible elections coming depending on the political climate. For example, there has been a lot of talk that Premier Christy Clark might call a 2011 election depending on developments relating to the HST referendum. The Alberta Conservatives are having their leadership election in late September and there is at least a possibility that the next Premier might want to call a snap election.

In terms of the national political picture, a lot depends on whether elections bring to power new leaders or parties. It is worth noting that the Premiers of Newfoundland and Labrador, Manitoba, British Columbia and (ultimately) Alberta will have taken office without being elected in a provincial election as party leaders.

The big election, both in size and possible national impact, is in Ontario where Dalton McGuinty will likely be the underdog (at least according to the polls) against the Conservatives

¹ Of course, as we saw at the federal level, laws on fixed dates can always be changed...or ignored.

and Tim Hudak who is already busy lining up “star” candidates (and at the same time irritating a lot of his rank and file members) and making promises which he sometimes resiles from quickly. And nobody knows whether the third party, the NDP, will have the same kind of provincial legs as it did in the federal election.

If the Conservatives were to form a government in Ontario, one could assume that there would be closer relations with the feds though in the past year or so (think HST) the relationship of the federal government and Ontario has been much improved compared to the days when Finance Minister Flaherty said he wouldn’t advise anybody to invest in the province. On a more personal note, the Ontario Conservative Deputy Leader Christine Elliott is married to Jim Flaherty. Think how Ontario’s adoption of the hugely disliked HST plays out over the breakfast table.

As we have found from bitter past experience, it is a mug’s game to try to predict election victors a couple of months in advance but with the obvious exception of the Liberals in Ontario, early polls suggest that most of the other incumbent governments seem to be in comfortable positions. One exception at this early stage may be in Manitoba where the NDP is behind the Conservatives in the polls. The upcoming election will see Premier Greg Selinger running his first battle as head of the party after Gary Doer resigned and was named Ambassador to Washington.

It will be a great autumn for election junkies but a tense time for politicians...and taxpayers.

NEW GOVERNMENT AGENCY CREATED

In the name of efficiency, the government has created a new Agency called “Shared Services Canada”.

The rationale seems to be, in the words of the government, improved IT services. From a government news release dated August 4th:

The Government now has over 100 different email systems, over 300 data centres, and over 3,000 network services within the Federal Public Service. This is inefficient and wasteful. The Government will move to **one** email system, reduce the overall number of data centres from 300 to less than 20, and streamline electronic networks within and between government departments. This will improve services to Canadians, make IT more secure and reliable, and save taxpayers’ dollars in line with the Government of Canada’s plan to return to balanced budgets.

All resources associated with the delivery of email, data centre and network services are being transferred from 44 of the more IT-intensive departments and agencies to a new entity called Shared Services Canada. These departments and agencies will no longer provide these services internally. Rather, the services will be provided by Shared Services Canada.

Minister Ambrose will be responsible for Shared Services Canada, which will be part of the [Public Works] portfolio. The President of the new entity was also appointed by the Prime Minister today, and will be leading this consolidation and transformation initiative.

Liseanne Forand, currently Senior Associate Deputy Minister of Human Resources and Skills Development and Chief Operating Officer for Service Canada, becomes President of Shared Services Canada, effective August 4, 2011.

Karen Jackson, currently Associate Deputy Minister of Human Resources and Skills Development, becomes Senior Associate Deputy Minister of Human Resources and Skills Development and Chief Operating Officer for Service Canada, effective August 4, 2011.

Ronald Parker, currently Senior Assistant Deputy Minister, Industry Canada, becomes Associate Deputy Minister of Human Resources and Skills Development, effective August 11, 2011.

It remains to be seen what it all means in real life but we remain skeptical that it means any improvement in actual service to Canadians.

JULIUS ISAAC DIES

Julius Isaac, the former Chief Justice of the Federal Court, died on July 16, 2011. He was 82.

His passions included first and foremost the Law; it was this drive and determination that led to his ultimate appointment as Chief Justice of the Federal Court of Canada by Prime Minister Brian Mulroney in 1991. His appointment was said by Mulroney to be one of the most important appointments of his nine years as Prime Minister.

Both as an officer of the Court and as a private citizen Isaac worked tirelessly to strengthen the fabric of Canada and the betterment of the Black community.

Born in St. David's, Grenada, in 1928, he came to Canada in 1955 to study at the University of Toronto. In 1962, he began a four-year stint in Saskatchewan, where he served as an adviser to the province's Economic Development Corp. He also practised law privately in Ontario and briefly returned to Grenada to serve as a senior magistrate.

In 1971, he was hired by the federal Justice Department. He primarily worked in prosecutions

in Ontario, but was also posted to Edmonton for several years in the 1980s. Isaac was appointed to the Supreme Court of Ontario in 1989 and two years later was tapped for the Federal Court.

One of the few humorous moments in our career before the Federal Court of Appeal came before Isaac who, like us, was hard of hearing. (This was before the Court deigned to allow the use of microphones.) We had gone through the first morning of a two-day trial, a morning punctuated by our asking the Court to repeat a question...over and over again.

In the afternoon we started further submissions and Isaac leaned forward and said something like, "Mr. Drache, I can't hear you. Can you speak up?"

I blurted out, "My God, it's catching!"

The whole bench roared with laughter.

The next morning, there was a jury-rigged microphone system in place! (It didn't help...we still lost.)

Interment will take place in Grenada, West Indies at a later date. To leave an online message of condolence, please visit www.speersfuneralchapel.com.