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**RECENT CASES WHICH AFFECT A  
TAX PRACTITIONER'S  
EVERYDAY'S PRACTICE**

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**CRA TAX PRACTITIONERS PRESENTATION**  
Recent Cases Which Affect a Tax Practitioner's  
Everyday Practice  
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# ***DIRECTOR'S LIABILITY – UNSIGNED RESIGNATION***

- > *Gariepy (2015 1 C.T.C. 2087);*
- > This was a Director's liability case with an unusual twist;
- > Husbands had previously operated a business which went bankrupt including substantial withholdings owed to CRA;
- > Husbands started a fresh (same) business.



## ***GARIEPY, CONT'D***

- > Husbands asked wives to be directors of the new company;
- > Wives not involved in day to day operations but agreed to do so ( act as directors) if they could resign and be replaced by husbands as directors after 2 year exposure period for husbands had passed;
- > just before end of 2 year period, husbands instructed company lawyers to prepare resignations for wives;



## ***GARIEPY, CONT'D***

- > Although resignations prepared by lawyers they were never signed;
- > Court relied on fact that instructions were clearly given to lawyers that wives would be resigning , to be replaced by husbands;
- > Court found that such instructions were given more than 2 years prior to the issuance of the assessments against the spouses.



## ***GARIEPY, CONT'D***

- > Court found that:
  1. everyone intended resignations to take place in 2 years;
  2. resignation instructions clearly communicated to company lawyers;
  3. written resignations were in fact prepared by lawyers based on those instructions.
  4. no apparent reason for not signing the documents or that wives had changed their minds.



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## ***568864 B.C. LTD. V THE QUEEN LEGAL VS. BENEFICIAL OWNERSHIP***

- > In many cases , the “paper” often takes time to catch up to the actual transactions;
- > This case reviews the major factors in determining when a person acquires beneficial ownership of a property;
- > The Supreme Court of Canada (*Jodrey Estate*) has held that the meaning of this term is *the person who can ultimately exercise the rights of ownership in the property*;



## ***568864 B.C. LTD. CONT'D***

- > The proper test is.... to identify whether the normal incidents of title (actual or constructive), such as possession use and risk, are present;
- > In this case a second issue arose, namely the determination of whether the patents had been purchased for the “purpose of earning income;”





## ***568864 B.C. LTD. CONT'D***

- > In determining whether the patents had been acquired for the purpose of “gaining or procuring income” the Court noted that no business was being carried on at the time of acquisition;
- > However the Court also found that the purchaser had advanced the monies for these patents many years earlier, and that it had done so to procure a business advantage for itself (namely to allow the supplier to whom the money had been given to produce the precise market advantageous products that the taxpayer required).



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# ***TORRES V. R***

## ***DEC 2, 2013- GROSS***

### ***NEGLIGENCE PENALTIES***

- > Although there are many cases of this nature it's good to review the relevant principles
- > *Torres* is a classic example of the tax tail wagging the dog;
- > It's also a great reminder to practitioners to pay attention to their "spider senses" when taking instructions from clients for T-1 filings;



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## ***TORRES CONT'D***

- One great indication that this case was going nowhere in the Court was the argument advanced by the representative that CRA's own failure to warn the Taxpayer of the scam they participated in somehow offended the provisions of the Taxpayer's Bill of Rights.



# ***TORRES CONT'D***

The court then reaffirmed the general principles of gross negligence as follows:

1. Gross negligence must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting;
2. the magnitude of the omission in relation to the income declared;
3. opportunity the taxpayer had to detect the error;



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## ***TORRES CONT'D***

4. Taxpayer's education and apparent intelligence;
5. Was taxpayer wilfully blind (did he shut his eyes to the obvious).



# ***SZYMCZYK V. QUEEN***

## ***2014 TCC 380***

*WHEN CAN THE MINISTER CHANGE HIS MIND  
AND DEPART FROM A LONGSTANDING  
ASSESSING PRACTICE?*

- > This is an interesting case involving about 350 General Motors of Canada Limited (GMCL) executives who were receiving company cars;
- > The taxable benefit had, since 1982, been calculated using a “simplified” method that had been accepted by CRA and GMCL;



## ***SZYMCZYK CONT'D***

- > However CRA commenced an audit in 2010 (30 years after agreement made between it and GMCL) and decided that the agreement methodology was outdated;
- > The new methodology to be employed basically doubled the taxable benefit and did so retroactively to the 2008 and 2009 tax years;
- > GMCL called foul!!!!!!!!!!!!!!!!!!!!



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## ***SZYMCZYK CONT'D***

- > Not only did all of the executives appeal the reassessments (perhaps with assistance of GMCL 😊) but GMCL also sued the Queen in the Federal Court for a declaration that the assessments were invalid because the decision to issue the reassessments was made retroactively in contravention of the existing agreement;





## ***SZYMCZYK CONT'D***

- > Somewhat predictably everyone lost;
- > The TCC upheld the obligation of CRA to assess in accordance with the law (ie the ITA);
- > Furthermore the Federal Court found that although GMCL was a “person” who was entitled to bring it’s application challenging the CRA actions, that it could not do so if the effect would be to do something that the TCC had sole authority to do (decide a tax appeal);



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# ***REDHEAD EQUIPMENT ACCOUNTANT CLIENT PRIVILEGE REVISITED***

- > This very recent decision (2014) DTC 5102 takes a fresh look at the long standing principle that there is no such thing as accountant client privilege;
- > Sadly the tradition continues ☹️
- > However, the Court re-iterated these long standing principles as follows:



# ***REDHEAD EQUIPMENT LTD. CONT'D***

1. No communication made or prepared by an accountant for a businessman falls within solicitor – client privilege unless it was prepared by the accountant at the request of the lawyer to be used in connection with litigation, existing or apprehended;
2. Here an accountant is used as a representative for the purpose of placing information before a lawyer to obtain legal advice he does so as agent for the client and THOSE communications are treated in law as a communication of the client (therefore subject to privilege);



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## ***REDHEAD EQUIPMENT LTD. CONT'D***

The same principle applies to other third party advisors of the client such as the in-house CFO provided that the communications were made to the lawyers for the purpose of seeking, formulating or giving legal advice;



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# ***REDHEAD EQUIPMENT CONT'D***

1. The key and undoubted highlight of this case is the list of documents (662) that is attached at the end of the case with the designation explaining whether each one was or was not subject to privilege.



# ***RECTIFICATION UPDATE LAU AND FAIRMONT HOTELS INC.***

- > These two recent decisions have reinforced the willingness of a Superior Court to provide relief to parties in situations where tax planning has gone awry;
- > The *Lau* case addressed an issue which has recently been the subject of a conflicting decision in Manitoba, namely the ability of a Superior Court to hear a rectification request when a tax appeal regarding the same matter was underway in the Tax Court of Canada;



## ***RECTIFICATION CONT'D***

- > The *Jaft* case in Manitoba was distinguished by the court in *Lau*;
- > In *Fairmont Hotel* (an Ontario case) a transaction was rectified to respond to an unintended foreign exchange problem in circumstances where the evidence was clear that the issue was part of the planning process from the beginning.



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Thank You.