

Federal Court of Appeal denies CRA routine access to tax accrual working papers

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On March 30, 2017, the Federal Court of Appeal (FCA) released its decision in *BP Canada Energy Company v. MNR* (2017 FCA 61), dealing with whether the Minister of National Revenue (the Minister) could compel the taxpayer to disclose the uncertain tax positions reflected in its tax accrual working papers (TAWPs). This ruling reverses a decision of the Federal Court that would have required disclosure by the taxpayer. The taxpayer was successfully represented in the appeal by Osler's [Al Meghji](#), [Edward Rowe](#) and [Pooja Mihailovich](#).

In response to queries received during the course of an audit, BP Canada Energy Company (BP Canada) had provided the Minister with certain schedules from its confidential TAWPs, which were redacted so as not to disclose BP Canada's descriptions of its uncertain tax positions (the Issues Lists).

The Minister asserted that she was entitled under s. 231.1(1) of the *Income Tax Act* to demand disclosure of the Issues Lists and brought an application to the Federal Court to compel production.

In the course of the application, the Minister admitted that the Issues Lists fell within the scope of her published administrative policy on TAWPs and that her purpose in requesting the Issues Lists was to use them as a "road map" to facilitate the audits of BP Canada for future taxation years.

The Federal Court ruled that the Issues Lists were compellable, and granted an order requiring BP Canada to produce them to the Minister. That decision was appealed to the FCA.

The FCA allowed the appeal, concluding that the Issues Lists were not compellable under s. 231.1(1) and therefore "beyond the reach of the Minister." Chief Justice Noël, writing for a unanimous Court, held that s. 231.1(1), properly interpreted, does not make TAWPs compellable "without restriction."

The context and purpose of the provision indicates that Parliament intended the broad power set out in s. 231.1(1) to be used with restraint when dealing with TAWPs. The FCA also noted that the financial reporting obligations under provincial securities legislation form part of the broader context. Parliament cannot have intended the power under s. 231.1(1) to be used to imperil the integrity of that financial reporting system.

The FCA contextualized this ruling by noting that while the tax system is one of self-assessment, the obligation to self-assess does not require taxpayers to self-audit. In other words, the Minister cannot enlist taxpayers to reveal "soft spots" in their tax returns or effectively subject themselves to tax on amounts that they believe not to be taxable.

In addition, the FCA determined that, even if the Issues Lists had been compellable, it would not have exercised its discretion to grant the Minister's request. The Minister's own policy states that the power to access TAWPs will not be used routinely, and recognizes the very

constraints which the *Income Tax Act* imposes on the Minister. By seeking ongoing access to BP Canada's uncertain tax positions, the Minister had effectively turned the policy on its head.

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