

SHOULD CANADA ENHANCE HOW IT REGULATES ITS TAX PRACTITIONERS?

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INTRODUCTION

Like many countries, Canada's income tax regime places the initial burden on taxpayers to voluntarily self-assess their taxable income and taxes payable in accordance with *Income Tax Act*.¹ Given the complexity and ever-changing nature of Canadian taxation law, it is not surprising that many persons seek assistance in satisfying these responsibilities. In respect of the 2018 taxation year, approximately 57% of all of the individual income tax returns that were received by the Canada Revenue Agency (CRA) were "electronically filed" by commercial tax preparers.² This represents over 17 million returns and has been increasing yearly for at least the last five years.³ In addition to those Canadians who hire someone to help them prepare and file their tax returns, another 700,000 individuals per year (approximately) rely upon the CRA's Community Volunteer Income Tax Program for similar assistance.⁴

The fact that the majority of Canadians rely on tax practitioners to help them with their tax returns, as well as to advise them on how they might structure their important affairs in a tax efficient manner (i.e. carrying on a business, transferring their property to their children, etc.) and to represent them in disputes against the CRA should not be surprising.⁵ In 2008, the Organization for Economic Co-operation and Development (OECD) released its Study into the Role of Tax Intermediaries (Study) and noted that,

In a world where tax codes have become increasingly complex, tax advisers help taxpayers to comply with the requirements of existing tax codes and to understand the complexity of legislation, particularly in the context of global businesses. In addition, managing tax risk has become an integral part of taxpayers' corporate governance and hence the tax adviser's role. Tax advisers help taxpayers design and comply with internal risk-management processes as part of newly developed corporate governance policies. Tax advisers also have roles in respect of aggressive tax planning...

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¹ RSC 1985, c 1 (5th Supp), s 150 [*Income Tax Act*]. **[Add SCC Johnson case citation]** Unless otherwise noted, all subsequent legislative references will be to the *Income Tax Act*.

² Canada Revenue Agency, "Individual Income Tax Return Statistics for the 2018 Tax-Filing Season" (8 January 2019), online: *Canada Revenue Agency* < www.canada.ca >.

³ *Ibid.* In 2013, approximately 50% of tax returns were e-filed by commercial tax return preparers – and this percentage has increased every year since 2013.

⁴ See e.g. Canada Revenue Agency, *2016-17 Departmental Results Report* at 23. **[Consider putting in some basic information about the program]**

⁵ In CRA, *Archived – Proposal – Registration of Tax Preparers Program* (4 November 2015), online: *Canada.ca* < www.cra-arc.gc.ca/gncy/cmplnc/rtp-pipdr/cnslttnppr-eng.html > [RTPP Proposal], it notes that "[a]pproximately 70% of individuals and business taxpayers use tax preparers".

The importance of the role tax advisers play in a tax system can be tested by answering a simple question: would compliance with tax laws improve if tax advisers did not exist? The Study Team found no country where the answer to that question is yes. *Across the whole range of taxpayers, taxes and circumstances, the vast majority of tax advisers help their clients to avoid errors and deter them from engaging in unlawful or overly-aggressive activities.*⁶

Despite the need for and importance of tax practitioners, Canada has chosen not to specifically regulate them. Instead, it has relied primarily upon (a) law societies and accounting institutes to regulate their members, including those who practice in the area of taxation, (b) the civil penalties and criminal offences contained primarily in the *Income Tax Act* to deter and, where necessary, punish serious misconduct,⁷ and (c) taxpayers to financially support competent tax practitioners and avoid the incompetent ones. In contrast, for almost one hundred years, the United States has specifically regulated its tax practitioners pursuant to U.S Treasury Department Circular No. 230, “Regulations Governing Practice before the Internal Revenue Service”.⁸ In 2009, Australia enacted the *Tax Agent Services Act 2009* (TASA), which created the Tax Practitioners’ Board (TPB) and empowered it to regulate any individual, firm or corporation who provides “tax agent services” for a fee.⁹ This article will explore whether Canada should consider enhancing how it regulates its tax practitioners and, if so, what components it might transplant from Australia’s and the United States’ regimes.

WHY NOW – WHAT IS THE “CLEAR AND PRESENT DANGER”?¹⁰

So there is no misunderstanding, I do not believe that there is any “crisis” with our current income tax regime that can be attributed to how Canada regulates its tax practitioners. More importantly, to my knowledge, neither does the Federal government, the Auditor General, or the CRA. Indeed, to the contrary, each of these bodies appears to believe (as do I) that our income

⁶ OECD, Study Team, *Study into the Role of Tax Intermediaries*, (Paris, OECD 2008) at 14 [emphasis added]. The Study (at 14) defines “tax advisers” as “law, accounting and other professional firms that provide sophisticated tax advice and other services” and (at footnote 3 at 16) that “[t]he activities undertaken by tax advisers include: tax compliance; tax accounting and audit support; day-to-day advisory; business and economic tax planning; and dispute resolution”.

⁷ The *Criminal Code* has also been used to charge persons with tax related offences. **[Complete legislative citation and consider adding a little more detail]**

⁸ **[Complete citation and provide some article references]**

⁹ *Tax Agent Services Act 2009* (Austl), 2009, as amended up to Act No. 7, 2017 [TASA]. Section 90-5(1) provides that:

- (1) a **tax agent service** is any service:
 - (a) that relates to:
 - (i) ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a taxation law; or
 - (ii) advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law; or
 - (iii) representing an entity in their dealings with the Commissioner; and
 - (b) that is provided in circumstances where the entity can reasonably be expected to rely on the service for either or both of the following purposes:
 - (i) to satisfy liabilities or obligations that arise, or could arise, under a taxation law;
 - (ii) to claim entitlements that arise, or could arise, under a taxation law.

¹⁰ Borrowed from the Tom Clancy novel of the same name.

tax regime is generally working well.¹¹ So why look to “fix” something that “ain’t broken”? There are several reasons.

Tax Systems, Like Indoor Plants, Are Delicate and Require Constant Attention and Nurturing to Remain Healthy

There is a growing body of research concerning “tax morale”, “taxpaying ethos”, etc., which generally provides that, particularly in a self-assessing system (as opposed to a system that calculates taxpayers’ income and tax liability for them), taxpayers’ willingness to comply with tax laws will depend on their perceptions of (a) the tax system generally – and most importantly, whether they believe it to be “fair” and “fairly enforced”, and (b) other taxpayers’ level of compliance.¹² Focusing for a moment on the second perception, a taxpayer is more likely to comply if she feels that everyone else is generally complying, but may be less inclined to comply – or comply fully – when she perceives that others are not fully complying; she doesn’t want to be a “dupe”.¹³

Shifting to the “fairly enforced” perception, I do not believe that it is controversial to state that even with the Federal government’s recent additional financial support to the CRA to combat tax evasion and “aggressive tax planning”,¹⁴ no one believes or expects that the CRA can achieve/maintain a fairly enforced and highly compliant tax regime on its own. Of course, a healthy tax system requires support from all participants, including tax practitioners. As noted in a joint submission by the Chartered Professional Accountants of Canada (CPA Canada) and the Certified General Accountants Association of Canada (CGAAC), “...the public interest in the tax system depends on a tax preparer’s personal integrity and technical tax competency”.¹⁵ Even a small subset of tax practitioners who are either indifferent to protecting the integrity of the system or worse, intentionally trying to ignore/damage it can have harmful effects beyond the scope of their actual work. Speaking in respect of the U.S. system, Michael Hatfield notes,

¹¹ **[Add supporting references]**

¹² See e.g. Pamela Olson, “What I have learned: Transparency, Taxes and the Push for a Better Tax System”, (2004) 56 Tax Executive 212, Michael Hatfield, “Tax Lawyers, Tax Defiance, and the Ethics of Casual Conversation” (2011) 10 Fla. Tax Rev 841, and Richard Lavoie, “Flying Above the Law and Below the Radar: Instilling a Taxpaying Ethos in Those Playing By Their Own Rules” (2009) 29:4 Pace Law Review 637.

¹³ **[Add citation]**

¹⁴ In Budget 2016, the Canadian government announced an investment of over \$444 million to enhance the CRA’s ability to combat tax evasion and tax avoidance. In Budget 2017, the government further enhanced this investment by adding an additional \$524 million (over five years) to the CRA to “prevent tax evasion and improve tax compliance” and stating that it expected to recover over \$2.5 billion of additional tax revenues (over five years). In Budget 2018, the government once again added monies to further support the CRA’s efforts to combat tax evasion and tax avoidance – as well as new monies for the courts to deal with “a growing and increasingly complex caseload”. **[Add citations]**

¹⁵ CPA Canada and CGAAC, “Proposal – Registration of Tax Preparers Program: A Submission to the Canada Revenue Agency” (May 2014) at 2

No one alleges that the tax gap is wholly allocable to tax defiers either underreporting their income or failing to file. The threat tax defiers pose to the tax system is in their rhetorical attacks on the legitimacy of the system itself. Their failure to comply likely leads in turn to other taxpayers failing to comply...

In other words, the anti-tax system rhetoric of the tax defiers has the potential to undermine the trust in the fairness of the tax system that supports the very high compliance rate of the American tax system. Without that compliance rate, the tax system itself is jeopardized”.¹⁶

Given this potential danger, I am both encouraged and troubled by the CRA’s recent successful prosecutions against tax practitioners,¹⁷ which since December 2017, has included:

- The laying of tax fraud charges against four individuals belonging to a “tax protestor group”, who allegedly “advised and enabled 50 individuals to claim losses totaling \$19,057,621, thereby evading or trying to evade more than \$1 million in federal income tax”,¹⁸
- The successful prosecution of an individual running a tax preparation business who falsified employment expenses on the personal tax returns of 24 of his clients;¹⁹
- The successful prosecution of two “tax protestors”, one who “advised and enabled 120 individuals to evade or try to evade a total of \$1,770,210 in federal income tax” and the other who “enabled 95 individuals to evade or try to evade a total of \$1,435,000 in federal income tax”,²⁰
- The successful prosecution of an individual for income tax evasion, goods and services tax evasion, and counselling fraud. This individual was an “educator” with a group that “counselled people across Canada to evade taxes”,²¹
- The successful prosecution an individual running a tax preparation business who “prepared 100 fraudulent individual tax returns for 37 clients” by creating “fictitious

¹⁶ Michael Hatfield, *supra* note 12 at 853-4.

¹⁷ And unsuccessful prosecutions – see e.g. Zach Dubinsky, “Accountant accused of fudging up to 1,400 tax returns won’t face criminal charges”, *CBC News* (1 September 2018), online <www.cbc.ca>.

¹⁸ Canada Revenue Agency, “Tax protestors: charges laid against four individuals”, (7 December 2017), online: *Canada Revenue Agency* <www.canada.ca>.

¹⁹ Canada Revenue Agency, “Toronto tax preparer sentenced for tax evasion”, (5 January 2018), online: *Canada Revenue Agency* <www.canada.ca>.

²⁰ Canada Revenue Agency, “Sentences for two tax protestors”, (9 February 2018), online: *Canada Revenue Agency* <www.canada.ca>.

²¹ Canada Revenue Agency, “Paradigm ‘educator’ sentenced to 4.5 years in jail for tax protestor scheme”, (8 March 2018), online: *Canada Revenue Agency* <www.canada.ca>.

business losses totaling \$2,577,221, resulting in the evasion or attempted evasion of a total of \$488,178 in federal taxes”;²² and

- The successful prosecution of an individual who had “filed false business losses and employment expenses on his clients’ returns totaling more than \$2.9 million”.

In addition to these prosecutions for tax evasion, since being enacted in 2000, the CRA has, as of March 31, 2017, assessed the section 163.2 Third Party Civil Penalties 196 times, with \$7.2 million of penalties being assessed against tax preparers and \$205 million of penalties being assessed against promoters.²³ Interestingly, despite the number of times the civil penalties have been assessed and the magnitude of the penalties, there have only been two challenges²⁴ – and both were unsuccessful. In Budget 2018, it noted that the CRA had assessed over \$44 million in civil penalties against third parties who promoted tax avoidance schemes.²⁵

[Consider adding a section that discusses the body of research that essentially states that for most persons, compliance with the tax regime is not based on the perceived risk of detection/prosecution – and that for enforcement to become a significant influence on taxpayer behaviour/compliance, the level of enforcement (as well as the magnitude of potential tax penalties/punishments) would have to be increased beyond what is feasible and desirable]

We Don’t Know Who Our Tax Practitioners Are

Other than section 150.1 of the *Income Tax Act* and section 17.1 of the *Tax Court of Canada Act*,²⁶ there are generally no restrictions on who can provide tax services in Canada²⁷ and no requirements on how tax services must be performed. There is also no legislative or common law definition of what constitutes a tax service.

Section 150.1 provides that anyone who prepares more than 10 tax returns in a calendar year for a fee must register for and electronically file (e-file) the returns or risk being assessed a penalty pursuant to subsection 162(7.3). To be eligible for registration (which must be done on a yearly basis), the CRA requires the applicant to be a Canadian resident, 18 years of age or older, with a

²² Canada Revenue Agency, “Brampton Tax Preparer Sentenced for Tax Fraud”, (3 May 2018), online: Canada Revenue Agency < www.canada.ca >.

²³ David M Sherman, ed, *Practitioner’s Income Tax Act*, 54th ed (Toronto: Thomson Reuters Canada, 2018) at 1201 (Notes to s 163.2)

²⁴ The two cases, which both concerned the same fact pattern, but concerned different individuals, are *Guindon*, 2015 SCC 41 and *Ploughman* 2017 TCC 64.

²⁵ **[Cite to Budget 2018]** It is unclear to me (and from the Budget information) whether this \$44 million is included in the amounts assessed against tax preparers and promoters.

²⁶ *Tax Court of Canada Act*, RSC 1985, c. T-2.

²⁷ While the *Legal Profession Act*, RSA 2000, c L-8, s 106(1)(a), provides that “[n]o person shall, unless the person is an active member of [the Law] Society [of Alberta], practice as a barrister or solicitor” (with other provinces and territories having the same prohibition in their respective legislation), the provision of tax services has not been found to be subject to this prohibition.

valid Social Insurance Number.²⁸ The applicant must also complete an online registration form that discloses (a) how the tax preparation services will be provided (i.e. by a proprietorship, corporation, partnership, etc.), (b) the official/registered name of the proprietorship, corporation or partnership, (c) the “business name” (if different from the official/registered name), (d) the name, phone number, email address and preferred language of communication of the contact person, and (e) the types of returns that will be prepared and e-filed (i.e. T1 Individual Tax returns and/or T2 Corporate Tax returns).²⁹

To be clear, registration for e-filing privileges is only necessary where an individual wants to prepare and file more than 10 returns for a fee; it is not required to provide any other tax service, such as giving tax advice or selling a tax strategy. Further, the registration form does not require (or even provide the opportunity for) the applicant to disclose what relevant qualifications and/or experience (if any) s/he has to prepare tax returns.

Under “Screening Criteria”, the CRA generally states that if the applicant has failed to comply with any federal or provincial tax law (including the payment of an outstanding personal tax liability) and/or has been assessed a penalty (or been convicted) under any federal or provincial tax law, then the individual’s application will be rejected.³⁰ Similarly, under “Conditions for Suspension”, the CRA describes sixteen circumstances where it may consider revoking an e-filer’s registration, including where the registrant has “an unacceptable cumulative error rate”, has engaged in “unethical practices in tax return preparation”, has been the subject of “significant complaints”, or where there are “other facts or disreputable conduct that that would reflect adversely on the program”.³¹

Section 17.1 of the *Tax Court of Canada Act* prohibits anyone other than a lawyer eligible to practice law in Canada to represent a taxpayer in Tax Court in a case heard under its general procedure; conversely, section 18.14 allows a taxpayer to be represented by a lawyer or an “agent” in Tax Court in a case heard under its informal procedure.³²

In the absence of a registration system for Canadian tax practitioners, we do not know who is providing tax services and what their qualifications to do so are.³³ We know that many

²⁸ For further information, see CRA, *EFILE for Electronic Filers: Eligibility* (2 January 2019), online: *Canada.ca* <www.canada.ca/en/revenue-agency/services/e-services/e-services-businesses/efile-electronic-filers/eligibility.html> [E-file Eligibility Requirements].

²⁹ CRA, *EFILE Registration – Identify Business and Return Types* (8 March 2018), online: *Canada.ca* <<https://apps.cra-arc.gc.ca/ebci/efes/emod/prot/registerrequest.action>>

³⁰ E-file Eligibility Requirements, *supra* note 28.

³¹ *Ibid.*

³² *Tax Court of Canada Act*, *supra* note 25, s 18.14. For a case to be heard under the Tax Court’s informal procedure, paragraph 18(1)(a) provides that the amount of federal income tax and penalties in a particular taxation year must be \$25,000 or less.

³³ In CRA, “ARCHIVED – Proposal – Registration of Tax Preparers Program (RTPP)” (4 November 2015) [RTPP Proposal], the CRA stated that there are three categories of individuals who prepare income tax returns for a fee,

Chartered Professional Accountants (CPAs) prepare and file tax returns, that lawyers represent some taxpayers in tax cases before the courts,³⁴ and that members of both professions provide tax advice and implement tax strategies. Of course, each of these professions have entrance requirements (i.e. “good character” and technical competence), practice requirements (i.e. professional liability insurance, continuing professional development, adherence to a Code of Professional Conduct, etc.), and oversight by each profession’s regulatory body. But what about those tax practitioners who are not CPAs or lawyers? Under our current regime, there no barriers to entry, practice requirements, or technical/ethical guidance and oversight – which may explain, in part, why the CRA has successfully prosecuted many tax practitioners in recent years, as well as successfully assessed a significant amount of third party civil advisor penalties. Interestingly, when Australia enacted TASA, which required all persons providing tax agent services for a fee to register with the TPB and comply with its registration requirements, the TPB discovered that approximately 50% of its registrants *were not* members of a professional association – and hence not subject to the entrance requirements, practice requirements, and oversight that Canada currently relies upon.³⁵

Tax Practice is Multidisciplinary

As alluded to above, with certain exceptions, most tax services are provided by CPAs, lawyers, and other tax practitioners, often working together. Given this, it seems to be more efficient and effective to have one specialized tax body regulate (or oversee the regulation of) all tax practitioners – rather than have thirteen provincial/territorial accounting bodies regulating tax accountants, thirteen provincial/territorial Law Societies regulating tax lawyers, and perhaps no one regulating the other tax practitioners. As Professor Deborah Rhode, speaking about the legal profession in the United States, has stated,

Today’s profession has become too diverse and specialized, and its bar associations too weak and divided, to enforce any unifying vision of professional ideals. As a result, the professionalism campaign has remained at a level of comforting generality, with “vague... invocation[s] of ‘shared’ values that really aren’t shared and a symbolic and nostalgic crusade... which has little to do with everyday working visions of American lawyers”...

It is time to reconsider whether an occupation as large and varied as the American bar is well served by a unified regulatory structure. The profession needs to recognize in form what is true in

namely: “accountants who prepare income tax returns for a fee and who belong to a provincially regulated body; employees of businesses that offer income tax preparation services for a fee; and others who offer income tax preparation services for a fee, but who do not fall within the previous two categories”.

³⁴ Unfortunately, the Tax Court does not currently publish any information on (a) the percentage of cases involving self-represented litigants versus the percentage of cases in which the taxpayer has representation, and (b) in cases under the Tax Court’s informal procedure, what percentage of taxpayers (who have representation) are represented by non-lawyers and what backgrounds/qualifications such individuals have.

³⁵ Auditor General, Australian National Audit Office, Commonwealth (Austl), *The Regulation of Tax Practitioners by the Tax Practitioners Board*, Audit Report N. 33, 2012-13, Performance Audit, (8 May 2013) at 31 [AG Performance Audit].

fact. Lawyers with diverse backgrounds and practice contexts need different preparation and sources of guidance. Our current one-size-fits-all model of legal education and professional regulation badly needs revision...

A true commitment to professionalism will require supplementing codes with more specific and more demanding standards... If specialized associations certified lawyers who comply with such standards, then the consequence might be a more efficient market in reputation and a more effective reward structure for ethical performance.³⁶

Having one oversight body would also eliminate (or at least reduce) current regional variances in continuing professional development requirements and disciplinary decisions; it could also reduce the costs associated with having multiple, regional regulators.³⁷

[Consider putting in an additional section noting that while many/most accountants do at least some taxation work as part of their practice, there are relatively few tax lawyers in relation to the legal profession as a whole. As a result, it is not surprising that the accounting profession appears to provide more tax support/guidance to accountants than Law Societies do for tax lawyers. While tax lawyers can mitigate this “deficiency” through their membership and active participation in such organizations as the Canadian Tax Foundation, Canadian Bar Association Tax Subsection, Society of Estate and Trust Practitioners, etc., having one regulatory oversight body for all tax professionals might more effectively (and efficiently) address this discrepancy.]

HOW MIGHT CANADA BENEFIT FROM CREATING A SPECIFIC REGULATORY REGIME FOR TAX PRACTITIONERS?

It Might Reduce the Number of Incompetent and/or Unethical Tax Practitioners before They Can Harm Taxpayers and/or Damage the Integrity of our Tax System

As noted above, with certain specified exceptions, anyone can apply to become a commercial tax preparer – and will lose this privilege only in cases of serious (and often repeated) tax misconduct. In the case of the provision of other tax services by persons who are not CPAs or lawyers, the main tools that the CRA can use to dissuade/stop inappropriate tax behaviour are the assessment of civil advisor penalties and the laying of criminal charges. Both of these tools require an individual to first engage in serious tax misconduct and the CRA to discover such misconduct.

In contrast, to ensure that all of its tax practitioners have personal integrity and technical tax competency before being allowed to practice (to the extent that this is possible), Australia, through the TASA, requires that anyone who provides “tax agent services” for a fee (or any other

³⁶ Deborah Rhode, “The Professionalism Problem” (1998) 39:2 Wm & Mary L Rev 283 at 316-8.

³⁷ See AG Performance Audit, *supra* note 35 at 32, which noted that prior to the enactment of TASA and the creation of the Tax Practitioners Board, there were six independent, regional, statutory bodies responsible for regulating tax agents (under the “old regime”), each with their own rules and procedures who made decisions based on the same national framework, but independently of each other.

services connected to the tax agent services) to register with the TPB.³⁸ While there are several different paths to a successful registration, all of the paths require that five components be satisfied. The first component is that the individual seeking registration be a “fit and proper person”, which is essentially equivalent to the “good character” requirement for an individual seeking to become a Canadian lawyer.³⁹ The second requirement is that the individual maintain (or be able to maintain) sufficient professional indemnity insurance.⁴⁰ The third and fourth components concern relevant education and supervised tax experience and are interconnected; a higher degree of education is reflected in a lesser amount of required tax experience, and a lesser degree of education (or even no formal post-secondary education) requires a longer period of tax experience.⁴¹ Finally, every individual, to the extent that it was not part of his/her formal education, must take a TPB-approved course in basic accountancy principles, corporate law, and Australian taxation law.

An interesting component of Australia’s current regime is that it recognizes three types of registered tax practitioners, namely, registered tax agents, Business Activity Statement (BAS) agents, and tax (financial) advisers – each with different abilities to provide tax services and each with commensurate qualification requirements. The most common type of registered tax practitioner is the registered tax agent, who can generally provide any “tax agent service”. In contrast, a BAS agent is limited to do work in respect of certain specified types of tax law (most notably indirect taxes) and in relation to certain tax functions (i.e. the calculation and remission of certain tax payments/withholdings). A tax (financial) adviser is an individual who is an Australian Financial Services licensee and can only provide tax advice related to the financial services provided.

It Would Facilitate the Creation of a Code of Professional Conduct that Is Specifically Written for Tax Practitioners and Tax Practice

One of the components of Australia’s current regime that I have been impressed with is its creation of a Code of Professional Conduct (Code) that all registered tax agents must comply

³⁸ *TASA*, *supra* note 9, s 2-10.

³⁹ *Ibid*, s 20-5(1)(a). Section 20-15 provides that in deciding whether an individual is a “fit and proper person”, the TPB must have regard to whether the individual (a) is “of good fame, integrity, and character” and (b) has not in the last five years (i) been convicted of a serious tax offence, fraud, etc., (ii) had the status of an undischarged bankrupt, or (iii) served a term of imprisonment. This requirement must be satisfied not only on the individual’s initial registration as a registered tax practitioner, but on any registration renewals, which is typically required every 3 years.

⁴⁰ *TASA*, *supra* note 9, s 20-5(1)(c).

⁴¹ *Ibid*, s 20-5(1)(b) in connection with *Tax Agent Services Regulations 2009* (Cth), 2009/314, Sch 2. For instance, if an individual seeking to be a registered tax agent has a degree from an Australian tertiary institution (or from an equivalent institution outside of Australia that has been approved by the TPB) in accounting, law, or another discipline that is relevant to the tax services the individual wishes to provide, then the relevant full-time tax experience requirement is 12 months in the last 5 years. However, if the individual has no formal, relevant, post-secondary education (and is applying under the “Qualifications of Work Experience”), then the relevant full-time tax experience requirement is 8 years in the last 10 years.

with. There are fourteen Code principles set out in the TASA organized under five headings as follows:

The Code of Professional Conduct

Honesty and Integrity

1. You must act honestly and with integrity
2. You must comply with the taxation laws in the conduct of your personal affairs
3. If you receive money or other property from or on behalf of a client and you hold the money or other property on trust, you must account to your client for the money or other property

Independence

4. You must act lawfully in the best interests of your client
5. You must have in place adequate arrangements for the management of conflicts of interest that may arise in relation to the activities that you undertake in the capacity of a registered tax agent, BAS agent, or tax (financial) adviser

Confidentiality

6. Unless you have a legal duty to do so, you must not disclose any information relating to a client's affairs to a third party without your client's permission

Competence

7. You must ensure that a tax agent service that you provide, or that is provided on your behalf, is provided competently
8. You must maintain knowledge and skills relevant to the tax agent services that you provide
9. You must take reasonable care in ascertaining a client's state of affairs, to the extent that ascertaining the state of those affairs is relevant to a statement you are making or a thing you are doing on behalf of a client
10. You must take reasonable care to ensure that taxation laws are applied correctly to the circumstances in relation to which you are providing advice to a client

Other Responsibilities

11. You must not knowingly obstruct the proper administration of the taxation laws
12. You must advise your client of the client's rights and obligations under the taxation laws that are materially related to the tax agent services that you provide
13. You must maintain professional indemnity insurance that meets the Board's requirements
14. You must respond to requests and directions from the Board in a timely, responsible and reasonable manner.⁴²

While these principles are generally the same as one would find in a Code of Conduct for Canadian lawyers or CPAs (i.e. acting honestly and with integrity, protecting client

⁴² TASA, *supra* note 9, s 30-10.

confidentiality, etc.) – which addresses the reasonable concern of a tax practitioner having to comply with two Codes, in the worst case, that conflict with each other – the difference is that the associated “commentary” is specifically directed to assisting tax practitioners with their tax practice – and presumably was created after extensive consultation within the registered tax practitioner community.

For instance, in relation to Principle #9, the associated Explanatory Paper (i.e. “commentary”) specifically asks and provides guidance on the following questions:

- Under what circumstances is a registered tax practitioner required to comply with this principle?
- What are a registered tax practitioner’s obligations under this principle?
- What does “reasonable care mean for registered tax practitioners? and
- What is “reasonable care in ascertaining a client’s state of affairs”?⁴³

In addition to this overall guidance, which appears to have been updated several times since first being issued, the Tax Practitioners Board has issued several other documents to further enhance tax practitioners’ understanding of their ethical obligations under the Code.⁴⁴

It Could Allow for the Effective Implementation of Output Controls

Relying in part on empirical research that has questioned whether “academic success is an accurate predictor of practice performance”⁴⁵ and in part on the concern that initially competent practitioners may, over time, “allow their human capital to depreciate..., develop bad practice habits, become overcommitted, or be induced to stray into areas of practice beyond their competence”,⁴⁶ Professor Michael Trebilcock has argued that self-regulated professions such as law and accounting should devote more resources to “active competence output regulation”, which focuses on the quality of service outputs through, for example, peer review or practice audits, particularly for higher-risk services.⁴⁷

WHAT ARE SOME OF THE CHALLENGES WITH A SPECIFIC REGULATORY REGIME FOR TAX PRACTITIONERS?

⁴³ Austl, Commonwealth, Tax Practitioners Board, *Explanatory Paper TPB 01/2010 Code of Professional Conduct* (13 July 2017)

⁴⁴ Continuing with Principle #9, the Tax Practitioners Board has created two further documents, namely: *TPB Information Sheet 18/2013 Code of Professional Conduct – Reasonable care to ensure taxation laws are applied correctly* (25 January 2017) and *TPB Information Sheet 28/2016 Code of Professional Conduct – Reasonable care to ascertain a client’s state of affairs for tax (financial) advisors* (13 October 2016)

⁴⁵ Michael Trebilcock, “Regulating Legal Competence” (2001) 34 Cdn Bus Law J 444 at 449. In this part of his article, he refers to research in the medical profession in the United States which suggests that academic grades in medical school are only good at predicting future grades in medical school and are, at best, weakly correlated to effective practice.

⁴⁶ *Ibid* at 450.

⁴⁷ *Ibid* at 455-58.

The Costs of Creating and Administering the Regulatory Regime

There is no question that setting up and operating a specialized regulatory body for all tax practitioners would have an associated cost. Since its creation in 2009, the Australian Tax Practitioners Board has incurred annual operating costs of approximately \$16-17 million (Australian) dollars and has required an annual capital budget of approximately \$3 million (Australian) dollars, primarily to create and maintain its website and online registry of registered tax practitioners.⁴⁸ To date, these funds have been financed through the Australian Taxation Office's (ATO's) budget.⁴⁹

Given that the CRA abandoned its proposed Registration of Tax Preparers Program (RTPP) before implementing it due to cost concerns,⁵⁰ it is reasonable to be concerned that it would similarly reject financing a specific regulatory regime for tax practitioners. Of course, this would mean that to create and operate such a regime, tax practitioners themselves would have to finance it. On the other hand, given the Federal government's high priority on ensuring that our tax system is fair and fairly administered, perhaps it would consider reallocating some of the additional funds recently provided to the CRA to the creation and operation of a tax practitioner regulatory regime.

Potential Increases in the Cost to Taxpayers of Obtaining Professional Tax Services

Measuring the Benefits of an Enhanced Regulatory Regime

⁴⁸ See e.g. AG Performance Audit, *supra* note 35 at 35 and 41-2.

⁴⁹ *Ibid* at 13.

⁵⁰ As noted in RTPP Proposal, *supra* note 33, under this program, which was proposed in January 2014, all individuals who prepare income tax returns for a fee would have to register with the CRA – and provide all of the same information required to be able to e-file, as well as the individual's: number of years of tax preparation experience and membership in a provincially-regulated accounting or legal body, if applicable. Upon receipt of this information, the CRA would provide the individual with a personal identification number (PIN); no one's registration would be refused based upon the information they submitted. The individual would then be required to put his/her PIN on each tax return that s/he prepared. If the CRA discovered an error with a particular tax preparer's return, the CRA would have the ability to identify and examine all of the other tax returns that the individual prepared – and would then be in a position to how to assist the tax preparer or, in more extreme/persistent cases, whether to suspend or terminate the individuals' ability to e-file. The CRA also discussed the possibility of setting up an online registry. At the 2017 STEP/CRA Roundtable (as summarized in CRA, TI 2017-0698971C6 STEP – Q15 – Registration of Tax Preparers (13 June 2017), the CRA announced that,

Taking into consideration the input of stakeholders, the CRA further pursued its analysis of the legislative and system requirements needed to implement the RTPP. This analysis has shown that to be effective the program as originally proposed would require significant investments that no longer align with CRA priorities. However, the goals of the RTPP continue to be very relevant to an effective tax administration: the value and importance of working closely with stakeholders to prevent common errors and improve long-term compliance.

The CRA is now considering other options that would serve to implement the objectives of the proposed RTPP through existing CRA programs and initiatives at lower costs.

CONCLUDING REMARKS