THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 13, 2013

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Canadian Revenue Agency
750 Heron Road
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Dear Ms. Barnard:

Re: Tax Issues for Family Lawyers, follow-up to October 13, 2010 letter to Ministers

This letter is one of several steps in a project for which the CBA has funding from the Canadian Revenue Agency and Department of Justice. The letter reports on results of a survey circulated to members of the Section to determine what tax-related issues family law practitioners and their clients are facing. The ultimate objective of this project is the collaboration of CBA with CRA in the development of an online "toolkit" providing advice to family law practitioners concerning how best to navigate through tax-related hurdles they come across in the course of representing clients in family law matters.Thispast fall, the Canadian Bar Association's National Family Law Section (CBA Section) invited its members, family law specialists from all regions of Canada, to answer a 15-question survey. The survey asked for:

- current information on the seven issues outlined in the CBA Section's October 2010 letter to the Ministers of Finance and National Revenue;
- feedback on recent interactions with CRA officials; and
- advice on other tax topics of concern to the family law bar.

I am writing to apprise you of the results of this survey. A comprehensive summary of the survey results is attached. I hope we will soon have the opportunity to discuss these results, as well as how they can be used to inform the Family Law Tax Toolkit project.

Of greatest concern are reports that some current tax rules and their application lead to greater stress on taxpayers who are separated and divorced, may result in less income available to low and medium-income families, and may be used by one ex-spouse to harass the other. For example, when CRA officials require a signed receipt as proof of support payments, the taxpayer may have an annual expense of going through a lawyer to get this proof, or it may give the support recipient an opportunity to make things difficult for the payor spouse.

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Another overarching concern is that CRA is perceived to be inconsistent in applying the tax rules. Some respondents replied that how CRA handles a situation depends on "who is reviewing the file", leading to confusion and frustration. On a more positive note, CRA officials were acknowledged for their professionalism and knowledge. Although timeliness of service remains an issue, one respondent said it is "way better than it used to be" and another commented that "CRA personnel are usually personally pleasant".

I will briefly revisit the seven issues raised in our October 2010 letter, and add the feedback from the fall 2012 survey for your immediate consideration.

Issue #1: Proving Separation for Income Tax Purposes

Providing proof of the date and the fact of separation continues to be problematic.

- CRA does not always accept the date of separation in a court order or separation agreement, creating a conflict between income tax law and family law.
- The CRA rule allowing letters from qualified independent third parties to prove separation is of little assistance to a stay-at-home parent whose children do not attend school.
- Providing utility bills or other documents with a separate address may be difficult for an ex-spouse staying with friends or family while trying to find work or an affordable living space after a relationship breaks down.
- Spouses who have separated may continue to live in the same house (for example, a basement apartment with a separate entrance) to more easily share care of the children and make the separation easier on them. CRA does not accept this type of arrangement as a separation even though there is a court order or separation agreement.

Issue #2: Deduction of Legal Fees

The rule that prevents a payor spouse from deducting legal fees for the negotiation or renegotiation of support payments continues to be seen as unfair, inequitable, and contradictory, especially since support calculations are based on the needs and contributions of **both** spouses, even though one spouse will ultimately make payments to the other.

- Informing the payor spouse of this rule may create "further conflict and animosity".
- When the recipient initiates discussions to change support payments, the payor gets "dragged in" and still cannot deduct the expense of getting legal advice.
- Some lawyers report difficulties in separating out the portion of their fees that relate to support discussions.

Issue #3: Provision of Receipts

While provincial maintenance enforcement programs provide receipts satisfactory to CRA, reducing the proof of payment problem in some jurisdictions and in some situations, frustrations with onerous or inconsistent requirements remain – "[CRA wants] receipts And an Agreement or Order AND cancelled cheques".

- Signed receipts require cooperation of the recipient spouse, which is not always forthcoming.
- CRA rules do not take into account electronic banking, automatic withdrawals and the like.

Issue #4: Proof of Child Support Payments

Proof of child support payments raises the same issues as proof of spousal support – inconsistencies in requirements, the insufficiency of a court order, and the need for cancelled cheques and receipts.

- CRA is not sufficiently responsive when child support obligations change during the year, for example, because the child no longer attends school and is no longer eligible for support according to the court order. It takes a cooperative spouse to get the paperwork in time to prevent unnecessary tax problems.

Issue #5: Spousal Support Arrears

Support enforcement programs have reduced the incidence of significant arrear debts according to some survey respondents. As well, some respondents referenced the new CRA rule and form that allows support recipients to reallocate spousal support arrears to the year they were due. However, they noted that the requirement to have the payor sign this form can be problematic. Other survey respondents continued to report problems.

- Both ex-spouses have to file their returns claiming the same thing which may result in difficulties for them.
- There is a difference in approach between the courts and CRA which should be addressed.
- Legal fees may only be deducted when support was paid in that year resulting in a lost deduction in some cases.

Issue #6: Splitting Pension Benefits and Attribution Rules

Although allocating the tax consequences resulting from the division of pension benefits seems to be managed effectively through a division at source approach in some jurisdictions – British Columbia and Alberta were specifically mentioned by respondents – problems remain for clients and their lawyers. They find the pension division process complicated and the tax implications difficult to understand, with inconsistencies in the application of rules from case to case.

- It would be an improvement if CRA would direct pension administrators to deduct taxes from each share of the pension.
- Problems remain with private company pension plans.

Issue #7: Application of Canada Child Tax Benefit

The new CRA rule allowing parents with shared parenting responsibilities to divide the Child Tax Benefit throughout the year has not resulted in significant improvements. Respondents said that this remains a source of conflict for parents. They would prefer a system that allows parents to decide on the division of the Benefit.

- Requiring an equal division of the Child Tax Benefit in shared custody situations assumes an equal tax impact on the parents, which is often not the case. This can result in a loss of overall income available for the children.
- More guidance from CRA would help parents to understand their options, what to do when custody arrangements change, and the tax consequences.

The attached report on the survey results gives comprehensive information about the survey respondents, their perceptions of CRA services, and their advice to clients when having to report to

CRA or respond to a CRA inquiry. It also lists other tax issues causing concern to former spouses and identifies topics about which clients need information.

On behalf of the CBA's National Family Law Section, I would like to thank you for your attention to these matters. We look forward to working with you on the next stages of this important project.

Yours truly,

(original signed by Rebecca Bromwich for Cori L. McGuire)

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cc.
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encl.

Report on the Fall 2012

Survey of CBA Family Law Section Members

BACKGROUND

In 2009, the National Family Law Section Executive asked Section members about any problems their clients were experiencing as a result of provisions in the *Income Tax Act* or directions given by the Canada Revenue Agency (CRA). The comments were the basis for discussions with CRA about ways that the Act, directives, and staff interactions with lawyers and clients could be improved to meet the realities of separating and divorcing couples and their children.

In 2012, the Family Law Section, with the support of Justice Canada and CRA, received funding from Justice Canada's Supporting Families Fund to prepare a tax toolkit for lawyers working with clients going through a separation or divorce. As part of the toolkit development, the CBA asked Family Law Section members to complete an on-line survey, to collect updated information on the main issues raised by lawyers who answered an open-ended request for feedback about tax issues in 2009.

This is a report on the results of the 2012 survey.

Survey methodology

An e-mail, in English and French, with a link to the English and French on-line survey, was sent to the approximately 1500 CBA members of the CBA Family Law Section on September 13, 2012. A reminder e-mail was sent on October 4, 2012. The survey closed on October 21, 2012.

The survey asked 15 main questions, 13 of which concerned respondents' experience with the application of specific tax rules and two asked for demographic information – jurisdiction of practice and percent of practice on family law matters. Almost all questions provided space for additional comments.

Response rate and respondent demographics

In total, 159 people responded to the survey, 154 in English and 5 in French.

Information about jurisdiction of practice was provided by 123 of the 159 respondents. The most responses were received from people in Ontario (34/28%), followed by British Columbia (29/24%) and Alberta (26/21%). Responses were also received from Manitoba (9/7%), Nova Scotia (8/7%), Saskatchewan (6/5%), New Brunswick (4/3%), Québec (2/1%), Prince Edward Island (2/1%), Northwest Territories (2/1%), and Yukon (1/<1%). No responses were received from Nunavut or Newfoundland and Labrador.

Of the 119 respondents who provided information about their practice focus, most (79%) reported that their practice focus was over 80% on family law matters; none reported a family law practice focus of less than 10%.

Although the 10% response rate (154 of 1500) to the survey is considered strong for this type of voluntary survey, *quantitative conclusions* are limited by the lack of responses from two jurisdictions, the minimal number of responses from Québec, and the low number of responses in French. Nevertheless, the survey responses provide rich *qualitative data* from practitioners with

significant experience in family law, many of whom provided detailed comments along with their basic answers to the questions.

GENERAL THEMES

The survey asked specific questions on particular tax issues, relationships with CRA, and clients' information needs. The responses to each question are discussed in the next section. This section identifies themes that came up repeatedly in the comments provided throughout the survey.

Impact of certain tax rules

- adds to the burden on children and families by increasing tension, keeping disputes alive, and reducing available income
- provides opportunities for a hostile or uncooperative spouse to seek revenge, make things difficult
- has a disproportionate effect on low income families and lower-middle income families where every dollar matters
- increases legal costs, and may sometimes require the assistance of an accountant or tax specialist

Application of certain tax rules

- depends on the CRA staff person, inconsistent information and application of the rules, arbitrary, confusing
- fails to account for changes that may occur during a year or for impossible situations (e.g. spouse's whereabouts unknown), rigid
- feels aggressive, punitive

Information

- makes it hard to explain a rule to clients when the rule is unfair (e.g. legal costs not deductible by payor spouse)
- requires better information materials to illustrate application of the rules

The survey results are consistent with the anecdotal information collected in 2009, and confirm that certain tax issues continue to be a source of conflict and confusion for couples who are separating or divorcing, and a source of concern and frustration for lawyers advising them.

ANALYSIS OF ANSWERS TO EACH SURVEY QUESTION

Question 1: In 2009, CBA members reported that clients had difficulties proving separation for income tax purposes to the satisfaction of the CRA. Please report on your recent experience (last two years) with how CRA requires a taxpayer to prove separation.

Of the respondents (111 of 147) who noted that proving separation for income tax purposes was an issue for their clients, 39%[1] (43 of 111) reported that CRA always accepts a **separation agreement**

[1] Percentages do not always add to 100 due to rounding.

as sufficient proof, while 56% (62 of 111) reported it was "sometimes sufficient". The rest, 7% (8 of 111) reported that it was "never sufficient".

> Notwithstanding very specific language in a separation agreement, CRA is now requiring copies of all cancelled cheques as well as a letter from the support recipient that she has received all of the support as reflected in the agreement.[2]
>
> They also want court orders, usually, and are also now insisting on child and spousal support receipts.
>
> Revenue Canada are very suspicious people. They do not always accept the separation agreement as proof of separation, even when the agreement specifically states that the parties have been living separate and apart since x date.

Of the respondents (69 of 136) who noted that proving separation for income tax purposes was an issue for their clients, 16% (11 of 69) reported that an **affidavit signed by one spouse** is "always sufficient" proof, while 52% (36 of 69) reported that it is "sometimes sufficient". The rest, 30% (21 of 29) reported that it was "never sufficient".

> I have had to do this on a couple of occasions when the Agreement wasn't enough, or when there's no Agreement and the other spouse has given conflicting information.
>
> Même un affidavit signé par la partie adverse, confirmant la date de la separation, dans une separation contestée, ne fût pas suffisant.

Of the respondents (66 of 132) who noted that proving separation for income tax purposes was an issue for their clients, 14% (9 of 66) reported that **two letters from independent third parties** were "always sufficient" proof, while 70% (46 of 66) reported that they were "sometimes sufficient". The rest, 17% (11 of 66) reported that they were "never sufficient".

> The [CRA] list of qualified independent third parties does not include anyone for the mother who does not work outside the home after separation and whose children do not attend school.

Of the respondents (86 of 135) who noted that proving separation for income tax purposes was an issue for their clients, 21% (18 of 86) reported that **proof of different residences provided by each spouse** was "always sufficient" proof, while 57% (49 of 86) reported that it is "sometimes sufficient". The rest, 22% (19 of 86) reported that it was "never sufficient". Several respondents commented on problems when separated spouses live in separate areas of the same home.

> Difficult if one party living in the basement of the home because not all utilities can be separated here, such as hydro and gas.
>
> … having to prove separate residences when the parties have been living separate and apart in the same house due to the financial inability to establish separate households is a real problem these days.
>
> This does not work for the situation where one parent moves in with friends or family and does not have a separate residence.

[2] The quotes may have been lightly edited to correct spelling or grammar.

> CRA is not consistent with what is acceptable. Some clients have been required to show various utility bills and a driver's licence, while others have been asked only for a licence or one other bill. The lack of consistency in what CRA wants is the big problem – whatever the issue.

Answers to Question 1 indicate that challenges continue for clients having to prove the date and fact of separation to the satisfaction of the CRA.

Question 2: In 2009, support payers were not allowed to deduct legal costs related to support negotiations from income; support recipients were allowed this deduction. How are you now handling this issue with your clients?

The 110 answers to this question can be grouped into these categories:

- This does not apply to my clients.

  > Not an issue in my practice (legal aid).

- I don't address this issue.

  > Has not been raised by my clients.

- I tell them the law.

  > I simply inform my client that they are not able to deduct the fees if they are payors and that they can if they are recipients. It has not to date affected negotiations.
  >
  > You have to be clear with your clients as to the fact that they cannot deduct their legal costs.

- I only discuss this issue with clients who are recipients of support.

  > I tell my recipients of support that they can deduct my legal fees and provide them with the necessary letters for CRA. I do not mention it to my payor clients.
  >
  > Needless to say, when it becomes apparent to the payor that the payee is not only getting the money but then able to deduct legal fees against that income, the payors are not happy. How I deal with it? For the payors, I simply don't have any reason to tell them that the payees get to deduct (usually) her fees. So unless they find out, they are none the wiser.

- I include discussions of the impact of this during negotiations.

  > All of my clients are made aware of this and there are occasions where the tax benefit is calculated into a support agreement.
  >
  > I use this as a negotiating point from time to time, but not often,

- I refer them to accountants.

  > Advising them to check with their accountants, as we can't keep up with the policy changes here.

> En tout temps, je les invite à consulter leurs comptables ou fiscalistes afin de s'assurer la déductabilité ou non de leurs frais, tout en les prévenant des difficultés inhérentes.

- I itemize my bill so that the amount relating to support is identified.

> I provide the support recipient with a letter indicating the estimated number of hours or amount of fees for issues that may allow this deduction and advise them to seek advice from a tax specialist.
>
> My retainer agreement sets out those legal fees which are deductible and those which are not. From February to April, I provide letters to CRA setting out my fees which are deductible. It takes lots of time but clients appreciate it.

Several respondents expressed their concerns with the tax rule, saying that it is a "contradictory position taken by CRA", "unfair", "inequitable", and "upsetting to clients".

> This is very difficult. It creates further conflict and animosity between the parents; creates an apprehension of bias; difficult, if not impossible, to explain the inequity.
>
> It is unfair particularly where the recipient starts the proceeding and the payor gets dragged in.

A few respondents noted that it is difficult to calculate the portion of their fees that relates to support issues.

> It is also difficult to separate out other issues in terms of % of the fees attributed to just seeking support.
>
> The problem is trying to break down my account as to what [part] exactly was negotiations for support as opposed to other issues that are talked about at the same time.

Question 3: In 2009, CBA members reported that CRA usually required support payers to provide either cancelled cheques or a receipt from the recipient spouse as proof of support payments. Please report on your recent experience (last two years) with how CRA requires support payers to prove their support payments.

Of the respondents (106 of 137) who noted that proving support payments was an issue for their clients, 20% (21 of 106) reported that a **signed separation agreement** is "always sufficient" proof, while 49% (52 of 106) reported that it was "sometimes sufficient". The rest, 31% (33 of 106) reported that it was "never sufficient". A few respondents noted that the maintenance enforcement program provides a year-end statement which CRA accepts.

> A signed separation agreement should always be sufficient for CRA but rarely is. Very frustrating when clients pay for a separation agreement or court order and CRA wants receipts!!!!
>
> CRA has gotten worse about its requirement for proof of payments. I have had cases where the signed agreement PLUS inclusion of the support payments by the recipient on her return were not sufficient and an Acknowledgment by the recipient was required.

> I have had increasing difficult with this lately where the separation agreement has been insufficient … and the payors have had to prove with receipts – not just cancelled cheques. I wrote a letter to CRA advising them that this process may prolong fighting in families and keep them from moving on and finding resolution, which, in turn, can have devastating impact on the children. I also pointed out that the requirement for receipts may put people in danger if their spouse is violent or abusive.

Of the respondents (76 of 132) who noted that proving support payments was an issue for their clients, 5% (4 of 76) reported that **bank statements showing withdrawals** are "always sufficient" proof, while 59% (45 of 76) reported that they were "sometimes sufficient". The rest, 36% (27 of 76) reported that they were "never sufficient".

> Have never seen CRA request this or suggest it.
>
> They typically want proof of what the withdrawal was for, so this will not generally be sufficient – they want receipts AND an Agreement or Order AND cancelled cheques.

Of the respondents (97 of 131) who noted that proving support payments was an issue for their clients, 46% (45 of 97) reported that **a receipt from a support recipient** was "always sufficient" proof, while 53% (51 of 97) reported that it was "sometimes sufficient". The rest, 1% (1 of 97) reported that it was "never sufficient".

> Always accepted by CRA but still very difficult for clients to get.
>
> Seems to be sufficient for CRA but adds unnecessary expense on an annual basis for clients.
>
> This requires co-operation of a spouse who can be either very hostile or whose whereabouts are unknown.
>
> Only if also accompanied with receipts for child support, too – because they won't let them claim for spousal unless the child support is paid. Have had difficulty getting some spouses to produce receipts – now making it part of agreements.

Of the respondents (86 of 129) who noted that proving support payments was an issue for their clients, 33% (28 of 86) reported that **cancelled cheques** were "always sufficient" as proof, while 61% (53 of 86) reported that they were "sometimes sufficient". The rest, 6% (5 of 86) reported that they were "never sufficient".

> This is a very difficult area due to the level of proof of both types of payments being demanded by CRA. Common complaint from clients.
>
> Not sufficient for spousal.
>
> Always accepted.
>
> We have had difficulty for people using electronic transfers. In this day and age, this is ridiculous.

Proving that support payments have been made is not always easy for clients and causes concerns for lawyers, a few of whom offered sharp criticisms of CRA when answering this question.

> This is a nightmare. There is no consistency on requisite proof. Lawyers draft detailed agreements and this is not always enough. A further agreement detailing payments is then

> required. Extra work; extra money for the clients. In my experience, the payors are frequently penalized. There has to be a better way of dealing with family issues. Families do not document nor anticipate tax issues in the same way that businesses do. The additional stress put on families by the way that the CRA deals with family issues is spilling over into litigation and onto families.
>
> There has been a recent change in policy that is quite evident in my practice. I perceive it as a hunting and scapegoating of citizens who have already been through the trauma of family breakdown, only to find themselves harassed by CRA demanding audit-level proof of support deductions, payments, etc. The previous policy was not abused to the best of my knowledge. My clients do not have the resources, time, or personal energy to deal with this level of scrutiny.

Question 4: In 2009, CBA members reported that CRA was denying clients a deduction for spousal support payments when they could not prove that they had made child support payments according to the Child Support Guidelines. This was most problematic in cases of shared or split custody. Please report on your recent experience (last two years) with clients having to prove their child support payments at Child Support Guideline levels to CRA.

Of the respondents (62 of 125) who noted that proving child support payments was an issue for their clients, 24% (15 of 62) reported that a **separation agreement** was "always sufficient" proof, while 48% (30 of 62) reported that it was "sometimes sufficient" proof. The rest, 27% (17 of 62) reported it was "never sufficient".

> Some clients have had difficulty – again, going back to who is reviewing the file.
>
> I, too, have had increased problems with this LATELY … In one case, we arranged for the payor to pay the rent in lieu of child support (which was more than the child support figure) and we are waiting to hear whether CRA has a problem with it … If we want to be creative in how we are dealing with financial issues, then we need the government to be responsive in allowing people to come to their own resolutions.
>
> This is very problematic. Sometimes payments are combined and the lawyers would have a paper trail for this and the reasons why. May even have a case conference memo from the Judge. Families, particularly in the $30-70k range need to be able to maximize income when restructuring. The fact is that you have the same incomes now supporting two households … The current regime is not working and is neither maximizing nor apportioning the benefit of deductibility appropriately.

Of the respondents (63 of 118) who noted that proving child support payments was an issue for their clients, 44% (28 of 63) reported that a **separation/divorce court order/decision** was "always sufficient" proof; while 35% (22 of 63) reported that it was "sometimes sufficient". The rest, 21% (13 of 63) said it was "never sufficient".

> I have not had this issue arise in the last 3 years,
>
> They accept the amounts set out in the Order, but not when the amount is merely reflected in a Decision. My experience is that CRA wants to see proof of payments and receipts.

Of the respondents (51 of 116) who noted that proving child support payments was an issue for their clients, 2% (1 of 51) reported that **bank records showing withdrawals** were "always

sufficient" proof, while 61% (31 of 51) reported that they were "sometimes sufficient". The rest, 37% (19 of 51) reported that they were "never sufficient".

> Depends on who is reviewing the file.

Of the respondents (52 of 113) who noted that proving child support payments was an issue for their clients, 21% (11 of 52) reported that **cancelled cheques** were "always sufficient" proof of child support payments, while 65% (33 of 52) reported that they were "sometimes sufficient". The rest, 15% (8 of 52) reported that they were "never sufficient".

Of the respondents (56 of 108) who noted that proving child support payments was an issue for their clients, 34% (19 of 56) reported that **a receipt from the support recipient** was "always sufficient" proof, while 54% (28 of 56) reported that it was "sometimes sufficient". The rest, 9% (5 of 56) reported that they were "never sufficient".

> A receipt was not sufficient unless it broke down the payments into child and spousal support.
>
> Sometimes payee refuses to provide a receipt and uses this to "blackmail" payor into providing something additional in exchange for the receipt.
>
> I have a case where the payor was hit with penalties, interest, etc. and had to set a date for tax court and hire a lawyer for this all as a result of the recipient's refusal to acknowledge payments formally for CRA although she did so at a 'without prejudice' case conference and subsequently refused to follow through.
>
> The CRA seems to have no capacity/interest in dealing with changes in the course of a year to the child support payment (e.g. child leaves school or changes residences). Even though the agreement may address that child support then ends, [CRA] only mechanically multiplies the child support by 12 and only then allows a spousal support deduction. Payors are spending a fortune on legal and accounting fees to deal with these matters. It is typically remedied if you have a cooperative former spouse who will sign the necessary documents but it should not be such as difficult process.

Question 5: In 2009, CBA members reported that some spouses were not paying support to accumulate arrears and then make the payments in a later year to offset higher income. This had a negative tax impact on the support recipient who had to report all the arrears as income in the year they were received. The CBA recommended to the federal government that recipients be able to refile their income tax returns to report the support in the year in which it was supposed to have been paid. The CBA also noted that it was detrimental to have a tax incentive for payers to be delinquent with their support payments. How are you handling this issue with your clients?

Of the 93 written answers to this question, 54% (50 of 93) were "this has not been an issue" or a similar comment. The remaining answers can be grouped into these categories:

- This is less of a problem now that support enforcement plans are in place.

> Ce problème est de moins en moins présent considérant la perception automatique des pensions alimentaires. Toutefois, s'il y a des arrérages, il est possible de réduire le montant de ceux-ci, et en ce faisant, le versement d'une somme forfaitaire

moindre ne peut constituer une déduction fiscale, et donc une imposition pour le bénéficiaire. Chacun peut y trouver son compte.

- I make sure clients know of the rules and their support obligations.

  Advise clients to use averaging and re-file options.

  I advise my clients of their obligations pursuant to the court order or agreement and, in the case of the recipient, advise they appeal this determination to CRA.

- I advise clients to bring enforcement proceedings.

  The only avenue left to [clients] is to bring enforcement proceedings regularly to avoid the buildup of arrears.

  I go after arrears aggressively. This continues to be a problem.

- I try to have arrears paid as a lump sum.

  This is not usually a problem for my clients as arrears settlements are done by way of lump sum payments so there are no tax consequences, but this is a serious problem that needs to be addressed. The problem will arise that there are arrears of taxes, penalties, and interest etc. owing when a payor is in arrears of support. Arrears should also be treated as net payments and not taxable for that reason.

  From the payee's perspective, there's really not much that can be done. Will sometimes encourage a "lump sum" retro payment somewhat less than the full support amount to offset the tax otherwise payable.

- There is a CRA form to use in these cases.

  ITA now gives recipient an option as to what year support income is reported.

  There is a CRA form (T1198) required in order for recipients to re-allocate the spousal support arrears to the year they were due; not paid. However, it has to be signed by the payor – and it can be difficult to acquire … It would be much better if the recipient had the authority to sign this form, not the payor.

- This is unfair, and still a problem.

  C'est une pratique déloyale et les bénéficiaires devraient pouvoir appliquer ses sommes aux années où elles étaient dues.

  This is a huge problem. Both sides are getting hurt by this because there are so many other factors, such as the deduction for legal fees to obtain support being available in the year of payment. If the support is not paid in that year, this can be a washed deduction.

  This problem is equally difficult for payor spouses because unless both parties file their tax returns claiming the same thing, CRA will not allow the deductions.

  [T]he courts are not in sync with CRA. The issue of treatment of retroactive support needs to be clarified on a number of fronts so as to ensure appropriate treatment.

A few respondents proposed ways to improve the situation including that judges make detailed orders and add interest accumulation as a deterrent.

Question 6: In 2009, CBA members noted a lack of clarity with respect to the taxation resulting form a division of pension payments, resulting in an extra tax burden for the pension member spouse and making it difficult to anticipate the tax consequences of the division. Sometimes the pension member had all taxes withheld against the full pension payout while the other spouse received the pension payout without taxes being withheld. One solution was for the pension plan member to apply to CRA to permit the pension plan administrator to reduce the tax withholdings from the plan member by withholding tax from the non-member spouse, as well, CRA had the discretion to refuse to approve this approach and sometimes did so. Please report on your recent experience (last two years) relating to pension benefit splitting and tax impacts on the pension plan member.

Of the 83 written responses to this question, 89% (74 of 83) were that "this has not come up", "no experience", or a similar comment. The more detailed answers can be grouped into these categories:

- Dividing pensions at source eliminates tax issues.

  > In Alberta, the pensions are typically divided at source by a transfer of one half into a separate account for the non-participate spouse. The tax would apply to each separately in this situation.
  >
  > No problem with BC government pensions where the non-pensioned spouse is actually a limited member of the plan.
  >
  > … most pensions divide the pension at source.
  >
  > Always, the pension has been divided and rolled over without any tax consequences to either party.

- It is complicated.

  > Despite having done extensive CLE on these issues, I still have trouble understanding it.
  >
  > Generally, my clients have had to work together to ensure that each pays appropriate tax. Often, the recipient spouse receives a lesser amount so that the payor spouse has the funds to pay the tax.

- There is a lack of information and consistency.

  > Effectivement, j'ai témoigné un manqué d'uniformité d'un dossier à l'autre.
  >
  > An issue arose with respect to the filing of income tax returns and pension splitting for the year of separation. A CRA enquiries rep said it was possible, but an accountant said it wasn't – although the form indicates that splitting may be done for partial years. The matter is still unresolved but it would be helpful for the CRA website to state the law clearly.

- There is a need for change.

> Generally a problem with private company pensions.
>
> It would be good if CRA directed the pension plan administrators to deduct tax from each share of the pension. Separated spouses should be separate as to their tax responsibilities and the member of the pension plan shouldn't have tax for the other spouse withheld. This would be a helpful change for all involved. I think pension plan administrators must be directed to do this; it seems many private sector pension plans are cutting costs by hiring independent administrators – who are busy learning the details of each plan and how to administer them. They won't change the way they withhold tax unless CRA forces them to do so.

Question 7: In 2009. CBA members reported that parents who were sharing parenting responsibilities in a generally equal manner could not receive a distribution of the Child Tax benefit equally through the year. Rather, CRA required them to rotate benefits on a six months for one parent, six months for the other parent basis. This could affect the overall family income over the year as during the higher income earner's six month period benefits could be reduced. (Note: In Québec two recipients are eligible for the Child Tax Benefit in the same month and the CRA takes the amount payable annually to each parent and apportions the child tax benefit payment to the parents on a monthly basis.) Please report on your recent experience (last two years) relating to the apportioning of the Canada Child Tax benefit.

Of the 100 written responses to this question, some respondents, 14% (14 of 100) reported that the situation had improved, while others did not know about the changes or did not reflect an understanding of the new rules in their answers. The remaining responses were overwhelmingly critical of the current situation despite the CRA rule changes that allow spouses with shared parenting responsibilities to apportion the Child Tax Benefit (CTB) throughout the year.

The problems identified by respondents can be grouped into these categories:

- There is a lot of confusion about how to handle this.

> I see many separated families just have the lower income spouse collect the CTB. Their attitude is that if CRA/CTB catch them, then they'll deal with it. I always warn them of a past client who was caught about 10 years ago and had her future CTB clawed back.
>
> I have recently negotiated an agreement where the parties have agreed that the benefits will not be rotated (notwithstanding the shared parenting regime) because the wife receives a larger payment which increases global family funds to be split.
>
> I have experienced confusion surrounding this and whether it could be that parents can, for instance, claim one child each, as opposed to six months each during the year. Clarification regarding this point would be of assistance.
>
> This has often caused problems for both the payor and recipient, in my experience, given that the CRA seems to arbitrarily accept some and reject others. It is therefore very difficult for a lawyer to give advice on this issue, not knowing how an individual CRA agent may handle the matter.

The rule is hard to explain and understand and confuses parents, who should be permitted to contract how they wish to deal with this.

This has been very problematic for separating clients. It would be helpful if the CRA issued a guide to divorcing parents in shared parenting situations that is understandable. Clients always have questions and issues with the CRA's communications with them.

My clients are bewildered and not impressed.

Parents find it very complicated. It is often difficult for them to cooperate.

This has been a nightmare. The process to try to re-adjust payments when custody changes to or from shared parenting takes too long and is hard for clients and lawyers to understand or bring to a conclusion. Policy as to apportioning also seems inconsistent between files.

- This is a source of conflict. One parent can make things difficult for the other.

  One concern here is that CTB may hold back the benefit it both parents don't file their tax returns on time, and CTB can't determine their joint income.

  This is an area of great contention between parents because there is a lack of "transparency" for clients as to how entitlement to these valuable benefits is taken into account. I have trouble characterizing the distribution of benefits as fair.

  This is used as a weapon to encourage parties to not negotiate in good faith. I am seeing more occasions where CRA just doesn't pay the CTB at all.

  I have had many cases where CRA accepts one parent's word that it was shared custody. CRA shares the benefit equally when the time the child is with each parent is unequal, albeit in a shared custody arrangement. This is one of the most frequent and annoying problems in a shared parenting arrangement.

  Retroactive adjustments have a negative impact on the parent who is then expected to refund the department. The current policy encourages spouses to delay the application. The late applicant gets a huge refund and the former recipient faces a huge claim from CRA. This has a very negative impact on low income families. The adjustment should be from the date of application and not made retroactive.

  The big problem is with uncooperative and lying parents receiving the CTB when they do not have custody and CRA's refusal to act for years despite custody order, letters form me, and affidavits.

- Spouses should be able to decide on CTB distribution.

  CRA is continuing to pay one parent for six months and the other parent for six months. It would be better for most families if the payments were spread over the year.

  The splitting of the CTB is an issue which is of significant import to my clients. The 6 month/6 month rule only works if you have 50/50 residency, and does not account

for the myriad of other combinations which can occur. I would suggest that CTB shift to a monthly basis.

This has been frustrating for clients. I think it would be easier if they could apportion the amount over the course of the year.

If clients want to waive receiving the CTB (so that the other parent receives full benefits 12 months of the year) in a shared parenting situation, they should be able to.

Many of my clients would actually prefer that the benefit did not have to be split.

Many clients wishing for different CTB-splitting options.

- The rules sometimes hurt family incomes at the expense of the children.

  It leads to extra legal fees being incurred as efforts are made to secure the CTB for the lower wage earner.

  This is a constant issue for my clients. They argue with CRA constantly.

  Often one parent is put in a position of having to repay CTB.

  Issue is should CRA be able to force parents to share this benefit when it is not in their best interests to do so, e.g. large income disparity between the two parents?

  This creates conflict and financial hardship for the lower income parent in the 6 months that the higher income parent is to receive benefits.

  It would be helpful if parents who split or share custody could elect which of the parents is to receive the CTB. The money is for the benefit of the children. Why make this difficult?

These answers suggest that the change in the rules has not resulted in clarity for former spouses with shared custody, or their lawyers, and that there continue to be many concerns about the fairness of the application of the rules.

Question 8: What percent of your family law clients rely on you to work out issues with CRA on their behalf?

Over three-quarters (77%; 97 of 126) respondents reported that less than 10% of their clients rely on them to work out issues with CRA. Instead, they refer their clients to accountants or tax specialists or advise them on what to provide to CRA. Only 5% of respondents (6 of 126) reported that over 40% of their clients have them work out issues with CRA.

I won't do it. It says right in my retainer agreement. I am not a tax lawyer, accountant, or expert in tax. I refer them to either a tax lawyer or accountant.

I always tell my clients to use their accountant or the CRA ombudsman, as I have found CRA IMPOSSIBLE to deal with.

As many times these issues arise after the file is concluded, and legal fees have long since been paid, it is upsetting to clients to have to incur further unexpected legal fees. Sometimes, I end up helping for free, if the issue is not too time consuming.

> Clients always contact me first. I provide them with detailed information as to what they must provide to CRA, and if this is then not acceptable, I refer them to their accountant.

Question 9: When you interact with CRA on behalf of a client, overall, how would you rate the interactions?

Respondents were asked to rate their interactions with CRA on a five-point scale of "very poor" to "outstanding" with respect to five service areas:

Professionalism of service received the highest ratings with 2% of respondents (2 of 94) providing an "outstanding" rating, and 18% (17 of 94) providing a "more than satisfactory" rating. Only 5% of respondents (5 of 94) rated professionalism of service as "very poor", while 26% (24 of 94) gave a "somewhat satisfactory" rating. About average = 50% (47 of 94).

> This truly depends on the party you contact.
>
> If you can talk to a live person.

CRA staff knowledge ranked next with one respondent providing an "outstanding" rating and 12 % (11 of 94) providing a "more than satisfactory" rating. 10% of respondents (9 of 94) rated CRA staff knowledge as "very poor" and 30% (28 of 94) gave a "somewhat satisfactory" rating. About average = 49% (46 of 94).

> More than expected given the breadth of topics they have to deal with.
>
> Some don't seem to know as much as they should, and others are just very reticent in the information they are willing to impart.
>
> Not unusual to get different answers from different people, and difficult to maintain contact with the same person.

Outcome received an "outstanding" rating from one respondent and a "more than satisfactory" rating from 5% of respondents (5 of 95). 10% (9 of 95) provided a "very poor" rating and 36% (34 of 95) provided a "somewhat satisfactory" rating. About average = 48% (46 of 95).

> I've had everything from very good to very bad outcomes. Usually, over time, things get resolved, but I'd like to think that CRA would standardize the knowledge-base of their personnel and ensure that they realize they SHOULD be there to help, not to hinder legal counsel and their clients.
>
> CRA are very arbitrary; they also seem to have the ability to be discretionary in a manner that makes it hard for clients. Some people have been denied deductions like daycare while others have got it – in shared parenting situations.
>
> I have a sense that whatever my client provides, they are always perceived as not doing quite enough and there are delays in resolutions that seem almost punitive.

Helpfulness of service received the second to lowest score with 15% of respondents (14 of 94) providing a "very poor" rating and 38% (36 of 94) providing a "somewhat satisfactory" rating. One respondent provided an "outstanding" rating; 10% of respondents (9 of 94) rated helpfulness of service at "more than satisfactory". About average = 36% (34 of 94).

> Just getting a response or phone number to call can be a major undertaking. Numbers are not readily available. What's the secret?
>
> Occasionally a helpful person will respond.
>
> CRA personnel are usually personally pleasant.

Timeliness of service scored lowest with 15% of respondents (15 of 96) providing a "very poor" rating and another 40% of respondents (38 of 96) providing a "somewhat satisfactory" rating. No one provided an "outstanding rating"; 10% of respondents (10 of 96) rated timeliness of service at "more than satisfactory". About average = 34% (33 of 96).

> Takes way too long.
>
> Low wait time to speak to call centre reps, who are very helpful. Turn around time on correspondence could improve.
>
> I regularly order clients' prior years' tax information and find that it takes months (!) to get this information back from CRA.
>
> Way better than it used to be.

Question 10: When a client has run into a family-law related problem with CRA and comes to you for advice before she or he replies to CRA, what general advice do you offer?

Of the 96 written responses to this question, 73% of respondents (72 of 96) included referring the client to a tax specialist or accountant in their answer.

> We involve their accountant.
>
> If the issue is complex, I refer them to a tax specialist.
>
> If I can answer the client's question, I will, but more often than not I would send the client elsewhere.
>
> If it is something simple that I can do like write a letter for the client or provide a copy of an agreement or receipts, then I will do that. Otherwise, I advise the client that they should consult a tax lawyer and/or accountant.
>
> My advice is often to ensure that their accountant speaks to me first, prior to responding, as many times general accountants are not clear about the rights and obligations in family law matters. A submission that has input from both professionals is generally a better one.

When their client is going to deal with CRA directly, respondents offered this advice:

- Answer in a timely manner/respond quickly, without delay
- Be forthright/answer fully and honestly
- Reply in writing
- Have documents handy/provide complete information

- Be pleasant
- Be patient/get ready for the long haul
- Get name of person to be able to go back to the same person if there are questions
- Stand your ground
- Involve Member of Parliament

Question 11: Please rank in order from most frequent to least frequent the family-law related tax issues about which you advise your clients.

Respondents used a 7-point scale to rank the family-law related tax topics about which they advise their clients most frequently. Topics with the highest totals in the 1 – 3 frequency range were:

- Tax consequences of support payments (85%, 95 of 112)
- Tax consequences of child custody options (61%, 70 of 115)
- Division of the Child Tax Benefit (57%, 64 of 113)
- Deduction of legal fees as an expense for tax purposes (39%, 43 of 109)
- Proof of support payments (38%, 41 of 109)
- Completion of income tax return after separation/divorce (17%, 19 of 114)
- Tax consequences of pension splitting (9%, 10 of 106)

Question 12: Please rank in order from easiest to explain to clients to hardest to explain to clients …

Respondents used a 7-point scale to rank the ease of explaining the family-law related tax topics to their clients. Topics that were hardest to explain, shown by a 5 – 7 hard-to-explain ranking, were:

- Tax consequences of pension splitting (83%, 85 of 102)
- Tax consequences of child custody options (50%, 52 of 105)
- Division of the Child Tax Benefit (45%, 47 of 104)
- Completion of income tax return after separation/divorce (45%, 45 of 101)
- Deduction of legal fees as an expense for tax purposes (26%, 27 of 102)
- Proof of support payments (26%, 26 of 101)
- Tax consequences of support payments (18%, 19 of 103)

Interestingly, the topic, identified in Question 11, about which respondents advised their clients most frequently– tax consequences of support payments – was the topic that they reported was the easiest to explain to clients. The topic, identified in Question 11, about which respondents advised their clients the least frequently – tax consequences of pension splitting – was the topic that they reported was the hardest to explain to clients.

Question 13: Please take a few moments to note any other issues that come up with your clients with respect to separation and divorce and the Income Tax Act and CRA interpretations of that Act.

Respondents were offered an opportunity to comment on other tax matters of concern that had not been the subject of questions in the survey. 46 respondents provided comments covering the following topics:

- The availability (not) of the equivalent to spouse deduction in shared parenting situations.

  > When parents have shared custody, they should both be able to deduct one child as a dependent or "equivalent to spouse". However, this is denied to the parent who pays support, while the other can deduct it. It is a flaw in the Income Tax Act that should be remedied.
  >
  > A parent paying support is not permitted to claim a child as an eligible dependent. … the reality is that BOTH parents are obligated to pay support, however, the set off results in one parent actually receiving money. But, since the obligation is actually on both parents, technically neither of them should be entitled to claim the deduction, or, of course, better would be that they amend to allow shared parent to make the claim regardless of which parent is actually handing over money at the end of the month.

- The problems of proving separation when the spouses continue to live apart at the same address

  > CRA won't recognize separated spouses who live at the same address, even in separate suites.

- The consequences of lump sum support payments, when part of the payment is retroactive (whether payment is taxable)
- RRSP rollovers between former spouses/ensuring rollovers work/RRSP rolls without triggering tax
- Section 85 rollovers

  > The need for the parties to still be married when the payment is made makes it difficult for the payments to be made over time. I believe it should be necessary for them to be married when the contract is entered into, but not necessary for them still to be married throughout the period of the payments being made.

- Tax on matrimonial property division
- Capital gains on revenue, capital assets, cottage properties, investments
- Getting one spouse out of the company without triggering tax
- Imputed income re: gross-up of tax due to expense in a company or due to income earned that is not taxable
- Section 160 claims

- Ability of non-custodial parent to claim all or part of a disability tax credit
- Sharing a child's post-secondary tax credit when both parties proportionately contribute to the child's university costs (cannot be shared, only alternated)
- Who gets the Universal Tax Credit?
- In shared custody situations, custodial parent paying child support cannot deduct legal fees (refused by CRA)
- Disclosure of spouse's (former spouse's) income tax information

  > Income tax information should be disclosed by CRA directly for an opposing spouse who refuses to disclose their income information contrary to a written agreement, court order, or request under the Guidelines. Thousands of Canadians, primarily women and children, are not receiving the appropriate amount of financial support because the payor refuses to disclose. This mean financial hardship and legal fees to force disclosure and, in some instances, disclosure never occurs. The right to privacy must be balanced with the legal obligations that a payor has.

- Delays in completing tax returns because they cannot agree on the date of separation
- CRA's power to interfere with a settlement alleging avoidance of tax debt by one or the other spouse
- CRA's refusal to go back beyond the last calendar year to adjust tax deductions arising when a separated couple have continued to have joint bank accounts and belatedly realize the benefits of clarifying support and spousal payments for tax purposes
- Deductibility of support payments made pre-order or agreement
- Loss of deductions that would benefit family when the ex-spouse has no income and other spouse cannot claim the deduction, e.g. when a spouse is retraining and paying a nanny but has no income against which to use the deduction
- Alberta parenting orders need to be recognized by CRA as custody orders
- Source deductions

  > When a client has a spousal support obligation, the limit on what can be deducted at source is difficult to explain. There is no logic in the amount of the limit. They also have to deal directly with CRA instead of through an agent, sometimes causing communications problems.

- Better information, with concrete examples, needed about:
  - Shared parenting
  - Shared parenting: child care deduction
  - Splitting of child tax benefit

Summary

The survey shows that all the issues identified in 2009 remain concerns even though CRA has made changes and offered clarifications to a few of the rules.

Separating and divorcing spouses continue to face challenges when managing the tax consequences of the end of their relationship due to both the complexity of the tax system and the fairness of the application of some of its rules. The tax rules may become an additional financial burden for a separated family, for example when the Child Tax Benefit is clawed back or the payor cannot deduct legal fees related to support. And, in some situations, the tax rules can be used by a hostile spouse as a weapon to punish a former spouse, for example, by not providing receipts for support paid, preventing the former spouse from benefitting from a tax deduction.

Overall, the survey suggests the need for clear and timely information materials, with examples, on a variety of tax topics to assist lawyers who are advising separating and divorcing spouses.