

# BREAKFAST FOR BUSINESS

What Did I Miss Over the Summer?

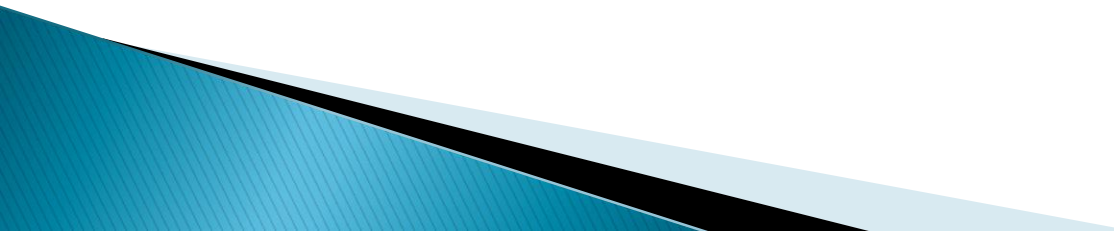
Gwen Benjamin  
Jag Gandhi  
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September 27, 2011



WILSON VUKELICH<sup>LLP</sup>  
BARRISTERS AND SOLICITORS

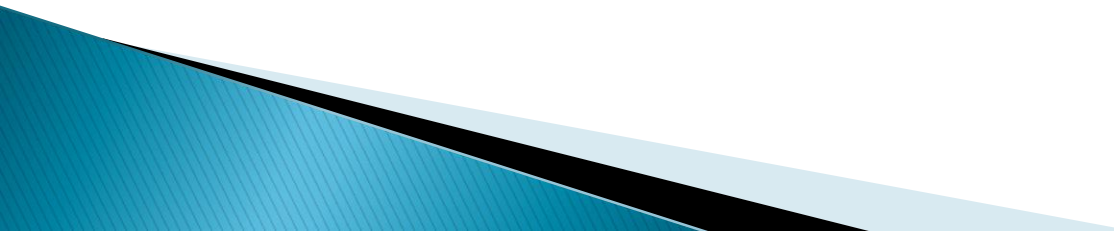
# Topics for Discussion

- ▶ Pending legislation – the Estate Administration Tax Act
  - ▶ Update of ss. 75(2) – *Sommerer v. the Queen*
  - ▶ Recent Cases of Interest
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# Estate Administration Tax Act

Changes to Come in January 2013

# Ontario Bill 173, Better Tomorrow for Ontario Act (Budget Measures) 2011

- ▶ Received Royal Assent on May 12, 2011
  - ▶ Changes to the Estate Administration Tax (generally referred to as probate fees)
  - ▶ Changes to come into effect January 2013
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# What is Estate Administration Tax?

- ▶ EAT is determined simply as a percentage of an estate's value, currently levied at 0.5% for the first \$50,000 of the value of the estate and then 1.5% of the value of the estate that exceeds \$50,000.
- ▶ Currently the estate value to be disclosed on the certificate of appointment is very simple, value of personal property plus real estate value net encumbrances.
- ▶ The estate value excludes the following:
  - insurance payable to a named beneficiary
  - Property held jointly and passing by survivorship
  - Real estate outside of Ontario

# Changes to be Made:

- ▶ **1. From Minister of Finance to Minister of Revenue**
  - Currently: the EAT is paid when a personal representative (i.e. an executor) files an application with the Court for a certificate of appointment of estate trustee whether with or without a Will and the amount is payable to the Minister of Finance.
  - Change: New section 4.1 requires the personal representative who applies for a certificate of appointment of estate trustee will be required to provide the MNR with certain prescribed information about the deceased person and his or her assets in addition to the amount disclosed in the application
  - No indication yet as to the prescribed information required
  - Implication: Will likely have to provide more detailed information on the deceased's assets as well as being required to support the valuations of the estate, increasing the estate trustee's accountability.

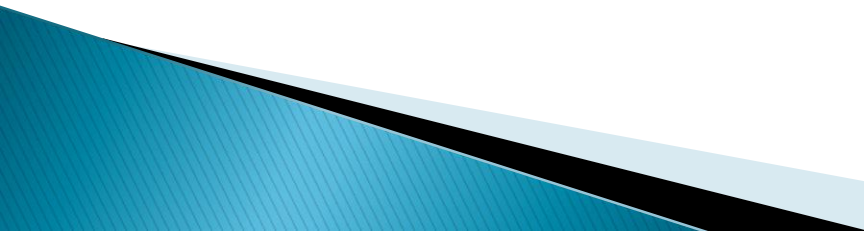
# Changes to be Made:

- ▶ 2. From No Assessment to Assessment
  - Currently: Unable to assess the estate value provided
  - Change: new section 4.2, 4.4 and 4.5(1) the MNR may assess and reassess an estate in respect of its tax payable under the EATA within 4 years after the day the certificate is issued and the tax becomes payable
  - Can assess at anytime, if the Minister establishes that a person failed to give the appropriate prescribed information
  - Imports assessment, reassessment, objections and appeals provisions from the *Retail Sales Act* (Ontario)
  - Implications: Probably be required to support valuations of the estate and be subject to potential reassessment for a 4 year period and perhaps even longer

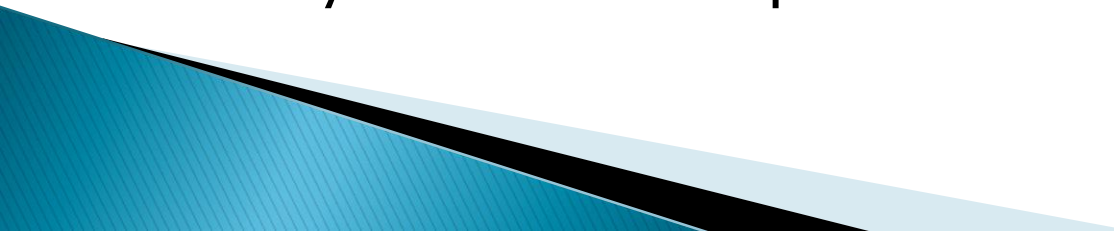
# Change to be Made:

- ▶ 3. From No Offence to Offence
  - Currently, it is not an offence if you don't comply with the information disclosure requirements
  - Change: New section 5.1 makes it an offence if you don't comply with the information disclosure requirements or if you make misrepresentation.
  - Penalties could include a fine equal to an amount that is at least \$1,000 but does not exceed twice the amount of the tax payable by the estate if that amount is greater than \$1,000 and/or imprisonment for a term not exceeding 2 years
  - Implication: Exposure to liability for estate trustees in their capacity as such. Does not provide for a clearance certificate that would provide protection to an estate trustee prior to the distribution of the assets

# Changes to be Made:

- ▶ 4. Enhanced Record Keeping
    - Currently: no formal obligation for record keeping for EAT purposes
    - Change: Under new section 4.9 estate trustees will also be required to keep at their residence or place of business detailed records and books of account containing the information that will enable the accurate determination of tax payable
    - Implication: more onerous and time consuming estate administration process
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# Overall Implications

- ▶ Value of the assets of the estate for probate or administration purposes will have to be supportable, this will likely include personal use property which is generally not formally valued and may even include jointly owned property
  - ▶ Delay in obtaining certificate of appointment of estate trustee thus delaying administering the estate
  - ▶ Information gathered will be accessible by the federal government so that when the final T1 is filed, the information about asset values on the T1 will likely need to match the information provided to the MNR
  - ▶ Uncertainty around multiple wills strategy
  - ▶ Many unanswered questions...
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# Peter Sommerer v. The Queen

## Tax Court of Canada 2011 TCC 212

- ▶ Attribution rule in s.75(2) applies only to settlor
- ▶ Sale for value not a contribution

# Subsection 75(2)

Where, by a trust created in any manner ... property is held on condition

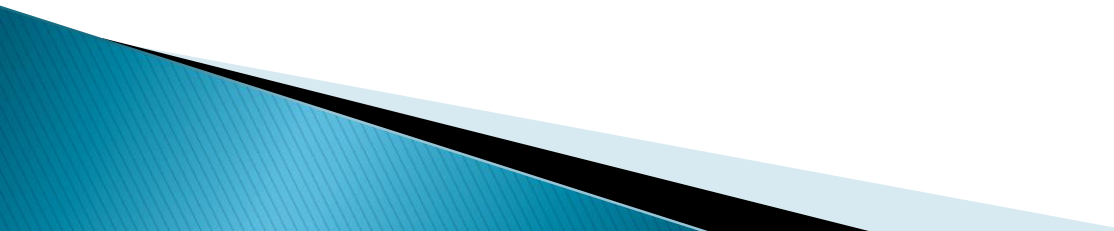
(a) that it or property substituted therefor may

(i) Revert to the person from whom the property ... was directly or indirectly received ..., or

(ii) Pass to persons to be determined by the person at a time subsequent to the creation of the trust, or

(b) that, during the existence of the person, the property shall not be disposed of except with the person's consent or in accordance with the person's direction

Any income or loss from the property ... and any taxable capital gain or allowable capital loss from the disposition of the property ... shall, during the existence of the person while the person is resident in Canada, be deemed to be income or loss, ... or a taxable capital gain or allowable capital loss, ... of the person.



# Peter Sommerer v. The Queen

## Tax Court of Canada 2011 TCC 212

- ▶ Use of textual, contextual and purposive approach

# Peter Sommerer v. The Queen

## Tax Court of Canada 2011 TCC 212

- ▶ Convention would override if wrong

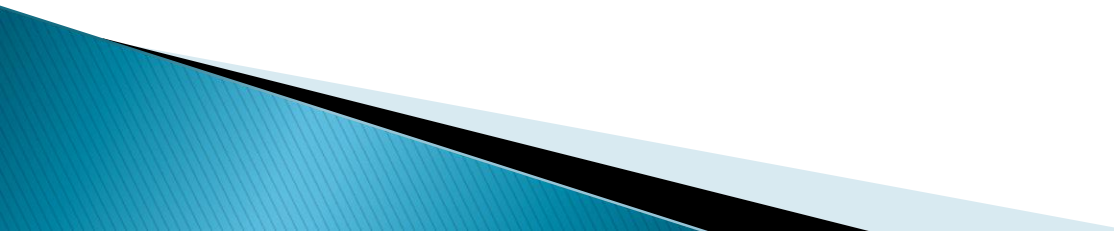
# Recent Cases of Interest

- ▶ *Adams v. Anderson* – 2011 ONCA 381 – confirming the illusion of indemnity
- ▶ *McNamee v. McNamee* – 2011 ONCA 533 – reversed trial judge on issue of gift
- ▶ *Bozzer v. the Queen* – 2011 FCA 186 – taxpayer relief and the 10 year period
- ▶ *R. v He* 2011 BCCA 360 – limits on CRA investigation powers?

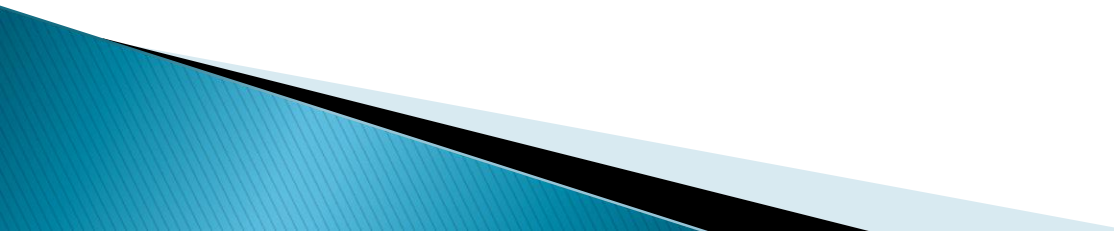
# Recent GAAR Cases

- ▶ *Triad Gestco Ltd. v. the Queen* – 2011 TCC 259 – reverse estate freeze – failed
- ▶ *1207192 Ontario Limited* – 2011 TCC 383 – alleged creditor proofing transaction – failed
- ▶ *The Queen v. Husky Energy Oil Inc.* – 2011 ABQB 268
- ▶ *Canada Safeway Limited v. Alberta* – 2011 ABQB 329 – both arbitraging differences in interprovincial tax policy – not abusive

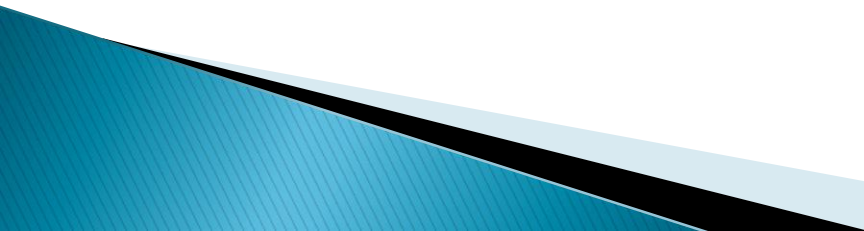
# Adams v. Anderson

- ▶ Directors of corporation assessed for GST
  - ▶ One director paid and sought contribution from other directors
  - ▶ CRA did not pursue other directors
  - ▶ Ontario court found the other directors therefor had no liability for tax, so Adams had no basis for his indemnity claim
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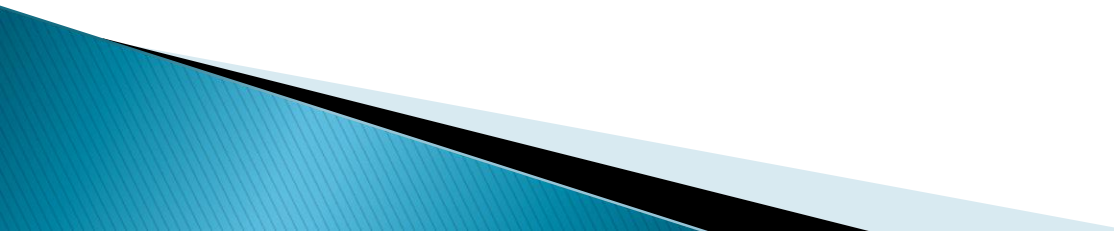
# McNamee

- ▶ Trial judge concluded the transfer of shares from father to son was not a gift because there was consideration
  - ▶ CA reversed – issue is not whether donor received some benefit, but whether the donee provided consideration for the transfer
  - ▶ CA found father had intention to make gift
  - ▶ Generally restores prior conceptions of gift
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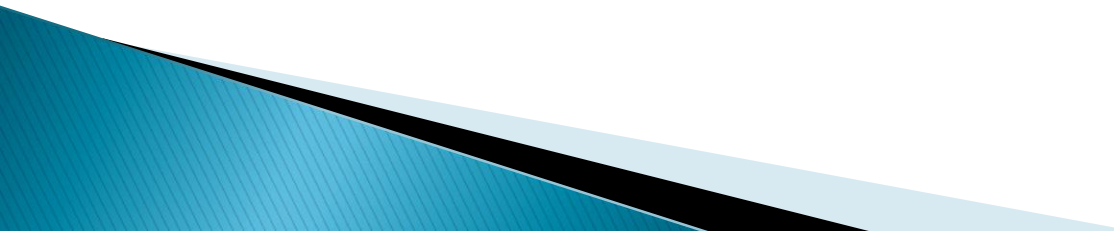
# Bozzer

- ▶ In December 2005 taxpayer applied for waiver of interest on tax debts that arose in his 1989 and 1990 tax years
  - ▶ Minister denied on basis he can only exercise discretion to waive interest if the taxpayer applies within 10 calendar years of the end of the tax year in which the underlying debt arose
  - ▶ Taxpayer argued that ss. 220(3.1) permits Minister to exercise discretion in any tax year ending within 10 years before the taxpayer's request for relief, regardless of when tax debt arose
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# Bozzer

- ▶ FCA – “... the 10 year period in ss. 220(3.1) does not start in the year of assessment. Nowhere does ss. 220(3.1) mention the year of assessment as a relevant consideration”
  - ▶ FCA – ss. 220(3.1) ambiguous so taxpayer wins
  - ▶ Sent back for consideration for relief for period January 1, 1995 to December 31, 2004
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# Re He

- ▶ Taxpayers operated a restaurant known as Sushi Man
  - ▶ CRA conducted a research survey project, looking at books and records of restaurants, convenience stores and small supermarkets fitting prescribed conditions and in prescribed locations
  - ▶ Taxpayers charged with criminal offences
  - ▶ Defence was that CRA actions went beyond their authorized audit powers to examine books and records
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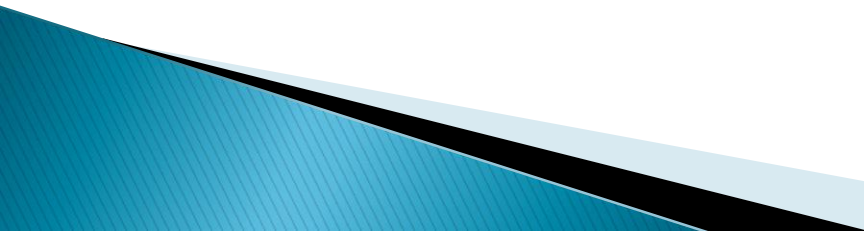
# Re He

- ▶ Trial judge acquitted taxpayers after ruling CRA seizure of records was unlawful, in violation of Charter of Rights, and inadmissible
- ▶ Crown appealed, but was unsuccessful
- ▶ Taxpayers argued the CRA project was not a “genuine and serious enquiry” into the tax matters of a specific taxpayer
- ▶ CRA – power to examine books and records not limited to audit, but to determine taxpayer compliance with record keeping obligations
- ▶ BCCA granted CRA leave to appeal to advance its arguments

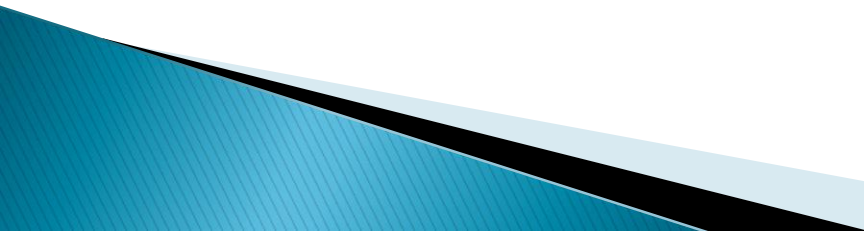
# Triad Gestco

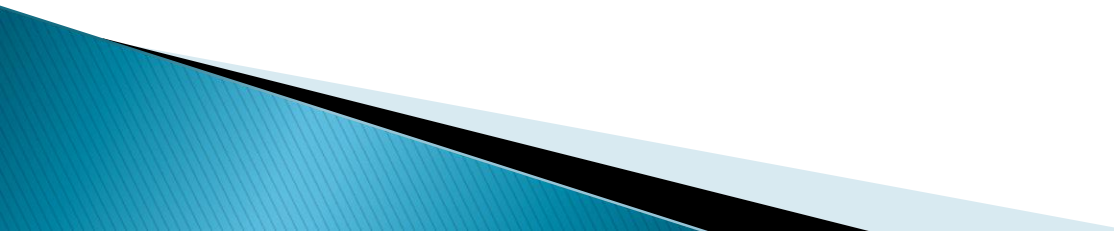
- ▶ Taxpayer tried to undertake a “reverse” estate freeze, realizing a capital loss on a disposition of shares to a trust that was not affiliated with the taxpayer
- ▶ TCC – the fact that the stop loss rules in 40(2)(g)(i) as it read at the time did not apply to trusts did not prevent the transaction from being abusive. Subsequent amendment which brought trusts within the scope of the stop loss rule was evidence that the results of taxpayer’s acts was contrary to the object, spirit and purpose of the ITA

# 1207192 Ontario Limited

- ▶ Taxpayer argued primary purpose of the transactions was to creditor proof the taxpayer.
  - ▶ Series of transactions included a “value shift” from common shares to redeemable special shares, with a resulting capital loss to the common shares
  - ▶ Taxpayer realized that loss by selling common shares to a family trust
  - ▶ TCC – realization of the loss *per se* abusive – but Crown demonstrated policy behind the stop loss rules was to allow capital losses only to the extent they reflect an underlying economic loss
  - ▶ Transactions “are artificial and lack substance”
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# Husky and Safeway

- ▶ Both cases involved arbitrage between Alberta and Ontario – which has since been eliminated
  - ▶ Alberta sought to attribute income back to Alberta under its provincial GAAR
  - ▶ Husky – “there is no principle, constitutional or otherwise, that says that a province may prevent corporations doing business within the province from taking advantage of another province’s tax policy”
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- ▶ Safeway – “the reduction of tax payable in a province through the use of *bona fide* commercial transactions that transfer income from one province to another to take advantage of a lower tax rate or of a different tax base in not abusive tax planning.”
  - ▶ Good news for Alberta trusts???
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# Comic Relief

- ▶ *Cohen v. the Queen* 2011 TCC 262
- ▶ former associate at law firm worked to be terminated and received 7 months severance which was foundation for his new career as a professional poker player
- ▶ Claimed deduction for \$121,000 gambling losses
- ▶ Failed to demonstrate his venture met standards of a business

