



April 27, 2009

The Honourable Dwight Duncan  
Minister of Finance  
7 Queen's Park Crescent, 7th Floor  
Toronto, ON M7A 1Y7

**ATTN: Alex Mazer**

Dear Minister Duncan:

**Re: Retroactive Amendments to Ontario's Taxing Legislation**

I am writing on behalf of the Ontario Bar Association to recommend that the Ontario government discontinue the practice of retroactively amending tax legislation. Alternatively, the Ontario Bar Association recommends that the Ontario government adopt comprehensive guidelines on the use of retroactive amendments to tax legislation.

The issue of retroactive amendments to tax legislation has, in the last few years, been addressed by, *inter alia*, the Ontario Bar Association, the Joint Committee on Taxation of the Canadian Bar Association and the Canadian Institute of Chartered Accountants, the Tax Executives Institute, the Canadian Chamber of Commerce, and the Canadian Bankers Association. All of these organizations have recommended eliminating or severely curtailing the use of retroactive amendments in taxing statutes.

A recent example of a retroactive amendment in an Ontario taxing statute was in the 2008 Ontario budget, where the *Retail Sales Tax Act* was amended to apply the RST to purchases of certain containers and other packaging intended to be returned for reuse (*i.e.*, wooden shipping pallets). This amendment was made retroactive to 1997 and was made in response to the Ontario Court of Appeal decision in *Proctor & Gamble Inc. v. Ontario (Finance)*.<sup>1</sup>

However, this submission is not concerned solely with this particular example of a retroactive amendment by the Ontario government. Rather, the Ontario Bar Association is troubled by the general and continuing use of retroactive amendments to taxing statutes.

The Ontario Bar Association recommends the elimination or narrow use of retroactive amendments to taxing legislation for the following reasons: retroactive amendments violate the rule of law, are unfair to taxpayers, create unnecessary uncertainty in the law, create an inhospitable business environment, and undermine the integrity of the tax dispute resolution process.

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<sup>1</sup> 2008 G.T.C. 1367 (Ont. C.A.).

### *Rule of Law*

Ontario taxpayers should know or be able to know the laws to which they are subject. Ontario's tax laws should be stable and predictable. The starting point for the operation of these principles is the text of Ontario's taxing legislation. The words of Ontario taxing statutes are vital, and the interpretation thereof by Ontario courts should be respected. Retroactive amendments to Ontario's taxing legislation tread heavily on the operation of these principles.

### *Fairness*

The Ontario government writes (Ministry of Finance) and enforces (Ministry of Revenue) the tax laws. In our view, there is an obligation to act fairly in these dual roles. Further, Ontario's tax system should be both fair and perceived to be fair. Such fairness – actual and apparent – is critical in Ontario self-assessing tax system. However, retroactive amendments are unfair and perceived to be unfair. Such unfairness undermines Ontario taxpayers' confidence in and heightens cynicism about the tax system.

### *Certainty*

Ontario taxpayers should be able to rely on the law as it is set forth or otherwise announced in the public domain. Ontario should not engage in lawmaking by “surprise” legislative amendments that have retroactive effect. Such retroactive amendments defeat reliance on tax statutes and penalize taxpayers for acting in a manner that complies with the law. In our view, if Ontario taxpayers are uncertain about the future state of the law, then taxpayers will undertake inefficient precautionary behaviour.

### *Business Investment*

Ontario is known for the stability of its private and public institutions. A stable and predictable tax system is necessary to encourage investment. However, retroactive amendments undermine institutional stability. Retroactive amendments create greater uncertainty and risk in a business organization's future planning. This aspect of Ontario tax planning reduces the competitiveness of the Ontario tax system. This, in turn, reduces the incentive to invest in Ontario.

Further, retroactive amendments diminish the integrity of the Ontario tax system in the perception of the global financial community. The Canadian Bankers Association recently stated that, “... retroactive [amendment] makes it more difficult to persuade an international financial institution to bring incremental business activity to Canada.”<sup>2</sup>

Retroactive amendments could lead to an inefficient allocation of capital, which would reduce productivity, slow economic growth and lead to less tax revenues for the Ontario

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<sup>2</sup> Canadian Bankers Association, “Strengthening Canada's International Tax Advantage” (15 July 2008).

government. Such retroactive amendments would discourage foreign and domestic investment in Ontario.

### *Integrity of the Tax Dispute Resolution Process*

The tax dispute resolution procedures (objection and appeals) are extensively prescribed in the various Ontario taxing statutes. There is no option for taxpayer's to "short-circuit" or opt-out of these procedures. Accordingly, such procedures must be fair and must be perceived to be fair. Retroactive amendments undermine the integrity of the objection/appeal process because taxpayers rely on these procedures to ensure that tax disputes are settled in a fair and even-handed manner. Taxpayers invest significant resources in resolving tax disputes, and such costs are not recoverable after a retroactive amendment deprives them of the fruits of a successful adjudication. Further, retroactive amendments in response to a court decision undermine the integrity and authority of the judicial system because such amendments erode confidence in the ability of the judicial system to resolve tax disputes.

### **Recommendations**

For these reasons, the Ontario Bar Association recommends that the Ontario government adopt a policy that prohibits the use of retroactive amendments in tax legislation and adopt a policy of amending tax legislation retrospectively (*i.e.*, effective as of date of announcement of change to the legislation).

Alternatively, the Ontario Bar Association recommends that the Ontario government adopt guidelines on the narrow use of retroactive amendments to tax legislation. We recommend that the Ontario government consult with stakeholders to develop "Made in Ontario" guidelines on the use of retroactive amendments.

The Ontario Bar Association would be willing to help lead an effort to craft these guidelines. One core component of such guidelines would be a provision that the Ontario government would not deprive winning tax litigants of the "fruits" of their court victories by making post-litigation retroactive amendments that would vaporize the effect of the court decision.

The Ontario guidelines could be modelled on the existing federal guidelines in respect of the use of retroactive amendments to taxing statutes.<sup>3</sup> The federal guidelines elucidate the criteria relied upon by the Department of Finance to determine whether changes to law should be introduced on a retroactive basis:

- (a) Retroactive clarifying amendments should only be made in exceptional situations
- (b) It may be appropriate to adopt retroactive clarifying changes where:
  - (i) The amendments reflect a long-standing well-known interpretation of the law by the Department of National Revenue;

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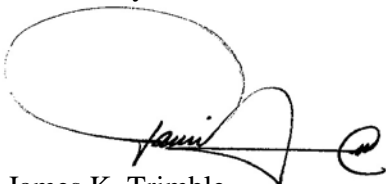
<sup>3</sup> Canada, *Comprehensive Response of the Government of Canada to the Seventh Report of the Standing Committee on Public Accounts* (September 1995).

- (ii) The amendments reflect a policy that is clear from the relevant provisions that is well-known and understood by taxpayers;
  - (iii) The amendments are intended to prevent a windfall benefit to certain taxpayers;
  - (iv) The amendments are necessary to preserve the stability of the government's revenue base; and
  - (v) The amendments are corrections of ambiguous or deficient provisions that were not in accordance with the object of the *Income Tax Act*.
- (c) Where litigation is underway, the following factors shall be taken into account for the purpose of determining whether clarifying changes should be recommended:
- (i) The relationship between the benefits of an immediate prospective reduction of risks to the tax base and the potential costs represented by the resulting increase in the risks with respect to cases under litigation;
  - (ii) The amount of tax revenues at risk in the objection and appeal process;
  - (iii) The stage of the judicial process that has been reached by a test case dealing with the issue to be dealt with by the change;
  - (iv) Whether it is possible to make a declaratory amendment or to officially recognise the clarifying nature of the changes.

### **Conclusion**

The Ontario Bar Association is very concerned about the general and continued use by the Ontario government of retroactive amendments to Ontario's taxing statutes. Thank you for considering this important proposal.

Yours truly,

A handwritten signature in black ink, appearing to read 'James K. Trimble', with a large, stylized flourish above it.

James K. Trimble  
President, Ontario Bar Association