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INTEREST RELIEF — relief under federal and provincial regimes

As many unfortunate taxpayers learn the hard way, interest accumulates quickly on tax obligations. It can also accrue on amounts that the taxpayer does not know to be owing and come to light only following an audit, and on tax debts that have been extinguished. The interest burden is exacerbated by the fact that the interest rate paid by the government on overpayments of tax is significantly less than the rate payable to the government on outstanding tax debts. In addition, interest due on tax obligations is not deductible while refund interest must be included in income and is taxed accordingly. To alleviate the consequences of potentially onerous interest obligations, most tax legislation — federal and provincial — specifically authorizes revenue officials to waive or cancel interest. However, the rules differ from jurisdiction to jurisdiction, lending a significant degree of uncertainty over both the circumstances when relief will be made available and the recourses available when interest relief I wrongfully denied. Michael Lubetsky compares the federal interest-relief regime with the regimes in Alberta and Quebec, with a particular focus on income tax. The author's survey of the different regimes reveals a number of significant differences in (a) the amount of guidance and information available on interest relief from revenue officials; (b) the circumstances when interest relief can be obtained; (c) the consequences of a favourable decision; and (d) available remedies following an unfavourable one. The result is a procedural minefield with a great number of unsettled issues.

COSTS — Tax Court's new approach to costs awards

In recent years, the Tax Court of Canada has had numerous occasions to canvass the exercise of its discretionary power to award costs under the *Tax Court of Canada Rules (General Procedure)*. One issue repeatedly confronting the Court is the role of the Schedule II, Tariff B in the exercise of the Court's discretion in awarding costs. Traditionally, the Court has awarded costs that deviated from the Tariff only in exceptional circumstances that would justify costs awards on a solicitor-client basis. As Florence Sauve explains, the Court's new approach to costs, as articulated by Chief Justice in *Velcro Canada Inc. v. R.*, suggests a trend toward awarding costs in excess of the Tariff. Since the Tax Court's new costs approach is relatively recent, it remains to be seen to what extent the significant weight given to the conduct of the parties by the Tax Court judges in exercising their discretion to award costs in excess of the Tariff may influence the conduct of parties in future proceedings.

1 Interest Relief — Interest Relief Under the Federal and Provincial Regimes

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As many unfortunate taxpayers learn the hard way, interest accumulates quickly on tax obligations. Interest can accrue for years on amounts that the taxpayer does not know to be owing and come to light only following an audit, and even on tax debts that have been extinguished.[1]

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[1] This can happen, for example, in the Delayed Loss Carryback Cases, discussed in detail below.

The interest burden is exacerbated by the asymmetries between interest paid by taxpayers on their tax debts and interest paid to taxpayers for overpaid taxes: not only is the interest rate paid by the government significantly less than that paid to the government,[2] interest due on tax obligations is never deductible, while refund interest must be included in income and is taxed accordingly.[3]

To alleviate the consequences of potentially onerous interest obligations, most tax legislation — both federal and provincial — specifically authorizes revenue officials to waive or cancel interest on tax debts. However, the mechanism differs from jurisdiction to jurisdiction, which introduces ambiguities over both the circumstances in which relief will be made available and the recourses available when interest relief is wrongfully denied.

This article compares the federal interest-relief regime with those of the Alberta and Quebec, with a particular focus on income tax.[4] A survey of the different regimes reveals a number of significant differences in (a) the amount of guidance and information available on interest relief from revenue officials; (b) the circumstances in which interest relief can be obtained; (c) the consequences of a favourable decision; and (d) available remedies following an unfavourable one. The result is a procedural minefield with a great number of unsettled issues.

Federal

Section 220(3.1) of the federal *Income Tax Act*,[5] which was originally enacted in 1991,[6] authorizes the Minister of National Revenue to cancel or waive interest on income tax debts:

> 220. (3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.

Because of the ten-year limit set out in subsection 220(3.1), interest relief extending to prior years requires a remission order from the Governor-in-Council pursuant to section 23 of the *Financial Administration Act*.[7] However, as held by the Federal Court of Appeal in *Bozzer*,[8] the ten-year limitation period in subsection 220(3.1) does not prevent the CRA from cancelling or waiving interest accruing within the past ten years on tax debts that originated earlier. *Bozzer* rejected the CRA's previous position, which was to deny that it had any power to cancel interest on tax debts that originated more than ten years prior to the taxpayer's application for relief.

The powers conferred upon the Minister of National Revenue to waive or cancel interest have been delegated to various officials in the Canada Revenue Agency ("CRA"),[9] which has published considerable guidance about how such applications are processed.[10] The CRA groups situations in which interest relief may be warranted into three broad categories — extraordinary circumstances (such as illness or natural disaster), delay attributable to the CRA (such as processing delays or the provision of incorrect information) and hardship.[11] Interest relief may also be extended to taxpayers making voluntary disclosures, a policy explained in separate CRA publications.[12]

According to the CRA's latest annual report to Parliament (for the period ended March 31, 2014), the CRA waived or cancelled $232,774,000 of interest and penalties (the amounts not being segregated) under the Federal ITA that year — or 4.2% of total interest and penalties recorded.[13]

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[2] The prescribed interest rates for federal tax purposes are available on the Canada Revenue Agency website: cra-arc.gc.ca/interestrates/. For the third quarter of 2015, the rate charged on overdue taxes stood at 5%, while the rate paid on overpaid taxes stood at 1% for corporate taxpayers and 3% for individuals and trusts.

[3] In the federal context, see sections 12(1)(c) and 18(1)(t) of the Federal ITA, infra. As David M. Sherman points out, a careful reading of section 18(1)(t) suggests that interest paid on provincial tax debts may be deductible from federal income, if it can be shown that "the interest was on money borrowed to earn income" (David Sherman, ed., *Practitioner's Income Tax Act, 4th Edition* (Toronto: Thomson Reuters, 2015) at s. 18(1)(t).

[4] The degree to which these observations apply to sales and other taxes is a topic worthy of discussion but beyond the scope of this article.

[5] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supplement) ("Federal ITA").

[6] For discussion of the history and purpose of subsection 220(3.1), see "The Application of the Fairness Provisions to Penalty and Interest" (CRA Memo #1996 fair, March 1996), at 1-2.

[7] R.S.C. 1985, c. F-11. For discussion and sources, see Sherman, supra note 3 at s. 220(3.1).

[8] *Bozzer v. Canada*, 2011 FCA 186.

[9] These delegations are done administratively pursuant to subsection 220(2.01) of the Federal ITA. A list of CRA officials with the authority to grant interest relief appears on the CRA website at bit.ly/1XufLfn.

[10] For example, see the "Taxpayer Relief Procedures Manual" (May 2013); "Taxpayer Relief Provisions (Information Circular #IC07-1, May 31, 2007). For a bibliography of other sources, see Sherman, supra note 3 at s. 220(3.1).

[11] See, e.g., IC07-1, paragraphs 23–28.

[12] See the CRA's Voluntary Disclosures Program website at: cra-arc.gc.ca/voluntarydisclosures/.

[13] CRA Annual Report to Parliament 2013-2014, online: bit.ly/1MPpqWo, at 138. Note that the CRA is not required to include specific data on interest cancellation in its annual report to Parliament, and thus does so on its own initiative; see *Canada Revenue Agency Act*, S.C. 1999, c. 17, s. 88(2).

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If a cancellation of interest results in a refund to the taxpayer (i.e., because the taxpayer has already paid the interest in question), subsection 164(3.2) of the Federal ITA provides that the Minister will pay interest on the refund starting 30 days after the date of the application for interest relief.

Subsection 165(1.2) of the Federal ITA specifies that no objection is possible from an assessment made pursuant to subsection 220(3.1). Since no objection is possible, no appeal to the Tax Court of Canada is possible either.[14] But many taxpayers seek interest relief in their appeals before the Tax Court, only to learn the hard way that it has no jurisdiction over such matters.[15]

Instead, if a taxpayer is refused interest relief,[16] the only remedy is to apply for judicial review in the Federal Court, which has exclusive jurisdiction over judicial review matters "against any federal board, commission or other tribunal."[17]

Such an application must be brought within 30 days of the date the final interest-relief decision is communicated to the taxpayer.[18] Federal Court jurisprudence on subsection 220(3.1) is voluminous and establishes that the power to waive interest is discretionary and entitled to deference by the Court. The Court will only quash a refusal to grant interest relief if the decision is "unreasonable."[19]

One particularly pernicious question relating to interest relief under the federal ITA concerns situations where a taxpayer is reassessed following an audit but has sufficient losses in subsequent taxation years to offset the reassessed amounts (referred to as "delayed loss carryback cases"). Even though the taxpayer may owe no tax following application of the losses, subsection 161(7) provides that interest runs for the entire period up to 30 days after the latest of several possible dates; in most cases this means 30 days after the taxpayer requests the loss carryback in writing.

Since in many cases the taxpayer can hardly make such a request until an audit is concluded, there may be an assessment of interest for the (often lengthy) period in which no tax is owing. The CRA offers apparently no guidance regarding interest relief in such situations and the Federal Court jurisprudence has gone both ways.[20]

The Agreeing Provinces

Most provinces and territories (the "Agreeing Provinces") have entered into tax collection agreements with the government of Canada to essentially harmonize their income tax regimes and contract their income tax assessment and collection powers to the CRA.

Various federal statutes expressly authorize the conclusion of tax collection agreements with the provinces and expressly grant the Minister of Revenue and/or the CRA the powers necessary to implement them.[21]

The Agreeing Provinces all have very similar income tax legislation based on a model drafted largely by the federal government.[22] The provincial income tax statutes incorporate section 220 of the Federal ITA by reference, specifying that the powers of the federal "Minster" are to be read as referring to his or her provincial counterpart.[23] In the tax collection agreements, each Agreeing Province then:

a) undertakes to apply the same interest rate as the CRA;

b) delegates its minister's taxation powers back to the federal Minister;

c) accepts the "assessments, decisions and other steps" taken by the CRA in the enforcement of the provincial tax statutes as "final and binding;"

d) undertakes not to demand the imposition, collection or remission of any interest payable by a taxpayer under the provincial income tax legislation; and

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[14] Federal ITA, s. 169(1).

[15] A number of recent examples appear in Sherman, supra note 3 at s. 165(1.2).

[16] The Courts have held, however, that notwithstanding subsection 165(1.2) of the Federal ITA, the TCC has the jurisdiction to waive *penalties* in the context of an ordinary tax appeal if a taxpayer can demonstrate due diligence (see, e.g., *Galachiuk v. The Queen*, 2014 TCC 188, for a review of jurisprudence). A future article can discuss in more detail why this is the case for penalties and not interest, and whether this should be the case.

[17] *Federal Courts Act*, R.S.C. 1985, c. F-7.17, s. 18.

[18] Ibid., s. 18.1(2). The Court may allow a late application to proceed but does not do so routinely.

[19] A large bibliography of sources appears in Sherman, supra note 3 at 1343–1346.

[20] A seminal case on this issue remains *Maarsman v. Canada (CRA)*, 2003 FC 1234, which recognized the "absurdity" of assessing interest during years when no taxes were owing and held in the taxpayer's favour on an application for judicial review. On the other hand, the Federal Court of Appeal upheld a decision denying interest relief in a delayed loss carryback situation in *Toastmaster Inc. v. Canada (National Revenue)*, 2009 FCA 270. In both cases, the courts seemed to place great emphasis on the degree to which the taxpayers' conduct in the relevant taxation years contributed to their predicament. See, also, *Canada Revenue Agency v. Slau Limited*, 2009 FCA 270 ("*Slau*").

[21] *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8, s. 7; *Canada Revenue Agency Act*, S.C.1999, c. 17, s. 5(1)(b); 8.

[22] See *Gendis Inc. v. Canada (AG)*, 2006 MBCA 58, ¶114-115.

[23] *Income Tax Act, 2000*, S.N.L. 2000, C.I-1.1, s. 2(9)(i), 67 ("ITA(NL)"); *Income Tax Act*, R.S.P.E.I. 1988, c. I-1, s. 1(9)(j), 61 ("ITA(PEI)"); *Income Tax Act*, R.S.N.S. 1989, c. 217, s. 2(1)(k), 79 ("ITA(NS)"); *New Brunswick Income Tax Act*, S.N.B. 2000, c. N-6.001, s. 1, 97 ("ITA(NB)"); *Income Tax Act*, R.S.O. 1990, c. I.2, s. 1(1), 27 ("ITA(ON)"); *The Income Tax Act*, C.C.S.M. c. I-10, s. 1(1), 36 ("ITA(MB)"); *The Income Tax Act*, R.S.S. 1978, c. I-2, s. 32, 60(9)(h) ("ITA(SK)"); *Alberta Personal Income Tax Act*, R.S.A. 2000, c. A-30 ("PITA(AB)"), s 1(3)(j), 69.; *Income Tax Act*, R.S.B.C. 1996, c. 215, s. 1(1)(7), 47 ("ITA(BC)"). Note that the delegation mechanism for the territories is slightly different, in that the territorial tax legislation delegates directly to the federal minister. *Income Tax Act*, R.S.Y. 2002, c. 118, s. 1(1), 40 ("ITA(YK)"); *Income Tax Act*, R.S.N.W.T. 1998, c. I-1, s. 1(1), 32 ("ITA(NWT)").

e) allows the CRA to retain any interest collected on provincial income tax debts "in consideration of the collection risk borne by Canada in respect of the [provincial] tax imposed."[24]

The various provincial tax statutes also incorporate by reference subsection 164(3.2) of the Federal ITA,[25] meaning that if a cancellation of interest results in a refund to the taxpayer, the refund bears interest starting from the 30 days after the date of the application for interest relief.

The CRA's copious published guidance on interest relief is conspicuously silent on the question of how interest relief granted by it will apply to provincial income tax debts. In practice, however, the CRA simply applies any decision with regard to interest relief under subsection 220(3.1) to any related provincial income taxes due to an Agreeing Province. If the taxpayer seeks judicial review of a refusal by the CRA to grant interest relief, the review generally considers the CRA's decision on the total interest amount without distinguishing between the federal and provincial portions.

It seems that the CRA has never argued that the Federal Court lacks jurisdiction over the provincial portion of the interest; nor does it appear to be any standard practice for taxpayers to simultaneously initiate proceedings in both Federal Court and any applicable provincial superior court(s) when challenging CRA interest-relief decisions.

A review of the scholarship and reported jurisprudence also does not disclose any cases in which a taxpayer has applied to the CRA for the cancellation or waiver of interest on a "pure" provincial tax debt due to an Agreeing Province. Such situations would be unusual but could occur, for example, in the context of an inter-provincial allocation dispute where income is belatedly re-allocated to an Agreeing Province.

While the CRA would have the authority, as the delegate of the provincial revenue minster, to process such an interest relief application, it remains an open question whether the Federal Court would have the jurisdiction to hear any judicial review of the CRA's decision.

A comprehensive analysis of this (to date) hypothetical question lies beyond the scope of this article. On one hand, insofar as the CRA collects provincial taxes as an agent of the province,[26] one might expect that any judicial review of its decisions regarding provincial tax administration would be heard by the court that normally reviews provincial administrative actions (i.e., that province's superior court). In addition, since disputes over "pure" provincial income taxes in Agreeing Provinces are heard by the province's superior court rather than by the TCC, one might reason by analogy that any review of the CRA's provincial interest-relief decisions must also lie in a local court rather than in the Federal Court. A closer look at the legislation, however, suggests otherwise. The TCC is a statutory court whose jurisdiction is set out in sections 12 and 13 of the *Tax Court of Canada Act*.[27] Notably, its jurisdiction does not include the adjudication of disputes under provincial income tax legislation.

In contrast, and as noted above, the Federal Court, whose powers are set out in the *Federal Courts Act*, has exclusive jurisdiction over any application for judicial review "against any federal board, commission or other tribunal," including the CRA, which is expressly authorized by federal legislation to administer provincial income tax as an agent of the of the provinces.

Indeed, in *Société des acadiens* — a decision ultimately confirmed by the Supreme Court of Canada — it was held that judicial review proceedings against the Royal Canadian Mounted Police ("RCMP") lie in Federal Court, even in cases involving actions of the RCMP in its role as a provincial police force pursuant to contracts with a province. As explained by both the New Brunswick Court of Queen's Bench and the Federal Court:[28]

> The applicant submits that for all intents and purposes, the [RCMP] is an institution of the Government of New Brunswick since it provides police services on behalf of the Government of New Brunswick and some municipalities . . . I cannot accept this position.
>
> The Royal Canadian Mounted Police does not lose its federal status because it enforces provincial and municipal legislation pursuant to a service contract with the Province of New Brunswick and some municipalities.
>
> In my opinion, it is clear that the Royal Canadian Mounted Police is a "federal board, commission or tribunal" within the meaning of the *Federal Court Act*.
>
> I also find that the Royal Canadian Mounted Police remains at all times a federal institution and that it cannot be transformed into a provincial institution by acting on behalf of the Government of New Brunswick.

Although *Société des acadiens* involved a different legislative regime, its holding concerning the jurisdiction of the Federal Court arguably applies to the CRA acting as an agent for the Agreeing Provinces.

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[24] See, for example, *Tax Collection Agreement Between the Government of Canada and the Government of the Province of Saskatchewan*, sections 1.4 and 4.4; *Tax Collection Agreement Between the Government of Canada and the Government of the Province of Alberta*, sections 1.4 and 4.4.

[25] ITA(NL), s. 60(1); ITA(PEI), s. 54(1); ITA(NS), s. 62(1); ITA(NB), s. 66; ITA(ON), s. 15, 21; ITA(MB), s. 28.1(1); ITA(SK), s. 23(1); PITA(AB), s. 54(1); ITA(BC), s. 40(1.1).

[26] See *Markevich v. Canada*, 2003 SCC 9, ¶45.

[27] *Tax Court of Canada Act*, R.S.C. 1985, c. T-2.

[28] *Société des acadiens et acadiennes du Nouveau-Brunswick c. Canada (Gendarmerie royale)* (2001), 244 NBR (2d) 366, at paragraphs 16–19, inclusive, reproduced in *Société des Acadiens et Acadiennes du Nouveau-Brunswick c. Canada*, 2005 FC 1172; confirmed 2008 SCC 15.

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Quebec

Quebec is not an Agreeing Provinces. It maintains its own tax regime with its own revenue agency — the *Agence du revenu du Quebec* (known as “RQ”). The Quebec income tax regime largely tracks the federal regime in substance, administration and dispute-resolution procedures — one significant difference being, however, that appeals of income tax assessments are not heard by the TCC, but rather in the Cour du Quebec (“CQ”), a provincially constituted court.

The power of Quebec’s Minister of Revenue[29] to waive or cancel interest appears in section 94.1 of Quebec’s *Tax Administration Act* (“TAA”),[30] which reads in part as follows:[31]

> The Minister may waive, in whole or in part, any interest, penalty or charge provided for by a fiscal law.
>
> The Minister may also cancel, in whole or in part, any interest, penalty or charge exigible under a fiscal law.
>
> A decision of the Minister under this section is not subject to opposition or appeal.

The Minister’s powers under section 94.1 have been delegated to various officials within RQ, pursuant to the Regulation respecting the signing of certain deeds, documents and writings of the Agence du revenu du Quebec.[32]

Section 94.1 also requires the tabling of an annual report of how the amount of interest, penalties and charges waived or cancelled that year. The latest report (for the year ended March 31, 2014) reports that in that year:[33]

a) RQ granted some kind of relief in 10,720 cases, of which 5,217 pertained to income tax; and

b) RQ waived or cancelled $50,110,747 of interest, of which $7,332,157 pertained to income tax and the rest to sales, payroll and other taxes.

These reports do not indicate how many requests for interest relief are refused each year, but since such cases surely also occur, RQ may well process thousands of cases each year over and above the numbers reported. Where RQ grants a cancellation of interest that results in a refund to the taxpayer, interest is paid by the RQ on the refund for the entire period that the refunded amounts were in the possession of the RQ.[34] Herein lies a difference with the federal regime, where refund interest only starts to accrue 30 days after the taxpayer requests interest relief.

RQ has published guidance on its application of section 94.1 — in particular in its *Bulletin d’interprétation LAF94.1-1/R7* (“BdI LAF94.1-1”).[35] Like the CRA, RQ groups interest-relief situations into the three basic categories: exceptional circumstances beyond the taxpayer’s control, actions attributable to RQ and hardship.[36] In addition, it recognizes the appropriateness of interest relief in some “operations sans effet fiscal” (e.g., circumstances where RQ issues corrective reassessments that alter certain tax balances but not the overall tax due), but states that RQ will generally not provide interest relief in delayed loss carryback situations.[37] In addition, like the CRA, the RQ also affords interest relief in the context of voluntary disclosures, concerning which it provides guidance in separate publications.[38]

Section 94.1 of the TAA does not specify any limit on the number of years of interest that the RQ can waive. Administratively, however, RQ adheres to the same 10-year time limit provided by the Federal ITA.[39] RQ also revised BdI LAF94.1-1 following *Bozzer* to specify that section 94.1 allows the waiver or cancellation of interest “dans les dix années civiles précédant l’année civile au cours de laquelle la demande est faite, peu importe l’année où la dette est survenue.”[40]

The third clause of section 94.1 of the TAA — the privative clause — was added in 1996.[41] That change followed the decision of the Quebec Court of Appeal in *Vézeau*,[42] which held that questions of interest relief could be raised by taxpayers in the context of a statutory appeal of an income tax assessment:

> In my view, the Court of Quebec had jurisdiction to decide whether the interest claimed by the Minister in a notice of assessment or a notice of reassessment was due. If the reassessments by the Minister in this case claimed interest, and they did, and the respondent had filed notices of objection under Sec. 1057, and he did, I can see no reason why respondent should not have had the right, under Sec. 1066, to

[29] Whose functions are currently exercised by the Minister of Finance. Order in Council 362-2014, dated April 24 2014, (2014) 146 G.O. 2 (French), 1871.

[30] R.S.Q. c. A-6.0002.

[31] It bears note that the TAA deals with a variety of fiscal laws and thus section 94.1 applies likewise to sales tax and other provincial taxes.

[32] C.Q.L.R. c. A-7.0003, s. 10, 21.6(2), 49(2) and various others.

[33] Revenu Quebec: Rapport annuel de gestion 2013-2014, online: bit.ly/1PQoINP, page 242.

[34] Note that this interest might not be paid if the refunded amounts are applied to another outstanding tax debt (TAA, s., 30, 30.2).

[35] “Renonciation ou annulation à l’égard d’intérêts, de pénalités ou de frais” (Bulletin d’interprétation LAF 94.1-1/R7, July 23, 2013).

[36] BdI LAF94.1-1, ¶18, 22. These three categories also appear on the RQ form MR-94.1 “*Application for the Cancellation or Waiver of Interest, Penalties of Charges*” and applicants are invited indicate the category into which his or her case falls.

[37] Ibid. ¶25. As an exception, however, RQ will consider providing interest relief if a delayed loss carryback replaces other available discretionary deductions (such as capital cost allowance).

[38] See “Le programme de divulgation volontaire” (Bulletin d’interprétation ADM.4/R6, May 22, 2015), ¶3.

[39] Whether RQ is legally entitled to limit its powers in this way is debatable.

[40] BdI LAF94.1-1, preamble and ¶6.

[41] LQ 1996, c. 31, s. 34.

[42] *Vézeau c. SMRQ*, 1995 RDFQ 26 (C.A.), ¶35.

> appeal to the Court to have the reassessments vacated or varied, and why the Court should not have had the power to vacate the assessment of interest.

The Court also commented that it made good sense to allow taxpayers to deal with interest-relief disputes in the same forum as their actual tax assessment:

> To require a taxpayer to proceed by way of judicial review [in the Superior Court] if he wishes to attack an assessment of interest is not a very satisfactory solution. That remedy is more limited, and if the taxpayer is, at the same time, attacking the tax or penalties assessed, it would be a cumbersome remedy.[43]

This good sense was short-lived, however; the addition of the privative clause to section 94.1 deprived the CQ of its jurisdiction to hear challenges to the RQ interest-relief decisions.[44]

As at the federal level, however, Quebec taxpayers continue to ask for interest relief in the context of their statutory tax appeals, only to discover to their disappointment that the CQ lacks jurisdiction over such matters and that their only remedy is to apply for interest relief under 94.1 and, if not satisfied with RQ's decision, to seek judicial review in Superior Court.[45]

Surprisingly, however, in contrast to the plentiful case law from the Federal Court on subsection 220(3.1) in the Federal ITA, and notwithstanding the thousands of interest-relief applications processed each year by RQ, there have apparently been no reported decisions to date from the Superior Court involving section 94.1 in the income tax context. Indeed, only two reported decisions (both involving interest on sales tax debts) have emerged from the Superior Court on section 94.1 since the 1996 amendments: *Lafarge*[46] and *Hydromega*.[47]

The paucity of case law makes it difficult to discern substantive patterns or rules concerning interest relief decisions in Quebec, although one recurring complaint from taxpayers is that the RQ allegedly fails to provide reasoned decisions to taxpayers when interest relief is refused.[48]

Both *Lafarge* and *Hydromega* have both held, however, that the interest-relief jurisprudence from the Federal Court can inform the application of section 94.1 of the TAA.[49] In particular, both decisions recognized that interest-relief decisions are generally discretionary and entitled to deference upon judicial review (although in *Hydromega*, the Court suggested that the complete failure of RQ to explain a decision could result in no deference being paid).[50]

Lafarge and *Hydromega* reveal some significant procedural differences between Quebec and federal interest-relief contestations. First, in Quebec, in some cases, the Superior Court can actually substitute its discretion for that of the decision-maker[51] (as in *Lafarge*).[52] In contrast, if the Federal Court allows an application for judicial review, all it can do is quash the decision and refer the matter back for reconsideration.[53]

Second, the rules of procedure applicable to judicial reviews in Quebec — set out in the *Code of Civil Procedurez* — are generally less formal than those applicable in Federal Court. In the Superior Court, judicial review proceedings are "heard and decided by preference"[54] with an "oral" defence (meaning that no written pleading from the defendant is required).[55] In addition, although evidence is made primarily by affidavit, *viva voce* testimony is also permitted without leave of the Court.[56]

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[43] Ibid. ¶42.

[44] As at the federal level, penalties can potentially be challenged in the context of statutory appeals before the CQ on the basis that the taxpayer demonstrated due diligence. See, e.g., *Gyptech Acoustique inc. c. Quebec (Sous-ministre du Revenu)*, 2007 QCCQ 7091 (in the sales tax context).

[45] See *Québec (Sous-ministre du Revenu) c Hamel*, 2010 QCCA 1094 and its progeny; *Agence du revenu du Québec c. Technostructur inc. (175094 Canada inc.)*, 2014 QCCA 533, ¶27–30.

[46] *Lafarge Canada inc. c. Quebec (Sous-ministre du Revenu) (Agence du revenu du Quebec)*, 2011 QCCS 7391.

[47] *Hydromega Services inc. c. Quebec (Sous-ministre du Revenu) (Agence du revenu du Quebec)*, 2013 QCCS 2170; leave to appeal to the QCA ref'd 2013 QCCA 918.

[48] *Lafarge* ¶37-38; *Hydromega* ¶20, 51-52. For a general overview of RQ's obligation to provide reasoned decisions to taxpayers when considering applications for discretionary relief (albeit in a different context), see *Millette v Quebec (Sous-ministre du Revenu)*, 2006 QCCS 3006, ¶37–62.

[49] *Lafarge* ¶57; *Hydromega* ¶53.

[50] *Hydromega* ¶48-49.

[51] A review of the jurisprudence lies beyond the scope of this article; for a list of sources, see Catherine Piché, ed, *Code de procédure civile annoté : 2015-2016* (Montréal : LexisNexis Canada, 2015) at 675-676.

[52] *Lafarge* ¶83. It bears noting that the Court took this step with the consent of the parties.

[53] See, e.g., *Slau*, supra note 20 ¶40-41.

[54] Article 834.2 CCP (or see Article 530 of the new CCP).

[55] It bears noting that Quebec civil procedure distinguishes between two procedural vehicles to quash administrative decisions: "direct actions in nullity" and "evocation before judgement." The differences are largely historical and the distinction will be abolished in 2016 with the coming-into-force of the new CCP. In *Hydromega*, the Court held that a judicial review of an interest-relief decision was best considered a procedure in "evocation" — to which an "oral" defence applies (Article 175.2(7)(c) CCP). The new CCP will provide that the defence in all proceedings is oral "unless the case presents a high level of complexity or special circumstances warrant otherwise" (Article 171). It remains to be seen whether interest-relief challenges will be considered sufficiently complex to generally warrant a written defence.

[56] Article 835.3 CCP.

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Third, while an application for judicial review before the Federal Court must be brought within 30 days, a judicial review in Quebec must be brought "within a reasonable time."[57] It bears noting, however, that the Quebec courts have held that the phrase "reasonable time" in the context of a judicial review application usually means "within 30 days."[58]

While many open questions remain with regard to obtaining interest relief from RQ, perhaps the most pressing involves the relationship between federal and provincial interest relief. While RQ's published guidance recognizes that RQ will waive interest for delays attributable to its own conduct, it does not contemplate interest relief for delays attributable to the CRA or other revenue agencies.[59] However, when the CRA reassesses a taxpayer so as to increase its income, RQ typically usually follows suit with a consequential reassessment without further reflection. But if the CRA reassessment has been unduly delayed for reasons attributable to the CRA, and even if the CRA agrees to waive and cancel interest on the federal reassessment, RQ does not follow suit with the Quebec assessment since the delay was not its fault. The reasonableness of this position remains to be judicially considered.

One other potential mystery involving RQ interest-relief is why — with thousands of decisions a year — there is so little case law coming out of Quebec on the subject. One might speculate that RQ prefers not to litigate such cases and is perhaps more amenable to negotiating settlement with taxpayers once proceedings are commenced.

Alberta

Alberta is an Agreeing Province for the purposes of individuals and trusts, but not for corporations. The province's Tax & Revenue Administration ("TRA") assesses and collects tax under the *Alberta Corporate Tax Act*.[60]

As with Quebec, Alberta's income tax regime for corporations resembles the federal regime in administration and dispute-resolution procedures — one pertinent difference being, however, that appeals of income tax assessments are not heard by the TCC, but rather by Alberta' superior court (the Court of Queen's Bench).[61]

Section 55.1 of the ACTA allows for the cancellation of interest and penalties by the responsible Alberta minister:

> Notwithstanding the *Financial Administration Act*, the Provincial Minister may waive or cancel all or any portion of any penalty or interest payable under this Act by the taxpayer, or refund any portion of any penalty or interest paid under this Act by the taxpayer,
>
> (a) at any time, if the waiver is in response to an application by the taxpayer within the time set out in clause (b)(i) or (ii), or
>
> (b) in any other case, on or before the later of
>
> (i) the day that is 10 calendar years after the end of the taxation year to which the interest or penalty relates, and
>
> (ii) the day that is 12 months from the date the interest and penalty is assessed.

An essentially identical provision appears in a variety of Alberta tax statutes, including the *Tourism Levy Act*,[62] *Tobacco Tax Act*,[63] and the *Fuel Tax Act*.[64] Alberta has no sales tax.

Unlike the CRA or RQ, the TRA does not include any data on interest cancellation in its annual report.[65]

The TRA has published its approach to interest relief in its *Information Circular* CT-5R5 ("IC CT-5R5")[66] which — similar to CRA and RQ — recognizes the three basic categories of circumstances beyond the taxpayer's control, administrative error or delay, and hardship. IC CT-5R5 also discusses, as a fourth category, voluntary disclosure situations.[67]

Unlike the guidance provided by RQ, IC CT-5R5 expressly recognises the involvement of the CRA in tax administration and outlines circumstances when a decision from the CRA to waive interest may (or may not) incite the TRA to follow suit:[68]

> CRA may waive federal interest and/or penalties if an assessment action was delayed by CRA and the delay was the cause of the liability for interest or penalties. If TRA has paralleled the federal assessment, TRA will consider waiving interest or penalties for the same time period.
>
> [. . .]
>
> TRA generally does not grant requests for waiver of penalties and/or interest on the basis of financial hardship unless CRA has also provided a waiver of penalties and interest for the same reason.
>
> [. . .]

---

[57] See Article 835.1 CCP (or Article 529 of the new CCP).

[58] For a review of jurisprudence, see Piché, supra note 51 at 913.

[59] See LAF 94.1, supra note 36 ¶18.

[60] R.S.A. 2000, c. A-15 ("ACTA").

[61] ACTA, s. 1(2)(c), 50 *et seq.*

[62] R.S.A. 2000. c. T-5.5, s. 13.1.

[63] R.S.A. 2000, C. T-4, s 22.1.

[64] S.A. 2006, c. F-28.1, s. 70.

[65] For its most recent report, see bit.ly/1MfkqtF.

[66] "Waiver or Cancellation of Penalties and/or Interest" (Information Circular CT-5R5, March 8, 2011), online: http://www.finance.alberta.ca/publications/tax_rebates/corporate/ct5.html.

[67] Ibid. ¶4.

[68] Ibid. ¶19, 27 and 34.

> While CRA waiving interest and/or penalties may be persuasive, it does not bind Alberta to a parallel action. The waiver request may fit under the federal guidelines, but not under the Alberta guidelines, or a federal waiver may be attributable to a federal action that does not reasonably affect the corporation's business with TRA. For example, a federal interest liability waived because a corporation was informed erroneously about its federal instalment requirements would not reasonably affect the interest liability to Alberta.

Concerning delayed loss carryback situations, IC CT-5R5 also states categorically that interest relief is not granted in such cases (the reasonability of which seems dubious and remains to be tested by the courts).[69]

The ACTA has no provision analogous to subsection 164(3.2) of the Federal ITA or section 30 of the TAA, and consequently, no interest is paid when the cancellation of interest results in a refund. As explained in IC CT-5R5, "any resulting change . . . to interest will be made through an adjustment to the corporation's tax account [. . .] Refund interest will not be paid on these adjustments."[70]

Section 55.1 of the ACTA allows for the cancellation of interest if a taxpayer applies either (a) within the 10-year period "after the end of the taxation year to which the interest relates" or (b) within 12 months of the date when the interest is assessed. The latter option obviates the need for a remission order in cases where a taxation year more than 10 years old is reassessed — an accommodation not found in the federal regime. Concerning the former option, IC CT-5R5 articulates the CRA's pre-*Bozzer* position to the effect that the relevant year is the year when the underlying tax debt arose.[71] IC CT-5R5 antedates *Bozzer*, however, and one might reasonably anticipate that the reasoning of *Bozzer* may also inform the interpretation of section 55.1. At this moment in time, however, the question of whether *Bozzer* applies to section 55.1 remains open.

According to the TRA, taxpayers dissatisfied with a decision relating to interest relief, can seek judicial review in the Court of Queen's Bench within six months:[72]

The powers of the Court of Queen's Bench on judicial review are arguably broader than those conferred on the Federal Court. In particular, the Court can not only quash a decision and refer it back to reconsideration, but can also "give any other direction it considers necessary."[73] In certain situations, the Court may thus substitute itself for the administrative decision-maker and issue directions accordingly.[74]

Because the ACTA contains no privative clause akin to subsection 165(1.2) of the Federal ITA or subsection 94.1(3) of the TAA, a taxpayer should arguably be able to challenge an interest-relief decision in the context of an ordinary tax appeal rather than instituting judicial review procedures (based on the reasoning of the *Vézeau* decision). There does not appear, however, to be any reported Alberta case law on this issue. However, the question is largely academic given that in Alberta, both statutory tax appeals and judicial reviews are heard by the same court (viz, the Court of Queen's Bench).

Indeed, there appears to date to be no judicial consideration of any kind by the Alberta courts of section 55.1 of the ACTA or the analogous provisions in Alberta's other fiscal statutes. One might hypothesize that, in practice, decisions from the TRA with regard to interest relief are heavily influenced by what happens on the federal level.

Conclusion

The table below summarizes some of the key differences between the different interest-relief regimes discussed in this article.

The table confirms that although the federal and provincial interest-relief regimes resemble each other, significant differences remain that become particularly apparent when a taxpayer seeks judicial review of unfavourable decisions. The table also reveals how differences between the CRA, RQ and the TRA in their respective attitudes towards interest relief can translate into divergent decisions faced with the same circumstances, with no single forum to resolve the inconsistencies.

At the same time, thousands of applications for interest relief are processed each year, with millions of dollars (if not more) of interest cancelled annually, suggesting that the system is indeed working for those who manage to successfully navigate the procedural labyrinth. One is left to query, however, how many do not.

	Agreeing Provinces	**Quebec**	**Alberta**
Maximum period during which interest may be waived	10 years, as interpreted by *Bozzer*	No statutory limit; federal limit (as explained by *Bozzer*) applied administratively	10 years from application or 12 months following assessment; unclear whether *Bozzer* accepted
Annual reporting to the Legislature on interest relief	Done voluntarily by the CRA	Obligatory	Not done

69 Ibid. ¶33.

70 Ibid. ¶6.

71 Ibid. ¶38.

72 Ibid. ¶45.

73 *Alberta Rules of Court*, Alta. Reg. 124/2010, s. 2.24(2)(c).

74 In the non-tax context, such a direction occurred in *LE v. Alberta*, 2013 ABQB 161.

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	Agreeing Provinces	Quebec	Alberta
Refund interest paid on cancelled and refunded interest	Yes, starting 30 days from date of application for interest relief	Yes, starting from date of overpayment	No
Whether CRA delay justifies interest relief	Yes	No (position not judicially tested)	Depends on the situation
Whether interest relief is possible in Delayed Loss Carryback Situations	Depends on the situation	Generally no (position not judicially tested)	No (position not judicially tested)
Court with jurisdiction to review interest-relief decisions	Federal Court	Superior Court	Court of Queen's Bench
Time limit to seek judicial review of interest-relief decision	30 days	"Within a reasonable time" (in practice, 30 days)	6 months
Standard of review on judicial review	Reasonableness	Generally reasonableness; could be correctness if RQ's decision insufficiently explained	Reasonableness (presumably)
Whether the Court, on judicial review, can substitute itself for the decision-maker	No	Potentially, in certain situations	Potentially, in certain situations
Whether interest relief decisions can be reviewed in a statutory income tax appeal	No (privative clause applies; different Court hears statutory tax appeals)	No (privative clause applies; different Court hears statutory tax appeals)	Possibly (no privative clause; the same Court hears statutory tax appeals)

2 Costs — The Tax Court of Canada's New Approach to Costs Awards

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In recent years, the Tax Court of Canada has had numerous occasions to canvass the exercise of its discretionary power to award costs under the *Tax Court of Canada Rules (General Procedure)* (the "Rules"). One issue repeatedly confronting the Court is the role of the Schedule II, Tariff B in the exercise of the Court's discretion in awarding costs. Traditionally, the Court only awarded costs that deviated from the Tariff in exceptional circumstances that justified costs awards on a solicitor-client basis. The Court's new approach to costs, as articulated by the now Chief Justice of the Tax Court in *Velcro Canada Inc. v. R.*,[1] suggests a trend towards costs awards in excess of the Tariff.

The Rules

Rules 147 to 152.1 circumscribe the exercise of the Tax Court of Canada's discretion in awarding costs. Rule 147(1) provides the Court with the discretion to "determine the amount of costs of all parties involved in any proceeding, the allocation of the costs and the persons required to pay them." Rule 147(3) enumerates various factors to be considered by the Court in exercising its discretionary power and specifies that the Court may consider "any other matter relevant to the question of costs."

Rule 147(4) confers an additional power, which includes the awarding of costs by way of lump sum "in lieu of or in addition to any taxed costs."

Pursuant to the recently enacted settlement offer rules in subsections 147(3.1) to 147(3.8), a deviation from the Tariff is further required where a successful party achieved a result in the appeal that was as good or better than the settlement offer it had extended in writing prior to the hearing.

The Tax Court's New Approach to Costs Awards

The increasingly significant role played by costs in tax litigation was recognized by Associate Chief Justice Rossiter, as he then was, in *Velcro*:

> Tax cases are becoming more complex, taking longer to prepare with detailed case management and larger amounts in dispute — all contributing to what appears to be more resources being used to litigate appeals.[2]

[1] 2012 TCC 273 ("*Velcro*").

[2] Ibid. ¶3.