

# Update

## Québec Releases Detailed Measures to Combat Aggressive Tax Planning Schemes

*“Out of concern for social justice and with the objective of protecting the integrity of our tax system, the Québec government has decided to review the legislative framework of aggressive tax planning schemes. The immediate result of these measures will be to recover tax that eludes the public treasury and ensure that our tax system is fairer for all taxpayers.”*

**The Honourable Raymond Bachand,  
Québec Minister of Finance**

(Excerpted from the [Press Release](#), Minister of Finance’s Office, October 15, 2009)

On October 15, 2009, the Québec Minister of Finance announced measures to fight aggressive tax planning (ATP). The measures extend the limitation period for the Québec tax authority (Revenue Québec) to assess transactions under the Québec provincial general anti-avoidance rule (GAAR) and introduce harsh penalties for transactions that are found to be subject to the GAAR. The extension of the limitation period and penalties can be avoided if the transaction is disclosed in accordance with new disclosure regimes introduced as part of the measures to provide an early detection mechanism for Revenue Québec to identify aggressive tax planning at an early stage. The measures are generally applicable to transactions carried out on or after October 15, 2009. They are very broad and could apply to all taxpayers having a connection with Québec, including promoters who transact with such persons and non-residents of Canada carrying on business in Québec through an establishment located therein. These measures could also influence other Canadian tax authorities in their decisions on tax avoidance.

As further explained below, the measures provide for two regimes for early disclosure of ATP transactions: mandatory disclosure for certain stipulated transactions and voluntary early (preventive) disclosure for other transactions. The mandatory early disclosure mechanism targets transactions involving confidentiality or conditional remuneration

arrangements. The preventive disclosure mechanism is available for other transactions which may ultimately be found to be subject to the GAAR. Where a transaction is not disclosed on a timely basis, Revenue Québec may assess the transaction beyond the normal limitation period and a penalty of 25% of the additional tax levied in respect of the transaction will apply if it is ultimately found to be subject to the GAAR. Taxpayers may submit a due diligence defence to avoid such penalty. The promoter of a transaction to which the GAAR applies will be subject to a penalty equal to 12.5% of the fees received or receivable in connection with the transaction where the 25% penalty is imposed on the taxpayer who engaged in the transaction by reason of the GAAR applying thereto. The penalty on the promoter may therefore be avoided in respect of a taxpayer who makes a mandatory or preventive disclosure of the transaction or who successfully maintains a due diligence defence. The promoter may also plead due diligence as a defence to avoid such penalty.

## **GREEN PAPER PROPOSALS**

In the 2008-2009 Budget Speech, the government announced its intention to release a working paper (Green Paper) assessing the legislative tools available to Revenue Québec and proposing new legislative initiatives to combat ATP schemes.

On January 30, 2009, the Green Paper, entitled “Aggressive Tax Planning,” was released. The Green Paper described the changes proposed by the Québec Minister of Finance to fight ATP schemes. The main proposed changes included the following:

- (1) a mandatory early disclosure regime for certain ATP arrangements;
- (2) an extended limitation period for GAAR reassessments;
- (3) a clarifying amendment to restrict the concept of *bona fide* purposes central to the definition of an avoidance transaction for purposes of the GAAR; and
- (4) a penalty regime where the GAAR applies.

For more information about the Green Paper, see the [Osler Update of February 6, 2009](#).

## **RELEASE OF INFORMATION BULLETIN 2009-5**

On October 15, 2009, the Québec Minister of Finance, The Honourable Raymond Bachand, released [Information Bulletin 2009-5](#). That Bulletin provides a detailed description of measures to assist Revenue Québec in combating ATP schemes. While the Minister has received proposals and comments presented by the tax community and other interested persons during the consultation process that followed the release of the Green Paper, the basic principles outlined in the Green Paper have been retained. The [Briefs](#) tabled during the consultation process are posted on the web site of the Québec Minister of Finance.

## **MANDATORY EARLY DISCLOSURE**

The Québec Minister of Finance reiterates the importance for Revenue Québec to be able to quickly detect ATP arrangements by identifying the types of transactions that are

perceived as being more likely to constitute abusive tax avoidance. Such transactions include those that are subject to an undertaking of confidentiality by the taxpayer towards his advisor and those under which the remuneration of the advisor is conditional upon the taxpayer obtaining a tax benefit. Accordingly, where a transaction results in a tax benefit of \$25,000 or more or in an impact on the income of the taxpayer of \$100,000 or more for a fiscal year or a taxation year, the taxpayer will be required to make early disclosure of such transaction if:

- (i) the contract between the advisor and the taxpayer, or the partnership of which the taxpayer is a member, includes an undertaking of confidentiality towards other persons or Revenue Québec; or
- (ii) the remuneration of the advisor is conditional upon obtaining a tax benefit, is refundable if the expected tax benefit does not materialize or only arises after the expiry of the limitation period applicable to the transaction.

The notion of an “advisor,” for such purposes, is very broad and means any person, including a partnership, who provides help, assistance or advice regarding the design or implementation of the transaction or who markets or promotes the transaction.

After the consultation process, it was decided that certain transactions involving conditional remuneration should be excluded from the early disclosure mechanism. Such transactions include the review of: claims for tax credits; interest arising under tax assessments; and tax returns after filing. Taxpayers will not be required to disclose such transactions at an early stage. Excluded transactions also include certain arrangements that may include result-based remuneration that is in accordance with the applicable professional code of conduct.

Disclosure of a transaction will have to be made using a prescribed form providing the required information to enable Revenue Québec to analyze the transaction and understand its tax consequences. The information to be provided must include a complete and detailed description of the facts relating to, as well as a statement of the tax consequences resulting from, the transaction. However, there will be no requirement to disclose any opinions received with respect to such transactions. The form must be filed within the time period prescribed for filing a tax return for the taxation year in which the transaction occurs.

A taxpayer who fails to file the prescribed form relating to a mandatory disclosure within the prescribed time will be subject to a penalty of \$10,000, increasing by \$1,000 per day late to a maximum of \$100,000. Moreover, the limitation period for Revenue Québec to reassess the tax consequences arising from the undisclosed transaction will not begin to run until the prescribed form relating to the disclosure of the transaction is filed with Revenue Québec. Taxpayers may submit a due diligence defence to avoid the penalty for failure to make a timely disclosure. Furthermore, a taxpayer who fails to comply with the mandatory disclosure requirement and has carried out a transaction that is successfully reassessed under GAAR will be subject to a penalty of 25% of the additional tax arising from the reassessment, subject to a due diligence defence (as discussed below).

## PREVENTIVE DISCLOSURE

The Minister of Finance is concerned that the risk-reward ratio for a taxpayer who sets up an aggressive tax planning scheme favours the taxpayer. To discourage a “nothing to lose” mentality, the measures provide for a three-year extension of the limitation period to reassess an ATP transaction and a penalty of 25% of the additional tax arising from a transaction that is successfully reassessed under the GAAR, unless the taxpayer has voluntarily disclosed the transaction by filing a prescribed form with Revenue Québec describing the transaction and the anticipated tax treatment of the transaction.

A taxpayer may submit a due diligence defence against the imposition of the 25% penalty (as discussed below).

## AMENDMENT OF GAAR TO CLARIFY NOTION OF *BONA FIDE* PURPOSES

As previously announced in the Green Paper, the GAAR will be amended to clarify that the notion of *bona fide* purposes also excludes the reduction, avoidance or deferral of tax or any other amount payable under a Québec law, other than the *Taxation Act*, a law of another province of Canada or a federal law, the increase of a tax refund or other amount under such laws or a combination of such purposes. This amendment is intended to harmonize Québec’s GAAR with the GAAR of other provinces. The amendment will apply to the 2009 and subsequent taxation years and will have retroactive application to taxation years that are open for reassessment and to taxation years for which a tax appeal or objection against a GAAR assessment has been filed.

## PENALTIES WHERE GAAR APPLIES AND DUE DILIGENCE DEFENCE

As discussed above, the measures provide that a taxpayer who has carried out a transaction that is successfully reassessed under the GAAR will be subject to a penalty of 25% of the additional tax arising from the reassessment, unless the taxpayer has disclosed the transaction, either as part of a mandatory early disclosure or preventive disclosure, by filing a prescribed form describing the transactions and the anticipated tax treatment thereof. In the event a taxpayer fails to make such disclosure, the Information Bulletin indicates that the taxpayer may submit a due diligence defence to avoid the imposition of such a penalty.

The scope of this due diligence defence may, however, be quite narrow. In this regard, the Information Bulletin specifically refers to the decision of the Federal Court of Appeal in [\*Corporation de L'École Polytechnique v. Her Majesty The Queen\*](#) in which the court stated that “*due diligence excuses either a reasonable error of fact, or the taking of reasonable precautions to comply with the Act.*” The court in that case also took the view that a mistake of law about the existence and interpretation of legislation, such as relying on professional tax advice, is generally not recognized as a valid due diligence defence. While the Information Bulletin does not address the mistake of law point explicitly, the reference to the *Polytechnique* decision may well reflect a narrow view on the Minister’s part of the due diligence exception.

A penalty will also apply to the promoter of an ATP transaction where a penalty is imposed on the taxpayer by reason of the GAAR applying to that transaction. The

penalty applicable to the promoter is equal to 12.5% of all amounts receivable by the promoter in relation to the avoidance transactions in respect of which a penalty has been imposed on a taxpayer. In this respect, the definition of “promoter” is relatively broad. The participants in the consultation process proposed a concept that clearly distinguished a “promoter” from a “tax advisor.” The Minister of Finance is, however, of the view that a promoter is properly defined as a person remunerated for having played a major role in marketing, promoting or encouraging the growth of an abusive avoidance scheme and that such definition allows an adequate distinction between the promoter and the advisor. The penalty on the promoter is tied to the penalty on the taxpayer and may therefore be avoided in respect of a taxpayer who makes a mandatory or preventive disclosure of the transaction or who successfully maintains a due diligence defence. The promoter may also plead due diligence as a defence to avoid such penalty.

## IMPLEMENTATION OF ANNOUNCED MEASURES

The measures announced in Information Bulletin 2009-5 apply to transactions carried out on or after October 15, 2009 – the date of publication of said measures – except for a transaction carried out as part of a series of transactions that began before October 15, 2009 and that is completed before January 1, 2010. The amendments to the notion of *bona fide* purposes in relation to the GAAR will have retroactive effect, as described above.

The consultation process following the publication of the Green Paper has had only a marginal impact on the measures proposed by the Minister of Finance. Taxpayers subject to Québec tax laws, including entities operating in Québec through an establishment located therein, must now consider the application of a mandatory early disclosure procedure for targeted situations and a preventive disclosure procedure for transactions that might be subject to the GAAR. It is expected that additional submissions will be made to the Commission des finances publiques (a parliamentary commission) with the objective of further refining the measures; but, the basic principles outlined in the Information Bulletin appear to be fairly entrenched. No date is presently set for the filing of a bill integrating such measures.

For more information on Information Bulletin 2009-5, please contact the authors or any member of our [Montréal Office Tax Department](#).

This *Update* has been authored by:

Mark Brender [mbrender@osler.com](mailto:mbrender@osler.com) 514.904.5777

François Auger [fauger@osler.com](mailto:fauger@osler.com) 514.904.8118

Robert Raizenne [rraizenne@osler.com](mailto:rraizenne@osler.com) 514.904.5626

Alain Fournier [afournier@osler.com](mailto:afournier@osler.com) 514.904.5390

Antoine Stébenne [astebenne@osler.com](mailto:astebenne@osler.com) 514.904.5365

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[counsel@osler.com](mailto:counsel@osler.com)  
[osler.com](http://osler.com)

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New York