



ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association



May 2013

Family Law Section

Tax Cheats and Whistle Blowers

By Philip M. Epstein, Q.C. and Richard R. Diamond

The Minister of Finance, Jim Flaherty, has, in his latest budget, announced the creation of a program designed to encourage Canadians to "rat out" known tax cheats by offering whistle blowers a reward of 15% percent of the money CRA would collect as a result of the snitch. This measure is designed to help Canada reduce its significant deficit. The idea behind the scheme is that there are a number of Canadians who are maintaining significant offshore accounts, or otherwise hiding income from CRA.

At first blush, one might assume that this was a tax measure perfectly designed with warring spouses in mind. Not only could the aggrieved spouse get revenge for the wrongs that they believe their spouse has committed, but they get a reward for so doing. The reward is an interesting one. As the reward is "*up to 15% of the tax collected, provided that the tax exceeds \$100,000*", it is clear that the government is only looking for big fish. The amount received by the whistle bower will be taxable, and since it will all be received in the same calendar year, the tax rate is likely to be close to 50%. Thus, reporting a tax cheat that yields the government a \$1,000,000 in taxes would result in a net \$75,000 payment to the whistle bower.

However, just like in Equity, the whistle bower's hands must be clean. That is, they cannot have been a partner in the tax evasion, nor could they have benefited from it. As Minister Flaherty so eloquently stated in the media, "we're not looking for rogues to turn in other rogues". Thus, where the evaded funds have gone into a matrimonial home or a cottage, or a lifestyle, and the whistle bower has knowledge of this, the whistle bower will be disqualified from collecting the reward, and worse, the whistle bower will have exposed both their spouse and themselves to the income tax consequences of failure to report.

This is a ludicrous scheme by the government. It is designed to bring out the worst in people. It is not likely to yield any significant results. Further, due to well publicized reports of understaffing at CRA coupled with governmental plans to cut a further \$60 million from the CRA operating budget, this scheme will no doubt result in legitimate leads going unpursued. There will be a temptation of many wronged spouses to simply pick up the phone and call CRA leading to CRA being inundated with leads, both legitimate and illegitimate. This scheme is a governmental invitation for vengeance and payback. By encouraging people to turn on each other, the government is encouraging the most atavistic aspects of our society.

In spousal relationships where tax fraud is present, it is almost always known to both parties. How often do we see pleadings and case conference briefs where it is suggested that one spouse or the other has money in a safe at home, or in a safety deposit box that was a result from undeclared cash from a business? Not only do both spouses know about this cash during the period of the marriage, but both have benefited from it, and thus are not in a position to benefit from this whistle bower legislation.

Having said all of that, if the government is thinking about whistle bower legislation, they first need to do a better job in enacting legislation that is a more appropriate response to the problem. Canada lags behind other modern countries in Europe and the United States in enacting appropriate whistle bower legislation that encourages

employees, particularly in industry, to come forward where they see a wrong doing that is being covered up. Employees who are aware of fraudulent acts in their companies need encouragement and appropriate protection so that they can report wrongful acts without the fear of recrimination. The United States has federal legislation that helps protect whistle blowers and Canada needs to bring their legislation up to date and provide protection where it is needed. Strong and effective whistle blower legislation is not the same as a scheme that encourages tax cheats to turn on each other, but rather is to protect legitimate claims by employees that their employers are engaged in fraudulent schemes.

Family lawyers have to be particularly cautious in advising their clients about this new legislation. Tolstoy said that when thinking of revenge "*dig two graves*". Tolstoy did not mean the spouse and his girlfriend. Clients that forward information to CRA with a view to vengeance for perceived wrongs may well bring down their spouse, but take down themselves as well. Contingent liabilities that are owing as a result of unpaid taxes will likely be deductions under the debt column in the Net Family Property Statement. In addition, providing evidence of tax evasion that subsequently turns out to involve your own client is a disaster for all concerned.

This new idea by the Minister of Finance was probably the most interesting part of what essentially was an extremely dull budget. It is poor financial policy to enliven one budget with vengeful schemes.