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Vern Krishna: Turning Canada into a goldmine for tax snoops



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Vern Krishna thinks a new whistleblowing program to catch tax cheats will turn Canada into a goldmine for snoops

Tyler Anderson/National Post

As tax filing season approaches, Canadians should watch their back in light of the new whistleblower initiatives of the Canada Revenue Agency (CRA), which will reward those who snoop into other people's affairs and invade their privacy.

Frustrated by cutbacks in staffing levels, the CRA has instead set up an incentive-backed financial rewards program — the Offshore Tax Informant Program (OTIP) — to crack down on international tax evasion, and “aggressive tax avoidance,” a term that remains undefined in law.

The program may have the effect of turning Canada into a goldmine for snoops and sneaks prying into the private affairs of taxpayers in the hope that there may be a healthy financial package to fund retirement. At the very least, OTIP will provide underemployed computer hackers with some incentive to boost their income. The government may ultimately benefit from net additional revenue collection, but it will do so at a price for society at large.

OTIP rewards apply only to foreign tax evasion. The program taps into the increasing volume of thefts of computer data by hackers and bank employees, who then market their ill gotten wares to foreign governments. The government has allocated \$30 million to increase CRA's crackdown on tax evasion. By setting up the rewards program to pay for stolen information, the CRA is seen as a vigilant enforcer of the law and avoids the stigma of being a party paying for stolen property.

Canada has long relied on unpaid whistle blowers to track down domestic tax evasion. The principal informants in this category are

angry spouses, disgruntled employees passed over for promotions, and envious neighbours. These sources do not require economic rewards for their information. Revenge provides the satisfaction.

OTIP will pay between 5 and 15 per cent of any federal tax collected related to international tax non-compliance, provided the information provided leads to the CRA collecting at least \$100,000 of federal tax (not including interest and penalties). The CRA will determine the amount of the payment, and says that the amount is taxable as income. The reward program does not extend to fellow conspirators convicted of tax evasion. There is, however, no dispute resolution process in the system, which will be administered within the CRA's compliance programs branch.

OTIP is modeled on an American whistleblower program run by the U.S. Internal Revenue Service (IRS). However, the American program is much broader than its Canadian equivalent. The targets are taxpayers who underpay their taxes, whether through fraud, aggressive or uncertain tax positions, or even simple mistakes. An "uncertain tax position" is a financial accounting term of art that describes situations in which taxpayers believe the IRS has a better position than they have on the merits, but who decide to play the lottery anyway in the hope that they will not be audited. This can include multinational corporations that engage in aggressive tax planning and transfer pricing schemes.

The American financial award is mandatory, and equals up to 30 per cent (without cap) of the amount of tax, interest, and penalties that the IRS ultimately collects. For example, a whistleblower who reports a US\$1-billion underpayment will be entitled to US\$300 million, which will provide a comfortable retirement. If the whistleblower makes only a substantial contribution, the minimum award is 15 per cent of the amount collected.

However, there are two minimum thresholds for the U.S. award. It applies only to collections of at least US\$2 million in taxes, interest, penalties, and other additions to tax. Second, the taxpayer must be a big fish and have at least US\$200,000 income. It is easy to reach these thresholds given penalties of 20 to 40 per cent, plus compound interest. Finally, in accordance with the principles of fair play and the rule of law, an aggrieved whistleblower can appeal the determination of his award in the U.S. Tax Court.

More recently, the Ontario Securities Commission has floated a paper (15-401) in which it considers adopting a whistleblower program, albeit of modest dimensions. The plan contemplates an award of up to \$1.5 million upon final resolution of the administrative enforcement proceedings, but only if the monetary sanctions exceed \$1 million. It is unclear whether the award is conditional upon the wrongdoer actually paying the monetary sanction. The minimum sanction puts the decision of granting the award squarely in the discretion of OSC Commissioners who hear the case. Securities wrongdoing (for example, insider trading) almost invariably also has tax consequences, which would entitle the whistleblower to double dip into the CRA's award program.

The whistleblowing program gives bank employees, computer hackers, and accountants new opportunities to blow the whistle on their employers. Lawyers and accountants are privy to many tax structure arrangements, and often work together to devise aggressive tax plans. Professional conduct rules require lawyers to maintain the confidentiality of client information, and, in most cases, the information is subject to solicitor-client privilege. Only in very limited circumstances can a lawyer breach the confidentiality rules. Thus, lawyers must focus on the private interests of the client where confidentiality is fundamental to the relationship. Lawyers who breach the rules and report their clients for reward will need to seek an alternative career.

In contrast, auditors exercise a public oversight role with respect to a corporation's financial reporting and should owe their duty to the shareholders and other investors. Accountants are also bound by duties of confidentiality, but communications with accountants are not privileged. Privileged communications by lawyers that are revealed to third parties can lose their privilege protection.

Do financial incentives work to bring out confidential information? Ask Bradley Birkenfeld, a former banker at Swiss UBS, who served two and half years in a minimum security U.S. prison for tax evasion. In exchange for information that he gave the U.S. IRS that led to a fine of US\$780 million for UBS, he will receive an award of US\$104 million, which will facilitate his early retirement.

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