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Transparency and the Voluntary Disclosure Program: Entrapment for the Wary

David H. Sohmer

In a recent report on the international tax gap,¹ the Canada Revenue Agency ("CRA") described the revised voluntary disclosure program ("VDP") as follows:

Under the new VDP policy, there are two tracks for income tax disclosures. The Limited Program provides limited relief where the facts suggest that there is an element of intentional conduct. While these individuals may avoid criminal prosecution and gross negligence penalties, they will be charged other penalties and interest. In other cases, the General Program would generally apply. The revised VDP came into effect on March 1, 2018.

By making the relief offered through the VDP less generous in certain circumstances, the CRA anticipates that use of the VDP will decline, particularly for taxpayers who have engaged in aggressive offshore tax avoidance.²

¹ "International Tax Gap and Compliance Results for the Federal Personal Income Tax System", dated June 2018.

² *Ibid.* at paragraph 5.4.

The description implies that there are three levels of generosity: the Limited Program — least generous; the General Program — less generous; the "old" program — most generous. In order to facilitate comparing the three levels of generosity, we have used the example contained in paragraph 32 of Information Circular 00-1R6 to determine the cost of disclosing under each of the programs.

32. A taxpayer's VDP application must be made for all relevant taxation years where there was previously inaccurate, incomplete or unreported information regarding their tax affairs, including any non-arm's length transactions and circumstances. In cases where books and records no longer exist, the taxpayer should make all reasonable efforts to estimate the income for those years.

For example: A taxpayer opened an offshore bank account in 2000 with an initial deposit of \$400,000. Books and records only exist for the years 2007 to 2015. As of January 1, 2007, the balance in the bank account was \$2,500,000. In this case, the taxpayer should make all reasonable efforts to estimate all the unreported pre-tax earnings that were deposited to the account during that time, as well as the interest income that would have been earned in the years where books and records are no longer available

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(2000 to 2006) in order for the VDP application to be considered complete.

In a letter dated October 4, 2018, CRA Assistant Commissioner, Ted Gallivan, clarified the CRA policy with respect to estimated income:³

³ Letter from CRA, October 4, 2018, TaxnetPro 2018-10-17 Commentary.

In other words, using the example set out in paragraph 32 of the IC, the taxpayer would be required to make an estimate of the income earned in the offshore account for the years where no books and records are available (2000 to 2006). Upon submitting their VDP application, the taxpayer should include payment of the estimated taxes owing for all years (2000 to 2015).

Sections 5 and 6 of the Form RC199, Voluntary Disclosures Program (VDP) Application, support this position by requesting that taxpayers identify the relevant tax years, the gross amount of income being disclosed and the associated estimated tax owing. The relevant tax years on Form RC199 include those where no books or records are available. In such cases, the taxpayer would estimate the amount of gross income attributable to each year and then calculate the estimated taxes owing. The amount of taxes owing would depend on the taxpayer's taxable income bracket for that year.

The versions of IC 00-1R6 which applied to the "old" VDP did not require income to be estimated in cases where no books or records exist. The "old" policy is described in a paper by John A. Sorenson delivered to the 2015 Annual Conference of the Canadian Tax Foundation.

Consequently, the CRA's practice of accepting voluntary disclosures limited to taxation years for which records exist and can be located is reasonable and in accordance with common sense. Viable estimates of income, gains, and losses for historical taxation years are essentially impossible if no records exist.⁴

Based on the foregoing, James Morrissey, retired Ernst & Young partner, calculated the combined federal and provincial cost of disclosing under each of the programs.⁵

Old VDP	General Program	Limited Program
\$900,000	\$3,400,000	\$6,800,000

Given the cost disparity between the "old" and "new" programs, the use of the term "generous" by the authors of the report on the tax gap indicates that they were either ill-informed or not transparent. The fact that no published comment on the proposed revisions (including the submission by the Joint Committee⁶) detected an intention

⁴ "A comprehensive review of penalty and interest relief under the Income Tax Act", John A. Sorenson, 2015 CR 41:22.

⁵ Detailed calculations can be viewed at <https://www.spiegelsohmer.com/content/uploads/2018/11/DHS-Programs.pdf>.

⁶ Proposed changes to the VDP announced on July 9, 2017, dated August 8, 2017.

to tax estimated income speaks volumes to the lack of transparency.

Since it was well known for several years prior to the effective date of the new VDP that the CRA would begin to receive offshore account information in 2018 through the OECD Common Reporting Standard, most taxpayers with offshore accounts disclosed under the “old” VDP. While such taxpayers will not be directly affected by the “new” VDP, there are indications that the CRA Offshore Compliance Division is attempting to apply *ex post facto* the new position with respect to estimated income to accepted disclosures under the “old” VDP. Years for which books and records were no longer in existence are being reassessed based on the position that the failure to report estimated income constitutes a misrepresentation. Not only is this position wrong in law,⁷ it is unconscionable entrapment.⁸ The CRA report on the tax gap indicated that from 2011-12 to 2016-17 there were 42,700 completed offshore disclosures. Until the Federal Court decision in *Gauthier v. M.N.R.* in 2017,⁹ there was nothing in the public domain to indicate that the CRA had changed its policy. It appears that the change in the policy is attributable to an attempt by the Offshore Compliance Division to repair the damage to its reputation from the KPMG / Isle of Man fiasco. Thumbing its nose at the Taxpayer Bill of Rights only aggravates the damage.

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⁷ “Regard critique sur l’application de la méthode de l’avoir net rétrospectif au-delà de la période normale de cotisation” L’Honorable Gerald J. Rip, et al. (2017, Vol. 36, numéro 4, revue de planification fiscale et financière 511-528).

⁸ It may also constitute a fault for which damages may be awarded — see *Ludmer v. Canada (Attorney General)* 2018 QCCS 3381, 2018 CarswellQue 6371 at paragraph 702.

⁹ 2017 FC 1173, 2017 CarswellNat 7692.

Pay Equity and Gender Equality Part of Omnibus Legislation

Bill C-86, the second budget implementation legislation of 2018 is so wide ranging that one is challenged to even give a *precis* of what is in it. Despite decrying omnibus legislation when they were in opposition, the Liberals

now defend an 850-page monster which goes far, far beyond the traditional tax amending legislation.

The federal government promised new pay equity legislation in the February budget, which focused on taking action to benefit women and increase their participation in the work force.

According to that budget, a woman working full time in Canada earns about 88 cents for every dollar of hourly wages earned by a man.¹ It noted that Canada ranks 15th out of 29 OECD countries based on the hourly gender wage gap.

About 1.2 million people work in federally regulated sectors and the federal public service.

While the P.R. focus was on proposals to enhance gender equality in pay, the legislation goes far beyond that.

For example, Maryam Monsef, Minister of Status of Women, issued a statement on the introduction of the *Budget Implementation Act, 2018, No. 2*, which includes legislation to create the Department for Women and Gender Equality (WAGE):

Today, we fulfilled that promise by introducing the *Budget Implementation Act, 2018, No. 2* which seeks to establish in law the Department for Women and Gender Equality (WAGE), modernize and formalize the role of the department and its Minister, and make it less vulnerable to change without public debate.

A bit of background.

On October 5, 2016, in its response to the Special Committee on Pay Equity report titled *It’s Time to Act*, the Government of Canada made a commitment to table new, proactive pay equity legislation for the federal jurisdiction before the end of 2018. The Government committed to draw upon provincial lessons learned and to conduct targeted stakeholder consultations on design issues. In April 2017, Labour Program officials held separate roundtable discussions with employer, employee and advocacy stakeholders on designing a proactive pay equity system . . .

We heard from over 40 stakeholders, including employee and employer representatives and organizations interested in proactive pay equity in federally regulated workplaces . . .

Everyone with whom we met broadly supported the principle of pay equity — equal pay for work of equal value. However,

¹ In the mid-1980s when we were researching material for our book, *Head and Heart*, the accepted wage gap was 67 cents earned by women for every dollar of hourly wages earned by men.

employer representatives were generally not supportive of creating new proactive pay equity legislation. Instead, they favoured the improvement of the current federal approach to pay equity.

There was general agreement among participants that the new federal legislation should have well-articulated requirements, clear definitions and an oversight body to provide guidance and support to workplace parties. When it came to some specific elements of a proactive pay equity system, however, views from employer, employee and advocacy stakeholders often differed, with employer representatives in particular expressing the need for flexibility.

For the most part, employee and employer representatives considered Quebec and Ontario's practice of exempting workplaces with fewer than 10 employees acceptable.

So to meet the self-imposed deadline the government brought in sweeping legislation:

[On October 29], the Honourable Patty Hajdu, Minister of Employment, Workforce Development and Labour, along with her colleagues, the Honourable Maryam Monsef, Minister of Status of Women, and the Honourable Scott Brison, President of the Treasury Board and Minister for Digital Government, marked the introduction of proactive pay equity legislation for the federal jurisdiction: an *Act to Establish a Proactive Pay Equity Regime within the Federal Public and Private Sectors (Pay Equity Act)*.

Under a proactive pay equity regime, employers will need to examine their compensation practices and ensure that women and men working in federally regulated workplaces, including the federal private sector, the federal public service, Parliamentary workplaces and Ministers' offices, receive equal pay for work of equal value.

A Pay Equity Commissioner will be appointed within the Canadian Human Rights Commission and will play both education and enforcement roles with regard to the legislation. The Commissioner, supported by a unit of subject-matter experts, will be responsible for assisting individuals in understanding their rights and obligations under the Act and facilitating the resolution of disputes related to pay equity. The Commissioner will have dedicated funding and a range of enforcement tools, including the power to initiate audits, to conduct investigations, and to issue orders and administrative monetary penalties.

Additionally, proposed amendments to the *Parliamentary Employment and Staff Relations Act* (PESRA) will extend proactive pay equity requirements to Parliamentary workplaces in a manner that respects Parliamentary privilege.

The new *Pay Equity Act* gives affected employers with at least 10 employees three years to come up with a pay equity plan. The legislation will apply to federal public servants and political staff, as well as federally regulated sectors such as banking, shipping and telecommunications.

"Coming up with a precise number of what it will cost, it's almost an impossible task," Employment Minister Patty Hajdu said. "The work has to be done prior to assessing the cost. I can tell you that when women make more money and when they make equitable money for work of equal value, they spend that money in our economy, and in fact it contributes to a strong and growing economy."

Other parts of the bill include the *Canadian Gender Budgeting Act* to promote gender equality, the *Poverty Reduction Act*, a host of technical tax changes and amendments to the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act* to address that province's plan to reduce carbon emissions.

Given the time frame for implementation of the various parts of the legislation, it is likely to be some time before we see any results from these initiatives.

Federal Leadership Debate Rules Formalized

With a federal election 11 months away, the government has formalized rules which will deal with who may participate in the debates.

Karina Gould, Minister of Democratic Institutions, made the announcement on October 30 which in turn reminded listeners about the problems encountered in 2015.

Since 1984, every federal election has seen at least one organized debate, broadcast by traditional media to Canadians, who have gathered before their TVs to watch party leaders.

Unfortunately, in 2015, that TV tradition was upended and resulted in a "Debate about the Leaders Debate". When one party was unable to come to an agreement with the consortium of broadcasters, a signature English language debate was cancelled.

Canadians expressed concern over accessibility, over the process, delivery and relevance of what, historically, has been a pivotal prime-time event. They expect those that seek to lead them to engage them in their policies and priorities.

Minister Gould went on to announce:

...the establishment of an Independent Debates Commission, in order to put in motion fair, open and transparent leaders' debates during the 2019 federal election campaign. This independent non-partisan body will ensure that the interests of Canadians are central to how leaders' debates are organized and broadcast.

The Debates Commission will be headed by a Commissioner who will be the sole decision-maker accountable for delivering the 2019 debates.

This Commissioner must be someone with integrity, someone who commands respect, someone with a thorough understanding and appreciation of the political process, the media and the people of Canada.

She then named David Johnston as the government's nominee for Canada's first Debates Commissioner. The opposition parties, we might note, have complained vociferously about not being consulted though they were careful not to impugn Johnston's integrity.

From our perspective, the key element is the establishment of rules as to who might participate in the debate.

In 2019 debates would include leaders of political parties that meet two of the following three criteria:

- 1) Have a Member of Parliament, elected as a member of that party, in the House of Commons at the time the election is called;
- 2) Intend to run candidates in at least 90 per cent of electoral districts; and
- 3) Either obtained four per cent of the vote in a previous election, have a legitimate chance to win seats in the upcoming election.

Under these rules, it is fairly certain that Elizabeth May will be a participant. It is less clear whether Maxime Bernier would qualify as he or his party cannot meet criterion 1 (he was elected as a Conservative) or 3 which would require assumptions which may or may not be acceptable to the Debates Commission.

Johnston told CPAC's Peter Van Dusen the day the plan was announced that "it has an element of subjectivity" — but that he was "quite comfortable" with the criteria. Polling results, party history, and campaign efforts would be the likely measuring sticks.

"On the one hand, you want as wide and broad a participation as possible," Johnston said. "On the other

hand, you want to have sufficient focus that the people who are appearing do represent significant political interests."

Insofar as we are concerned, the establishment of the Commission and the rules are positive steps which offer a level of certainty about the debates. . . though how such debates will work effectively with four or five participants remains to be seen.

YMPE for 2019

The maximum pensionable earnings under the Canada Pension Plan for 2019 will be \$57,400, from \$55,900 in 2018. The new ceiling was calculated according to a CPP legislated formula that takes into account the growth in average weekly wages and salaries in Canada.

Contributors who earn more than \$57,400 in 2019 are not permitted to make additional contributions to the CPP.

The basic exemption amount for 2019 remains \$3,500.

The employee and employer contribution rates for 2019 will be 5.1 percent, up from 4.95 percent in 2018, and the self-employed contribution rate will be 10.2 percent, from 9.9 percent in 2018. The increase in contribution rate is due to the CPP enhancement which will be implemented on January 1, 2019.

The maximum employer and employee contribution to the plan for 2019 will be \$2,748.90 each and the maximum self-employed contribution will be \$5,497.80. The maximums in 2018 were \$2,593.80 and \$5,187.60.

The reference to CPP enhancement means increased contributions for the next several years.

Starting January 1, 2019, Canadians will contribute more to the Canada Pension Plan. This change is designed to help increase retirement income for working Canadians and their families.

Once mature, the CPP enhancement will increase the maximum CPP retirement pension by about 50 percent. It will also increase the survivor and disability pensions.

Effect of the enhanced CPP

- Your benefits will gradually increase as you contribute more to the CPP. Starting in 2019, annual CPP contribution rates will rise modestly over seven years. For example, if you earn \$54,900 per year, you will

contribute about \$6 more per month in 2019. By 2023, you will be contributing about \$40 more per month.

- How much your CPP benefits increase will depend on how much and for how long you contributed to the enhancement. Canadians just entering the workforce will see the largest increase in CPP benefits. Employees who are near the end of their working life will see a small increase.
- The CPP enhancement will affect you only if you work and contribute in 2019 or later. If you are retired, not working, and not making contributions to the CPP, nothing will change and your CPP benefits will not increase.
- The CPP enhancement will happen in two phases over seven years. Phase 1 takes place from 2019 to 2023 and involves a gradual increase in the contribution rate. Phase 2 will begin in 2024 and will only affect those at higher income levels.

Ontario Cabinet Shuffle

Just four months after coming into office, Doug Ford was forced to shuffle his cabinet at the start of November. The move was forced because of the resignation of Jim Wilson, a longtime member of the Legislature who quit to deal with addiction issues. Other news stories have suggested that the issue may have been some element of sexual misconduct. He apparently is no longer a member of the Progressive Conservative caucus and will sit as an independent.

Subsequently, Ford said he withheld the fact that Wilson was facing an allegation of sexual misconduct to protect the staffer who made the complaint. Ford said his government has launched an investigation into the situation.

The Premier clarified that Wilson was forced to resign, telling reporters "I have zero tolerance for this behaviour" and vowing to protect government staff. Ford didn't disclose what Wilson said when confronted with the allegation, but said the veteran politician "understands the situation".

Wilson was Minister of Economic Development, Job Creation and Trade, a key economic portfolio. Government House Leader Todd Smith will take over Wilson's post.

Among the biggest promotions is Tourism, Culture and Sport Minister Sylvia Jones who will lead the Ministry of Community Safety and Correctional Services. The Dufferin-Caledon MPP was named to Ford's first cabinet this summer.

Jones will replace Michael Tibollo, a rookie MPP for Vaughan-Woodbridge, whose short tenure as the minister responsible for the OPP has been speckled with controversy. Most recently, media reports surfaced that Tibollo was criticized by the Ontario Securities Commission for his actions as a lawyer in the 1990s related to a \$30-million stock fraud.

Natural Resources and Forestry Minister Jeff Yurek has also been promoted. The Elgin-Middlesex-London MPP will become the Transportation Minister, swapping places with longtime MPP John Yakabuski, who represents Renfrew-Nipissing-Pembroke.

Cabinet newcomer Bill Walker, the MPP for Bruce-Grey-Owen Sound, will take over Smith's old job as the Minister of Government and Community Services.

More Tax Relief for PE Islanders

In an early November announcement, the P.E.I. government gave a tax break to Islanders. . .outside a formal budget.

New changes to the Basic Personal Amount and Business Tax Credit will provide more tax relief to Islanders and Island businesses. In the 2018 budget, the basic personal amount was raised by an additional \$500, bringing the total to \$8,660. Now, government is again raising the amount by \$500 bringing the new total to \$9,160. This change will be made retroactively to January 1, 2018.

"Our economy is stronger than ever and we are continuously looking at ways Islanders can benefit from this success. Our province's solid financial position — with a surplus of \$75.2 million — means we can now further accelerate the priorities of Islanders so they all share in the benefits," said Finance Minister Heath MacDonald.

This will benefit approximately 84,000 Islanders, saving them an extra \$4.1 million a year. Combined with the previously-announced increase for this year, that represents a total savings of \$8.2 million. As a result of these

changes, 5,200 Islanders no longer pay any provincial income tax.

It is the fifth increase to the basic personal exemption since 2015, after seven years of no changes.

Building on the commitment in Budget 2018 to reduce tax on small business and the new capital investment grant, an additional reduction of 0.5 percent will be added. This will come into effect January 1, 2019.

"A further reduction in the small business tax will help our vibrant Island businesses continue to thrive and grow," said Minister MacDonald. "These businesses are the backbone of our provincial economy, they are putting Prince Edward Island and our renowned products on the world map."

This represents a further \$1.2 million in savings for approximately 2,600 small businesses, for a total savings of \$2.4 million. This means a savings of up to \$5,000 for an individual business.

Higgs Takes Reins in New Brunswick

Five weeks after New Brunswickers went to the polls, Tory Leader Blaine Higgs has become the Premier-designate. The Liberals under Brian Gallant made a valiant effort to keep power but the numbers were against them even though they managed to get the three members of the Green Party to support them in a confidence motion based on the Throne Speech.

"People of the province should feel comfortable that the system worked, it just took a little longer," Higgs said after meeting with Lt.-Gov. Jocelyne Roy Vienneau hours after Brian Gallant's Liberals fell on a confidence vote.

Higgs said he wants the transition to occur as quickly as possible, with a cabinet in a week and a throne speech before the end of the month.

"The throne speech won't be a shopping list. It will be a priority list and it will be focused on some big items we can agree on," Higgs said.

On November 9, the new cabinet was sworn in. The 17-member cabinet has four women and six first-time MLAs. Interestingly, two men who were cabinet ministers in the previous Progressive Conservative government, Bruce Fitch and Bruce Northrup, were not named by Higgs.

The new Finance Minister is Ernie Steeves who is a one-term MLA with no discernible financial background. A few other ministers include.

- Robert Gauvin, Deputy Premier, Tourism, Heritage and Culture
- Andrea Anderson-Mason, Justice and Attorney General
- Mike Holland, Energy and Resource Development
- Greg Thompson, Intergovernmental Affairs

Higgs said he believes his minority government can survive four years by producing results. (This is generally known as whistling past a graveyard.)

Its success will depend on support from the opposition parties, and that has thrown the spotlight on language rights in Canada's only official bilingual province.

The People's Alliance, which has agreed to prop up the Tories for at least 18 months, put bilingualism and service duality front and centre in their campaign. People's Alliance Leader Kris Austin said his party has agreed to support the Tories to provide some stability to the Legislature.

However, he said his members will be free to vote their conscience on bills.

If the Higgs name is familiar to readers, it may be because he is a former provincial Finance Minister in New Brunswick.

His extensive big business experience as an employee of the Irving enterprises has had an impact on his approach to politics. Higgs refers to citizens as customers, and his campaign for the September 24 election was replete with references to getting results.

Higgs has promised to cut government waste and balance the province's budget in two years — a year earlier than his outgoing rival, Liberal Premier Brian Gallant.

Higgs announced that his Throne Speech will be delivered on November 20.

If he is still around in two years, we'll get a chance to assess his success. . .or otherwise.

S.C.C. Vindicates Security Regulator Plan

The Supreme Court of Canada says the Constitution allows Ottawa and the provinces to set up a national securities regulator. In a unanimous ruling, the Court also found that federal draft legislation for countrywide oversight of stocks, bonds and other investments falls within Parliament's powers on trade and commerce.¹

But the decision certainly does not guarantee that we'll see a national securities regulator. As most readers are aware, the concept has been under discussion for decades but has never come to fruition because some provinces are jealously guarding their regulatory turf.

Supporters of the concept of which we are one say it would eliminate duplication, reduce red tape and ensure more consistent enforcement and investor protection.

In an earlier ruling, the Supreme Court said in 2011 that a draft bill to create a national regulator strayed beyond federal jurisdiction, as the provinces and territories have constitutional authority over most elements of securities regulation. However, the Court said it was open to Ottawa and the provinces to exercise their respective powers over securities harmoniously, in the spirit of co-operative federalism.

As a consequence, British Columbia, Saskatchewan, Ontario, New Brunswick, Prince Edward Island, Yukon and the federal government signed a memorandum of agreement to create a new regulatory system.

The plan includes a common regulator, a council of ministers to play a supervisory role, a model law that provinces and territories could pass, and federal legislation to manage systemic risk, allow for data collection and address criminal matters.

In July 2015, the Quebec government asked the province's Court of Appeal to consider the proposal's constitutional validity.

The Quebec appeal court said last year the Constitution does not authorize creation of a pan-Canadian securities regulator under a single body as envisioned in the memorandum of agreement. It also flagged concerns with aspects of the draft federal legislation on the proposed role and powers of the council of ministers.

The federal government appealed to the Supreme Court on both matters.

In its latest decision, the top Court said the proposed co-operative system "does not improperly fetter" the sovereignty of Legislatures. In addition, the Court concludes that the draft federal legislation falls within Parliament's trade and commerce powers under the Constitution.

We are not certain that the decision really clears the way for the creation of a national system. Presumably Quebec, Alberta and Manitoba remain reluctant to voluntarily participate in a national system and, without all provinces participating, the full benefit of a national securities commission will not be achieved.

The Court noted that the Model Provincial Act is expressly subject to legislative approval, and thus lacks the force of law within a province unless and until it is enacted by that province's Legislature. Accordingly, the Legislatures remain free to reject the proposed statutes, and any amendments made to them, if they so choose.

And within hours of the S.C.C. decision Quebec issued a press release:

Québec does not intend to join the federal regime, despite the Supreme Court judgment authorizing Canada to implement pan-Canadian securities regulation.

"We acknowledge the Supreme Court of Canada ruling, but intend to retain our autonomy and keep our expertise in Québec. The finance sector is highly strategic and we will remain autonomous," Québec Minister of Finance Eric Girard said.

"Québec will continue to be responsible for regulating securities on the Québec market. The Autorité des marchés financiers will continue to be the integrated regulator responsible for overseeing all stakeholders in the Québec financial sector," he added.

We preached the virtues of a national securities regulator when we taught securities law at Queen's in 1969-70. We are still waiting and doubt whether the Supreme Court's decision will bring the wish to a successful conclusion in our lifetime.

¹ Reference re *PanCanadian Securities Regulation*, 2018 SCC 48, 2018 CarswellQue 9836.