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Policy Forum: Whistleblowers and the Evidentiary Challenges in Offshore Tax Evasion Cases

David W. Chodikoff*

PRÉCIS

L'article fait un survol et une comparaison de haut niveau des programmes de dénonciation au Canada et aux États-Unis. Tandis que l'expérience aux États-Unis a permis au fisc de recouvrer des sommes considérables d'impôt non déclarées et de gagner ses poursuites, le programme de dénonciation canadien a eu, jusqu'à présent, un succès limité. Le programme existe cependant depuis trop peu de temps pour que l'on puisse juger de son efficacité. Le programme canadien fait face à des défis uniques. Le public n'a pas encore vu de poursuite fructueuse contre des contribuables canadiens ayant des comptes financiers étrangers dans des institutions financières bien connues, qui ont été cités dans des poursuites couronnées de succès aux États-Unis.

ABSTRACT

The article provides a high-level overview and comparison of the US and Canadian whistleblower programs. Whereas the US experience has resulted in the recovery of significant unreported tax dollars and successful tax prosecutions, the Canadian whistleblower program has, to date, had limited success. However, it is still too early in the program's existence to pass judgment on its efficacy. The Canadian program faces unique challenges. The public has yet to see the successful prosecution of any Canadian taxpayers with offshore financial accounts held in well-known financial institutions that have been named in successful US prosecutions.

KEYWORDS: TAX EVASION ■ OFFSHORE ■ CASES ■ EVIDENCE ■ CHARTER RIGHTS ■ ENFORCEMENT

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* Of Miller Thomson LLP, Toronto (e-mail: dchodikoff@millerthomson.com). I am grateful to Benjamin D. Mann, associate, Miller Thomson LLP, for his assistance in the preparation of this article. Any mistakes or errors are mine alone.

INTRODUCTION

Tax evasion is a serious problem in Canada, as it is elsewhere.[1] The failure of a Canadian taxpayer to pay his or her (or its, in the case of a corporation) fair and statutorily required share of tax has a detrimental effect on the ability of our governments to pay for and maintain our entire societal infrastructure. Put simply, taxes pay for all sorts of public resources, including police, fire departments, schools, roads, sanitation, hospitals, and much more. A question that remains open to debate is just how much tax goes uncollected as a consequence of tax evasion.[2] Some international organizations maintain that the tax gap is huge, running into the billions; others are convinced that the problem is not as pervasive as some analysts claim and that, in any event, the problem from a Canadian perspective is being well managed by the Canadian government, particularly given its recent political and financial efforts to combat both offshore and domestic tax evasion.[3]

While comparisons are not always fair, the US experience can teach Canadians a thing or two about the pursuit of tax evaders. The United States has reported great success in identifying non-compliance through the Internal Revenue Service's (IRS's) whistleblower program.[4] Additionally, the United States has achieved numerous successful prosecutions and convictions of US tax evaders, including many cases with offshore components.[5] Canada has made efforts to combat tax evasion by

1 See Will Fitzgibbon and Emilia Diaz-Struck, "By the Numbers: Eight Months of Panama Papers Global," *ICIF International Consortium of Investigative Journalists*, December 1, 2016 (https://panamapapers.icij.org/blog/20161201-impact-graphic.html). This particular article from the website provides the number of people and companies investigated (6,520); the number of inquiries, audits, or investigations prompted by the publication of the Panama papers (150 in at least 79 countries and territories); and the amount of money ($110 million) recovered by governments, in the eight months following, and in part attributable to, the initial Panama papers revelations.

2 The difference between tax owed and tax collected is referred to as "the tax gap." For a recent article and commentary on the subject, see Marco Chown Oved, "Canada Misses Out on Nearly $50 Billion in Tax Each Year," *The Star*, February 13, 2017 (www.thestar.com/news/world/2017/02/13/canada-misses-out-on-nearly-50-billion-in-tax-each-year.html); and Caroline D. Ciraolo, "US International Tax Enforcement and Compliance," remarks delivered at the Thirty-Fifth Cambridge International Symposium on Economic Crime, September 5, 2016.

3 See supra notes 1 and 2. On recent Canadian initiatives in particular, see "Offshore and Aggressive Tax Planning," in Canada Revenue Agency, *Departmental Performance Report 2015-16* (Ottawa: CRA, 2016), at 54-55.

4 Dean Zerbe, "IRS Whistleblower Program: Update" (2016) 18:4 *Journal of Tax Practice & Procedure* 33; United States, Treasury Inspector General for Tax Administration, *The Whistleblower Program Helps Identify Tax Noncompliance; However, Improvements Are Needed To Ensure That Claims Are Processed Appropriately and Expeditiously*, reference no. 2016-30-059 (Washington, DC: Treasury Inspector General for Tax Administration, August 30, 2016); and Internal Revenue Service, *IRS Whistleblower Program: Fiscal Year 2016 Annual Report to the Congress* (Washington, DC: IRS, 2016).

5 Robert W. Wood, "IRS and Justice Department Push Tax Prosecutions," *Forbes*, February 12, 2016 (www.forbes.com/sites/robertwood/2016/02/12/irs-and-justice-department-push-tax

creating its own whistleblower program. However, on the prosecution front, it is arguable that Canada has, to date, failed to bring significant tax evaders to justice. There have been a handful of successful prosecutions with trace elements of offshore components,[6] but there has yet to be a major reported case involving any of the more familiar financial institutions that have been named and brought to justice in other parts of the world.

This article provides an overview and a comparison of the US and the Canadian whistleblower programs, and it identifies a number of specific challenges facing Canadian prosecutors in tax evasion cases. The article also offers some ideas for addressing the obstacles to successful prosecutions involving Canadian taxpayers with offshore financial accounts.

THE US EXPERIENCE

The IRS operates a special unit called the Whistleblower Office, which oversees the US whistleblower program. The Whistleblower Office was created by legislation adopted by the US Congress over a decade ago. The Tax Relief and Health Care Act of 2006[7] added section 7623(b) to the Internal Revenue Code,[8] which enacted major changes in the IRS award program for whistleblowers.[9] It was this legislative change that created a new framework for the consideration of whistleblower submissions and actually led to the establishment of the Whistleblower Office.

The Whistleblower Office operates under the control and supervision of the commissioner of the IRS, and it is well staffed, with a director, 19 senior analysts, and 18 supporting personnel.[10] Recently, the IRS office of the chief counsel appointed a senior lawyer to serve as special counsel to the director of the Whistleblower Office. The special counsel provides legal advice to the director and coordinates legal support to other chief counsel offices.[11] The Whistleblower Office coordinates with numerous IRS units reviewing the information that is submitted to the IRS, and it makes the determinations regarding financial awards for informants.

-prosecutions/#60443765baef); and United States, Department of Justice, US Attorney's Office, Middle District of Pennsylvania, "U.S. Attorney and IRS Announce Message to Potential Tax Cheats That Tax Crimes Result in Criminal Prosecution and Lengthy Prison Sentences and Fines and Issue a Fraud Notice to Taxpayers," *News Release*, April 14, 2016. See also Joshua D. Blank and Daniel Z. Levin, "When Is Tax Enforcement Publicized?" (2010) 30:1 *Virginia Tax Review* 1-37.

6 Patrick Cain, "Tax Evasion Prosecutions in Canada Fall Dramatically," *Global News*, April 26, 2016 (globalnews.ca/news/2660332/tax-evasion-prosecutions-in-canada-fall-dramatically/).

7 Tax Relief and Health Care Act of 2006, Pub. L. no. 109-432.

8 Internal Revenue Code of 1986, as amended.

9 *IRS Whistleblower Program*, supra note 4, at 5.

10 Ibid., at 7.

11 Ibid., at 6.

The awards are made to informants who come forward to report cases of substantial tax evasion (as described below). Before an award is considered, an informant must meet several conditions to qualify:[12]

1. The whistleblower must submit the information in writing and execute the document knowing that false information can lead to a penalty for perjury. This condition obviously discourages frivolous complaints.
2. The information must relate to an action in which the tax penalties, interest, and any additional sums in dispute exceed a basic threshold of $2 million.
3. The information must relate to a taxpayer whose total income exceeds $200,000 for at least one of the years in question.

Where the conditions are fully met, and the provision of the information results in the actual collection of tax, penalties, and interest, the IRS will pay a minimum of 15 percent and up to 30 percent of the collected amounts related to the enforcement action; it does not matter if the enforcement action is a result of an administrative or a judicial action. The ultimate percentage awarded depends on the IRS's determination of the amount of the information supplied that was available or disclosed in the public domain when the whistleblower reported the underpayment of tax. The whistleblower is not entitled to collect the award until the taxpayer that has been accused of tax evasion has exhausted all appeal rights. On the basis of experience to date, under the US program, typically a payment is received by the whistleblower about five to seven years after the claim has been filed.

According to the Whistleblower Office's annual report to Congress, in 2016 awards to whistleblowers increased by 322 percent over the number in the previous year (418 in 2016 compared to 99 in 2015).[13] Not only has there been a jump in awards but there have also been more claims. Chuck Grassley, a Republican senator from Iowa who is known to be highly supportive of the whistleblower program, recently stated that

> [US] whistleblowers have helped the IRS recover $3.4 billion that otherwise would have been lost to fraud. Cracking down on big-dollar tax fraud is a matter of fairness to the vast majority of taxpayers who pay what they owe.[14]

The speed at which the Whistleblower Office processes the information that it receives has been criticized. Not only is there a long waiting period before awards

12 Ibid., at 5.

13 Ibid. See also Matthew D. Lee, "United States' Crackdown on Offshore Tax Evasion: What Does the Future Hold?" *Financier Worldwide Magazine*, *Special Report: White Collar Crime*, July 2016.

14 Quoted in Robert W. Wood, "Tax Cheats Beware: IRS Whistleblower Awards Soar 322%," *Forbes*, January 17, 2017 (www.forbes.com/sites/robertwood/2017/01/17/tax-cheats-beware-irs-whistleblower-awards-soar-322/#3d7a78287b8e).

are made, but many of the claims that are filed are ultimately rejected. The belief is that the failure of such claims is attributable to workload management, to the quality of the information, or to the IRS agents' lack of persistence in following through with an investigation. Meanwhile, when an investigation is launched, the whistleblower is not kept informed about its progress. It has been reported that some unhappy whistleblowers have gone to court to force the release of information from the IRS on the status of an investigation, but it appears that such efforts typically fail.

The United States has a record of success in its prosecution of offshore tax evaders.[15] Dozens of US citizens have been sent to prison, with periods of incarceration ranging from a few months to several years. Fines and penalties are common. In 2016, as part of the effort to combat offshore tax evasion, the Tax Division of the US Department of Justice concluded its 80th non-prosecution agreement under its Swiss bank program.[16] This program provides a way for Swiss banks to resolve potential criminal prosecution in the United States before the commencement of litigation. In order to be eligible for the program, a Swiss bank must not be under criminal investigation for its banking activities, and it must have one or more US clients with undeclared accounts. The agreement requires the bank to make its own presumption that it committed a tax-based criminal offence. The Swiss bank program has been viewed as a great success. The US government has received more than $1.36 billion in penalties and the promise by the 80 Swiss banks to cooperate in future criminal enforcement actions.[17]

In March 2016, the US Department of Justice announced its first conviction of a non-Swiss financial company for tax evasion.[18] Two Cayman Island companies pleaded guilty to criminal charges related to allegations that they had helped US clients to hide more than $130 million in offshore accounts. Cayman National Securities Ltd. and Cayman National Trust Co. Ltd. further aided these accountholders in evading the payment of US taxes on the income earned in their accounts. The two

15 See United States, Department of Justice, Office of Public Affairs, "Justice Department Highlights Tax Division's Enforcement Results—Investigating Offshore Evasion" (www.justice.gov/opa/pr/justice-department-highlights-tax-divisions-enforcement-results); and United States, Department of Justice, "Offshore Compliance Initiative—Offshore Compliance Initiative News—Indictments, Pleas, Sentences, and Other Developments," covering the period from February 18, 2009 to December 29, 2016 (www.justice.gov/tax/offshore-compliance-initiative).

16 United States, Department of Justice, Office of Public Affairs, "Justice Department Reaches Final Resolutions Under Swiss Bank Program," *News Release*, December 29, 2016.

17 Ibid. See also Marvin J. Michaels, George M. Clarke, Martin P. Furrer, and James J. Dries, "The DOJ's Swiss Bank Program—Lessons Learned and the Road Ahead," *The Journal/Litigation Practical Law*, August/September 2016, 50-57.

18 United States, Department of Justice, "Two Cayman Island Financial Institutions Plead Guilty in Manhattan Federal Court to Conspiring To Hide More Than $130 Million in Cayman Bank Accounts," *News Release*, March 9, 2016; and "Cayman Islands Companies Fined for US Tax Evasion Conspiracy in Historic Conviction," *Caribbean 360*, March 11, 2016 (www.caribbean360.com/news/cayman-islands-companies-plead-guilty-us-tax-evasion-conspiracy).

companies provided investment brokerage and trust management services to various entities and individuals, including US persons. As part of the plea agreement, the Cayman companies agreed to cooperate fully with the US Department of Justice, and specifically with the department's investigation of their criminal conduct.

The US Department of Justice is already following a number of leads created by the Swiss bank program that will likely result in further convictions of non-Swiss financial institutions for tax evasion. US investigators are currently looking at various financial operations in Israel, Luxembourg, Liechtenstein, the Cook Islands, Panama, and the Marshall Islands, and several other countries.[19] Information obtained as a result of compliance with the Foreign Account Tax Compliance Act[20] (FATCA) has provided another avenue for investigators to search for and find American offshore tax evaders. In May 2016, the US Department of Justice announced that a dual citizen of Canada and the United States, Gregg R. Mulholland, had pleaded guilty to money-laundering conspiracy, involving the fraudulent manipulation of stocks of more than 40 US publicly traded companies and the laundering of more than $250 million in profits through at least five offshore law firms.[21] Mulholland was the "secret" owner of Legacy Global Markets S.A., an offshore broker-dealer and investment management company that had offices in Panama and Belize. As the IRS special agent-in-charge stated at the time of the announcement,

> [t]his investigation highlights the government's ability and resolve to combat global money laundering, in this case, the laundering of illicit proceeds from a stock manipulation scheme. . . . Prospective money launderers should take note of Mr. Mulholland's conviction and think twice about the consequences of such actions. The same holds true for individuals who attempt to criminally circumvent IRS reporting requirements regarding foreign accounts, as their actions will attract the attention of IRS-Criminal Investigation.[22]

19 Interestingly, on January 20, 2017, tax agencies from 30 countries met in France to discuss the information obtained from the Panama papers. The meeting of the Joint International Taskforce on Shared Intelligence and Collaboration was held at the offices of the Organisation for Economic Co-operation and Development. According to reports, this was a historic meeting because it was the largest simultaneous exchange of information that had ever occurred between the tax authorities from these countries seeking to collaborate on tax investigations. For further information, see Will Fitzgibbon, "Tax Agencies Draw Up Target List of Offshore Enablers," *ICIF International Consortium of Investigative Journalists*, January 20, 2017 (www.icij.org/blog/2017/01/tax-agencies-draw-target-list-offshore-enablers).

20 Foreign Account Tax Compliance Act (FATCA), enacted on March 18, 2010 as subtitle A of Title V of the Hiring Incentives To Restore Employment Act of 2010, Pub. L. no. 111-147.

21 United States, Department of Justice, United States Attorney's Office, Eastern District of New York, "Orchestrator of More Than 40 Pump and Dump Schemes and Secret Owner of Offshore Brokerage Firm Pleads Guilty to $250 Million Money Laundering Scheme," *News Release*, May 9, 2016.

22 Ibid., quoting Shantelle P. Kitchen, special agent-in-charge, IRS, Criminal Investigation, New York.

As demonstrated by the prosecution of Mulholland and other recent tax evasion cases, the successful crackdown on US tax evaders can be attributed in part to the coordinated efforts of various US government departments and agencies, including, for example, the Federal Bureau of Investigation, the IRS, the Department of Justice, the Financial Industry Regulatory Authority, Inc., Criminal Prosecution Assistance Group, the Department of State's Diplomatic Security Service, and the US Immigration and Customs Enforcement, Homeland Security Service. For US customers of foreign-based financial institutions, time is clearly running out before the potential of US criminal tax liability becomes a reality. An avenue that still remains open to taxpayers is the IRS's offshore voluntary disclosure program.[23] But those at risk had better hurry because, as in the old days when bloodhounds were put on the trail of escapees from prison, in present-day circumstances the coordination within the United States between the various agencies and departments, as well as their individual efforts, means that there is little time or cover for those US citizens who are not in compliance with the law.

THE CANADIAN EXPERIENCE

The Canadian equivalent to the US whistleblower program is known as the offshore tax informant program (OTIP).[24] Unlike the US program, the OTIP is not administered by a separate whistleblower office, but rather operates within the Offshore Compliance Division of the Canada Revenue Agency's (CRA's) Compliance Programs Branch. The establishment of the Canadian program is also a recent development. Its genesis can be traced to the Harper government's 2013 economic action plan.[25] As a core component of the government's commitment and effort to combat international tax evasion and aggressive tax avoidance, the OTIP was designed to catch serious tax offenders. It permits the CRA to make financial awards to individuals who provide information concerning tax non-compliance that ultimately results in the collection of taxes owing to the Canadian government.

In order to be eligible for the OTIP, an informant must meet certain criteria.[26] The individual must provide the CRA with specific and credible information of

23 United States, Internal Revenue Service, "Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers 2014" (www.irs.gov/individuals/international-taxpayers/offshore-voluntary-disclosure-program-frequently-asked-questions-and-answers-2012-revised). See also David Kerzner and David W. Chodikoff, *International Tax Evasion in the Global Information Age* (Toronto: Irwin Law, 2016), at chapter 10, "International Collections Enforcement and Voluntary Disclosures."

24 Canada Revenue Agency, "Offshore Tax Informant Program," January 12, 2016 (www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/offshore-tax-informant-program.html).

25 Canada, Department of Finance, 2013 Budget, March 21, 2013.

26 Canada Revenue Agency, "Eligibility for the Offshore Tax Informant Program," January 12, 2016 (www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/offshore-tax-informant-program/eligibility-offshore-tax-informant-program.html).

major international tax non-compliance. Exactly what constitutes "major" non-compliance is not explained, and apparently depends on the CRA's evaluation of the information. Failure to meet this requirement can lead to the cancellation of the contract between the informant and the CRA, and consequently the denial of any payment. The informant does not have to be a resident or citizen of Canada, but there are some restrictions. Specifically, the informant cannot

- have been convicted of tax evasion concerning the reported situation;
- be a CRA employee;
- be or have been a federal, provincial, or municipal employee, official, or representative and have obtained the information during the course of employment;
- be or have been a contractor and acquired the information while working for any of the three levels of government;
- have been convicted of an offence listed in section 750 of the Criminal Code;[27]
- have participated in the non-compliance to which the information relates;
- be an authorized representative of the taxpayer involved;
- have a legal obligation to provide the information to the CRA; or
- provide the information anonymously.

Similarly, certain restrictions apply to payment for information provided to the CRA. In some respects, these restrictions mirror the rules under the US program. For example, an informant will receive a contract for payment only if the lead results in an assessment of federal taxes (excluding interest and penalties) that exceeds a specified minimum amount, currently $100,000. Furthermore, the informant will not receive any monies until at least $100,000 of the federal taxes related to the assessment has been collected and the taxpayer's recourse rights associated with the assessment have been exhausted. The informant may be entitled to receive a reward that is equal to between 5 percent and 15 percent of the amount of federal tax collected that relates to the tax evaded. That amount excludes any monies collected in respect of assessed interest and penalties.

As of February 2017, it was reported that the CRA had executed contracts with more than 20 informants and that resulting assessments of federal tax and foreign reporting penalties amounted to over $1 million;[28] however, to date, no money has been paid to a single informant. Although the tips submitted to the CRA have resulted in more than 218 current audits of Canadian taxpayers, there are no signs

27 RSC 1985, c. C-46, as amended, section 750.

28 Mike Godfrey, "CRA's Offshore Informant Program Nets CAD1m," *Global Tax News*, February 6, 2017 (www.tax-news.com/news/CRAs_Offshore_Informant_Program_Nets_CAD1m____73395.html).

that tax prosecutions from these audits are forthcoming.[29] Moreover, the CRA has not confirmed how much of the $1 million in assessments has actually been recovered.

It is not cheap to run the OTIP. The program cost for the period January 2014 to November 2016 was approximately $1.8 million.[30] It is therefore not surprising that the OTIP has its critics. The New Democratic Party revenue critic, Pierre-Luc Dusseault, has been quoted as saying, "It doesn't look like an effective program. At the pace they are recovering federal taxes and the administrative cost, the program is ineffective."[31] This criticism is too harsh. The OTIP is still in its infancy. It takes years to get the message out to the public about the existence of this particular program. It also takes years to move a CRA investigation to the stage of prosecution before the courts.

Compared with the record of prosecutions in the United States, the number of tax prosecutions in Canada that involve some element of holding monies in an offshore bank account is tiny. In fact, from the CRA web page entitled "Criminal Investigations Actions, Charges, and Convictions," it is obvious that virtually none of the listed reports have an offshore component.[32] It is true that the web page does report convictions of tax evaders, but the crimes range from the failure to file personal income tax returns and to report the income earned in those years, to participation in a fraudulent registered retirement savings plan scheme and the practice of declaring oneself a "natural person," knowingly evading the payment of tax. In some forums, CRA officials have been known to maintain that the CRA does not disclose names for reasons such as jeopardizing related investigations or matters of privacy.[33] However, this positioning is in stark contrast to the CRA's publicly stated rationale for seeking publicity with respect to criminal investigation cases. According to its pronouncement on the subject issued in May 2017, the CRA seeks publicity for two reasons: first, to maintain confidence in the integrity of the self-assessment system and provide a deterrent to non-compliance; and second, to warn Canadians of potential fraudulent schemes.[34]

If the published record of prosecutions is accurate and complete, the question is: Why are there so few Canadian cases that have a true offshore component?

29 Elizabeth Thompson, "CRA Offshore Tax Tip Line Nets $1M in Reassessments, Penalties," *CBCNews*, February 1, 2017 (www.cbc.ca/news/politics/taxes-offshore-tax-evasion-cra-1.3960851).

30 Ibid.

31 Ibid.

32 Canada Revenue Agency, "Criminal Investigations Actions, Charges, and Convictions," May 5, 2017 (www.cra-arc.gc.ca/nwsrm/cnvctns/menu-eng.html).

33 I have heard these types of defences by CRA officials in a variety of settings, including conferences and symposiums, and in relation to matters in private practice.

34 Supra note 32.

EVIDENTIARY CHALLENGES

Whether a criminal tax prosecution takes place in the United States or Canada, the starting point for both the prosecution and the defence is the development of a strategy to advance or mount a challenge against the alleged offence. From the government perspective, this involves avoiding mistakes in gathering the evidence and at the same time avoiding improprieties. The defence can take advantage of any missteps and cause the government to rethink advancing its case. Both sides will next want to consider substantive issues. This stage of the process typically concerns the quality of the evidence and how the evidence supports or diminishes each element of the offence. The prosecutor and the defence counsel will each consider all of the evidence and determine to what extent it helps or hurts their case. The next fundamental consideration by both sides is the evidentiary issue. What challenges can be foreseen regarding the admissibility of evidence, and how can they be addressed, either to advance the case for the prosecution or to reinforce the defence against it? The final preliminary consideration in a criminal tax case for both the prosecution and the defence is how to prepare for the unlikely, the unexpected, or the unforeseen. This is an experience-based aspect of counsel's preparation for a case. Indeed, the expression "Experience is the best teacher" has a true qualitative meaning in the defence or prosecution of a criminal tax matter.[35]

If we can assume that the elements of case preparation are essentially the same in both Canada and the United States, one question that arises is: Why does it appear to be so difficult to prosecute offshore as opposed to domestic tax evaders in Canada?

There are many reasons, beginning with the length of time it takes to gather the information and analyze it. Then there is the determination as to whether the quality of the evidence is sufficient to meet the criteria for the launch of a successful prosecution. Undoubtedly these initial challenges are the same for Canadian and American prosecutors. However, the difference may lie with the engagement of Canadian taxpayer rights. In other words, once the predominant purpose of an inquiry by the CRA is the determination of penal liability, the taxpayer's rights as secured by the Canadian Charter of Rights and Freedoms[36] are fully engaged.[37] These legal rights are found in sections 7 through 11 of the Charter.

35 For some useful discussions on the conduct of tax evasion cases from the government and private sector perspectives, see Johanne Charbonneau, "Tax Evasion from the Government's Perspective," in *Tax Dispute Resolution, Compliance, and Administration in Canada* (Toronto: Canadian Tax Foundation, 2013), 22:1-13; and Craig C. Sturrock and Jessie Meikle-Kahs, "Tax Evasion from the Practitioner's Perspective," ibid., 23:1-16. See also Canada, Public Prosecution Service, *The Federal Prosecution Service Deskbook* (Ottawa: Department of Justice, September 2, 2014).

36 Part I of the Constitution Act, 1982, being schedule B to the Canada Act 1982 (UK), 1982, c. 11 (herein referred to as "the Charter").

37 *R v. Jarvis*, [2002] 3 SCR 757.

Charter challenges are common in criminal tax matters. Pretrial motions often raise the more routine Charter arguments, such as unreasonable delay, the right to be secure against unreasonable search and seizure, and the right to counsel. Where a court finds a Charter breach, it can order the exclusion of evidence or a judicial stay of proceedings in accordance with section 24 of the Charter.[38]

The Supreme Court of Canada has specified a number of conditions that must be met for a stay to be granted.[39] First, there must be prejudice to the accused's right to a fair trial or prejudice to the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome."[40] Second, there must be no way other than a stay of proceedings to eliminate the prejudice to the accused or to protect the integrity of the judicial system.[41] Third, where there exists uncertainty after the first two steps are considered, the court is required to balance the interests in favour of granting a stay. This balancing calls for weighing the need to denounce misconduct and preserve the integrity of the justice system against the interest that "society has in having a final decision on the merits" of the case.[42]

The Supreme Court of Canada has maintained that a stay of proceedings is an extraordinary remedy and therefore should be ordered only in the clearest of cases.[43] An alternative remedy available to the courts in accordance with section 24 of the Charter is the ability to order a new trial. Again, the specific circumstances of each case must be carefully considered in order to justify this course of action.

As a further complication in what can be called the "Charter minefield," Crown counsel in Canada now have to deal with the implications of the Supreme Court of Canada's decision in the *Jordan* case.[44] In *Jordan*, where the accused faced drug charges, the Supreme Court held, in a 5-to-4 ruling, that four years was an unreasonable delay for the case to get to trial; therefore, the court determined that the constitutional right of the accused to a trial within a reasonable time, as guaranteed by section 11(b) of the Charter, had been violated. The Supreme Court's decision led to a dramatic overhaul of the legal framework that provides the judiciary with a methodology in deciding if a person has been tried within a reasonable time. The court introduced a numerical ceiling, determining that the time between the laying of charges and the conclusion of a trial should not exceed 18 months in provincial court or 30 months in a superior court. Where a case goes beyond these limits, the

38 In *R v. D.(E.)*, 1990 CanLII 6911 (ONCA), Arbour JA, for the court, stated, "A stay of proceedings is tantamount to an acquittal in that it effectively brings the proceedings to a final conclusion in favour of the accused." See also *R v. Jewitt*, [1985] 2 SCR 128.

39 *R v. Babos*, 2014 SCC 16.

40 Ibid., at paragraph 32, citing *R v. Regan*, 2002 SCC 12, at paragraph 54.

41 *Babos*, supra note 39, at paragraph 32.

42 Ibid.

43 *R v. O'Connor*, [1995] 4 SCR 411.

44 *R v. Jordan*, 2016 SCC 27.

courts are essentially directed to conclude that the delay is unreasonable and therefore the charges should be dismissed, unless the Crown can demonstrate that there are exceptional circumstances that can explain the delay. If the delay is, in fact, caused by the actions of the defence, the time caused by that delay does not count. As a result of the *Jordan* decision, the repercussions were swift, as dozens of cases in Ontario alone were stayed.[45]

In the immediate aftermath of the *Jordan* decision, an Alberta Crown early resolution team reviewed over 400 cases to determine whether any of them were potentially at risk of "*Jordan* applications."[46] Then, in late February 2017, an Alberta Crown attorney, Shelley Bykewich, stayed 15 criminal cases in provincial court because (according to the news report) the justice system does not have the resources to prosecute them.[47] This decision is significant because it is the first known instance in Alberta of proceedings being stayed at the Crown's instigation owing to a lack of resources, and because the offences involved were serious. It has also been reported that in Nova Scotia "best-offer" plea deals for low-level offences are now the norm.[48] It is hard to imagine that the *Jordan* decision would not have an impact on the potential conduct of a tax prosecution in Canada.

CONCLUSIONS

It is still too early to gauge the success of the Canadian whistleblower program. Nevertheless, the Canadian government can point to investigations and the increase in voluntary disclosures since the OTIP was introduced. By any measure, these are positive developments. Yet the potential for greater success has to be questioned, in light of the response of Canadian authorities in the case of Bradley Birkenfeld. Birkenfeld, the well-known whistleblower who informed US authorities about Americans holding secret accounts with UBS in Switzerland, was reportedly

45 Joe Lofaro, "Ontario Judges Stayed 46 Cases due to Court Delays in 2016," *CBCNews*, March 6, 2017 (www.cbc.ca/news/canada/ottawa/46-cases-stayed-ontario-jordan-decision-1.4009250). On June, 16, 2017, the Supreme Court of Canada stated in a unanimous (7-0) ruling that the *Jordan* case set a precedent and that it must be followed and cannot be lightly discarded or overturned: *R v. Cody*, 2017 SCC 31. In *Cody*, five years elapsed between the laying of drug charges and the commencement of trial. The Supreme Court found that this constituted an unreasonable delay that merited a stay of proceedings.

46 Meghan Grant, "Calgary Has 400 Cases Under Review over Concern Delays Will Allow Accused Criminals To Walk Free," *CBCNews*, October 13, 2016 (www.cbc.ca/news/canada/calgary/alberta-court-trials-jordan-decision-supreme-court-1.3803543).

47 Sean Fine, "Alberta Drops 15 Criminal Cases in Resource Crunch," *Globe and Mail*, March 1, 2017 (www.theglobeandmail.com/news/national/alberta-resorts-to-large-scale-triage-for-courts/article34170249/).

48 Sean Fine, "Courts Shaken by Search for Solutions to Delays," *Globe and Mail*, June 8, 2017 (www.theglobeandmail.com/news/national/courts-shaken-by-search-for-solutions-todelays/article34275019/).

rebuffed when he approached Canadian authorities with secret offshore account information.[49]

There are still no reported tax prosecutions in Canada that truly relate to offshore accounts held at those widely reported global financial institutions that have been named in successful US offshore tax prosecutions. If and when those types of prosecutions occur and convictions are reported, Canadians will have the sense that the government has taken concrete action to combat tax evasion.

49 Claire Brownell, "Famous Swiss Bank Whistleblower Wonders Why Canada Gave Up So Easily on $1 Billion in Unpaid Taxes," *Financial Post*, February 17, 2017 (business.financialpost.com/personal-finance/taxes/famous-swiss-bank-whistleblower-wonders-why-canada-gave-up-so-easily-on-1-billion-in-unpaid-taxes/wcm/472c3174-3e83-4049-8ec2-02a6b0e6b4b7); and William Hoke, "Whistleblower's Attempts To Aid Canadian Authorities Ignored" (2016) 84:4 *Tax Notes International* 360-62.