# Dangerous Dialogues

## A Warning to Canadians with undisclosed Swiss accounts.

On October 7, 2010, Diane Francis, in her *Comment* column in this newspaper, accused Canada of doing nothing about offshore cheating and lack of disclosure, suggesting corruption, incompetence, or both as the root cause of this inaction.

The Minister of National Revenue, the Hon. Keith Ashfield, responded within a day (*see LETTERS, FP19, October 9, 2010*) to rebut Ms Francis' allegations and defend the efficiency of the CRA's soft core approach to tax enforcement, otherwise know as the Voluntary Disclosures Program.

How Canadian. And how dangerous.

The speed and vehemence of the Minister's letter reveals two things:

1. Ms. Francis clearly touched a nerve; and
2. The gloves are off and the Minister is demanding heads in the form of high profile prosecutions to vindicate his mandate.

Both are perilous to any Canadian engaged in tax behaviour as defined by s. 239 of the Income Tax Act, which deems failure to report income for the purpose of evading tax an offense **prosecutable in the criminal courts** and punishable by penalties, fines and jail time.

Notwithstanding the unquestionably legal nature of offenses under s.239, and the threat they pose to the security of the person, the CRA disingenuously presents the off-the-shelf Voluntary Disclosure application as a prophylactic against both prosecution and punishment. Yet the VDP is no more than a policy created from an administrative interpretation of s. 220 (3.1), which permits the Minister the discretion to waive or cancel penalties and interest. Prosecution is not part of the equation, and is not in the purview of the Minister to dismiss. Thus there is a glaring disconnection between the promise of protection from prosecution, which is the most compelling consumer proposition of the VDP, and the section of the law on which it is founded.

A Voluntary Disclosure application does not confer automatic absolution. **Prosecution is an option always preserved** as a sword of Damocles to be wielded at the absolute discretion of the CRA. To protect from prosecution, a legal approach must be established at the outset of the disclosure and maintained throughout. Failure to do so leaves a taxpayer bereft of legal rights, and even undermines solicitor-client privilege, both of which will become essential in the event the disclosure is denied. It is thus surreptitious of the CRA to encourage tax professionals – particularly lawyers – to approach the resolution of such tax delinquency strictly through administrative policy, not law.

It must be remembered that **a Voluntary Disclosure is only viable when the CRA deems it has no prior knowledge of your offense.**

That leaves Canadians whose names are already in the possession of the CRA naked and at the mercy of a Minister, who, while personally calling for heads, will continue to mask his true intentions behind the all-too-Canadian happy face of gentle inquiry.

Beware of any contact from the CRA requesting, among other things, completion of a simple questionnaire presented in the guise of an innocent audit of tax years past. These questionnaires, issued by the Aggressive Tax Planning unit of your local tax office, are in reality an investigative audit of your holdings offshore, onshore, indeed anywhere in the world where you hold accounts. Any information you provide can and will be used against you if the Minister decides he can get your head quickly and with minimal effort.

Protecting your head and your wealth is not a matter of playing the odds. It's a matter of seeking cover and comfort in the law.

The Prime Minster has declared that he will pursue offshore tax evaders with the full extent of the law. The policy-driven VDP and audit questionnaires, for all their friendly demeanour, are in fact means to that end.

Therefore, I exhort the people of Canada to be wary of well-meaning administrative policy and those who re-sell it. Instead, celebrate and avail yourselves of the protection of the law.

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