

House of Commons Standing Committee on Finance
Review of Bill C-31 – Meeting No. 33 – May 8, 2014

Speaking Notes

Mark Tonkovich

Baker & McKenzie LLP

Thank you, Mr. Chair.

And thank you to the Committee for the invitation to appear before you today.

I have had the privilege of seeing tax disputes from many angles – as a lawyer in private practice, as counsel with the federal Department of Justice, and as judicial clerk to the Federal Court of Appeal. My current legal practice focuses exclusively on helping taxpayers resolve disputes with Canadian tax authorities. But I am here today as an individual, and my comments reflect my personal views – not necessarily those of my firm nor my clients.

Against this background, I am pleased to offer whatever assistance I can to the Committee as it consider Parts I to IV of the government's February 11th budget bill. Before answering your questions, I would like to take the opportunity to highlight two important tax initiatives relating to Bill C-31.

Canada is working hard to balance budgetary needs and foreign policy against the sophisticated tax planning that exists on the global stage. One continuing challenge is ensuring that the Canada Revenue Agency has the tools it needs to maintain the integrity of the tax system while respecting the basic taxpayer rights of consistency, predictability, and fairness.¹ After all, our society and our laws correctly recognize each taxpayer's right to arrange his or her affairs in the most business-savvy and tax-efficient manner.

Returning to the *Economic Action Plan*: Bill C-31 contains provisions touching on two new information gathering tools aimed at helping the CRA to achieve its mandate. The first is the introduction of the new Electronic Fund Transfer (EFT) reporting regime in Part XV.1 of the *Income Tax Act*. The second deals with the CRA initiative today called the Offshore Tax Informant Program (OTIP).

The Department of Finance released legislative proposals relating to the new EFT reporting regime this past January, and the proposed rules are contained in Bill C-31. The rules will require most financial intermediaries to file reports with the CRA days after completing an electronic fund transfer of \$10,000 or more, flowing into or leaving Canada at a client's request. The new regime includes:

- detailed provisions defining which financial entities must submit reports;
- a corresponding recordkeeping obligation for those entities, and the creation of an offence for failure to comply with this obligation; and
- rules explaining that EFT information can be used for non-income tax purposes.

¹ These long-established principles seem to be reflected in Bill C-31's proposal to introduce section 162 of the *Financial Administration Act*, which requires the annual tabling of legislative proposals to amend Canada's tax laws that were previously announced but are yet to be enacted. One underlying goal appears to be keeping taxpayers informed of anticipated changes to Canada's tax rules, some of which take a number of years from initial budgetary announcements to their eventual enactment.

Although the CRA will need resources to properly monitor and analyse this new EFT information, the proposed regime will undoubtedly provide a fuller picture of traditional fund transfers across our borders. In turn, this will make it easier for the CRA to consider whether those funds have been properly accounted for from a tax standpoint.

Moving to the second initiative: the Offshore Tax Informant Program is a whistleblowing program first announced in the 2013 budget and formally launched by the CRA in January 2014. OTIP aims to pay awards of between 5% and 15% of federal tax collected as a result of tips provided to the CRA concerning major international tax non-compliance. Anecdotally, I understand that would-be informants have already started approaching professional firms for advice on the new program, and have begun opening informant files with the CRA.

In contrast to the detailed legislative framework for EFT reporting, however, there are no legislated rules defining the new informant regime. There are a number of provisions in Bill C-31 that relate to the informant program – which I've set out in a schedule to my speaking notes – but these generally touch on how award monies will be taxed, and how informants can be kept abreast of the status of their file.

Otherwise, all rules pertaining to the OTIP are left to the CRA, including:

- who can be an informant;
- whether awards could be paid for information concerning domestic as opposed to international tax non-compliance;
- whether there are limits on how tax information can be obtained or used; and
- whether an informant's identity will be protected down the road.

Leaving the framework to the CRA is efficient in some respects since it allows the rules to be changed without needing to pursue legislative or regulatory amendments. This kind of flexibility makes good sense for certain aspects of the program – such as deciding how valuable a particular piece of information is, and whether this justifies a larger or smaller award percentage.

But leaving the program to administrative discretion falls short in other respects. For example, without legislative rules or regulations:

- i) The extent to which CRA policies can be relied upon or enforced by informants is unclear, as is the breadth of the CRA's authority to pay awards out of taxpayer dollars. This can be contrasted to the whistleblowing program used in the United States, where legislative provisions in the Internal Revenue Code outline the program's framework.²
- ii) There is also a lack of clarity concerning how information can be obtained, and whether viable tips can (or should) be acquired by breaking the law or breaching professional or ethical rules. An important public institution such as the CRA should not be seen as encouraging taxpayers or their advisers to cheat or steal to obtain potentially-useful tax information in order to make a buck.
- iii) Finally, the scope of the informant's obligations in any future tax assessment or enforcement proceeding is unclear. It is also unclear to what ends the CRA will go to protect the informant's identity. Legislated rules providing a certain degree of protection to informants, or making awards conditional on a degree of cooperation, would assist potential informants and their advisers in deciding how to take part in the new program.

² See *e.g.* 26 U.S. Code § 7623. In addition, there are regulations and Internal Revenue Service guidance documents setting out some of the program's particulars.

For these reasons, legislative rules (or regulations) addressing these basic aspects of the informant program should be introduced to bring clarity to the system, which will make the program easier to administer and more reliable in the long run.

Thank you, Mr. Chair.

I would be happy to answer questions on these or any related topics.

Schedule of Relevant Bill C-31 Provisions

Mark Tonkovich

Baker & McKenzie LLP

Relating to the Offshore Tax Informant Program

- 2** [adds paragraph 56(1)(z.4) to the *Income Tax Act* to include in income amounts paid to an informant under a contract entered into by that person under a program administered by the CRA to obtain information relating to tax non-compliance (*e.g.* OTIP)]
- 3** [adds paragraph 60(z.1) to the *Income Tax Act* to allow the deduction from a taxpayer's income of any amount initially included in income under paragraph 56(1)(z.4) and then repaid]
- 22(2)** [amends subsection 152(10) of the *Income Tax Act* to carve out amounts assessed further to information received under OTIP from applying in the context of a federal-provincial collection agreement until the amount assessed has actually been collected]
- 23** [adds paragraph 153(1)(s) to the *Income Tax Act* to include in the source withholding regime amounts paid as awards under OTIP]
- 26** [adds paragraph 212(1)(x) to the *Income Tax Act* to subject OTIP awards to Part XIII withholding tax where they are paid to a non-resident]
- 28(2)** [adds paragraph 241(4)(r) to the *Income Tax Act* to allow officials to provide confidential taxpayer information to OTIP informants, notifying them of the

amount to which they may be entitled under OTIP and the status of their claim under an OTIP contract]

- 32 [adds subsection 103(9) to the *Income Tax Regulations*, which prescribes source withholding rules for awards paid under OTIP]
- 34 [amends paragraph 202(2)(m) of the *Income Tax Regulations* to require the making of an information return where an OTIP award is paid to a non-resident]
- 50(2) [similar to amending subsection 28(2), above, this provision adds paragraph 295(5)(o) to the *Excise Tax Act* to allow officials to provide confidential taxpayer information to informants under OTIP]
- 51 [similar to amending subsection 22(2), above, this provision adds section 300.1 to the *Excise Tax Act* so as to carve out amounts assessed for purposes of administering a federal-provincial sales tax harmonization agreement]
- 75(2) [similar to amending subsection 28(2), above, this provision adds paragraph 211(6)(n) to the *Excise Act, 2001* to allow officials to provide confidential taxpayer information to informants under OTIP]

Relating to the Electronic Fund Transfer Reporting Regime

- 27 [amends subsection 238(1) of the *Income Tax Act* to create an offence where a person has failed to comply with the recordkeeping requirements of the new EFT reporting regime under Part XV.1 of the *Income Tax Act*]

- 28(2)** [adds paragraph 241(4)(s) to the *Income Tax Act* to allow an official to disclose confidential taxpayer information to FINTRAC in connection with determining whether a reporting entity has complied with the new Part XV.1 EFT reporting regime]
- 29(1)** [adds the new Part XV.1 EFT reporting regime to the *Income Tax Act*, which requires the filing of information returns with the CRA in respect of EFTs of \$10,000 or more, exiting Canada or coming into Canada at a client's request, by certain types of financial intermediaries]
- 49(1)** [adds section 273.3 to the *Excise Tax Act* to make clear that information obtained under the new *Income Tax Act* EFT reporting regime may be used for purposes of the GST/HST portion of the *Excise Tax Act*]
- 74(1)** [similar to amending subsection 49(1), above, this provision adds section 207.1 to the *Excise Act, 2001* to make clear that information obtained under the new *Income Tax Act* EFT reporting regime may be used for purposes of the *Excise Act, 2001*]
- 87** [similar to amending subsection 49(1), above, this provision adds section 98.2 to the *Excise Tax Act* to make clear that information obtained under the new *Income Tax Act* EFT reporting regime may be used for purposes of the non-GST/HST portion of the *Excise Tax Act*]
- 90** [similar to amending subsection 49(1), above, this provision adds section 37.1 to the *Air Travellers Security Charge Act* to make clear that information obtained under the new *Income Tax Act* EFT reporting regime may be used for purposes of the *Air Travellers Security Charge Act*]