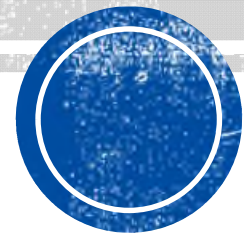


# VOLUNTARY DISCLOSURE... OR NOT

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**RAVINSKY RYAN LEMOINE**

S.E.N.C.R.L./L.L.P  
AVOCATS / BARRISTERS AND SOLICITORS

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# THE CRA'S VDP

Information Circular IC00-1R6



# 1. The CRA's VDP

## 1.1 The “proposed” June 2017 Circular

- On June 9, 2017, the CRA proposed a new circular to the tax community
- We had two months to submit our comments
- The APFF and the Joint Committee on Taxation of the Canadian Bar Association and CPA Canada submitted their comments to the Minister of National Revenue:
  - ➔ The comments were essentially that the proposed new program would discourage taxpayers from making voluntary disclosures
- The CRA did not retain any comments and, as we will see later on, the official circular contained even more “discouraging” elements for taxpayers
- The new circular was published on December 15, 2017 to come into effect on March 1, 2018

# 1. The CRA's VDP

## 1.2 Conditions of a valid application have not changed

- Voluntary
- Complete
- Involve a penalty
- One year past due
- Payment

But the interpretations of these conditions have changed

# 1. The CRA's VDP

## 1.3 Reminder of the key elements of the “new” program

- No more anonymous disclosure that allowed for protection during case preparation
- The application must be complete upon opening, including payment of the estimated tax (payment of penalties and interest is not mandatory)
- New interpretation of the “complete” criterion (para. 32 of the Circular) :
  - ➔ Before March 2018, the CRA accepted voluntary disclosures generated on the basis of available records based on the retention periods of the country where the funds were held
  - ➔ Since March 2018, to meet the “complete” criterion, all non-compliance with tax laws must be corrected since day one of the issue(s)
    - If records/information are not available, the taxpayer should make every reasonable effort to estimate reportable income

# 1. The CRA's VDP

## 1.3 Reminder of the key elements of the “new” program (cont’d)

- ★ Effect of the new position: CRA now “catches” initial capital, subsequent injections and investment income that was not necessarily disclosed beforehand
- ★ The “new” question to be dealt with: what do we do with the account value that appears on the oldest available statement?



As of February 2022: of 14 615 voluntary disclosure files with an offshore component since March 1, 2018, only 117 files were denied on the basis of being incomplete (0.8%)



# 1. The CRA's VDP

## 1.3 Reminder of the key elements of the “new” program (cont'd)

- New interpretation of the “voluntary” criterion:
  - ➔ Before March 2018, voluntary disclosure was not voluntary if:
    - 1) the taxpayer was aware that an enforcement action was underway with respect to the information to be disclosed; OR
    - 2) an enforcement action had been taken against the taxpayer (or a third party if the purpose and impact of the action was sufficiently related to the disclosable information) AND that action was likely to have revealed disclosable information



# 1. The CRA's VDP

## 1.3 Reminder of the key elements of the “new” program (cont'd)

- New interpretation of the “voluntary” criterion (para. 29 of the Circular):
  - ➔ Since March 2018, the disclosure is not voluntary if:
    - 1) the taxpayer was aware that an enforcement action was underway with respect to the information to be disclosed; OR
    - 2) an enforcement action concerning the information to be disclosed was taken against the taxpayer (or a third party if the purpose and impact of the action is sufficiently related to the information to be disclosed); OR
    - 3) The CRA has already received information that the taxpayer (or a related person) is potentially involved in tax non-compliance

29. Subject to the exceptions in paragraph 31, a VDP application will not be voluntary if:

(...)

the CRA has already received information regarding the specific taxpayer's (or a related taxpayer's) potential involvement in tax non-compliance (for example, a leak of offshore banking or other information that names the taxpayer)

# 1. The CRA's VDP

## 1.3 Reminder of the key elements of the “new” program (cont’d)

- ✓ The criterion that the enforcement action was likely to have revealed the information to be disclosed no longer exists
- ✓ Introduction of a new concept: “tax suicide”, i.e. being denied access to the VDP on the basis that it is not voluntary when there was no way for the taxpayer to be completely sure that this criterion was met
- ✓ What more can you do than:
  - Interrogate the taxpayer
  - Consult the ICIJ lists: <https://offshoreleaks.icij.org/>
  - Obtain a copy of the information provided by the bank to its local tax authorities



The “tax suicide” concept was not included in the “proposed” circular



As of February 2022: of 14 615 voluntary disclosure files with an offshore component since March 1, 2018, only 560 files were refused on the basis that they were not voluntary (3.8%)

# 1. The CRA's VDP

## 1.3 Reminder of the key elements of the “new” program (cont'd)

Example of a letter informing a taxpayer of the information sent by the foreign bank to its local tax authorities for international exchange of information with the CRA:

### Aperçu des comptes à déclarer en 2019 (pour 2018)

Vous trouverez ci-dessous un aperçu des informations qui seront déclarées aux autorités fiscales belges pour les comptes détenus auprès d'ING Belgique entre le 1<sup>er</sup> janvier et le 31 décembre 2018.

Les autorités fiscales belges transmettront ces informations à l'autorité fiscale du(des) pays suivant(s) : Canada, en fonction de la (des) résidence(s) fiscale(s) enregistrée(s) dans nos systèmes au 31 décembre 2018<sup>1</sup>.

#### Avoirs

Veuillez trouver ci-après, les avoirs sur le(s) compte(s) au 31 décembre 2018.

Número de compte	Nature du compte	Solde	Devise
	compte courant		EUR
	compte d'épargne		EUR

#### Revenus financiers

Veuillez trouver ci-après, les revenus financiers rapportables perçus en 2018, agrégés par devise :

Número de compte	Nature du compte	Revenu	Devise	Type de revenu
	compte d'épargne		EUR	intérêt

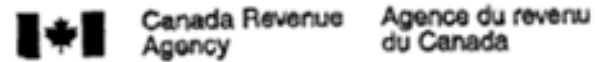
Produits du rachat, du remboursement, de la vente, de l'échange ou, de manière générale de toute cession de titres

Non applicable.

# 1. The CRA's VDP

## 1.3 Reminder of the key elements of the “new” program (cont'd)

Example of a letter informing a taxpayer of the start of an EFT audit:



January 28, 2019

COPY

**Subject: Income tax return for 2016**

**Case number:**

We are writing to inform you that your personal income tax return has been selected for audit for the above-noted period. The Canada Revenue Agency (CRA) is in possession of information regarding amounts you have received or sent internationally.

In order to expedite and facilitate our audit, we will require a clear understanding of the international electronic funds transfers (EFT) that you have sent or received during the tax year noted above. We would like to receive a clear explanation of the nature of these EFTs and, if applicable, details of where in your tax returns these amounts were declared.

We also request that you complete the enclosed questionnaire and return it by February 28, 2019 with the following records:

# 1. The CRA's VDP

## 1.3 Reminder of the key elements of the “new” program (cont'd)

- General vs. Limited Program

For a claim to be considered under the general program, there must be **no** indication that the failure to file or properly file a return was due to an element of intentional conduct. Where there is **an** element of intentional conduct on the part of the taxpayer or a closely related party, the claim falls under the limited program. To determine whether an element of intentional conduct exists, VDP officers examine the taxpayer's overall tax situation and the matter disclosed. For example, VDP officers may consider several factors such as the length of time between when the error is identified and the date the request is submitted, the significance of the adjustment in relation to the reported income or source of income giving rise to the adjustment, the taxpayer's compliance history, the taxpayer's previous communications with the Agency regarding the issue, etc.

Annual APFF Congress 2018, “Divulgations volontaires et conformité internationale”, see the CRA's response to question #7

# 1. The CRA's VDP

## 1.3 Reminder of the key elements of the “new” program (cont'd)

What is an element of intentional conduct?

Paragraph 20 of the Circular:

The following factors may be considered:

- efforts were made to avoid detection through the use of offshore vehicles or other means,
- the dollar amounts involved,
- the number of years of non-compliance,
- the sophistication of the taxpayer,
- the disclosure is made after an official CRA statement regarding its intended specific focus of compliance (for example, the launch of a compliance project or campaign) or following broad-based CRA correspondence (for example, a letter issued to taxpayers working in a particular sector about a compliance issue)

# 1. The CRA's VDP

## 1.3 Reminder of the key elements of the “new” program (cont'd)

- General vs. Limited Program



The concept of “intentional conduct” was not included in the “proposed” circular which instead referred to the concept of “major non-compliance”



The CRA VDP Director confirmed to us in February 2022 that: “the vast majority of disclosures with foreign source income were processed under the general program”



# 1. The CRA's VDP

## 1.3 Reminder of the key elements of the “new” program (cont'd)

- General vs. Limited Program:

The treatment of interest is clear:

Limited (para. 16 of the Circular):

- No relief

General (para. 15 and 17 of the Circular):

- No relief for debts arising in non-prescribed years
- For all other years: 50% of the interest accumulated during the last ten years (calculated in accordance with the decision *Bozzer*, 2011 FCA 186)

# 1. The CRA's VDP

## 1.3 Reminder of the key elements of the “new” program (cont'd)

- General vs. Limited Program

The treatment of penalties is much less clear:

General (para. 13 and 17 of the Circular):

- No penalty for the last 10 years
- For years beyond 10 years: at the Minister's discretion

Limited (para. 14 and 17 of the Circular):

- No gross negligence penalty for the last 10 years. However, the taxpayer will be subject to other penalties, as applicable
- The CRA does not specify what these other penalties are. It probably refers to penalties under sections 163(1) and 162(7) of the ITA
- For years beyond 10 years: at the Minister's discretion

# 1. The CRA's VDP

## 1.4 Common Issues

- ✓ Uncertainty regarding the “voluntary” criterion: avoid “tax suicide”
- ✓ Uncertainty regarding the “complete” criterion: reasonable efforts made to estimate income?
- ✓ Uncertainty regarding the tax debt: general vs. limited program and vagueness in relation to penalties
- ✓ Insufficient funds abroad (considering the provincial debt, all in a worst case scenario)
- ✓ Opening of files for taxpayers who have passed away many years ago
- ✓ The time frame for the preparation of a file is often long, so the pressure on the representatives is high
- ✓ Repatriation of funds is generally a prerequisite for opening a voluntary disclosure. Therefore, it is important to ensure that there is a clear mandate to open a voluntary disclosure before repatriating the funds to a trust account

# 1. The CRA's VDP

## 1.5 Practical experiences

- ✓ Processing time: currently around 2.5 years
- ✓ Classification of files: none in limited, despite files involving structures abroad
- ✓ Penalty for years beyond 10 years: none
- ✓ CRA audit (before or after verification letter): none
- ✓ Incomplete application: CRA has given one month to correct the situation
  - No phone number to reach an officer on CRA correspondence
- ✓ Communication with CRA officers assigned to review files: none
  - To reach the program department, the CRA confirmed to us in February 2022 that the different ways are:
    - For businesses: 1-800-959-5525 (general line)
    - For individuals: 1-800-959-8281 (general line)
    - Online via the CRA platform
    - By fax: 1-888-452-8994



# 1. The CRA's VDP

## 1.5 Practical experiences (cont'd)

Example of a completed case where the facts presented to the CRA and the results are as follows:

- ✓ Undeclared commissions received from abroad and deposited abroad between 1996 and 2008
- ✓ Account held by a nominee company
- ✓ Funds administered by a broker
- ✓ Six bank changes (including one in 2017) in five countries on three continents
- ✓ First statements available as of January 1, 2003 with a balance of \$760,000 (this amount was allocated in an estimated manner between 1996 et 2002 based on the factual framework outlined by the client)
- ✓ \$2,502,884 of taxable adjustments presented in VD
- ✓ Value of account on December 31, 2017: \$2,550,137
- ✓ Total taxed debt: \$1,080,539 (to the provincial government, under the old program his file cost \$641,000)

# 1. The CRA's VDP

## 1.6 Future of the program and possible solutions

- The CRA was to take a position on the continuation of the program in March 2020:

While the Agency's ability to detect non-compliance continues to improve, the Agency is committed to reviewing the new VDP two years after the implementation of the new policy to assess the results of the new program, particularly with respect to access to the program by taxpayers who use sophisticated techniques to hide their income. Once the new program is in place for at least two years, the Agency will review the processes and outcomes, and determine if additional changes are needed based on the results and feedback

Annual APFF Congress 2018, “Divulgations volontaires et conformité internationale”, see the CRA’s response to question #13

# 1. The CRA's VDP

## 1.6 Future of the program and possible solutions (cont'd)



CRA Position as of February 2022: The voluntary disclosure program remains an important part of the tax compliance continuum, giving Canadians the opportunity to come forward and correct errors or omissions in their tax returns. The Agency continually strives to review and improve the process in place to provide better service to Canadians.



# 1. The CRA's VDP

## 1.6 Future of the program and possible solutions (cont'd)

- Legislative change: extend the ten-year period provided for by section 220(3.1) ITA?
  - Before January 1, 2005, the CRA was not limited by this ten-year period
- Amendments to the Circular:
  - Remove the possibility of a tax suicide or remodel the CRA's position so that taxpayers can better assess their risk
  - Allow taxation of the value of foreign assets in year 10
  - Be more transparent about the criteria for file classification AND the application of penalties

# **REVENU QUÉBEC'S VDP**

Information Bulletin ADM.4/R8



## 2. Revenu Québec's VDP

### 2.1 Differences with the Federal Program

- ✓ With respect to the processing of files between December 20, 2019 and February 9, 2022, Revenu Québec:
  - Received 237 applications with an offshore component
  - None of these files were addressed in the Limited Program
  - Only three files were refused due to non-compliance with the spontaneous or complete criteria

## 2. Revenu Québec's VDP

### 2.1 Differences with the Federal Program (cont'd)

- ✓ Essentially harmonized as of December 20, 2019, except for interest calculation
- ✓ Before December 20, 2019, only the years not prescribed bore interest
- ✓ New program:

General (para. 21 of the Bulletin):

- Non-prescribed years: no relief
- Other years up to six: 50%
- No interest for years seven and up

## 2. Revenu Québec's VDP

### 2.1 Differences with the Federal Program (cont'd)

Limited (para. 22 of the Bulletin) :

- Non-prescribed years: no relief
- Other years up to 10: 50%
- For years 10 and up: 50% and only for the past 10 years

## 2. Revenu Québec's VDP

### 2.1 Differences with the Federal Program (cont'd)

With regards to penalties, the Revenu Québec program is a little clearer:

- General (para. 21 of the Bulletin): no
- Limited (para. 22 of the Bulletin): no penalty of “intention” (e.g. gross negligence), but possibility of other penalties (e.g. repeated failure to report income: 59.2.2 TAA)

## 2. Revenu Québec's VDP

### 2.1 Differences with the Federal Program (cont'd)

➔ That which has not changed with the old Revenu Québec program:

- ✓ The processing of a voluntary disclosure to Revenu Québec is a “real-time” audit in which the representative or the taxpayer actively participates
- ✓ Presumption that all foreign assets were acquired with unreported income (para. 47 of the Bulletin)
- ✓ To respect the complete criterion, the taxpayer and related persons must be in good standing with Revenu Québec (all declarations must be up-to-date and if there are tax debts, they must be legally suspended or covered by a valid payment agreement) (para. 49 of the Bulletin)
- ✓ The deemed disposition (DD) concept is still applicable when there are too many uncertainties related to an “in the money” approach (para. 53 du Bulletin)



# 2. Revenu Québec's VDP

## 2.1 Differences with the Federal Program (cont'd)

- ➔ That which has not changed with the old Revenu Québec program (cont'd):
  - ✓ The DD is intended to tax the value of the account in the year in which the first statements are available
  - ✓ A file involving a DD requires the drafting and signing of a transaction
  - ✓ Two common adjustments to the DD:
    - Adding previous withdrawals to reconstitute all unreported income
    - Withdrawal of non-taxable amounts (“explained capital”)

## 2. Revenu Québec's VDP

### 2.2 Tax/source deductions clarification

- ✓ If they have not been collected (or no input has been claimed), Revenu Québec is limited to assessing only the non-prescribed years/periods

## 2. Revenu Québec's VDP

### 2.3 Common issues

- ✓ Claiming explained capital is often tedious considering the position of Revenu Québec which requires convincing proof of veracity, non-taxable or already taxed character, quantum and deposit in the foreign account
- ✓ Where there is more than one taxpayer involved, Revenu Québec often questions the income splitting between the beneficial owners to assess based on who injected the funds abroad
- ✓ During the analysis of the file, Revenu Québec sometimes determines that additional income must be added, for example following the analysis of the Quebec Land Register and/or its foreign equivalent (i.e. Florida) or as a result of an analysis of originally reported income (e.g. low rental income vs. number of doors) and the associated debt must be paid (para. 55 of the Bulletin)

## 2. Revenu Québec's VDP

### 2.3 Common issues (cont'd)

- ✓ Proving that foreign assets that are not in voluntary disclosure were not acquired with unreported income is burdensome in some cases
- ✓ The processing of a voluntary disclosure may extend over years in the presence of a DD and/or explained capital and/or an attempt to add additional income estimated by Revenu Québec
- ✓ With regard to the DD:
  - Chasing past withdrawals
  - Refusal to consider a portion attributable to capital gains

# 2. Revenu Québec's VDP

## 2.4 Practical experiences

- ✓ Representatives and taxpayers must have a good grasp of their case and take steps to obtain as much evidence as possible
- ✓ Do not hesitate to request access to information from Revenu Québec via:  
resp-acces.revenu@revenuquebec.ca
  - Fast process and receipt of documents/information via secure email
  - Many documents can be obtained for free, otherwise the fee is 41¢/page and the first \$8.15 is free:  
<https://www.revenuquebec.ca/en/about-us/access-to-information/information-and-access-requests/>
- ✓ Do not hesitate to make access to information requests to other organizations: CBSA, RAMQ, SAAQ, etc.
- ✓ Do not hesitate to apply to the CRA for a residency determination (NR73 and 74)

## 2. Revenu Québec's VDP

### 2.4 Practical experiences (cont'd)

- ✓ Do not hesitate to submit estimated calculations (e.g. to determine the value of an account upon the arrival of an immigrant)
- ✓ Do not hesitate to discuss freely with the agent assigned to the file
- ✓ Do not hesitate to involve the team leader and/or the manager of the officer assigned to the case
- ✓ Do not forget to consider the involvement of the Bureau de la protection des droits de la clientèle and/or le Protecteur du citoyen



★ The keys to success: investigation, communication, patience, creativity, transparency and negotiation

## 2. Revenu Québec's VDP

### 2.4 Practical experiences (cont'd)

- Ultimately, if there is an impasse as to the qualification of an amount (taxable or not, business income vs. capital gain, etc.), a notice of objection may be filed (para. 26 and 27 of the Bulletin, noting that if the file requires the signing of a transaction, a clear clause to this effect must be included)
- Problem with this approach: the payment of the tax debt must be made before the file is closed and assessments are issued



## 2. Revenu Québec's VDP

### 2.5 Future of the program and possible solutions

- ✓ The processing of a voluntary disclosure to Revenu Québec can quickly become cumbersome, so Revenu Québec should be a little more flexible on the evidence required, especially when the facts date back several years
- ✓ The Revenu Québec program is here to stay (Measure #9 of the Action Plan to ensure tax fairness tabled on November 10, 2017) since it is an essential source of information, a very effective tool and compliant with OECD requirements, but the government is still keeping an exit door in the Action Plan:
  - However, the continuation of this program will be re-evaluated based on recent developments in the exchange of information between Canada and other foreign jurisdictions, including those related to the implementation of the Standard for Automatic Exchange of Financial Account Information (automatic exchange standard), as well as the federal government's thinking on voluntary disclosure
  - Ultimately, the evolution of Revenu Québec's voluntary disclosure program will be determined by the OECD's approach and the improvement of information exchanges at the international level



# CONCLUSION



# 3. Conclusion

- ✓ Evidently, there are risks in filing a voluntary disclosure, but these risks (other than tax suicide!) are necessary in the majority of files to avoid much worse: an audit and/or an investigation, and this, without forgetting that tax debts (assessed or not) are transmissible to heirs
- ✓ Yes, the files cost more, but the climate that has set in since March 2018 does not seem justified based on the files we have handled and that are now completed
- ✓ The key to success: make sure you are dealing with qualified professionals!



# PANAMA PAPERS

# THANK YOU!