Investigating Offshore Financial Services in Family Law Cases

GERALD STOTLAND AND KEVIN MCGARR, M.S.M.

A 270-page study, published by the Canadian Tax Foundation, reports that 17 cents of every dollar in goods and services produced in Canada in the mid-1990s were generated by the underground economy. It is believed that the Canadian government was losing approximately 44 billion dollars a year in potential taxes.[1] The size of the underground economy in Canada reached a staggering 130 billion dollars in 1995. Since 1986, the marginal burden of personal income taxes has increased by more than 17.3 percent.[2]

The study also contends that since the introduction of the Federal Sales Tax (GST) in 1991, the underground economy continued to increase.[3] A survey, in May of 2001, suggests that two thirds of Canadians would cheat on their taxes if they thought they could get away with it. The report indicates that *"the Auditor General also found the taxman was much less successful in recovering some of that money than it had been claiming."* The recipients of support undoubtedly share some of the same frustrations of the taxman. And, this is true not only for Canadians. What applies in Canada is equally true in matrimonial cases in the United States.

THE OFFSHORE FINANCE INDUSTRY

Recent studies indicate that up to 7 trillion dollars is ensconced in offshore asset protection trusts, representing 30 percent of the world's wealth. An offshore asset protection trust is a common vehicle employed to protect assets, ultimately, from property division and payment of the appropriate amount of spousal and child support. At one point, these offshore asset protective trusts were held by the few super rich. This is no longer the case. Indeed, *Offshore Finance Canada* is a news magazine available throughout Canada, reporting events affecting the offshore finance industry.

Up to 30 percent of the world's wealth is in offshore protective trusts.

Initially, estate planning, the avoidance of potential attachment of property in the event of litigation, avoidance of potential money exchange controls, privacy, and flexibility were some of the reasons which would drive the creation of offshore trusts, bank accounts, or investment management. The lure to foreign financial institutions is clearly set out in remarks by William T. Johnson, President of the Global Fidelity Bank & Trust Company of the Commonwealth of Dominica. In a paper delivered on International Private Banking in the New Millennium at the

---

Gerald Stotland *is a member of Lavery, deBily, Montreal, Canada.* ***Kevin McGarr,*** *M.S.M., is a Vice President, KPMG Forensic, Montreal, Canada.* *This article was originally presented at the July 2002 meeting of Federation of Law Societies, Canadian Bar Association, National Family Law Program, in Kelowna, British Columbia.*

Offshore Institute in June 2000, Mr. Johnson defines international private banking.

> International private banking is emerging as a vehicle that can efficiently and effortlessly transact and transport bank financial products and services unhindered by often artificial and political barrier, while protecting the confidentiality and privacy of the bank customer nearly anywhere on the globe.

To further amplify the role of the international private banking community, Mr. Johnson states:

> We are not the destination of choice for money launderers; rather we cater to wealthy families and customers who seek privacy and confidence in the confidentiality of their financial transactions and management of their assets.

Mr. Johnson goes on:

> Once offshore, the capital becomes essentially untraceable by the source country for purposes of taxation and other forms of regulation. It is then invested in the import market, but at favourable rates and deregulation. The Caribbean islands nations and Bermuda performs this function for the U.S. The Channel Islands perform the same function for the United Kingdom and Europe.
>
> As a direct result of the high price of malpractice insurance in response to huge tort recoveries, offshore jurisdictions have marketed trust related legal and financial structures affording asset protection from onshore litigants. Similarly, the significant tax burdens and regulatory demands on wealthy and increasingly growing middle class customers that are not technologically challenged, are responding to products and services offered by such offshore banks and trust companies.
>
> Almost common now are these offshore centers offering facilities supporting international trusts, international business corporations, captive insurance companies and substantial international cross border and transnational activities and functions for foreign sales corporations and personal financial holding companies.

To clarify the benefits both to the private bank and the client, opportunities are described as follows:

1. Total offshore investments are estimated between $5 trillion and $6 trillion US dollars.
2. Caribbean bank deposits are now over $3 trillion compared to $2 billion US dollars in 1980—a startling rate of growth.
3. It is estimated that the Cayman Islands alone have more American dollars than do all the banks in New York City.
4. About one in four North Americans, who earn more than $100,000 a year, now invest some funds offshore.

TRACING HIDDEN ASSETS

The family law practitioner is often confronted with a client who maintains that he or she is certain that the spouse possesses assets that will not appear on the financial statement that is required. The spouse alleging these hidden assets may believe she or he has little to offer in tracing them. Frequently, the spouse alleging the existence of these hidden assets will not have the financial wherewithal to engage forensic accountants or investigators to pursue the search. Courts will generally consider the income produced by secreted assets and the asset itself in determining support. Nevertheless, the initial challenge remains in accumulating and producing the evidence.

A shred of evidence can serve to open the door and reveal at least the probability of the existence of hidden monies. Evidence that a representative of the foreign financial institution communicated with the settlor of a trust, the trustees, or in the case of a bank account or investment account, the depositor himself or herself, is valuable information. Reference to a representative or agent of the foreign financial institution may be found in a diary, personal papers, private files, or address book of the payor. From time to time, the status of the holding is requested by the beneficial owner. Although these status reports most often will not identify the owner *per se*, the circumstances in which these documents were uncovered can serve to convince the court that such assets exist.

Offshore holdings were not necessarily established for the purpose of avoiding payment of support or division of property in the event of a divorce. In many instances, these offshore ve-

hicles were created for the purpose of asset protection, and for the benefit of the family. Given the sensitive nature of that investment, the individual establishing such asset protection is generally cautious about sharing the details with family members.

It is not unusual for a client to report, "I know my husband has a Swiss bank account, because every time we go to Europe, we stop in Zurich and he has appointments with bankers in the morning." When the client is further asked which bank? with whom does he have the appointments? on what street is the bank? etc., the client is usually at a lost to respond.

A shred of evidence can open the door to hidden monies.

Occasionally, the client is informed of the precise location and the details of the holdings and moreover the client is aware that he or she has power of attorney or signing authority on the asset. A client who has signing authority on an account may be inclined to take necessary steps to effect a withdrawal or transfer. Although this recourse may prove to be successful in some instances, most likely, the foreign financial institution will have instructions to communicate with the title holder (who is not necessarily the beneficial owner) of the account beforehand. The title holder will in turn contact the beneficial owner, if they are not one in the same and the transaction will be blocked.

UNCOVERING VALUABLE DOCUMENTS

Possession of documents that lead the family law practitioner to identify an offshore trust or bank account is quite often a question of good fortune. One's fortune can result from hard work, persistence, and careful scrutiny of the documents connected to the owner of the asset. One transaction can sometimes lead to a paper trail that establishes the existence and magnitude of the IBC (International Business Corporation), offshore trust or bank account. Withdrawals of substantial amounts of money in cash, issuing checks to unfamiliar parties, passports indicating trips to tax havens, or meetings with certain individuals who are renowned as either representatives of offshore financial institutions or ultimately involved in establishing offshore holdings are but a few indicators of hidden assets.

Once the investigating spouse is successful in identifying the hidden asset, the spouse holding the offshore asset may be prepared to make a voluntary disclosure (in Canada, pursuant to the *Income Tax Act* to avoid prosecution). Courts will then take into consideration such assets in determining support payments.

Although the uncertainty as to whether all the assets held in foreign financial institutions have been declared (*e.g.*, to the Canada Customs and Revenue Agency) may remain, the consequences of filing a false disclosure will act as a deterrent.

Undoubtedly the most difficult aspect in the pursuit of hidden assets is tracing. In many instances, it is crucial that an expert in the field be appointed to assist the practitioner and client. The Canadian Institute of Chartered Accountants recognizes the speciality in forensic accounting with the designation of CA•IFA. Forensic accountants have complimented their client services by working with investigators with specialized skills. In working with the expert or investigator, it is crucial to enlist the cooperation and ongoing assistance of the client. The client's participation should provide the initial leads to the asset that is to be uncovered.

Although the form of the asset can vary, and the level of sophistication of the holding differs, the initial goal remains to establish some paper trail that evidences communication, either initially or ongoing, with the administrator or the holder of the assets. The record of communication is of great value for the investigator to pursue and complete the task.

During the course of the marriage or the relationship, spouses may share with their partner the existence of assets located outside of Canada or the United States. All too often, however, the precise details with respect to *situs* of these assets is unavailable. Accordingly, the participation of the investigator is essential.

The attorney should prepare the discovery process with the view of pursuing the identification and location of the hidden assets. Discovery must be conducted with the goal of securing the production of documents and undertakings that will confirm communication with the administrator of the asset. Such communication may be by telephone; correspondence whether conventional or electronic; in person with a representative or agent of the foreign financial institution

in Canada or the United States; or in person with a representative or agent of the foreign institution in the country where the asset is located.

Communication Options

The client should advise the professional of any communications by the spouse with the offshore financial institution whether by telephone, internet, electronic, or other means. A perusal of phone records, cellular telephone records, internet communication, and address books as well as identifying correspondence from the financial services industry, attorneys' offices, reference to post office boxes, or mail drop of mailbox services, and links to companies that administer small businesses offering services (such as recurring phone calls or courier service) may assist in the investigation.

In the event that correspondence to and from the financial institution is available, such document will form a *prima facie* evidence of the hidden asset.

When the signature of either spouse is sufficient for the administration of the asset, both spouses will be called upon to sign documents. When such a document surfaces, the dilemma of providing a copy to opposing counsel to promote settlement, or holding on to the document for the purpose of discrediting the adverse party, will confront the attorney.

Banking Records

In-depth study of banking records may prove to be valuable. Banking records should not be restricted to the personal banking records but will include banking records of the corporate entity managed by the adverse party. In examining banking statements, the expert will be looking for significant payments, or regular payments to parties who do not appear as part of the ordinary supply chain. Payments to companies or to entities outside of Canada or the United States serve to *red flag* the investigation. The investigator will trace suspicious transactions such as requesting bank drafts, travellers checks or payments to a financial institution. Moreover, the records of the financial institution which the individual is dealing with may indicate the purchase of bank drafts or bank documents equivalent to payable to bearer. Most offshore financial services are conducted in US dollars, thereby creating a need to exchange Canadian currency. Currently, in Canada, there are strict record keeping requirements of currency exchange in excess of $3,000. Consequently, further investigation and persistence could result in uncovering the ultimate destination of the funds.

The client is rarely equipped with the tools to trace the hidden assets on his or her own. However, without the initial assistance and cooperation of the client, the search will normally fail. The success of the process depends on evidence of the communications that the client will assist in uncovering. The skills of the attorney on discovery to pursue these issues should result in more details and documents allowing the investigator to, ultimately, identify the location of the asset. The presence of the investigator at discovery is advised.

Particular attention should be given to business trips.

In preparing out-of-court examinations, counsel may be guided by the indication of suspicious transactions. The adverse party may have established a mode of communication with the financial institution that differs from that of the initial encounter and setting up of the account. Communications with the financial institution are subject to regulations in the country where the assets are located. In some instances, written communication is required, in others, simple telephone communication is sufficient.

Travel Documents

Another method of identifying the foreign administrator of assets is by examining travel documents. A passport does not always provide evidence of travel, and countries such as Switzerland rarely stamp the passport. On the other hand, many of the Caribbean countries are strict with respect to stamping the passport and recording information on entry documents.

Once travel documents indicate the presence of the adverse party in jurisdictions that form part of the offshore financial community, the next challenge is to identify the financial institution. Particular attention should be given to business trips, which on the surface appear to be *bona fide*. It is essential that the routing be examined so as to determine whether or not this

would be the most convenient or appropriate route under the circumstances. Special attention should be given to return trips when potential deposited funds in a foreign institution may occur. It is helpful to determine whether or not there has been an unnecessary stopover for a day or two, which may require further investigation.

Credit Card Statements

Study of credit card statements can often reveal travel to suspicious jurisdictions. Another document that should not be ignored is the record of accumulated travel points with certain carriers. Although individuals may wish to maintain the secrecy of their travel, they may be reluctant to lose the advantage of the accumulated travel points. The record of travel points will indicate the destinations. Stays in certain hotels may appear on the travel point record. Although the owner of the hidden assets may elect to pay for his or her accommodations in a manner that is not easily traceable, the payor may still want to gain the advantage of the travel points.

International Business Corporation (IBC)

Some banking regulations (such as for Bahamian transactions) require the financial institution to indicate the name of the holder of the asset. An individual who is reluctant to be identified as such, will often proceed by way of establishing an International Business Corporation (IBC). An IBC is a corporate vehicle that is recognized in the country where the asset is located. It is this corporate vehicle that will identify the title holder of the bank account or the investment service offered by the financial institution. The beneficial owner of this IBC is not readily apparent and a local representative will appear as the principal administrator of the IBC.

In order to incorporate or to acquire such an IBC, initial communication will be established with those who offer the service. This communication is generally established with an individual located in the country where the asset management is going to take place. Although the organization of this type of corporation can be accomplished through attorneys in Canada or the United States, individuals are quite often reluctant to involve their local attorneys in such a transaction. Furthermore, given the sensitive nature of these transactions, local attorneys would resist pursuing such a venture if there was any indication that the goal was tax evasion or money laundering. Recent decisions of Canadian courts establish that professionals who are involved in assisting their client in filing tax returns or documents under oath which are inaccurate, are themselves committing a criminal offence or contravening the Canadian *Tax Act*.

Reporting Requirements

Canadian residents are obliged to report the following for tax purposes:

a. Any interest in a foreign affiliate of a Canadian corporation;

b. Transfers of loans to a foreign trust;

c. Receipt of any distribution from a foreign trust; and

d. Ownership of more than $100,000 of foreign investment property;

The Financial Transactions and Report Analysis Centre of Canada (FINTRAC) prepared guidelines (directed towards those who fall within the scope of Section 7 of Bill C-22 in Canada) and are required to report suspicious transactions namely:

- Financial entities (banks, credit unions, caisses populaires, trust and loan companies, and agents of the Crown that are engaged in the business of accepting deposit liabilities);
- Life insurance companies, brokers, and agents;
- Securities dealers, including portfolio managers and investment counsellors;
- Persons engaged in the business of foreign exchange dealing;
- Money services businesses (including Canada Post for money orders);
- Legal counsel (when carrying out certain activities on behalf of their clients);
- Accountants (when carrying out certain activities on behalf of their clients);
- Real estate brokers or sales representatives (when carrying out certain activities on behalf of their clients);
- Casinos; and
- Employees of such persons or entities.

(FINTRAC is protected by legislation and is not compelled to respond to a subpoena. The extent that the same privilege is extended to those required to report to FINTRAC will be determined by the courts.)

COMMUNICATION WITH OFFSHORE FINANCIAL SERVICES COMMUNITY

As previously indicated, telephone records can be of great assistance. Unfortunately, the individual is generally cautious with respect to telephone communication that originates from either home or his or her place of business. However, the individual is often less cautious when communication takes place from a hotel. It is inconvenient to use coins or charge cards from public phones in foreign countries. Quite often communication is made directly from the hotel. Scrutiny of the hotel account will detail the phone number and, consequently, the destination of the communication.

The establishment of the relationship with the financial institution is often accomplished at the site of the financial institution. For many years, representatives of financial institutions would come to Canada in order to meet potential clients and organize foreign investments. Recent amendments to our law will render such visits and communications increasingly more difficult. Regulations published on May 14, 2002, will address transnational movement of funds. The identification of the foreign representative or agent may be known, but their presence in Canada is irregular.

The practitioner may want to consider seeking permission from a Canadian court for an out-of-court examination of the representative who happens to be in Canada at the time. Whether or not the representative or agent of the offshore financial institution will benefit from the banking laws of his or her jurisdiction, or will be compelled to testify, is another matter.

FORENSIC TECHNOLOGY

The client should also be made aware of experts in forensic technology. The client may believe that it is possible to retrieve information from a computer used by the estranged spouse. The adversary may be confident that many transaction details are not recoverable because such information was deleted. The existence of passwords, or entry requirements in order to access the information, can, in some instances, result in the nonprofessional obtaining results that are either not up to date, inaccurate, or that have been modified as a result of an attempt to access the information. In order to access data stored on a computer, forensic specialists possess the equipment necessary to retrieve much of the deleted information.

Once again, it is important that the role of the client together with the client's attorney and the investigator appointed to pursue asset location be performed in concert. In some instances, the computer equipment may not be readily accessible to the client and a special order will be required from the court in order to secure access to the equipment that stores the information.

FOREIGN CREDIT CARDS AND BANK DEBIT CARDS

Credit cards may be issued for the benefit of the cardholder by foreign financial institutions. The payment of the monthly statements on these credit cards are made directly by the foreign financial institution and the detail of monthly charges are not (in accordance with instructions) forwarded to the card holder in Canada. Under these circumstances, the monthly statements are not available. It is, therefore, essential to examine all credit cards in the possession of the adversary. Indeed, the adversary may, under separate cover, hold credit cards that are issued by a foreign financial institution.

The client should report on the number of credit cards held by the spouse. For example, the card holder may have two American Express cards, one from Canada and another card issued by a foreign financial institution. Once the number of the foreign credit card is secured, one can normally access the information as to where the card was issued and who effects payment on that credit card. The same recourse applies to bank debit cards.

Information with respect to assets held outside of Canada may have been shared to various degrees with the spouse. All too often however, the spouse, during the course of the marriage, shows little interest in the details, and once interest is manifested, the adverse party is sensitive to the state of the marriage and the reason that the information is requested.

THE OFFSHORE COMMUNITY

Although the traditional location of secret accounts has been in Europe and specifically Switzerland, many other countries offer similar services. The location of these foreign financial institutions vary and certain countries are known to be more cooperative than others.

The financial action task force on money laundering, which can be accessed by www.fatf.org, lists countries and territories that are deemed to be non-cooperative, and they are listed as follows:

1. Cook Islands
2. Dominica
3. Egypt
4. Grenada
5. Guatemala
6. Hungary
7. Indonesia
8. Israel
9. Lebanon
10. Marshall Islands
11. Myanmar
12. Nauru
13. Nigeria
14. Niue
15. Philippines
16. Russia
17. St. Kitts and Nevis
18. St. Vincent and the Grenadines
19. Ukraine

Bill C22 provides for certain restrictions in the transfer of monies outside of Canada and obligations on the part of financial institutions, attorneys, real estate agents, stock brokers, and others who deal in financial transactions to report transactions of a suspicious nature. It is presumed, with the introduction of this legislation, that it will become easier to identify offshore transactions. However, many believe that this is simply an invitation for the offshore asset managers to develop more sophisticated means of secreting assets and communicating the status of those assets to the beneficiary.

ROLE OF THE ATTORNEY

The financial statements provided during the course of a matrimonial dispute serve as the basis for establishing child support, spousal support, and property issues. Inasmuch as these financial statements are made under oath, or by solemn affirmation, affidavit or otherwise, they fall within the scope of the relevant provisions of the *Criminal Code of Canada* in the event that such declarations are determined as deliberately false. Sections 131 and 139 of the *Criminal Code of Canada* establish the essential elements of the crime:

a. The statement must be false;

b. The statement must be made under oath or solemn affirmation by affidavit, solemn declaration or deposition or orally; and

c. The element in perjury requires evidence that the affiant or witness intended to do an act which constitutes external circumstances of the offence and that such statement was made in the express knowledge of its falsity and with the intent to mislead.

In the matter of *Chantal Éthier v. Queen*, the Québec Court of Appeal summarizes certain relevant jurisprudence as follows:

> In *R.* v. *Sweezey*, a sentence of 18 months had been imposed by the trial judge on a lawyer convicted of attempting to obstruct justice by counselling a Crown witness to be forgetful and evasive while giving evidence. On appeal to the Newfoundland Court of Appeal, the sentence was reduced from 18 months to 12 months. An attorney being an officer of the Court, his special position of trust would, of course, have been an aggravating factor of this cause.
>
> In *Gagné* v. *R.*, our Court confirmed a sentence of 7 months imposed on a member of the Bar for attempted obstruction of justice imposed by a judge of the Court of Sessions of the Peace. The accused had attempted to persuade a witness to sign a fabricated contract to be used as evidence in a criminal trial. Here again, the fact that the accused was an attorney was held by the trial judge to be an aggravating factor. While only the accused appealed the sentence, and not the Crown, there is certainly nothing in the judgment of our Court sug-

gesting that the sentence was excessively lenient or unfit.

R. v. Doz (No. 2) similarly concerned a lawyer convicted of obstruction of justice and counselling perjury. He received a sentence of 30 months but, here again, the relatively severe sentence reflected the special position of trust occupied by members of the Bar as officers of the Court.

The court added that,

> No one can doubt the seriousness of conspiracy, incitement to commit perjury, to fabricate evidence and to obstruct justice. These offences go to the very heart of the criminal justice system and threaten to subvert the means by which society is empowered to protect itself from criminal wrong-doing. The gravity with which Parliament views perjury is reflected in the maximum penalty of 14 years of imprisonment provided under Section 132 of the *Criminal Code*. Obstruction of justice, under Section 139, provides for a maximum penalty of 10 years.

In the matter of *R. v. Salomon*, reported in 1997 Carswell Que 309, the accused lawyer loaned money to a client restaurant owner. The accused drafted a sworn statement declaring that unpaid rentals were the only debt connected to the restaurant, aware that other debts existed. In this instance, the attorney participated in the redaction of a false affidavit and was found guilty of an offence and imprisoned as a result.

Parties and their attorneys must not underestimate the seriousness of the financial disclosure. Furthermore, inciting a witness to perjure themselves and assisting in the fabrication of fraudulent evidence as well as participating in the attempt to manufacture this evidence is a violation of the professional code.

The absence of reported incidents with respect to the confection of false declarations in matrimonial proceedings is, in this writer's opinion, not indicative of the frequency of the violations. The challenge of establishing the true income and net worth of the payor of support should not be frustrated by the participation of counsel who assists in intentionally misleading. The agreement on fees which is signed by the client should make reference to the attorney's obligation to insure that all relevant assets and income disclosed by the client will be included in the financial statements submitted.

CONCLUSION

Following an analysis of the lifestyle of the parties and the income required to maintain it, the practitioner may come to the conclusion that substantial assets are unaccounted for. Can these hidden assets be found in safety deposit boxes? Are they precious jewels? gold? rare coins? or is this a case of offshore dealings? It is now apparent that not only the super rich take advantage of offshore financial services. Hidden assets and income often escape calculation but remain relevant in determining support.

More precise provisions as to the participation of the family law attorney in the preparation of financial statements in family matters need to be considered. We should not, by the same token, understate the obligation of opposing counsel to inquire as to the lack of details and the veracity of the sworn financial statements produced by the adverse party. Some members of the judiciary resist a role in monitoring the process. If the courts adopt a *laissez faire* attitude, then attacks on the integrity of the system by clients who are not forthcoming with proper financial disclosure and the attorneys who assist them will continue. The courts must adopt a zero tolerance attitude when confronted with misleading affidavits and testimony. Rules of evidence should be applied with flexibility once the probability of hidden assets is introduced. The cooperation of the judiciary will place the holder of hidden assets or guard. Consequently, faith in the process will be restored.

END NOTES

1. David E.A. Giles, Lindsay M. Tedds, *Taxes and the Canadian Underground Economy*, Canadian Tax Paper No. 106.

2. *Id.* at p. 7.

3. *Id.* at p. 228.