

CANADA / JUDGMENT

HMTQ v. Wilder

2003 BCSC 859

COURT

Supreme Court of British Columbia

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2003 BCSC 859 HMTQ v. Wilder

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

HMTQ v. Wilder,

2003 BCSC 859

Date: 20030603

Docket: CC901654

Registry: Vancouver

HER MAJESTY THE QUEEN

AGAINST

DARA M. WILDER

Before: The Honourable Mr. Justice S.R. Romilly

Addendum to Written Ruling No. 3

Counsel for the Crown

Lyndsay Smith

Veda Kenda

Counsel for the Accused

H.R. Anderson

Date and Place of Hearing:

March 10, 11, 12, 13,

April 14, 15, 16, 17, 22, 23, 28,

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27 and 29, 2003

Vancouver, B.C.

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A. NATURE OF THIS APPLICATION

- [1] Since my decision in *R. v. Wilder No.3*, 2001 BCSC 156, regarding the admissibility of documents seized under the Income Tax Act, R.S.C. 1985, c.1 (5th Supp.)(the "Act"), and a search warrant issued pursuant to that Act, the Supreme Court of Canada released pertinent decisions in *R. v. Jarvis* (2002), 169 C.C.C. (3d) 1 and *R. v. Ling* (2002), 169 C.C.C. (3d) 46. Both cases address whether evidence obtained pursuant to the Requirement powers of the Act can be used to further the investigation or prosecution of offences. As a result of *Jarvis* and *Ling*, it became necessary for me to revisit my analysis of the Requirements issued by Revenue Canada pursuant to s. 231(3) of the Act.
- [2] The accused, who is now represented by counsel, also took this opportunity to raise allegations of other possible breaches of his Charter rights and additional considerations regarding the s. 24(2) analysis, particularly with respect to the issue of bad faith.
- [3] The accused submits that the use of the compulsory provisions of the Act to gather evidence against him from October 21, 1985, breached his s. 7 and s. 8 rights under the Charter and he seeks a ruling to that effect. He also seeks a ruling that the abuse of his rights in the circumstances of this case are such that these proceedings should be stayed. Alternatively, the accused seeks a ruling pursuant to s. 24(1) or 24(2) of the Charter that all of the evidence gathered through the breach of his s.7 or s. 8 rights either directly or indirectly, be excluded from these proceedings.
- [4] For the reasons stated below, I continue to adopt the conclusions I arrived at after my analysis under s. 24(1) and s. 24(2) of the Charter in *R. v. Wilder No.3*. As a consequence I still find that the non-conscriptive evidence that was obtained as a result of the breaches under s. 7 and s. 8 of the Charter to be admissible as evidence at this trial. I also find that there was no abuse of process and consequently the application for a stay of proceedings is denied.

B. BACKGROUND TO THIS ADDENDUM

- [5] The accused, Dara M. Wilder, while representing himself in this trial, boasted that he was a direct descendant of Thomas Edison. He indicated that he had a natural talent for inventing things. It is not surprising, therefore, that when the government introduced the Scientific Research Tax Credits scheme (S.R.T.C.), the accused decided to form not one, not two, but 23 S.R.T.C. companies. Only three of those 23 companies are the subject of this trial (the "subject companies"). They are Coastal Natural Resources Inc. ("Coastal"), Canadian Bio-Mass Research Inc. ("Bio-Mass"), and Pacific Research Inc. ("Pacific").
- [6] At any rate, because of the tax relief afforded by these subject companies, wealthy Canadians, groaning under the burden of heavy taxation, found investing in such companies to be irresistible. As a result, they poured hundreds of millions of dollars into S.R.T.C. companies, including the 23 operated by the accused.

- [7] It is important to note that Revenue Canada had the task of monitoring these projects. Prior to October 21, 1985, the activities of the accused and others relating to certain S.R.T.C. projects were reviewed by personnel from Revenue Canada's Collections and Audit Section in order to determine whether the subject companies had in fact carried out research in accordance with designations made under Part VIII of the Income Tax Act. At that time, however, the Charter jurisprudence was in its infancy and consequently Revenue Canada Officials who were classified as members of the Special Investigators Branch of Revenue Canada also did audits of taxpayers' accounts. It is also fair to say that at that time the boundary between the audit division of Revenue Canada and the Special Investigation Department of Revenue Canada was blurred.
- [8] If the research and development expenses of these subject companies had not been incurred, the companies would be liable to pay tax under Part VIII. During their audit of the subject companies, however, Revenue Canada auditors were completely frustrated in their efforts to obtain any meaningful information from the accused or his associates with respect to the details of the research and development expenses incurred by these companies. As is evidenced by exhibit 663, the auditors had some indication that total expenses in the amount of over \$200,000,000.00 had been incurred by the subject companies which are the subject of these proceedings. There was, however, no secondary source of financing and the expenses were to be paid by promissory notes in the sum of over \$160,000,000.00.
- [9] Revenue Canada auditors tried serving the accused and his co-accused, Ron Johnson with Requirements under the Income Tax Act in order to further their audit of the subject companies. The accused and his co-accused, Ron Johnson, however, continued to refuse to provide them any meaningful information. In addition, the accused kept a tight rein on the information that his co-accused, Michael Richards, was allowed to give to Revenue Canada Officials. Michael Richards was the accountant of the subject companies. Even at the audit phase, Mr. Richards was unable, or unwilling, to give any meaningful information to Revenue Canada Officials unless the accused personally authorized it. When Revenue Canada Officials insisted that they be provided with the requested information, the accused would, on occasion, accuse them of being incompetent.
- [10] In his testimony on December 5, 2001, the following exchange between Mr. Robert Kuhn of Revenue Canada and the accused shows the obvious frustration of Revenue Canada Officials:

Q And you outlined a number of concerns yesterday for the court. After the receipt or as a result of the conclusions that you reached in relation to whether or not the demands had been satisfied in relation to these corporations, what was your view of the file?

A We took into -- I took into account and some of the following kinds of things, the length of time in which Revenue had been trying to get information starting from January of '85 to this time, the -- the lack of authenticity of the few invoices that we had seen.

Q What do you mean by that?

A Well, for example, we are talking about an aircraft. The cost of it was supported by one piece of paper, no Customs B-13s, no idea of how it entered Canada, whether there was a certificate of airworthiness, these kinds of things, and the fact that it was supposed to be paid for by a promissory note by a new company, a relatively new company, unknown company to again an unknown company in, of all places, Reno or Las Vegas, Nevada. We were concerned that we had never seen any detail of suppliers of work, that is contractors or sub-trades who -- who would have done any scientific research. We had not seen any satisfactory reports from engineers or others who were doing the work and we looked at the enormity of this. In total we had -- there were --

Q And sorry, if you can confine your evidence to what you saw and knew?

A Okay, I -- I took into account that what was involved was \$101,000,000 in tax credits which means that the companies would have to expend \$200,000,000 in scientific research and we just didn't see -- we just didn't see the evidence. It was never provided to us. We took all these things into account, the delays and the fact that -- that if people were dealing with these large sums of money, the first thing they should be doing is complying with the laws of the country in order to make these things qualify for themselves and for the investors, and it just wasn't happening. And at that point I thought, "This isn't right. This is a house of cards. I can't see any evidence given to us that the work's been done."

[11] Completely frustrated and desperate, and having only suspicions but absolutely no tangible evidence on which to rely, on October 21, 1985, Revenue Canada, through its Special Investigations Section, commenced an investigation in an effort to find out where this large sum of money was located or to have the research and development expenses substantiated. This investigation could have led to possible violations of s. 239 of the Act or violations under the Criminal Code or the research and development expenses may have been substantiated to Revenue Canada's satisfaction. As a precautionary measure, however, Revenue Canada filed Certificates of Indebtedness against Coastal for the sum of \$89,766,339.02 plus interest of \$80,015,000.00 in the Federal Court on the 10th of December, 1985, and a Certificate of Indebtedness against Bio-Mass for the sum of \$11,440,711.19 plus interest of \$10,237,250.00. Another Certificate of Indebtedness was filed showing that Pacific also owed Revenue Canada \$10,558,500.00 plus interest of \$1,015,018.75 for Part VIII tax.

[12] After the investigation began, the accused's uncooperative and antagonistic attitude toward Revenue Canada Officials turned to outright hostility. At times the behaviour of the accused and his lawyer, Mr. Crump, seemed almost to border on a wilful obstruction of the investigation.

[13] The accused is a very intelligent and sophisticated person who was able to take this case all the way to the Supreme Court of Canada without the benefit of legal counsel. He also took the challenge of the search warrants issued in this case all the way to the Supreme Court of Canada. In addition, he had the presence of mind to have the evidence seized pursuant to those search warrants sealed while he took this battle all the way to the Supreme Court of Canada. Flushed with some of his legal successes, and being of the view that lawyers were

too polite to judges, he undertook this trial without the benefit of legal counsel. He represented himself at this trial for the past ten months. He has now retained counsel on his behalf, Mr. Anderson. During the trial he brought on at least 20 motions which were all very well argued, both legally and factually.

- [14] While acting on his own behalf, the accused's cross-examination of Mr. Ma and Mr. Jamieson was complete and aggressive and lasted for many, many days. During his aggressive cross-examination of these two Revenue Canada Officials, however, he had difficulty, concealing his obvious intense dislike for both of them.
- [15] On the re-opening of this voir dire these two Revenue Canada Officials were again cross-examined at length by Mr. Anderson. This time the cross-examination was much more focussed. I mention all of this because I have had more than an ample opportunity to see these two Revenue Canada Officials on the witness stand. I was impressed by their refreshing candour. I accept their evidence in total. The suggestion by defence counsel that Mr. Jamieson had an ulterior motive for the late disclosure of the Charter materials is, in my view, ludicrous.
- [16] At any rate, while conducting their investigation, Revenue Canada Officials became aware of a prospectus for a limited partnership which was controlled by the accused in Morris, Manitoba. This involved a project in which the accused's company, Organic Research Inc. ("Organic"), was developing a process by which to obtain sugar from wood.
- [17] The accused was tried and convicted in Manitoba for fraud with respect to the operation of that limited partnership. I therefore refer to this project only because it was alleged that certain assets of Coastal were transferred to the plant in Manitoba. I also refer to it because of certain allegations made by the accused with respect to the manner in which the plant was entered. The accused also challenged the authority of the experts to enter onto that plant. He also questioned the manner in which taxpayer information obtained as a result of that audit was used to further the investigation of the case which is presently before this court.
- [18] On May 1, 1987, Mr. Ma swore an "Information to Obtain Warrants to Enter and Search Pursuant to Section 231.2 of the Income Tax Act". On the basis of that affidavit, a Federal Court judge granted a number of search warrants. These warrants were executed but the seized items were immediately sealed by the accused. However, he was not able to keep all of the seized items sealed because certain parties from whom the evidence had been seized did not wish to maintain the sealing order. At any rate, seized evidence obtained from six locations remained sealed from the date of their seizure on May 7, 1987 until November 23, 1989. During this period of time the accused challenged the validity of the warrants all the way to the Supreme Court of Canada.
- [19] In *R. v. Wilder No.3*, I noted that it was common ground that the items seized pursuant to the search warrants were seized in breach of s. 8 of the Charter because of the decision in *Baron v. Canada* (1993), 78 C.C.C. (3d) 510 (S.C.C.). Although this "Baron" warrant was

unconstitutional because of the wording of the Act, in my view, there was no doubt that were it not for the wording of the Act, a judge or justice could have issued a warrant on the basis of the information contained therein. In fact, that is precisely what was held in *Solvent Petroleum Extraction Inc. v. Canada (Minister of National Revenue)*, [1988] 3 F.C. 465 (T.D.), upheld on appeal at (1989), 50 C.C.C. (3d) 182 (F.C.A.), further appeal to the Supreme Court of Canada dismissed November 23, 1989.

- [20] Following a s. 24(1) and s. 24(2) analysis in *R. v. Wilder No.3*, I found that the evidence seized under the unconstitutional "Baron" warrants was nevertheless admissible. I also found that some of the Requirements served on third parties after the investigation into this matter began were also admissible. Since the decision in *R. v. Wilder No. 3*, however, the decisions in *R. v. Jarvis* (2002), 169 C.C.C. (3d) 1 (S.C.C.) and *R. v. Ling* (2002), 169 C.C.C. (3d) 46 (S.C.C.) have made it necessary for me to perform a s. 24(2) analysis with respect to the evidence obtained by Revenue Canada pursuant to Requirements issued after it commenced its criminal investigation of the accused and the subject companies.
- [21] As I understand his submissions, defence counsel submits that, all information obtained pursuant to these Requirements which were served on the accused, his employees and his banks after the investigation of the accused and the subject companies began resulted in a breach of his rights under s. 7 of the Charter. He submits that this information received from the Requirements after October 21, 1985, should therefore be excluded from evidence at this trial. Counsel further submits that all information received as a result of threats to prosecute third parties in the event of non-compliance with Requirements should also have been excluded from the affidavit in support of the warrant and should not have formed the basis for the granting of the unconstitutional "Baron" warrants. Finally, he submits that evidence obtained from the employees of companies controlled by the accused should also have been excluded from the affidavit in support of the search warrants since it was obtained in breach of confidentiality agreements between the accused and his employees. As has become so typical in so many of the voir dres in this trial, there are also other alleged breaches that are too numerous for me to mention at this stage.
- [22] Because so much of the argument that I heard on this re-hearing centred around s. 231 of the Act, I propose to begin by reproducing that section and the amendment that is relevant to this voir dire.

C. THE RELEVANT SECTIONS OF S. 231 OF THE ACT

- [23] The relevant sections of the 1984 Income Tax Act are:

231.(1) Investigations. - Any person thereunto authorized by the Minister, for any purpose related to the administration or enforcement of this Act, may at all reasonable times, enter into any premises or place where any business is carried on or any property is kept or anything is done in connection with any business or any books or records are or should be kept, and

- (a) audit or examine the books and records and any account, voucher, letter, telegram or other document which relates or may relate to the information that is or should be in the books or records or the amount of tax payable under this Act.
- (b) examine property described by an inventory or any property, process or matter an examination of which may, in his opinion, assist him in determining the accuracy of an inventory or in ascertaining the information that is or should be in the books or records or the amount of any tax payable under this Act.
- (c) require the owner or manager of the property or business and any other person on the premises or place to give him all reasonable assistance with his audit or examination and to answer all proper questions relating to the audit or examination either orally or, if he so requires, in writing, on oath or by statutory declaration and, for that purpose, require the owner or manager to attend at the premises or place with him, and
- (d) if, during the course of an audit or examination, it appears to him that there has been a violation of this Act or a regulation, seize and take away any of the documents, books, records, papers or things that may be required as evidence as to the violation of any provision of this Act or a regulation.

(2) Return of documents, books, etc. - The Minister shall,

- (a) within 120 days from the date of seizure of any documents, books, records, papers or things pursuant to paragraph (1)(d), or
- (b) if within that time an application is made under this subsection that is, after the expiration of that time, rejected, then forthwith upon the disposition of the application,

return the documents, books, records, papers or things to the person from whom they were seized unless a judge of a superior court or county court, on application made by or on behalf of the Minister, supported by evidence on oath establishing that the Minister has reasonable and probable grounds to believe that there has been a violation of this Act or a regulation and that the seized documents, books, records, papers or things are or may be required as evidence in relation thereto, orders that they be retained by the Minister until they are produced in any court proceedings, which order the judge is hereby empowered to give on ex parte application.

- (3) Idem. - The Minister may, for any purposes related to the administration or enforcement of this Act, by registered letter or by a demand served personally, require from any person
 - (a) any information or additional information, including a return of income or a supplementary return, or
 - (b) production, or production on oath, of any books, letters, accounts, invoices, statements (financial or otherwise) or other documents.

within such reasonable time as may be stipulated therein.

[24] This section of the Act was amended in 1986 as follows:

Section 231.1(1) Inspections - An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,

- (a) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by him under this Act, and
- (b) examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any other person, an examination of which may assist the authorized person in determining the accuracy of the inventory of the taxpayer or in ascertaining the information that is or should be in the books or records of the taxpayer or any amount payable by him under this Act.

and for those purposes the authorized person may

- (c) subject to subsection (2), enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept; and
 - (d) require the owner or manager of the property or business and any other person on the premises or place to give him all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with him.
- (2) Prior Authorization. - Where any premises or place referred to in paragraph (1)(c) is a dwelling-house, an authorized person may not enter that dwelling-house without the consent of the occupant except under the authority of a warrant under subsection (3).
- (3) Application. - Where, on ex parte application by the Minister, a judge is satisfied by information on oath
- (a) that there are reasonable grounds to believe that a dwelling-house is a premises or place referred to in paragraph (1)(c),
 - (b) that entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, and
 - (c) that entry into the dwelling-house has been refused or that there are reasonable grounds to believe that entry thereto will be refused,

he shall issue a warrant authorizing an authorized person to enter that dwelling-house subject to such conditions as may be specified in the warrant but, where the judge is not satisfied that entry into that dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, he shall

- (d) order the occupant of the dwelling-house to provide reasonable access to an authorized person to any document or property that is or should be kept therein, and
- (e) make such other order as is appropriate in the circumstances to carry out the purposes of this Act

to the extent that access has been or may be expected to be refused and that the document or property is or may be expected to be kept in the dwelling-house.

231.2(1) Requirement to provide documents or information. - Notwithstanding any other provisions of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as is stipulated in the notice,

- (a) any information or additional information, including a return of income or a supplementary return; or
 - (b) any document.
- (2) Unnamed persons. - The Minister shall not impose on any person (in this section referred to as a "third party") a requirement under subsection (1) to provide information or any document relating to one or more unnamed persons unless he first obtains the authorization of a judge under subsection (3).

I now turn to the decisions in Jarvis and Ling.

D. THE DECISIONS OF JARVIS AND LING

- i. Jarvis and Ling ushered in a significant change in the law

[25] In the recent decisions of Jarvis and its companion case, Ling, the Supreme Court of Canada made a significant change in the law. The Court discussed the extent to which the use of ss. 231.1 and 231.2 of the Income Tax Act, to build a prosecutorial case, infringed a taxpayer's rights under the Charter. In summary, the Court held that evidence gathered by the Canada Customs and Revenue Agency (the "CCRA") pursuant to ss. 231.1(1) and 231.2(1) of the Act in the proper exercise of its audit function could be used in a subsequent investigation or prosecution for a s. 239(1) offence. However, where the predominant purpose of a question or inquiry was the determination of penal liability, CCRA officials relinquished the authority to use ss. 231.1(1) and 231.2(1). Rather, they were required to seek search warrants, either under the Act or the Criminal Code, to further their investigation. Obtaining evidence under the Requirement powers for the purpose of determining penal liability constituted a violation of an accused's Charter rights and must, accordingly, be excluded from the prosecution of an offence.

[26] Determining whether the circumstances of an investigation are auditorial or investigatory is significant to the analysis as to the admissibility of evidence obtained pursuant to a Requirement. The Court in *Jarvis* addressed this issue at paras. 93-4:

To reiterate, the determination of when the relationship between the state and the individual has reached the point where it is effectively adversarial is a contextual one, which takes account of all relevant factors. In our opinion, the following list of factors will assist in ascertaining whether the predominant purpose of an inquiry is the determination of penal liability. Apart from a clear decision to pursue a criminal investigation, no one factor is necessarily determinative in and of itself, but courts must assess the totality of the circumstances, and make a determination as to whether the inquiry or question in issue engages the adversarial relationship between the state and the individual.

In this connection, the trial judge will look at all factors, including but not limited to such questions as:

- a. Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?
- b. Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?
- c. Had the auditor transferred his or her files and materials to the investigators?
- d. Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?
- e. Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?
- f. Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's mens rea, is the evidence relevant only to the taxpayer's penal liability?
- g. Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation?

[27] The Court in *Jarvis* discussed the consequences of an investigation into penal liability within the context of both s. 7 and s. 8 of the Charter. Regarding s. 8, it noted that taxpayers have a diminished expectation of privacy with respect to records and documents produced during the ordinary course of regulated activities. The Court wrote as follows at para. 95:

With respect to the consequences related to s. 8 of the Charter, *McKinlay Transport, supra*, makes it clear that taxpayers have very little privacy interest in the materials and records that they are obliged to keep under the ITA, and that they are obliged to produce during an audit. Moreover, once an auditor has inspected or required a given document under ss. 231.1(1) and 231.2(1), the taxpayer cannot truly be said to have a reasonable expectation that the auditor will guard its

confidentiality. It is well known, as Laskin C.J. stated in *Smerchanski*, supra, at p. 32, that "[t]he threat of prosecution underlies every tax return if a false statement is knowingly made in it". It follows that there is nothing preventing auditors from passing to investigators their files containing validly obtained audit materials. That is, there is no principle of use immunity that prevents the investigators, in the exercise of their investigative function, from making use of evidence obtained through the proper exercise of the CCRA's audit function. Nor, in respect of validly obtained audit information, is there any principle of derivative use immunity that would require the trial judge to apply the "but for" test from *S.(R.J.)*, supra. If a particular piece of evidence comes to light as a result of the information validly contained in the auditor's file, then investigators may make use of it.

[28] The consequences for s. 7 of the Charter are broader. Where the predominant purpose of a question or inquiry is the determination of penal liability, the "full panoply" of Charter rights are engaged for the taxpayer's protection. In such circumstances, CCRA officials do not have the benefit of the ss. 231.1(1) and 231.2(1) Requirement powers and must instead resort to either s. 231.3(1) of the Act or s. 487 of the Criminal Code. Both provisions mandate prior authorization. The Court in *Jarvis* articulated the consequences that flow from the engagement of s. 7 at para. 96:

First, no further statement may be compelled from the taxpayer by way of s. 231.1(1)(d) for the purpose of advancing the criminal investigation. Likewise, no written documents may be inspected or examined, except by way of judicial warrant under s. 231.2 of the ITA or s. 487 of the Criminal Code, and no documents may be required, from the taxpayer or any third party for the purpose of advancing the criminal investigation. CCRA officials conducting inquiries, the predominant purpose of which is the determination of penal liability, do not have the benefit of the ss. 231.1(1) and 231.2(1) requirement powers.

[29] An audit and an investigation are not mutually exclusive and CCRA may conduct both concurrently. If an investigation into penal liability is subsequently commenced, investigators may avail themselves of information obtained pursuant to the audit powers prior to the commencement of the criminal investigation, but not with respect to information obtained pursuant to such powers subsequent to the commencement of the investigation into penal liability.

[30] The Court in *Jarvis* summarized its reasons at para. 99:

By way of summary, the following points emerge:

1. Although the ITA is a regulatory statute, a distinction can be drawn between the audit and investigative powers that it grants to the Minister.
2. When, in light of all relevant circumstances, it is apparent that CCRA officials are not engaged in the verification of tax liability, but are engaged in the determination of penal liability under s. 239, the adversarial relationship between the state and the individual exists. As a result, Charter protections are engaged.

3. When this is the case, investigators must provide the taxpayer with a proper warning. The powers of compulsion in ss. 231.1(1) and 231.2(1) are not available, and search warrants are required in order to further the investigation.

[31] In *Ling*, the Supreme Court of Canada affirmed the principles enunciated in *Jarvis* and applied them to the facts before it.

[32] It should be noted that these judgments, *Jarvis* and *Ling*, do not state that otherwise relevant evidence will automatically be excluded where it is obtained in violation of the taxpayer's Charter rights. Notwithstanding any violations, admissibility remains to be determined under s. 24(2) of the Charter.

ii. The law prior to the Supreme Court of Canada decisions in *Jarvis* and *Ling*

[33] Counsel for the accused argued that in *Jarvis* and *Ling* the Supreme Court of Canada merely crystallized what was already the law. In support of this proposition he drew my attention to the following cases: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Minister of National Revenue v. Coopers and Lybrand* (1978), 92 D.L.R. (3d) 1 (S.C.C.); *Re Belgoma Transportation Ltd and Director of Employment Standards* (1985), 20 D.L.R. (4th) 156 (Ont.C.A.); *R. v. Bichel* (1986), 29 C.C.C. (3d) 438 (B.C.C.A.); *R. v. Quesnel* (1985), 24 C.C.C. (3d) 78 (Ont.C.A.) and *F.K. Clayton Group Ltd v. Canada (M.N.R.)* (1986), 2 F.T.R. 189 (F.C.T.D.), appeal allowed [1988] 2 F.C. 467 (F.C.A.).

[34] I do not mind admitting that I spent hours reading and re-reading these cases and none of them state what was stated in either *Jarvis* or *Ling*. Prior to the recent Supreme of Canada's decision in *Jarvis* there was disagreement between the courts as to whether Requirements were or were not a search; there was disagreement as to whether or not Requirements were constitutional or not; no distinction was drawn by the courts between Requirements that were used by Revenue Canada during the audit process and those used when the predominant purpose of the inquiry was the determination of penal liability. There was also no indication from the courts that it was a breach of s. 7 of the Charter to serve Requirements on third parties when the predominant purpose of the inquiry was the determination of penal liability.

[35] In my view, until the principles with regard to third parties and "self-incrimination" vis-à-vis an accused were articulated in *Jarvis* in November, 2002, it was reasonable and fair for Revenue Canada to believe and act on the belief that self-incrimination related only to compulsion of an accused vis-à-vis him or herself. There could be no doubt that the decisions in *Jarvis* and *Ling*, therefore represent a significant change in the law.

iii. Date when the predominant purpose of the investigation into penal liability began

- [36] The Supreme Court in *Jarvis* mandated a contextual approach to assessing whether the predominant purpose of a particular inquiry was the determination of penal liability. While the Court noted that the fact that a matter was referred to the investigations section was not determinative, it did go on to state that "if, in an auditor's judgment, a matter should be sent to the investigators, a court must examine the following behaviour very closely."
- [37] The determination as to when the predominant purpose of the investigation into penal liability began is obviously a question of fact. Defence counsel drew my attention to *R. v. Mercer*, [2003] N.J. No. 65 (Nfld.S.C.) and *R. v. Foy* (3 March 2003) Milton M1904/01 (Ont.C.J.). Like so many of the cases on this issue, however, those decisions are fact driven.
- [38] An interesting case on this subject is *Comité paritaire de l'industrie de la chemise v. Potash; Comité paritaire de l'industrie de la chemise v. Sélection Milton* (1994), 91 C.C.C. (3d) 315 (S.C.C.), sub nom. *R. v. Potash; R. v. Sélection Milton*. In that case the issue was whether a statutory power of inspection can be used as legislative authority for a search of business premises and whether such an inspection was inconsistent with s. 8 of the Charter because it did not require prior judicial authorization to be exercised. *La Forest* and *L'Heureux-Dubé JJ.* gave separate but concurring reasons for judgment finding that the power of inspection was consistent with s. 8 of the Charter. *L'Heureux-Dubé J.* agreed with *La Forest J.* that an inspection power does not require prior judicial authorization to be reasonable under s. 8 of the Charter. She was of the view that an inspection provision in a regulatory context is to permit inspectors to determine whether an offence has been committed. At p. 351 she stated:

It is of the very nature of an administrative inspection in a regulated industry that it takes place when there are no reasonable grounds to believe that a particular offence has been committed.

[Emphasis in original]

- [39] She agreed with *La Forest J.* at p. 351 that:

... a mere complaint is insufficient in itself to justify inspectors being subject to the requirements of *Hunter v. Southam Inc.* There is an important distinction between having reasonable and probable grounds to believe that an offence was committed and simply having an information, especially if the latter is given anonymously.

- [40] The *Potash* decision seems to imply, however, that where an inspector under a regulatory regime possesses reasonable and probable grounds to believe that an offence has been committed the *Hunter v. Southam* requirements will have to be met. See also *R. v. Inco Ltd.* (2001), 155 C.C.C. (3d) 383 (Ont.C.A.).
- [41] In *Jarvis Iacobucci* and *Major JJ.* follow up on some of the principles laid down in the *Potash* case. They state at paras. 89-92:

To begin with, the mere existence of reasonable grounds that an offence may have occurred is by itself insufficient to support the conclusion that the predominant purpose of an inquiry is the determination of penal liability. Even where reasonable grounds to suspect an offence exist, it

will not always be true that the predominant purpose of an inquiry is the determination of penal liability. In this regard, courts must guard against creating procedural shackles on regulatory officials; it would be undesirable to "force the regulatory hand" by removing the possibility of seeking the lesser administrative penalties on every occasion in which reasonable grounds existed of more culpable conduct. This point was clearly stated in *McKinlay Transport*, *supra*, at p. 648, where Wilson J. wrote: "The Minister must be capable of exercising these [broad supervisory] powers whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act." While reasonable grounds indeed constitute a necessary condition for the issuance of a search warrant to further a criminal investigation (s. 231.3 of the ITA; Criminal Code, s. 487), and might in certain cases serve to indicate that the audit powers were misused, their existence is not a sufficient indicator that the CCRA is conducting a *de facto* investigation. In most cases, if all ingredients of an offence are reasonably thought to have occurred, it is likely that the investigation function is triggered.

All the more, the test cannot be set at the level of mere suspicion that an offence has occurred. Auditors may, during the course of their inspections, suspect all manner of taxpayer wrongdoing, but it certainly cannot be the case that, from the moment such suspicion is formed, an investigation has begun. On what evidence could investigators ever obtain a search warrant if the whiff of suspicion were enough to freeze auditorial fact-finding? The state interest in prosecuting those who wilfully evade their taxes is of great importance, and we should be careful to avoid rendering nugatory the state's ability to investigate and obtain evidence of these offences.

The other pole of the continuum is no more attractive. It would be a fiction to say that the adversarial relationship only comes into being when charges are laid. Logically, this will only happen once the investigators believe that they have obtained evidence that indicates wrongdoing. Because the s. 239 offences contain an element of mental culpability, the state will, one must presume, usually have some evidence that the accused satisfied the *mens rea* requirements before laying an information or preferring an indictment. The active collection of such evidence indicates that the adversarial relationship has been engaged, since it is irrelevant to the determination of tax liability. Moreover, although there are judicial controls on the unauthorized exercise of power (*Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Babcock v. Canada* (Attorney General), 2002 SCC 57, at para. 25), we believe that allowing CCRA officials to employ ss. 231.1(1) and 231.2(1) until the point where charges are laid, might promote bad faith on the part of the prosecutors. Quite conceivably, situations may arise in which charges are delayed in order to compel the taxpayer to provide evidence against himself or herself for the purposes of a s. 239 prosecution. Although the respondent argued that such situations could be remedied by the courts, we view it as preferable that such situations be avoided rather than remedied. It is for this reason that the test is as set out above.

Whether a matter has been sent to the investigations section is another factor in determining whether the adversarial relationship exists. Again, though, this, by itself, is not determinative. An auditor's recommendation that investigators look at a file might result in nothing in the way of a criminal investigation since there is always the possibility that the file will be sent back. Still, if,

in an auditor's judgment, a matter should be sent to the investigators, a court must examine the following behaviour very closely. If the file is sent back, does it appear that the investigators have actually declined to take up the case and have returned the matter so that the audit can be completed? Or, does it appear, rather, that they have sent the file back as a matter of expediency, so that the auditor may use ss. 231.1(1) and 231.2(1) to obtain evidence for a prosecution (as was found to be the case in *Norway Insulation*, *supra*).

[42] As mentioned previously, Iacobucci and Major JJ., in *Jarvis*, also seem to indicate that the predominant purpose of the investigation into penal liability begins when there is, among other factors, reasonable and probable grounds. They state at paras. 93-4:

Apart from a clear decision to pursue a criminal investigation, no one factor is necessarily determinative in and of itself, but courts must assess the totality of the circumstances, and make a determination as to whether the inquiry or question in issue engages the adversarial relationship between the state and the individual.

In this connection, the trial judge will look at all factors, including but not limited to such questions as:

- a. Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?

....

(1) Analysis

[43] I have found that the investigation, as opposed to the audit began on October 21, 1985. The record clearly indicates, however that Revenue Canada did not know what was going on with regard to the 23 projects as of that date. All the Revenue Canada Officials had as of that date was suspicion. As noted in *Foy*, *supra*, suspicion is not sufficient to vitiate a legitimate inquiry into an individual's tax liability, as distinct from criminal liability.

[44] As was pointed out by Crown Counsel, exhibit 33 is Larry Moi's memo to Director Roy seeking his approval of recommendations made by the Audit section. The document is not the usual T134 form used by audit to refer a file to Special Investigations:

Q. Now, in your memorandum, you don't use the word "fraud." It's a referral to Special Investigations. Is it normal to use Special Investigations in the manner in which you're suggesting it be used in this memo?

A. No, it's not. Normally, a referral is made on a form called a T134 form, and in that form, we point out instances or incidences of fraudulent transactions. In this particular case, we couldn't point out to anything in term - that way, in terms of positive indication of fraud. S.I. normally takes on a referral when they can see, yes, something has happened, but in this particular case, we could not point out anything. Therefore, instead of preparing the normal T134 form, I had to - from my recollection, I had to prepare this memo, include a recommendation that way for the Director to - to approve of so that Special Investigations section would take on the work, (See:

Larry Moi, December 3 2001, p. 38, ll. 28 - 46).

[45] Mr. Moi, who turned over his file to Mr. Ma of the Special Investigation Section of Revenue Canada in October 1985, made the following recommendations:

1. refer the files to S.I. for further audit and investigative work.
2. commence collection action.

The state of the file was set out at page 2 of Mr. Moi's report:

Audit has had the file under review for some ten months. Documentation submitted during that period has been insufficient and inconclusive. It is considered that further requests of information from the taxpayers will be of little assistance. Substantial third party information will be required to establish the validity of the research programs and expenditures or to develop a basis for action in respect of:

- director's liability under s. 227.1;
- prosecution under s. 239 for tax evasion;
- investors liability under ss.195(5).

[46] With regard to the proposed referral to the Special Investigation Section ("S.I."), the recommendation was that "S.I. carry out further investigative work. The review by Audit to date disclosed indications of irregularities or non bona fide transactions. In our view S.I. is best suited to access the necessary information." On December 3, 2001, Larry Moi testified as follows:

S.I. was also more experience in terms of- of doing- issuing requirements, and getting information that way. So that was another factor...

As far as the Audit was concerned, we had come to the point where collections was recommended already so at that particular point on time, or at this particular point in time, I felt I couldn't get the kind of information I needed.

[47] Mr. Ma testified that the concept of audit/investigation was not particularly in their minds at the time; certainly, it appears that the word "investigate" is not being used as a term of art by Mr. Moi, as he indicates that Audit has already done some investigative work, which S.I. can now further. I agree that while tax evasion is one possible outcome allowed for in Mr Moi's memo to Mr. Ma, so is the establishment of the validity of the research programs and expenditures. It is also significant that in his testimony on December 4, 2001, Mr. Robert Kuhn, one of Revenue Canada's auditors, also stated that, at the time of the referral of the files to S.I., there was "no evidence of fraud; no answers to Revenue Canada's questions."

- [48] In their submissions defence counsel placed much reliance on exhibit 663 dated October 25, 1985, which was prepared by Mr. Ma four days after I found that the investigation began. Mr. Ma testified that the document, headed "Synopsis of Alleged SRTC Fraud," was a working paper of his based on the file provided to him. In my view, in that document there is no conclusion regarding the existence of fraud; rather, problems encountered by auditors and areas "to be investigated" are set out.
- [49] In exhibit 663, under the heading "Problems Encountered by Auditors" the following four items are listed:
1. Not all tax returns are filed; some are not yet due.
 2. Johnson, Wilder and Zen are uncooperative and produced documents on a piecemeal basis; important documents are believed to be kept in USA.
 3. companies have no monies to pay outstanding Part 8 tax; current locations of companies assets unknown; quality and quantity of assets unidentified and unknown in most cases.
 4. extensive third parties contacts are required both in and outside Canada.
- [50] Also in exhibit 663, under the heading "Investigator's Recommendations on Areas To Be Investigated" three items are set out:
1. Actual costs of R & D equipment purchased;
 2. disbursements of the net cash of \$73 721 648.00 resulting from the issuance of the SRTC debts. (Ron Johnson and Leonard Wong paid \$10.1 million cash for the purchase of Continental Trust in 1985);
 3. Gains on dispositions of assets at "inflated costs" by vendors.
- [51] I agree with the submissions of Crown Counsel that up to the date exhibit 663 was prepared, October 25, 1985, the "investigation" had absolutely nothing to do with mens rea or establishing criminal liability. In my view, the "investigation" at that point in time was aimed at ascertaining the facts underlying the SRTC activity of the subject companies. In my view, S.I. was asked to get involved for two reasons: (1) in an effort to get information from persons other than the taxpayers and (2) they had more experience in issuing Requirements. The referral of the files to S.I. was certainly not evidence that an inquiry into penal liability had commenced. In fact, I accept the evidence of Mr. Ma when he testified that he did not know "what's going on" as of December 5, 1985, and that he did not have reasonable grounds to believe that an offence had been committed until he spoke with Mr. Breitzman and Mr. Russ on March 6, 1986.
- [52] On January 23, 1986, Rod Jamieson authored a memo to E. Kucher, at Head Office, requesting approval for a Simultaneous Criminal Investigation into the activities of Canadian Bio-Mass Research Inc., Coastal Natural Resources Research Inc. and Pacific Western Research Inc., noting that there were alleged R & D expenditures of \$200,000,000.00

but Revenue Canada's investigation "revealed that these expenditures have been grossly overstated." The memo refers to an informant's willingness to provide information for a price; it does not name individuals.

[53] Exhibit 669 purports to be a memorandum from J. R. Robertson to H.A. Diguier, dated February 6, 1986. The document is unsigned and an "X" is crossed through it. It is in reference to the Simultaneous Criminal Investigation Program and Coastal Natural Resources Research Inc. et al. The document refers to a "substantial SRTC fraud scheme whereby the Canadian Government will have lost over \$100 million in tax credits;" that "the investigation to date has indicated false documents... and suggesting that a simultaneous investigation with the IRS is necessary and worthwhile". In my view, these documents record suspicion on the part of Revenue Canada with regard to gross over-inflation of expenditures and possible fraud, with an indication of false documents. They indicate a desire to commence an investigation; however, I am satisfied that until Mr. Ma spoke with Mr. Breitzman and Mr. Russ on March 6, 1986, he did not have reasonable grounds to believe that an offence had been committed.

(2) Conclusion with respect to the "predominant purpose" inquiry

[54] I find as a fact that although Revenue Canada Officials commenced their investigation against this accused on October 21, 1985, they had absolutely no evidence to support their suspicions. I find that the predominant purpose of the inquiry became the determination of penal consequences as of March 6, 1986, after Revenue Canada Officials had spoken to Mr. Russ, and Mr. Breitzman. That was the date that Mr. Ma felt he had enough to begin working on an information in support of a search warrant.

[55] With respect to Organic, it is important to note that it was not one of the subject companies that was being investigated by the Vancouver branch of Revenue Canada. From the evidence on the voir dire, it is also clear that the Revenue Canada Officials did not even have suspicions that there was any illegal activity with respect to the Organic project. I find as a fact that, with respect to that investigation, up to the date of their visit to the Organic plant on April 7, 1986, there was no consideration of penal consequences by the Revenue Canada Officials in either Manitoba or British Columbia.

[56] In view of this finding, I am of the view that Revenue Canada was entitled to use their compulsion powers as at November 25, 1985, when documents were received from Ron Johnson and in December, 1985 when Mr. Ma spoke to Mr. Byerlay.

iv. Jarvis and compelled statements by third parties

(1) The Law

[57] Iacobucci and Major JJ. stated as follows at paras. 96-8 of Jarvis:

On the other hand, with respect to s. 7 of the Charter, when the predominant purpose of a question or inquiry is the determination of penal liability, the "full panoply" of Charter rights are engaged for the taxpayer's protection. There are a number of consequences that flow from this. First, no further statements may be compelled from the taxpayer by way of s. 231.1(1)(d) for the purpose of advancing the criminal investigation. Likewise, no written documents may be inspected or examined, except by way of judicial warrant under s. 231.3 of the ITA or s. 487 of the Criminal Code, and no documents may be required, from the taxpayer or any third party for the purpose of advancing the criminal investigation. CCRA officials conducting inquiries, the predominant purpose of which is the determination of penal liability, do not have the benefit of the ss. 231.1(1) and 231.2(1) requirement powers.

The predominant purpose test does not thereby prevent the CCRA from conducting parallel criminal investigations and administrative audits. The fact that the CCRA is investigating a taxpayer's penal liability, does not preclude the possibility of a simultaneous investigation, the predominant purpose of which is a determination of the same taxpayer's tax liability. However, if an investigation into penal liability is subsequently commenced, the investigators can avail themselves of that information obtained pursuant to the audit powers prior to the commencement of the criminal investigation, but not with respect to information obtained pursuant to such powers subsequent to the commencement of the investigation into penal liability. This is no less true where the investigations into penal liability and tax liability are in respect of the same tax period. So long as the predominant purpose of the parallel investigation actually is the determination of tax liability, the auditors may continue to resort to ss. 231.1(1) and 231.2(1). It may well be that there will be circumstances in which the CCRA officials conducting the tax liability inquiry will desire to inform the taxpayer that a criminal investigation also is under way and that the taxpayer is not obliged to comply with the requirement powers of ss. 231.1(1) and 231.2(1) for the purposes of the criminal investigation. On the other hand, the authorities may wish to avail themselves of the search warrant procedures under ss. 231.3 of the ITA or 487 of the Criminal Code to access the documents necessary to advance the criminal investigation. Put another way, the requirement powers of ss. 231.1(1) and 231.2(1) cannot be used to compel oral statements or written production for the purpose of advancing the criminal investigation.

In summary, wherever the predominant purpose of an inquiry or question is the determination of penal liability, criminal investigatory techniques must be used. As a corollary, all Charter protections that are relevant in the criminal context must apply. [Emphasis added]

[58] Defence counsel in his eloquent submissions, which lasted a few days, submitted that, according to Jarvis, all compelled statements were inadmissible if they were made by witnesses other than the accused after the predominant purpose became penal liability. He further submits that even statements made by Thomas Yankis and David Tolle to the IRS, which were compelled statements, were not admissible.

[59] In support of this startling submission, defence counsel drew my attention to para. 97 of Jarvis. In particular, he drew my attention to the following words:

Put another way, the requirement powers of ss. 231.1(1) and 231.2(1) cannot be used to compel oral statements or written production for the purpose of advancing the criminal investigation.

[60] In my view, however, these words were taken out of context. Those words refer to what was said in para. 96:

... There are a number of consequences that flow from this. First, no further statements may be compelled from the taxpayer by way of s. 231.1(1)(d) for the purpose of advancing the criminal investigation. Likewise, no written documents may be inspected or examined, except by way of judicial warrant under s. 231.3 of the ITA or s. 487 of the Criminal Code, and no documents may be required, from the taxpayer or any third party for the purpose of advancing the criminal investigation.

[61] On a careful reading of paras. 96-8, of Jarvis, it is my view that statements may not be compelled from an accused under s. 231.1(1)(d) for the purpose of advancing the criminal investigation after the predominant purpose of the inquiry becomes penal liability. After penal liability becomes the predominant purpose of the inquiry documents also cannot be obtained from third parties except by way of a search warrant. There is, however, no breach of the accused's rights where Revenue Canada, or anyone else for that matter, takes compelled statements from third parties in any place other than the business premises of the accused. In my view, if the accused's interpretation is correct the evidence of compellable witnesses would not be admissible at trial after the predominant purpose of the inquiry becomes penal liability. In my view, Jarvis does not cover statements that were taken by Revenue Canada from Betty Klatt, David Tolle or Thomas Yankis.

[62] In the event that I am wrong on my interpretation of the above quoted portion of the Jarvis judgment, I propose to deal with four of the alleged compelled statements that were alleged to have been taken in contravention of the accused's s. 7 Charter rights.

(2) The statements of Breitzman and Russ

[63] I agree with the submissions of Crown Counsel that the initial and subsequent interviews of James Breitzman and James Russ require a different analysis, given that both individuals were U.S. citizens whom Revenue Canada officers subjectively believed were not being compelled under the provisions of the Income Tax Act. In view of my "predominant purpose" ruling, however, I find that on March 6, 1986, Revenue Canada was entitled to rely on the provisions of s. 231 of the Act, even under Jarvis.

[64] On March 6, 1986, Revenue Canada officers attended at the Aldergrove plant. There is no evidence that this property was the accused's personal property. Rather, the evidence suggests that it was associated to Coastal Natural Resources Inc. As will be discussed later, corporations attract no s. 7 Charter protection; Revenue Canada's attendance at the corporate site pursuant to s. 231, even during the investigative stage is, therefore, irrelevant

to a s. 7 challenge. In addition Revenue Canada officers spoke with Mr. Breitzman, of whom they had been aware since the accused had provided Mr. Moi with a list of engineers on June 24, 1985. While Mr. Ma explained that it was in Mr. Breitzman and Mr. Russ's interests to cooperate, there is no evidence that he relied on the compulsory provisions of the Income Tax Act during the interview.

[65] In my view, the accused has not established any breach of the accused's Charter rights, on a balance of probabilities, during the visit and interview of Messrs. Breitzman and Russ at the Aldergrove plant on March 6, 1986.

(3) The statement of Betty Klatt

[66] With regard to the interview of Betty Klatt, although Mr. Ma testified that the interview occurred within the context of s. 231 of the Act, it is my view that there is no evidence of actual compulsion and that Mr. Ma simply viewed all of his actions as an employee of Revenue Canada as being activities "related to the administration and enforcement" of the Act, as set out in s. 231, generally. Mrs. Klatt, a former employee of Ron Johnson's, was cooperative and required no compelling. In my view, apart from my interpretation of Jarvis as it applies to compelled statements, even on the defence's interpretation on this issue, Jarvis does not preclude the receipt by Revenue Canada of information volunteered by people.

(4) The evidence of David Tolle

[67] The evidence of David Tolle is included in para. 57 of the affidavit in support of the unconstitutional "Baron" warrants. This evidence was given to the IRS in the United States of America. Defence submits that because this evidence was compelled testimony, it is inadmissible against the accused and should be excised from the affidavit in support of the search warrants because of what was stated in Jarvis. I disagree with this submission. In my view this evidence of what was said in that interview is hearsay evidence which was properly included as part of the affidavit in support of the search warrants.

(5) The evidence of Thomas Yankis

[68] The evidence of Thomas Yankis is included in para. 74 of the information in support of the search warrants. As I understand the submissions of defence counsel, this paragraph should be excised before I consider whether Revenue Canada had reasonable and probable grounds for their warrantless "Baron" searches. He submits that Yankis was staying at a home that belonged to Seona Wilder and that at the time of the interview Revenue Canada knew that the accused had an office in that house. He submits that they should have got his permission before they spoke to Yankis. Because the predominant purpose of the investigation was the penal liability of the accused, the statement obtained by Revenue Canada from Mr. Yankis contravened the accused's s. 7 rights under the Charter.

[69] I must admit that I am not too sure that I understand this submission, nevertheless, I see nothing in Jarvis that precludes the use of these statements in the affidavit in support of the search warrants.

E THE AUDIT OF THE ORGANIC PREMISES IN MORRIS, MANITOBA

i. Background to entry onto Organic premises

[70] Although Mr. Ma, the affiant in the information in support of the invalid "Baron" warrants, collected some of the material on the Organic file, I find as a fact that Mr. Phil Seagle of the Vancouver Revenue Canada office and other auditors from Manitoba were placed in charge of conducting the audit of this limited partnership, Organic. I also find that, although Mr. Ma was at the time investigating Coastal, he acted as an auditor on the Organic file and that he was acting under Mr. Seagle's direction on the Organic file. I again hasten to point out that Organic was not one of the subject companies.

[71] I also find as a fact that Revenue Canada was conducting an audit, as opposed to an investigation, of Organic on April 7, 1986, the date the Organic plant was visited by Revenue Canada personnel. I again reiterate that although the investigation into the matter before this court began on October 21, 1985, the predominant purpose of the investigation cannot be said to have been penal liability until March 6, 1986. Up to that point the Revenue Canada Officials had nothing but suspicion with respect to their investigation.

[72] I also find that at the time of Revenue Canada's visit to the plant in Morris, Manitoba there was absolutely no indication that the predominant purpose for that audit was penal liability. I find that Revenue Canada Officials were auditing Organic and the other limited partners to see if they qualified for their tax rebates. As of April 7, 1986, Revenue Canada Officials just did not have any evidence as to whether or not there was any tax liability or other penal consequences that could be considered by them with respect to the Organic project.

[73] On April 7, 1986, a number of persons attended the accused's limited partnership plant in Morris, Manitoba: Cpl. Dave Dunford of the R.C.M.P.; Mr Kevin Smith of Revenue Canada, Winnipeg; Mr. Phil Seagle of Revenue Canada, Vancouver; Mr. Tom Hanks of Revenue Canada, Vancouver; and two engineers employed by Revenue Canada, Dr. Gordon Bacon and Mr. Rein Raudsepp. I am satisfied, and find as a fact, that when these individuals attended the plant in Morris, Manitoba, they identified themselves as being from Revenue Canada and were let into the plant. The plant occupied one city block. A large portion of the plant was in darkness. There were about six or seven employees and although there was equipment present, none was operating. No evidence was led as to whether the Revenue Canada Officials saw any of the sugar that was produced from wood.

[74] In a testy exchange between the accused and Mr. Jamieson on this voir dire on April 5, 2002, the following was said about the visit by Revenue Canada to the plant at Morris, Manitoba:

Q Why didn't you ask someone to go look?

A Go look at what, the research projects?

Q You're the guy in charge, you're the guy directing them, every day you talk to them. Why didn't you say, "What the hell is going on here? Why don't you guys go and look?"

A It was my understanding that attempts had been made to locate the research projects.

Q Well, show me the evidence of it, please.

A Well, I don't have that. That was my understanding.

Q From --

A That was part of what had attempted to be done.

Q -- from who?

A From speaking with the investigators?

Q Who, Mr. Ma?

A Correct.

Q He tried to look --

MS. SMITH: Objection. This is the wrong witness to be cross-examining, and cross-examining about this issue. Mr. Jamieson has testified with regard to his role, which was supervisory. He wasn't an investigator with hands-on conduct of the matter that's before the court.

THE DEFENDANT: He has the guts --

MRS. WILDER: Well, he's the one who's responsible.

THE DEFENDANT: -- to sit here, pay her to prosecute me when nobody even went and looked.

Q You've got a lot of guts, haven't you?

A Well, we did go and look in Morris, Manitoba.

Q Yes.

A And we found exactly what we expected.

Q What did you find?

A We found a whole bunch of used equipment, junk that was allegedly worth 16 million dollars that was new and unused. We found a bunch of equipment that had been salvaged, repainted, shipped there. The auditors had gone and supposedly verified, that said it was worth 16 million dollars. Financial statements that had been prepared, and it turned out to be a bunch of junk. There was virtually nothing new.

Q Who looked at it?

MS. SMITH: Well, objection. Objection. It's hearsay.

THE DEFENDANT: Hey, he brought it up.

MS. SMITH: It's cross-examination.

THE DEFENDANT: He -- he brought it up.

MS. SMITH: It's irrelevant to the issues at bar.

THE DEFENDANT: He -- he sits here and he spews rhetoric, which is absolute, unadulterated garbage. Let's put his feet to the fire.

- [75] Dr. Bacon produced a report that also pointed out that the majority of the equipment in the warehouse at Morris, Manitoba had seen prior use and that some of the used equipment had been repainted. It was also noted that the new equipment did not exceed \$500,000 in value and that the equipment had a scrap value of approximately \$65.00 per ton.
- [76] Although I did not have the benefit of reading the reasons for judgment of the judge who heard the fraud trial of the accused involving Organic, one can only assume that the judge agreed with Mr. Jamieson and Dr. Bacon's assessment of the equipment that was found at the Organic project. After all, he convicted the accused of fraud with respect to the accused's operation of that project.
- [77] During the visit to the plant on April 7, 1986, photos were taken of the equipment stored there. These photos were shown to Mr. James Breitzman who was able to identify some of the new equipment as equipment he had purchased for the Bio-Mass project that was shipped to Winnipeg, Manitoba via Vancouver, British Columbia, at the request of the accused. He also identified other photos as being of used equipment pertaining to the Bio-Mass technology he had sold to the accused, equipment pertaining to the Fly Ash technology and used equipment he believed he saw at the accused's plant in Aldergrove, British Columbia.
- [78] The accused was incensed by this visit. When he discovered that Revenue Canada Officials were at his plant, he ordered them off the premises. He also used his considerable influence with the then deputy minister in charge of Revenue Canada to have the Revenue Canada Officials from Vancouver removed from the Organic case. In fact, the accused was so influential that the Vancouver officials were removed from the Organic case on April 8, 1986, the day following the visit to the plant. In addition to having the Vancouver officials removed from the Organic case, the accused also caused a letter to be sent by his lawyer to the Revenue Canada Officials in Vancouver, ordering them not to print the photographs they had taken of the equipment at the plant.

[79] Counsel for the accused submits that the visit by Revenue Canada Officials to the plant was unlawful and that the engineers who accompanied them did not have proper authorization to enter the plant. He also submits that contrary to s. 241 of the Income Tax Act, Revenue Canada breached its oath of confidentiality by showing photos of what was contained inside of the plant to Mr. Breitzman and Sean Morriss.

ii. Section 231 of the Income Tax Act as justification for entry into Organic plant

[80] In my view, it was the duty, and indeed the obligation of Revenue Canada, to enter those premises under the provisions of s. 231.1 of the Income Tax Act. I have already found that at that time no penal consequences were contemplated and Revenue Canada Officials were entitled to conduct this verification audit.

[81] In support of my conclusion I also refer to R. v. Chusid (2001), 57 O.R. (3d) 20 (Ont.S.C.J.) at para. 23:

..."The need for random monitoring is incompatible with the requirement in Hunter that the person seeking authorization for a search or seizure have reasonable and probable grounds, established under oath, to believe that an offence has been committed." Obviously monitoring for compliance cannot require reasonable and probable grounds to believe that an offence has been committed. Wilson J. likens monitoring for compliance to a "spot check" system, where records are examined randomly to ensure compliance with Canada's tax system. Monitoring does not target individuals suspected of evading taxes, but rather targets all taxpayers by making each potentially susceptible to examination for compliance purposes. As random checks for an effective tax system, the requirements in Hunter and subsequent cases cannot apply to monitoring for compliance. This does not, however, displace the Hunter requirements as they apply to criminal and quasi-criminal investigations.

iii. Were the photographs taken at the Organic plant confidential taxpayer information?

[82] As I understand the submissions of the accused, pursuant to s. 241 of the Income Tax Act, Revenue Canada Officials should not have provided the accused's confidential taxpayer information, the photos of his plant in Morris, Manitoba, to Mr. Breitzman and Mr. Sean Morriss.

[83] Section 241 of the Income Tax Act states:

- (1) Except as authorized by this section, no official shall
 - (a) knowingly provide, or knowingly allow to be provided, to any person any taxpayer information;
 - (b) knowingly allow any person to have access to any taxpayer information; or
 - (c) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the Canada Pension Plan or the Employment Insurance Act or for the purpose for which it was provided under this section.

- (2) Idem Notwithstanding any other Act of Parliament or other law, no official shall be required, in connection with any legal proceedings, to give or produce evidence relating to any taxpayer information.
- (3) Communication where proceedings have been commenced. Subsections (1) and (2) do not apply in respect of
- (a) criminal proceedings, either by indictment or on summary conviction, that have been commenced by the laying of an information or the preferring of an indictment, under an Act of Parliament; or
- (b) any legal proceedings relating to the administration or enforcement of this Act, the Canada Pension Plan or the Employment Insurance Act or any other Act of Parliament or law of a province that provides for the imposition or collection of a tax or duty.
- [84] I must admit I have some difficulty accepting that photographs of the type of equipment that was in the plant at Morris, Manitoba fall within the type of taxpayer information that was contemplated when s. 241 of the Act was promulgated. One would have expected that the type of taxpayer information that was contemplated was information contained in the books and records of the company. Given what was found at the plant, however, it was not surprising that the accused objected to photographs being taken of the equipment that was at that plant. Again, I quote from Mr. Jamieson's testimony on April 5, 2002, as to the type of material contained in those photographs:

A We found a whole bunch of used equipment, junk that was allegedly worth 16 million dollars that was new and unused. We found a bunch of equipment that had been salvaged, repainted, shipped there. The auditors had gone and supposedly verified, that said it was worth 16 million dollars. Financial statements that had been prepared, and it turned out to be a bunch of junk. There was virtually nothing new.

[85] In *R. v. Dilling* (1993), 84 C.C.C. (3d) 325 (B.C.C.A.) the Court held that no Charter breach was occasioned by the admission into evidence of a photograph of the accused taken by a police officer to assist in identification. Goldie J.A. stated at pp. 329-30:

The context in which all this occurred was a lawful detention.

Counsel for the appellant urged us to find that a cardinal principle of the common law - the right to remain silent - was violated by the taking of a photograph without the consent of the person detained. The unposed photograph was used and was intended to be used as evidence against him.

In my view there was no breach of the right to remain silent.

The camera recorded what the eye of each police officer could see at the moment it was taken. For purposes of later identification a still photograph records less than deliberate police scrutiny. Examples of what the camera could not record are demeanour and repetitious or involuntary body movement.

A still photograph is no more permanent than a sketch or the officer's notes. A photograph may appear more accurate than a sketch and more comprehensible to a third person but these are not advantages, if such they be, provided unwillingly by a detained person.

Fingerprints are a far more damaging means of identity. Taking fingerprints from a suspect unwillingly has a greater impact on the right to silence but this apparent breach is excused by virtue of the public interest in combatting serious crimes and requiring no bodily violation: See *R. v. Beare* (1988), 45 C.C.C.(3d) 57(S.C.C.).

[86] The taking of photographs at Morris, Manitoba is not evidence of bad faith: Revenue Canada officers thought that they were entitled to be at the premises; they thought that they were entitled to have the assistance of Dr. Bacon and Mr. Raudsepp. The photos recorded what the Revenue Canada officers saw - equipment. No person's rights were infringed; no person was involved. Further, if they are correct that they and Bacon were entitled to be there, the taking of the photos is legally irrelevant, as is their development and subsequent showing of the photos to James Breitzman. While questions were raised prior to the showing of the photos to Mr. Breitzman, this does not alter the fact that no personal right was infringed by the taking or showing of the equipment photos.

[87] With respect to the alleged breach of confidentiality by Revenue Canada Officials, I note that in *R. v. Mills* (1999), 139 C.C.C. (3d) 321 (S.C.C.) the majority pointed out at p. 365:

This interest in being left alone by the state includes the ability to control the dissemination of confidential information. These privacy concerns are at their strongest where aspects of one's individual identity are at stake, such as in the context of information "about one's lifestyle, intimate relations or political or religious opinions": *Thomson Newspapers*, supra, at pp. 517-18, per LaForest J., cited with approval in *Baron*, supra, at pp. 444-45.

[88] The confidential nature of this photograph that was taken by Revenue Canada can hardly be classed as one where the accused's individual identity was at stake. However, I have some difficulty with the printing of the photos and showing them to Mr. Breitzman and Mr. Morris. This would seem to be a technical breach of the accused's rights, as I am not aware of any provision in the Income Tax Act that authorized the printing of these photos.

[89] Nevertheless, even if Revenue Canada's actions in printing and showing the photos to Mr. Breitzman were unconstitutional, this does not render inadmissible the non-constitutive evidence that was obtained as a result of showing the photos to Mr. Breitzman. It will be necessary for me to undertake a s. 24(2) analysis to determine the admissibility of the evidence that was given by Mr. Breitzman as a result of being shown those photographs.

[90] I note, however, that in *R. v. Golden* (2001), 159 C.C.C. (3d) 449 (S.C.C.), the Supreme Court of Canada stressed the requirement for a judicial balance to be struck in the context of searches. At para. 46, the Court stated:

This Court has emphasized on many occasions the need to strike the appropriate balance between the privacy interests of the accused on the one hand and the realities and difficulties of law enforcement on the other hand, most recently in the case of *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65.

[91] In my view, the appropriate balance to be struck in this case is for the evidence that was obtained from Mr. Breitzman as a result of his being shown the photos to be admitted into evidence at this trial.

iv. The authority of Revenue Canada's experts to enter the plant at Morris, Manitoba

(a) Background to this issue

[92] Exhibit 798 of these proceedings contains an executed agreement dated March 26, 1986, entered into between Dr. Gordon Bacon and Mr. Rein Raudsepp. This written agreement was between Her Majesty the Queen in the right of Canada represented by the Minister of National Revenue and Bacon, Donaldson & Associates. This agreement provided for them to provide expertise in evaluating the scientific research in which the accused and his associates were involved with respect to Organic. Both Dr. Bacon and Mr. Rein Raudsepp executed this agreement and they both agreed that they were engaged in this agreement for the purposes of the Income Tax Act and agreed that they were subject to all of the provisions of s. 241 of the Income Tax Act.

(b) Position of defence counsel

[93] Defence counsel submits that the Revenue Canada Officials were very well aware that Dr. Gordon Bacon and Mr. Rein Raudsepp needed special authorization to enter the plant at Morris, Manitoba on April 7, 1986. He submits notwithstanding that they wilfully and flagrantly decided to disregard the law by failing to get the necessary authorizations before giving them access to his confidential taxpayer information. He submits that in order for these experts to legally enter the plant they should have received a special permit from Revenue Canada. In support of this proposition defence counsel drew my attention to an opinion (exhibit 797) from the Department of Justice to Mr. H.S. Terris, of the Special Audit section in Ottawa, on this issue dated November 21, 1984. Defence counsel also relies on an opinion from Sandra Ferber of the Department of Justice dated December 5, 1986 on the subject. This opinion was addressed to Mr. G.W. Venner, Director General of Audit Programs Directorate in Ottawa. Defence counsel also relies on two memos marked exhibits 803 and 804 in these proceedings and dated September 10, 1986 and September 18, 1986.

[94] Defence counsel submits that this behaviour by Revenue Canada Officials is yet another indication of the bad faith demonstrated by them during this entire matter.

(c) Analysis of this issue

[95] Permit me to say at the outset that without seeing the terms of the agreement referred to in exhibit 797, it is impossible to reach the conclusion that the advice set out in that letter referred to a case where there was an agreement of the kind set out in exhibit 798. It is my view that there was an implied authorization for Dr. Gordon Bacon and Mr. Rein Raudsepp to enter the Organic plant with representatives of Revenue Canada. Given the obvious tension that existed between the accused and Revenue Canada Officials at the time of their entry into the Organic plant, I also find that they were justified in having a police officer present when they went to conduct this audit.

[96] Even if I am wrong in arriving at that conclusion, it is obvious that Revenue Canada Officials made full disclosure of the situation when they swore the affidavit in support of the warrant. Paragraph 60 of that affidavit states:

As a result of the Informant's examination and enquiry referred to in paragraph 59 above, the Informant, as authorized by subsection 231.1(1) of the Income Tax Act, together with

Phil Seagle and Tom Waters, a special investigator of the Department of National Revenue, Taxation, Vancouver District Office

Kevin Smith, a special investigator of the Department of National Revenue, Taxation, Winnipeg District Office

David Dunford, Corporal, Royal Canadian Mounted Police, Commercial Crime Section

and

Gordon Bacon and Rein Raudsepp, professional engineers of Bacon, Donaldson and Associates Ltd. of Vancouver, British Columbia, which firm was contracted by the Department of National Revenue, Taxation, to elevate the feasibility of the Organic Research Project and to examine the condition of the equipment purchased for the Organic Research Project, as referred to in paragraph 59 above,

visited a plant at 334 Main Street South, Morris, Manitoba, at 10:00 a.m. on April 7, 1986, where the Organic Research Project was purportedly being carried out, to inspect the equipment situated in the plant at that time.

[97] The judge who granted the search warrants on the basis of Mr. Ma's affidavit is presumed to know the law. It is also significant that the search warrants that were obtained as a result of the affidavit, which included para. 60, was upheld by a judge of the Federal court, the Federal Court of appeal and leave to the Supreme Court of Canada to challenge the warrants was refused: *Solvent Petroleum Extraction Inc. v. Canada (Minister of National Revenue)*, [1988] 3 F.C. 465 (T.D.), upheld on appeal at [1990] 1 F.C. 20 (C.A.), further appeal to the Supreme Court of Canada dismissed November 23, 1989.

F. THE REQUIREMENTS ISSUE

i. Requirements under the Income Tax Act

- [98] Under the Requirement power contained in, what is now, s. 231.2(1) of the Act, the Minister may compel any person to produce any information or any document. The scope of this Requirement power was considered in *Canadian Bank of Commerce v. Canada (Attorney General)*, [1962] S.C.R. 729 and *James Richardson & Sons, Ltd. v. M.N.R.*, [1984] 1 S.C.R. 614. At p. 625 of the Richardson case, Wilson J. held that the provision could not be employed for the purposes of a "fishing expedition", and that it was "only available to the Minister to obtain information relevant to the tax liability of some specific person or persons if the tax liability of such person or persons is the subject of a genuine and serious inquiry".
- [99] Mr. Maurice Ma of the Special Investigations Section was, at the material time, one of the lead investigators looking into the unravelling of the question of the research and development expenses of the subject companies. He was cross-examined at length by defence counsel. He testified that at the time the investigation was taking place, his department generally used Requirements to obtain tax information from taxpayers.
- [100] According to Mr. Ma, the only instances in which warrants, instead of Requirements, were used were when they wished to obtain information from lawyers, accountants and the person under investigation. He indicated that the situation with banks was different. Mr. Ma testified that, upon serving a bank with a Requirement, it was the usual practice for them to advise Revenue Canada of what documents they had in their possession. This was mainly because the banks had to produce all of the required information at their expense. After the banks advised Revenue Canada of the information in their possession, Revenue Canada would then specifically indicate which documents they were interested in so that they could obtain copies of that information only.
- [101] With respect to the banks, Mr. Ma also testified that pursuant to s. 29 of the Evidence Act, information about the accounts of anyone could be obtained by way of subpoena and an affidavit from branch personnel. On this issue, I have already referred to *Del Zotto v. Canada* (1999), 131 C.C.C. (3d) 353 (S.C.C.) which was relied on by me in *R. v. Wilder No. 3*, *supra*.

ii. The efforts made by Revenue Canada Officials to keep up with the law

- [102] Those of us who were around at the time the questioned Requirements were issued would remember the debates as to whether the Charter was going to attain the same stature as the Bill of Rights. Some would fondly remember switching on their computers every Thursday morning to see what was the latest edict from the Supreme Court of Canada. Those who were around at that time will tell you that Charter jurisprudence was in a state of flux. In fact some may be tempted to say that if every police department or government department and regulatory body changed their policy every time a trial court made a ruling on the Charter there would have been chaos in this country.

[103] From the evidence that was led on this voir dire, I find that Revenue Canada Officials dealing with the subject companies attended various courses on the Charter and took all reasonable steps to stay abreast of the developments in the law. I also find that their policy was only changed, however, when they received word from head office that a change in policy was warranted as a result of recent jurisprudence. I certainly find that the use of the questioned Requirements was in no way a flagrant violation by Revenue Canada Officials of any law that restricted their use.

[104] There were some decisions from some lower courts that held that all Requirements were unconstitutional. In our Province, however, in *R. v. Oldfield* (1986), 28 C.C.C. (3d) 104 (B.C.S.C.) McKenzie J. (as he then was) held at p. 110:

Under various provisions of s. 231 the Minister is given investigatory powers including powers of search and seizure under s. 231(1)(d) and (4). We are not concerned here with the search and seizure provisions.

Section 231(3), under consideration here, is a mere demand for information or production of documents. It is not a "forced production", i.e., production by order of the court. In the event of failure to comply, the taxpayer may be charged with a summary conviction offence under the Act, as he was here.

The demand letter cannot be associated with any kind of uninvited entry of any premises or seizure of any property.

My conclusion is that, as a question of law, no search or seizure was involved here, and therefore it is unnecessary to consider the question of unreasonableness.

The matter is remitted to the Provincial Court for determination of the charges on their merits.

[105] *R. v. Oldfield* was further appealed to the British Columbia Court of Appeal. In that Court the appeal from McKenzie J. was dismissed [1987], 3 W.W.R. 670 (B.C.C.A.). In dismissing the appeal the Court held at p. 672:

In the present case there is no search or seizure. I do not accept the proposition that s. 8 guarantees a broad and general right to be secure from unreasonable invasion of privacy, apart entirely from search or seizure.

[106] In *R. v. Oldfield* a further appeal was taken to the Supreme Court of Canada. This appeal was dismissed on June 22, 1987. At none of these hearings was any distinction drawn between Requirements that were used during the audit phase and those used when the predominant purpose was penal liability.

[107] It is indeed interesting to note that in *Jarvis*, *supra*, Iacobucci and Major JJ. gave the following overview of the statutory context of the Income Tax Act beginning at para. 48:

Governments, indisputably, require revenue in order to finance their operations and to implement social programmes. Currently, the collection of federal income tax -- a measure first introduced at that level during the First World War by The Business Profits War Tax Act, 1916, S.C. 1916, c. 11, and The Income War Tax Act, 1917, S.C. 1917, c. 28, and thought to be temporary -- comprises a crucial source of federal revenue, not to mention a crucial source of revenue for a good number of provincial governments (see *Del Zotto v. Canada*, [1997] 3 F.C. 40 (C.A.), at para. 19, per Strayer J.A., whose dissenting reasons were affirmed by a unanimous panel of this Court: [1999] 1 S.C.R. 3). In this connection, because the ITA controls the manner in which federal income tax is calculated and collected, this Court has recognized it as being "essentially a regulatory statute": *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at p. 641, per Wilson J. (See also: *La Forest J.*, concurring in the same case, at p. 650, where he described the ITA as "essentially of an administrative nature"; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 506, per La Forest J.; *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338, at p. 354, per Cory J.; *143471 Canada Inc. v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339, at p. 378, per Cory J.; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 46, per Lamer C.J. and Iacobucci J.) The ITA is both detailed and complex.

They continued at para. 51:

It follows from the tax scheme's basic self-assessment and self-reporting characteristics that the success of its administration depends primarily upon taxpayer forthrightness. As Cory J. stated in *Knox Contracting*, *supra*, at p. 350: "The entire system of levying and collecting income tax is dependent upon the integrity of the taxpayer in reporting and assessing income. If the system is to work, the returns must be honestly completed." It is therefore not surprising that the Act exhibits a concern to limit the possibility that a taxpayer may attempt "to take advantage of the self-reporting system in order to avoid paying his or her full share of the tax burden by violating the rules set forth in the Act" (*McKinlay Transport*, *supra*, at p. 637). The nature of the tax collection scheme, however, creates an obstacle in this regard:

Often it will be impossible to determine from the face of the return whether any impropriety has occurred in its preparation. A spot check or a system of random monitoring may be the only way in which the integrity of the tax system may be maintained.

(*McKinlay Transport*, *supra*, at p. 648)

Accordingly, "the Minister of National Revenue must be given broad powers in supervising this regulatory scheme to audit taxpayers' returns and inspect all records which may be relevant to the preparation of these returns".

iii. Application of *Jarvis and Ling*

- [108] In light of *Jarvis and Ling*, information obtained pursuant to Requirements issued in furtherance of Revenue Canada's penal investigation of the accused was obtained in violation of his rights under the Charter. Information obtained pursuant to Requirements issued in furtherance of Revenue Canada's audit of the accused before he became the subject of a criminal investigation remains constitutionally valid, even if subsequently used to advance the criminal investigation.
- [109] I concluded in Ruling No. 3 that the certificates which formed part of the escrow agreement between the bank, the investors and the research company were admissible, notwithstanding the fact that they were obtained after the commencement of the investigation. The certificates were obtained pursuant to a Requirement served on the National Bank on November 6, 1987. In light of *Jarvis*, however, this conclusion can no longer stand.
- [110] Revenue Canada executed search warrants issued under s. 231.3 of the Act in May 1987. There can therefore be no doubt that by November 1987, not merely the predominant, but the sole purpose of the Requirement served on the National Bank was to advance the criminal investigation against the accused. It was not open to Revenue Canada to use the Requirement powers of the Act for this purpose, and in so doing, it breached the accused's rights under the Charter. The fact that there may have been other means by which Revenue Canada could have obtained these certificates does not alter this conclusion, though it is a factor to consider under s. 24(2).
- [111] The continued validity of the other Requirements served on the accused, his banks and various third parties will also depend on whether the predominant purpose of their issuance was to advance the criminal investigation against the accused. As noted above, Mr. Ma commenced his investigation into the particular subject companies and the possible violations of s. 239 of the Act after October 21, 1985. Commencing in early 1986, Revenue Canada investigators were aware, too, of the possibility of charges under the Criminal Code.
- [112] Although Revenue Canada's investigation into this matter began on October 21, 1985, I am satisfied that the Revenue Canada Officials had only suspicions as of that date. They certainly did not have evidence to lay a charge, nor did they have sufficient evidence to consider the penal consequences of the accused's conduct. As stated previously, the earliest date on which this existed is March 6, 1986.
- [113] The Supreme Court in *Jarvis* clearly articulated that Revenue Canada Officials conducting inquiries, the predominant purpose of which is the determination of penal liability, may not avail themselves of the power under ss. 231.1 and 231.2 of the Act to require documents from the taxpayer or any third party (para. 96). Accordingly, information and documents obtained pursuant to Requirements issued after March 6, 1986 were obtained in violation of the accused's rights under s. 7 of the Charter.

[114] Although I have found that it was not until March 6, 1986 that the predominant purpose of the investigation was the determination of penal liability, for ease of reference, the Requirements issued after October 21, 1985, the date the investigation began, are as follows:

Date of Requirement

Person or Institution to Whom the Requirement was Directed

Person or Company to Whom the Requirement Applied

January 6, 1986

Manager, Bank of British Columbia, 937 West Georgia Street, Vancouver, B.C.

Nola Johnson, Johnson & Burnett Ltd., Ronald L. Johnson, Pacific Natural Resources Inc., Tempe Holdings Inc., Dara M. Wilder, Seona Wilder

January 6, 1986

Manager, Vancouver City Savings Credit Union, 1030 West Broadway, Vancouver, B.C.

Johnson & Burnett Ltd., Nola Johnson, Ronald L. Johnson

January 6, 1986

Manager, Canadian Imperial Bank of Commerce, North Bluff and Johnston, White Rock B.C.

Vardax Consultants Inc., Dara Wilder, Seona Wilder

January 6, 1986

Manager, Canada Trust Company, 15137 - 16th Avenue, White Rock, B.C.

Vardax Consultants Inc., David Tolle, Earl E. Wilder, Dara M. Wilder, Seona Wilder

January 6, 1986

Manager, National Bank of Canada, 595 Howe Street, Vancouver, B.C.

Canadian Bio-Mass Research Inc., Johnson & Burnett Ltd., Pacific Natural Resources Inc., Coastal Natural Resources Research Inc., Pacific Western Research Inc., Ronald L. Johnson, Dara M. Wilder, Nola Johnson, Seona Wilder

January 6, 1986

Manager, Royal Bank of Canada, 1025 West Georgia Street, Vancouver, B.C.

Johnson & Burnett Ltd., Terra Pacific Consulting Inc., Ronald L. Johnson, Nola Johnson

January 6, 1986

Manager, Royal Trust Corp. of Canada, 505 Burrard Street, Vancouver, B.C.

Johnson & Burnett Ltd., Ronald L. Johnson, Nola Johnson

January 6, 1986

Manager, Toronto Dominion Bank, 45905 Yale Road West, Chilliwack, B.C.

Vardax Consultants Inc., Dara M. Wilder, Seona Wilder

March 3, 1986

C & C Auto, Truck & Equipment Sales Inc., 800, 550 - 6th Avenue S.W., Calgary, Alberta

C & C Auto, Truck & Equipment Sales Inc.

March 3, 1986

Mr. Donald Carter, 94, 9090 - 24 Street S.E., Calgary, Alberta

Donald Carter

April 25, 1986

Mr. R.L. Gauvin, Coordinator, Access to Information Section, Department of National Defence,
101 Colonel By Drive, Ottawa, Ontario

Gerald Milton Byerlay

May 23, 1986

Manager, Royal Trust, 505 Burrard Street, Vancouver, B.C.

Terra Pacific Consulting Ltd., Pacific Natural Resources Inc.

June 9, 1986

Manager, Canada Trust, 15137 16th Avenue, White Rock, B.C.

James Breitzman, Protech Industrial Systems Inc.

September 16, 1986

Terry Hunter, Calgary, Alberta

Terry Hunter

September 17, 1986

Dale Mather, Calgary, Alberta

Dale Mather

September 17, 1986

Edward Miles, 944 Raynard Cr. S.E., Calgary, Alberta

Edward Miles

September 17, 1986

Mel Miller, 2202 - 44 St. S.E., Calgary Alberta

Mel Miller

*March 2, 1987

National Trust, Winnipeg, Manitoba

Organic Research Limited Partnership

*March 2, 1987

R.I.S. Equities, Winnipeg, Manitoba

Organic Research Limited Partnership

*March 2, 1987

Insurance company which insured the equipment

Organic Research Limited Partnership

June 18, 1987

Arthur Andersen & Co.

Ronald Johnson

October 14, 1987

Manager, Royal Bank of Canada, 1055 West Georgia Street, Vancouver, B.C.

Victor Attrill, Roger Lawrence, Michael Richards, Michael Vaz

October 23, 1987

Manager, Royal Bank of Canada, 685 West Hastings Street, Vancouver, B.C.

Michael Richards

October 23, 1987

Manager, National Bank of Canada, 555 Burrard Street, Vancouver, B.C.

Victor Attrill, Ronald Johnson, Roger Lawrence, Michael Richards, Michael Vaz, Dara Wilder, Canadian Bio-Mass Research Inc., Coastal Natural Resources Research Inc., International Technical Research Consultants Inc., Pacific Western Research Inc.

October 23, 1987

Manager, Royal Bank of Canada, 1055 West Georgia Street, Vancouver, B.C.

Elizabeth Attrill, Victor Attrill

October 23, 1987

Manager, Hong Kong Bank of Canada, 530 Main Street, Vancouver, B.C.

Victor Attrill, Ronald Johnson, Roger Lawrence, Michael Richards, Michael Vaz, Dara Wilder, Canadian Bio-Mass Research Inc., Coastal Natural Resources Research Inc., International Technical Research Consultants Inc., Pacific Western Research Inc.

March 25, 1988

Manager, Canadian Imperial Bank of Commerce, 698 West Hastings Street, Vancouver, B.C.

Roger E. Lawrence In Trust for Jones, Cation & Company

October 17, 1990

Manager, Canada Trust, 15137 - 16th Avenue, White Rock, B.C.

Eucumbeng Properties Inc.

*Although there was a request for these Requirements it was not established that Requirements were in fact issued.

[115] Although I find that information obtained pursuant to the above noted Requirements was obtained in breach of the accused's Charter rights, I will address some of the accused's corollary challenges to the conduct of Revenue Canada in its dealings with certain third parties, as this may have an impact upon the s. 24(2) analysis.

iv. Standing to challenge the Requirements

[116] In R. v. Wilder No.3 I dealt with the issue of standing at paras. 48-9. I merely adopt what was said there. At para. 50 I noted:

In my view, it would appear from the jurisprudence that the accused has no standing under s. 24(1) or 24(2) with respect to the records that were seized from persons other than himself. I note, however, that the issue of standing is not relevant to my inquiry with respect to exclusion of evidence under s. 24(1) of the Charter. This is because an accused always has standing to argue about the fairness of his or her trial. As such, regardless of how the evidence was obtained, if its admission would affect the fairness of the trial, exclusion is a possibility that I must consider.

[117] On this voir dire, it would appear that regardless of whether the accused has standing or not I have to consider his arguments in my analysis of both ss. 24(1) and 24(2) of the Charter. This is so because Jarvis indicates that Revenue Canada is not entitled to avail itself of the powers under ss. 231.1 and 231.2 once the predominant purpose of an investigation is the determination of penal liability. To do so is inappropriate under s. 7 of the Charter. Documents may not be required from the accused or from third parties (para.96). In Jarvis the Court also stated in para. 105 that Revenue Canada's use of s. 231.2(1) Requirement letters to obtain banking information from the accused's financial institutions violated the accused's s. 7 rights in that case. According to Jarvis, all Requirements issued by Revenue

Canada after March 6, 1986 contravened the accused's rights under s. 7 of the Charter.

[118] In the event that the appeal courts are of the view that I am unable to find, as I did in this case, that the beginning of the investigation could be a different date from the date on which the predominant purpose of the investigation became the determination of penal liability, I propose to deal with two instances where Requirements were used but where there was, in my view, no breach of s. 7 of the Charter.

v. The use of Requirements on C & C Auto Truck & Equipment Sales Inc. and Donald Carter

[119] Defence counsel cross-examined Mr. Ma vigorously with respect to the Requirements served on or around March 3, 1986 on C & C Auto, Truck & Equipment Sales Inc. ("C & C Auto") and Mr. Donald Carter of that company. These Requirements were served during the audit of Organic and prior to the time that the predominant purpose of the inquiry was penal liability of the accused. The service of them was therefore not in breach of the rights of the accused.

[120] Mr. Ma admitted that Mr. Carter had been served with a Requirement but that since he had failed to comply, he had been charged under s. 238 of the Income Tax Act. After the Requirements were served on C & C Auto and Mr. Carter, Mr. Robert Crump, the accused's lawyer, acted on behalf of the company and Mr. Carter. Eventually Mr. Carter and C & C Auto were represented by Michael Dorchik from Calgary. Mr. Dorchik had advised a representative of Revenue Canada that he intended to challenge the constitutionality of the Requirements which had been served on his clients. Eventually a deal was reached whereby the s. 238 charges were dropped in return for Mr. Carter providing Revenue Canada with information against the accused.

[121] Counsel for the accused submits that the authorizing judge should have been apprised of the fact that Mr. Carter had cooperated with Revenue Canada in exchange for "a clean bill of health" and complete immunity in the event that they came across problems concerning him. Counsel for the accused takes the position, therefore, that the information in para. 52 of the affidavit in support of the invalid "Baron" warrant was obtained in breach of the accused's s. 7 rights.

[122] The issue of whether the arrangement with Mr. Carter should have been disclosed in the affidavit in support of the warrant would have been relevant if I were reviewing the warrant that was issued as result of that affidavit. I am not doing that here, however, as the warrants are unconstitutional because of the decision in Baron. Moreover, if Mr. Carter's rights were violated as a result of the serving of the Requirements on him, which I doubt, the accused has no standing to rely on a violation of the rights of this third party.

[123] In my view, the leverage that was used by Revenue Canada to obtain information from Mr. Carter cannot be challenged by the accused because he has no standing to do that. In any event, the evidence that was given to Revenue Canada by Mr. Carter was given after a deal was made between his lawyer, acting on his behalf, and Revenue Canada. It cannot be said

under those circumstances that there was any breach of the accused's s. 7 rights. In my view, the failure to mention to the authorizing judge the circuitous route by which this information was obtained does not amount to bad faith on the part of the Revenue Canada Officials.

vi. The Requirements served on Edward Miles and Mel Miller

[124] Requirements were served on Edward Miles and Mel Miller on September 17, 1986. This was well after the predominant purpose of the inquiry was penal liability. It is clear from the evidence that was adduced on this voir dire that both Edward Miles and Mel Miller wished to voluntarily cooperate with Revenue Canada Officials. However, according to the evidence, they both wished to be served with Requirements for their own protection. Pursuant to their request, Revenue Canada complied with their wishes and served them with Requirements. Under these circumstances there is no proof on a balance of probabilities that the information that they supplied to Revenue Canada was in contravention of the accused's s. 7 Charter rights.

[125] In the event that I am wrong and there was a breach of the accused's s. 7 rights under these circumstances, I will deal with the remedy for this breach when I deal with my s. 24(1) and s. 24(2) analysis.

vii. The use of Requirements to circumvent the sealing orders

[126] As mentioned previously, on the same day that the search warrants were executed, the accused had the evidence seized pursuant to those search warrants sealed. The evidence from six of the locations where the warrants were executed remained sealed while the accused challenged the validity of the search warrants all the way to the Supreme Court of Canada.

[127] The application for sealing orders for the seized materials while the warrants were challenged was dealt with in *Solvent Petroleum Extraction Inc. v. Canada (Minister of National Revenue)*, supra, where Dube J. refused to quash the search warrants. This decision was appealed by the accused to the Federal Court of Appeal, which upheld Dube J.'s decision at [1990] 1 F.C. 20 (C.A.). Undaunted, the accused appealed this decision to the Supreme Court of Canada. The Supreme Court of Canada dismissed the appeal with costs on November 23, 1989.

[128] There was a submission by defence counsel that Mr. Ma, and indeed Revenue Canada, were using Requirements to circumvent the sealing order regarding the documents seized from the accused and his related companies. I find that there is no foundation to that allegation. Counsel for the accused referred to Tab 7 of exhibit 659, in particular, Tab M, and pointed out that those Requirements were used not only to get around the sealing order but to obtain information from the Hong Kong Bank of Canada. Again, I am not satisfied that the accused has established this on a balance of probabilities.

[129] In my view, the defence's suggestion that Revenue Canada was using the Requirements in this case as part of a "fishing expedition" is also groundless and has certainly not been established by the accused on a balance of probabilities.

[130] I now turn to other instances where, in my view, the accused has no standing to challenge the alleged violations of the rights of third parties.

G. THE OBTAINING OF INFORMATION FROM MR. RICHARDS BY CHRIS STROTHER OF REVENUE CANADA

[131] Defence counsel submits that Mr. Ma improperly included information in para. 76 of the affidavit that was obtained from Mr. Richards by Chris Strother on a separate civil matter. In dealing with this and other allegations of deception by Revenue Canada, it may be prudent to remind counsel of what was said in *R. v. Rothman* (1981), 59 C.C.C. (2d) 30 (S.C.C.). In that case Lamer J. (as he then was) at p. 74 pointed out that courts should be wary not to unduly limit police discretion:

[T]he investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community.

[132] As examples of what might "shock the community", Lamer J. suggested a police officer pretending to be a chaplain or a legal aid lawyer, or injecting truth serum into a diabetic under the pretense that it was insulin. Although *Rothman*, supra, was a pre-Charter case, Lamer J.'s discussion on this point was nevertheless adopted by the Court in *R. v. Collins*, [1987] 1 S.C.R. 265 at pp. 286-7; see also *R. v. Clot* (1982), 69 C.C.C. (2d) 349 (Que.Sup.Ct.).

[133] This allegation by defence counsel is again one of those situations where, to the extent any rights were infringed, they were those of Mr. Richards, not the accused. In any event, Mr. Ma testified, and I accept his testimony on this point, that some of the information in that paragraph was received from other sources. The manner in which that paragraph was written was simply a convenient form in which to express the information they had from other sources. Mr. Ma testified, and I accept his testimony, that he was privy to the information which was obtained from Mr. Strother but he had no say in the audit of Mr. Richards' income tax. In any event, Mr. Richards was the one who wanted to speak to Revenue Canada and he spoke to them about this matter through his lawyer.

[134] Accordingly, I find that the accused has no standing to rely on breaches that were alleged to have occurred to Mr. Richards when, although Mr. Richards was told that his audit was to be used for civil purposes only, the information obtained from him on the civil audit found its way into the affidavit in support of the search warrants. In any event, I find no bad faith by Revenue Canada here.

H. THE EFFECT OF ERRORS AND OMISSIONS FROM THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANTS ON THE EVIDENCE OBTAINED AS A RESULT OF THE SEARCHES MADE PURSUANT TO THOSE WARRANTS

[135] Defence counsel submits that numerous errors and omissions in the affidavit in support of the warrants undercut the basis for the issuance of the warrants. He drew my attention to the following facts that were not included in the affidavit in support of the "Baron" warrants:

- (a) Mr. Breitzman and Mr. Russ were granted immunity in exchange for their cooperation;
- (b) Mr. Breitzman and Mr. Russ had commenced civil action for the full amount of their invoices as opposed to the 30% that they had told Mr. Ma was the amount of the invoice that was to be paid to them;
- (c) Don Carter had made a deal with Revenue Canada to cooperate in exchange for its agreement to drop a charge against him for non-compliance with Requirements;
- (d) there was the possibility of proceeding against the accused with criminal charges;
- (e) Revenue Canada was involved in a simultaneous criminal investigation with the American I.R.S.; and
- (f) David Tolle was under the compulsion of a subpoena when he gave his information to the I.R.S. in the presence of Mr. Ma.
- (g) That the authorizing judge was not advised of the fact that there was a dispute between the Department of Justice and Revenue Canada Officials that there should be disclosure that the information contained from the execution of the search warrants could be used in a Criminal prosecution of the accused.
- (h) That on numerous occasions Mr. Ma. And his fellow investigators were told to leave private property but they refused to do so.
- (i) That on many occasions Mr. Ma was acting under s. 231 of the Act but failed to disclose this in the affidavit in support of the information to obtain the search warrants.

[136] In dealing with this submission, it may be prudent for me to state my understanding of the law on this issue.

i. The law

[137] In *R. v. Kelly*, [1994] B.C.J. No. 1490 (Q.L.) (S.C.) [affirmed on appeal (1995), 99 C.C.C. (3d) 367 (B.C.C.A.)], Hood J. had to deal with the sufficiency of the information in support of a search warrant. The learned justice rejected the submission that the officer who swore the information in support of the search warrant was required to disclose "all" information in the possession of the police, including an informant's criminal record.

[138] Where an affiant has made mis-statements, omissions and half-truths in an affidavit in support of a search warrant, evidence obtained as a result of that warrant may be excluded where these shortcomings were in furtherance of a deliberate intent to mislead and were "of sufficient significance to the information as a whole and sufficiently misleading": *R. v. Melenchuk* (1993), 24 B.C.A.C. 97 (B.C.C.A.). See also *R. v. Norris* (1993), 35 B.C.A.C. 133 (B.C.C.A.), where a search warrant obtained on the basis of a careless and misleading affidavit was set aside.

[139] The accused in *R. v. Grant* (1993), 84 C.C.C. (3d) 173 (S.C.C.) had submitted that a search warrant should be quashed because the police officers had not mentioned a warrantless perimeter search in their information to obtain. Sopinka J. stated at pp. 196-7:

However, the respondent further proposed that the warrants ought to be quashed on the basis that the police officer did not mention the warrantless perimeter search of September 7, 1989, in his information. As this court indicated in *Garofoli*, supra, at p. 1452, "the existence of fraud, misleading evidence and new evidence" are all relevant to the determination as to whether the information expunged of offending data could properly result in the issuance of a search warrant. In the case at bar, however, there is no evidence to support the allegation of bad faith on the part of the officer in question. Unlike the situations in *R. v. Sismey* (1990), 55 C.C.C. (3d) 281 (B.C.C.A.), and *R. v. Donaldson* (1990), 58 C.C.C. (3d) 294 (B.C.C.A.), there is no information to suggest anything other than the officer inadvertently failed to include mention of the warrantless perimeter search and certainly nothing to suggest a purposeful attempt to deceive the issuing justice. [Emphasis added]

[140] In *R. v. Plant* (1994), 84 C.C.C. (3d) 203 (S.C.C.), the police had received an anonymous Crime Stoppers tip about marijuana being grown in the basement of a "cute house". The exact address of the house was not given in the tip but, acting on the tip, the police were able to find the house. The information in support of the search warrant gave the impression that the person who had given the tip had reported the exact address to the police.

[141] Sopinka J., writing for the Court, held that this "mis-statement" did not affect the validity of the warrant. At p. 216 he stated:

Although the British Columbia Court of Appeal in *R. v. Donaldson* (1990), 58 C.C.C. (3d) 294 determined that a search warrant must be quashed should a deliberate deception by the police be proven, neither the trial judge nor the Court of Appeal found any deliberate attempt to mislead the issuing justice in the case at bar. Furthermore, the appellant has not pointed to any new evidence which would indicate that the misstatement by the officer was anything more than a good faith, albeit erroneous, attempt to draft the information concisely by omitting reference to the step between the general tip and the conclusion as to the exact address.

In considering the material that was properly before the authorizing judge, however, only the information actually obtained from the tipster should be included. In addition, this information can be amplified by reference to the fact that the police were able to locate the residence matching the description which they were given. [Emphasis added]

[142] The Supreme Court of Canada recently articulated the appropriate standard of review for a wiretap authorization in *R. v. Araujo* (2000), 149 C.C.C. (3d) 449 (S.C.C.) at para 54:

...whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge.

[143] LeBel J., for the Court, at para. 57 cited with approval various appellate court judgments to the effect that:

[T]he function of the reviewing judge is to determine whether there is any evidence remaining, after disregarding the allegations found to be false and taking into consideration the facts found to have been omitted by the informant, upon which the justice could be satisfied that a search warrant should issue.

[144] In making this determination, the reviewing judge may consider additional evidence tendered by the Crown on the review, assuming the authorities acted in good faith:

Where the erroneous information results from a simple error and not from a deliberate attempt to mislead the authorizing judge, amplification may be in order. Nonetheless, there would be no need to seek to amplify the record if sufficient reliable material remains even after excising the erroneous material.

Thus, in looking for evidence that might reasonably be believed on the basis of which the authorization could have issued, the reviewing court must exclude erroneous information. However, if it was erroneous despite good faith on the part of the police, then amplification may correct this information. (at paras. 57-8)

[145] LeBel J. also cited with approval the following passage regarding the effect of errors from the Nova Scotia Court of Appeal's decision in *R. v. Morris* (1998), 134 C.C.C. (3d) 539:

These cases stress that errors, even fraudulent ones, do not automatically invalidate the warrant.

This does not mean that errors, particularly deliberate ones, are irrelevant in the review process. While not leading to automatic vitiation of the warrant, there remains the need to protect the prior authorization process. The cases just referred to do not foreclose a reviewing judge, in appropriate circumstances, from concluding on the totality of the circumstances that the conduct of the police in seeking prior authorization was so subversive of that process that the resulting warrant must be set aside to protect the process and the preventive function it serves. (at para. 54)

ii. Conclusion on this issue

[146] As noted earlier, any argument challenging the affidavit in support of the search warrants is misplaced since it was held in *R. v. Wilder No. 3* that the warrants were unconstitutional as a result of the decision in *Baron*. In that ruling, I admitted the evidence obtained as a result of the unconstitutional warrants under s. 24(2) of the Charter. In any event, I would have found that Mr. Ma did not deliberately omit the information identified by the accused with the intent to mislead. Even taking into account the omitted facts, I would have had no hesitation in concluding that there was sufficient reliable evidence in the affidavit that might reasonably be believed on the basis of which the warrant could have been granted.

[147] Apart from that, s. 231.3(1) of the Income Tax Act at the time these warrants were applied for stated:

A judge may, on ex parte application by the Minister, issue a warrant authorizing any person named therein to enter and search any building, receptacle or place for any document or thing that may afford evidence as to the commission of an offence under this Act and to seize and, as soon as practicable, bring the document or thing before, or make a report in respect thereof to, the judge, or where the judge is unable to act, another judge of the same court to be dealt with by the judge in accordance with this section. [Emphasis added]

[148] Having reached this conclusion, it is not necessary for me to say anything more on this issue. Nevertheless, I wish to make two observations. The first is that the communication between Mr. Frankel Q.C. and the Revenue Canada Officials in Vancouver regarding the decision by the head office in Ottawa to overrule their decision to include the fact that Criminal Code offences might be laid is usually privileged: *R. v. Chan* (2002), 164 C.C.C. (3d) 24 (Alta.Q.B.), and *R. v. Trang* (2002), 168 C.C.C. (3d) 145 (Alta.Q.B.). In this case, however, it is obvious that the Crown has, in its infinite wisdom, decided to waive that privilege. The second observation that I wish to make is that I accept the evidence of Mr. Jamieson that Revenue Canada Officials were told by Mr. Breitzman and Mr. Russ that they had to sue for the full amount of the invoices as opposed to the 30% on the advice of their lawyers because they could not admit to the civil courts that they were part of a fraud.

[149] In *R. v. Araujo*, supra, LeBel J., for the Court, dealt with the kind of affidavit that the police should submit in order to seek permission to use wiretapping. He stated that the obligation of anyone seeking an ex parte order was to make full and frank disclosure of material facts, avoid boiler plate language and wherever possible include an affidavit directly from those with first hand knowledge. He stated at paras. 46-8:

....So long as the affidavit meets the requisite legal norm, there is no need for it to be as lengthy as *À la recherche du temps perdu*, as lively as the *Kuma Sutra*, or as detailed as an automotive manual. All that it must do is set out the facts fully and frankly for the authorizing judge in order that he or she can make an assessment of whether these rise to the standard required in the legal test for the authorization. Ideally, an affidavit should be not only full and frank but also clear and concise. It need not include every minute detail of the police investigation over a number of months and even of years.

A corollary to the requirement of an affidavit being full and frank is that it should never attempt to trick its readers. At best, the use of boiler-plate language adds extra verbiage and seldom anything of meaning; at worst, it has the potential to trick the reader into thinking that the affidavit means something that it does not. Although the use of boiler-plate language will not automatically prevent a judge from issuing an authorization (there is, after all, no formal legal requirement to avoid it), I cannot stress enough that judges should deplore it. There is nothing wrong -- and much right -- with an affidavit that sets out the facts truthfully, fully, and plainly. Counsel and the police officers submitting materials to obtain wiretapping authorizations should not allow themselves to be led into the temptation of misleading the authorizing judge, either by the language used or strategic omissions.

[150] While disclosure must be full, fair and frank, it is not the task of the issuing judge to assess the merits of the prosecution. There must be, at a minimum, reasonable grounds to believe that an offence has been committed. In *Re Church of Scientology and the Queen* (No.6) (1987), 31 C.C.C. (3d) 449, the Ontario Court of Appeal pointed out that the search warrant is an investigative tool and that: "Police work should not be frustrated by the meticulous examination of facts and law that is appropriate to a trial process".

[151] The process of prior authorization is very important for the prevention of unreasonable searches. It is not a mere formality. In *R. v. Feeney*, [1997] 2 S.C.R. 13 at p. 47 Sopinka J. stated:

The purpose of the Charter is to prevent unreasonable intrusions on privacy, not to sort them out from reasonable intrusions on an ex post facto analysis.

[152] In *R. v. Morris* (1998), 134 C.C.C. (3d) 539 (N.S.C.A.), Cromwell J.A., for the Court, wrote at pp. 551-2:

The prior authorization process, however, is quite fragile. When the police attend before a Justice of the Peace, no one, for obvious reasons, is there as an advocate of the interests of the target of the search. The justice of the peace will usually not be a lawyer or a judge. The circumstances under which the warrant is sought may be urgent and the process, of necessity, quite informal. This simply demonstrates that the process depends on two things: the honesty, good faith and diligence of the police when they gather and present their grounds for consideration and the independence and caution of the Justice of the Peace deciding whether to authorize the proposed search.

The nature of the process demands candour on the part of the police. They are seeking to justify a significant intrusion into an individual's privacy. This is especially so when it is proposed to search a dwelling house which has long been recognized as the individual's most private place. The requirement of candour is not difficult to understand; there is nothing technical about it. The person providing the information to the justice must simply ask him or herself the following questions: "Have I got this right? Have I correctly set out what I've done, what I've seen, what I've been told, in a manner that does not give a false impression?" see *R. v. Dellapenna* (1995), 62 B.C.A.C. 33 (B.C.C.A.) per Southin J.A. at para. 37.

In reviewing police conduct during the prior authorization process, the court's attention cannot focus solely on the particular search under consideration. It is tempting to do so, especially where, as here, police suspicions proved to be well founded. However, the purpose of the prior authorization requirement must be kept in mind. As noted, the purpose is to prevent unreasonable searches, not to condemn them after the fact. If the prior authorization process is not vigorously upheld by the courts, it will lose its meaning and effectiveness. That process is in place to protect everyone from unreasonable intrusions by the state. In considering this, or any other s. 8 case, the court must not only protect the rights of this individual, but also protect the prior authorization process which helps assure that the rights of all individuals are respected before, not after, the fact.

[153] In my view, it would have been advisable for Mr. Ma to have disclosed the fact that notwithstanding the fact that Mr. Russ and Mr. Breitzman claimed that they were only receiving 30% of their invoices, they had both filed civil actions against the accused for the full amount of these invoices. I am satisfied, however, that both Breitzman and Russ advised Mr. Ma and other Revenue Canada Officials that in their civil action against the accused they only claimed 100% of the invoices on the advice of their lawyers. Their lawyers were obviously concerned, as was testified to by Mr. Jamieson, with the maxim *Ex turpi contractu actio non oritur* - from an immoral or iniquitous contract an action does not arise. A contract founded upon illegal or immoral consideration cannot be enforced by action. I hasten to add that in the cross-examination of Mr. Jamieson by the accused he did not state the above quoted Latin maxim but he did state words to the effect that Mr. Breitzman and Mr. Russ were advised by their lawyers that the courts would not enforce an illegal contract.

[154] I have instructed myself on all of the law enunciated above. Notwithstanding the fact Mr. Ma believed that this declaration against economic interest by Mr. Breitzman and Mr. Russ to be true, in my view, he should have advised the authorizing judge about the civil actions. I find, however that none of these omissions, including this one, from the affidavit in support of the warrants are strategic omissions. In my view, even if the authorizing judge was advised of the reason why the civil actions took the form that they did, he still could have issued the search warrants. I have arrived at this conclusion after reading the 80 page affidavit that has already been approved by the Federal Court and the Federal Court of Appeal in *Solvent Petroleum Extraction Inc v. Canada (Minister of National Revenue)*, *supra*.

I. THE VISITS OF REVENUE CANADA OFFICIALS TO THE ACCUSED'S BUSINESS PREMISES WITHOUT PERMISSION AFTER BEING WARNED BY THE ACCUSED'S LAWYER, MR. CRUMP, THAT THEY SHOULD FIRST OBTAIN PERMISSION FOR SUCH VISITS

i. Background to this issue

- [155] The accused's lawyer, Mr. Crump, purported to ban Revenue Canada Officials from the accused's business premises. Revenue Canada Officials, on the other hand, were of the view that, pursuant to s. 231 of the Act, they had the right to go onto the accused's business premises and speak to their employees without the accused's consent.
- [156] Under this heading, the accused alleges that Revenue Canada Officials visited the accused's plant in Aldergrove and spoke to various employees of the accused without first obtaining permission to be on the premises. The accused also complains that Revenue Canada Officials also questioned the person who purported to be the engineer on the Organic project on the accused's property in Alberta.
- [157] In particular, Revenue Canada Officials visited the accused's Aldergrove plant without permission on the following occasions:
- (a) On December 5, 1985, pursuant to s. 231 of the Act Mr. Ma of Revenue Canada entered the accused's plant at Aldergrove and interviewed Alida Saulnier, the accused's bookkeeper. The information obtained from her was included in para. 39 of the affidavit in support of the search warrants.
 - (b) On December 11, 1985, Mr. Moi and Mr. Ma, both from Revenue Canada, visited the Aldergrove plant and attempted to interview Alida Saulnier but were refused information.
 - (c) On December 17, 1985, Mr. Moi and Mr. Ma again visited the Aldergrove plant to look for activity and to speak to Alida Saulnier.
 - (d) On December 19, 1985 Mr. Ma returned to the accused's Aldergrove plant to see if some equipment was being moved from the plant. On that day Mr. Ma spoke to one of the accused's employees, Mr. Jim McDonald. Mr. McDonald admitted that he was in charge of the plant and admitted that the accused was his boss. Mr. McDonald also told Mr. Ma. that no one was to be allowed beyond the office area without the accused's consent. The information received from Mr. McDonald is contained in para. 44 of the affidavit in support of the search warrant.
 - (e) On March 6, 1986 Mr. Ma and Mr. Seagle, both from Revenue Canada, attended the accused's Aldergrove plant and identified themselves as accountants to two of the accused's employees, Mr. Thom and Mr. Gauthier. They told these employees that they were waiting to see Mr. Breitzman and Mr. Russ. Mr. Ma and Mr. Seagle eventually did see Mr. Breitzman and Mr. Russ at the Aldergrove plant that day. The Revenue Canada Officials received some non committal information from Mr. Breitzman and Mr. Russ but they eventually decided to cooperate fully with Revenue Canada Officials after they were granted immunity some time later. The information that Mr. Ma and Mr. Seagle received from Mr. Gauthier on that date, March 6, 1986, is contained in para. 46 of the affidavit in support of the search warrants.

- (f) Revenue Canada Officials entered onto the accused's property to speak to Mr. Robert Frederick Becker after they had been warned by the accused's lawyers that they should not trespass onto their private property without their permission.
- (g) Mr. Ma and Tom Waters from the Vancouver Special Investigation office and Joe Hanks from the Calgary office visited Mr. Becker to speak with him. They advised him they were looking into the accused's business transactions for the previous two years and that they understood the accused was involved in the Organic research project. They also advised him that among the documents they obtained from the accountant and lawyer in Winnipeg were two letters signed by R.F. Becker of Becker Engineering Ltd. The Revenue Canada Officials told Mr. Becker that the purpose of the visit was to ascertain his involvement in the research project and to discuss the contents of the two letters. The interview, however, was interrupted by a call from the accused's lawyer, Mr. Crump, to Mr. Becker.
- [158] In order to deal with this issue it is necessary for me to canvass my understanding of the law. Before doing that however, it is important to remember that the accused has to prove these alleged breaches on a balance of probabilities. Here there is no evidence of the physical layout of the Aldergrove plant, there is no evidence as to the hours of business of this plant and the property in Alberta, there is no evidence of "no admittance" signs. During one of these visits, Mr. McDonald told Mr. Ma that no one was to be allowed beyond the office area without the accused's consent. This raises the implication that the public had general access to the office area. There is absolutely no evidence before me as to where the interview between Mr. Breitzman, Mr. Russ and Mr. Saulnier took place. Nor is there any evidence before me as to what part of the accused's business premises the interview with Mr. Becker took place.
- [159] Even if the Revenue Canada Officials misrepresented themselves as accountants to the receptionist in order to gain access to Messrs. Russ and Breitzman, I have no proof, on a balance of probabilities, that the Revenue Canada Officials committed any breach of s. 8 in visiting these premises without first obtaining permission from the accused or his lawyer. This should dispose of the matter, nevertheless, I will continue with my understanding of the law.

ii. The law

- [160] It is trite law that a warrant is not needed for the police to enter business premises during working hours where those premises are open to the public. The owner of the business premises has no reasonable expectation of privacy to those parts of his or her premises to which the public is invited: *R. v. Kouyas* (1994), 136 N.S.R. (2d) 195 (N.S.C.A.); affirmed (1996), 103 C.C.C. (3d) 224 (S.C.C.); *R. v. Fitt* (1995), 96 C.C.C. (3d) 341 (N.S.C.A.); affirmed (1996), 103 C.C.C. (3d) 224 (S.C.C.). In *Fitt* it was held that the warrantless seizure of gambling devices in plain view on business premises which was open to the public did not contravene s. 8 of the Charter.

iii. Conclusion on this issue

[161] In the circumstances of this case, I find that, pursuant to their powers under s. 231 of the Act, up until March 6, 1986, Revenue Canada Officials were justified in entering onto the business premises of the accused without first getting the permission of the accused or his lawyer. I find that it was only after that date that the predominant purpose of the inquiry was penal consequences. With respect to the interview with Mr. Becker, that interview involved the Organic project. I have already found as a fact that it was only after April 7, 1986 that the predominant purpose of that inquiry was to establish penal liability.

[162] In the event that I am wrong, and there was a breach of the accused's rights by the entry onto the Aldergrove plant, I will deal with the remedy under my s. 24(1) and s. 24(2) analysis.

J. THE USE OF A MAIL COVER BY REVENUE CANADA OFFICIALS

[163] In July 1987, a 60 day mail cover was imposed by Revenue Canada which required Canada Post to photocopy mail sent to and from Hong Kong by the accused and the subject companies. Mr. Ma testified that he was aware of this, and that it was one of the tools available to Revenue Canada at the time. He did not recall receiving any evidence as a result of this mail cover.

i. Was the Mail Cover a search?

[164] In *R. v. Evans* (1996), 104 C.C.C. (3d) 23 (S.C.C.) Sopinka J. pointed out at p. 29 that not every investigatory technique used by the police is a "search" within the meaning of s. 8 of the Charter. As to what constitutes a "search" Sopinka J. commented as follows at p. 29:

... As this Court stated in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 160, the objective of s. 8 of the Charter is "to protect individuals from unjustified state intrusions upon their privacy". Clearly, it is only where a person's reasonable expectations of privacy are somehow diminished by an investigatory technique that s. 8 of the Charter comes into play. As a result, not every form of examination conducted by the government will constitute a "search" for constitutional purposes. On the contrary, only where those state examinations constitute an intrusion upon some reasonable privacy interest of individuals does the government action in question constitute a "search" within the meaning of s. 8.

[165] Under this definition, the mail cover was clearly a search. In fact, it was a warrantless search and therefore prima facie unreasonable. In my view, this search was in breach of the accused's s.8 Charter rights. According to the evidence on the voir dire, however, no evidence was discovered as a result of this search. Nevertheless I will be considering its use when I consider the good faith argument.

K. CONTEXT IN WHICH THESE ALLEGED S. 7 AND S. 8 CHARTER BREACHES ARISE

[166] By choosing to take advantage of the government's largesse in relation to scientific development in Canada, the accused consciously and voluntarily chose to enter into this very lucrative regulated sphere of the Act. In my view, the accused's voluntary entry into this scheme distinguishes this case from the facts in Jarvis.

[167] With regard to the ascertainment of a Charter breach, (under either s. 7 or s. 8) and the exclusion of the impugned evidence pursuant to either ss. 24(1) or 24(2), Jarvis mandates that a contextual analysis is required, including an assessment of the nature of the challenged evidence. The context here is different from that in Jarvis. However, the notion that the Charter must receive a "contextual" application is recognized in a number of cases, including Jarvis.

[168] In Jarvis, the Court stated at paras. 63-4:

At this stage, it is a firmly established principle that the Charter must receive contextual application. The scope of a particular Charter right or freedom may vary according to the circumstances. [Cases cited in support].

For present purposes, where ss. 7 and 8 of the Charter are at issue, it is instructive to note both that the requirements of fundamental justice relevant to the former section "are not immutable; rather, they vary according to the context in which they are invoked" (R. v. Lyons, cite given) and that context will determine the expectation of privacy that one can reasonably expect the latter section to protect (Thomson Newspapers, McKinlay Transport, Baron and Branch, all cited).

[169] The contextual factors critical to an analysis of the accused's application to have the evidence excluded include: (i.) he voluntarily entered into the regulated SRTC arena, for benefit; (ii.) he chose to create and use artificial individuals (corporations); (iii.) the date of the events and the state of the law; (iv.) the lack of compulsion on the accused himself; and (v.) the drastic change in the law.

i. Voluntary entry into a regulated field

[170] In R. v. Fitzpatrick (1995), 102 C.C.C. (3d) 144 (S.C.C.) the Court considered the significance of state compulsion within a regulated activity voluntarily entered into by the accused. In discussing s. 7, La Forest J. stated at paras. 37-8:

(2) Lack of coercion

Even more important, however, is the fact that the "coercion" exercised by the state here is, to say the least, muted. This is a far cry from the facts in S(RJ), Branch and Thomson Newspapers, where individuals were subpoenaed to testify on pain of contempt, without any choice in the matter. It is true that once an individual decided to participate in the groundfish fishery, and accepts his licence, he is thereafter "compelled" to submit hail reports and fishing logs in accordance with the dictates of s.61 of the Fisheries Act. But this is not an obligation imposed upon a fisher through "the denial of free and informed consent", in the terms suggested by the

Chief Justice in Jones, *supra*, at p.367CCC, p.659 DLR. In fact, free and informed consent is the essence of the relationship between the state and the individual in this context.

No one is compelled to participate in the groundfish fishery; they do so purely as the result of their own free decision...

Further, at para. 42, La Forest J. stated:

Surely it defies common sense to argue that the state, in seeking to regulate the commercial fishery by attaching certain conditions to a fishing licence, is coercing an individual to furnish information against himself. Quite the opposite in fact is true; the individual is furnishing information that is meant to benefit him or her, through proper and fair distribution of scarce fishing resources. Just because this information may later be used in an adversarial proceeding, when the state seeks to enforce the restrictions necessary to accomplish its regulatory objectives, does not mean that the state is guilty of coercing the individual to incriminate himself. The state required certain information to be provided, and the individual voluntarily assumed the obligation to do so in deciding to become a fisher in the first place. It ill lies in the mouth of someone who knowingly assumes an obligation for a beneficial purpose to argue that this obligation has the effect of denying him his rights. [Emphasis added]

[171] La Forest J. then proceeded to review the reports in light of s. 8 considerations in assessing whether or not an abuse existed, noting at para. 49 that:

My conclusion that it is not abusive for the state to prosecute those who overfish, using their own haul reports and fishing logs as evidence of the offence, is strengthened by reference to this court's jurisprudence on the application of s.8 of the Charter in the regulatory context. In applying a contextual approach under s.8, this court has repeatedly emphasized that searches and seizures of documents relating to activity known to be regulated by the state are not subject to the same high standard as searches and seizures in the criminal context. This is because a decreased expectation of privacy exists respecting records that are produced during the ordinary course of business: see in particular my reasons in both Thomson Newspapers, *supra*... and R. v. Potash, as well as those of Wilson J. in R. v. McKinlay Transport Ltd R. v. Plant... In my view, a similar standard should be applied to the use in a regulatory prosecution of records that are statutorily compelled as a condition of participation in the regulatory area. Little expectation of privacy can attach to these documents, since they are produced precisely to be read and relied upon by state officials. Similarly, I do not believe it is inconsistent with the principles of fundamental justice for the Crown to rely upon documents in a prosecution for overfishing. The documents should not be equated to involuntary confessions to investigators, reflecting as they do instead the voluntary compliance by commercial fishers with the statutory requirements of the regulated fishing regime. The principle against self-incrimination under s.7 of the Charter should not be understood to elevate all records produced under statutory compulsion to the status of compelled testimony at a criminal or investigative hearing. [Emphasis added]

[172] This reasoning in Fitzpatrick was applied by the British Columbia Court of Appeal in its analysis of the admissibility of audit information obtained in the instant case, in the decision *R. v. Wilder* (2000), 142 C.C.C. (3d) 418 (B.C.C.A.) at pp. 431-2:

A comparison of the factors identified in Fitzpatrick to the facts of the case at bar supports the Crown's position. In terms of the nature of the records, the records in this case were not merely "like" business records, but appear, for the most part, to be business records in the ordinary sense. As to the Crown's purpose in using the records, s. 241 expressly provides for the use of taxpayer information in litigation including criminal proceedings. This accords with Fitzpatrick where it was held that the intended use of the records in the prosecution of over-fishing was contemplated by, and indeed essential to, the regulatory scheme.

Two other factors should be noted. First, the records in question here are not remotely like "confessions". That is one of the more obvious distinguishing features from *White* where the statement was made after the events which gave rise to the charge. A related consideration is that a true confession (as was the accident report in *White*) is generally tendered to prove the truth of what is said therein. These business records may not serve that purpose but any falsity in them may constitute the essence of the offence. Secondly, in Fitzpatrick there was emphasis on the consideration that the obligation to file the reports was one voluntarily assumed by the person engaged in fishing because that was an activity they voluntarily entered into. That applies a fortiori to those engaged in the SRTC scheme. They were necessarily persons of some sophistication in matters of business who had the constant assistance of lawyers, accountants and other advisors. They knew that they had to keep records. They knew that they had to produce them to the tax authorities and the knew, or should have known, that s. 241, while creating a right of confidentiality had a clear exception in s.241(3) for proceedings such as these.

[173] Part VIII of the Income Tax Act provided a benefit to those who chose to take advantage of it: significant monies, otherwise earmarked for tax, were available upon the satisfaction of certain preconditions. The accused voluntarily chose to conduct the business of his corporations so as to take advantage of this tax regime for financial benefit. The use of corporations undoubtedly also limited his liability from would be investors. That compliance with the Act, including maintaining books and records and producing them was clear. In the context, I am of the view that the accused and his companies had little, if any, expectation of privacy vis-à-vis Revenue Canada.

L. THE ACCUSED'S EXPECTATION OF PRIVACY IN THE SEIZED DOCUMENTS

[174] In *R. v. Sandhu*, (1993), 82 C.C.C. (3d) 236, the British Columbia Court of Appeal dealt with the onus on the accused to prove that s/he had an expectation of privacy. At p. 255, Prowse J.A. held that an accused had no standing to object to a search of a bag containing drugs which took place at an airport. At pp. 255-6 her Ladyship stated:

In this case, I conclude that Mr. Sandhu does not have standing to challenge the admissibility of the evidence obtained in the search and seizure on December 27, 1990, at the airport. The onus was on him to prove, on a balance of probabilities, that he had a reasonable expectation of privacy with respect to the bag and its contents. The evidence does not support that conclusion. Although the evidence does suggest that Mr. Ahmed had a reasonable expectation of privacy with respect to the bag and its contents, the authorities do not support the proposition that Mr. Sandhu can rely on that fact to give him standing in the circumstances. [Emphasis added]

See also Ramsay (No. 1) (1992), 13 B.C.A.C. 172 (B.C.C.A.) at p. 175.

[175] In *R. v. Wilder* No.3 I dealt with this issue. I continue to adopt what I said there. This issue was reargued with such vigour, however, that I have decided to add to what I said in my previous ruling.

[176] By choosing to take advantage of the government's largesse in relation to scientific development in Canada, the accused consciously and voluntarily chose to enter into the regulated sphere of the Act. The voluntary entry distinguishes this case from the facts in *Jarvis*. Furthermore, most of the documents are corporate in nature.

[177] It has been held repeatedly that corporations enjoy a lower expectation of privacy than do natural persons. Within the SRTC arena, this expectation must be reduced further. In my view, the accused has failed to establish on a balance of probabilities a reasonable expectation of privacy in any of the information obtained.

[178] In *Kligman v. Canada (M.N.R.)* (2003), 227 F.T.R. 126 (T.D.) at paras. 103-4, the Court considered the privacy interests involved in a corporation compelled to provide information pursuant to the provisions of the Act discussed in *Jarvis*:

Although the corporate applicants in the case at bar are not publicly traded companies like the company in question in *British Columbia Securities Commission*, they still have records that they must maintain for regulatory purposes, including purposes related to the ITA. The privacy interest in these records will be minimal.

The privacy interests of corporate entities are substantially limited compared to those of individuals. The values on which the privacy interests of individuals include recognition of, and respect for, the physical and psychological integrity of human beings. These values are simply not present in the case of corporate entities. Accordingly, I find that neither s. 7 nor s.8 of the Charter would be violated by compelling the corporate applicants to comply with the Requirements as issued by the CCRA.

[179] The Court in *R. v. Pheasant*, [2000] O.J. No. 4237 (Q.L.) (C.J.) also dealt with the issue of the applicants' standing and privacy interests in relation to the corporate documents. The Requirements had not been aimed at the applicants personally. At para. 35 Lane J. stated:

There appears to be no legal authority as to whether an individual director, officer or agent of such organizations has a reasonable expectation of privacy in such records. The law is clear that an expectation of privacy attaches to banking records of an individual. The records at issue are not personal banking records, but the records of non-profit and charitable organizations. The issue, therefore, is a novel one.

[180] After discussing the factors identified in *Plant and McKinlay*, the Court concluded that the applicants did not have a reasonable expectation of privacy. At paras. 37-8 Lane J. continued:

Applying all the factors to be considered to the totality of the circumstances in this case, I am not satisfied that the applicants do have any reasonable expectation of privacy in the banking records of the non-profit and charitable organizations. The records were held by the banks, controlled by the banks, and subject to audit, inspection and production at the request of Revenue Canada without notice to or consent of the organization, let alone the applicants. The materials Revenue Canada sought from the banks included signature cards, account statements, loan files, copies of all debits and credits, and current balances all materials deposited at the banks by and on behalf of the organizations, generated by the organizations as part of their activities, or by the banks on behalf of the organizations.

Most important, these banking records of the organizations are not documentation of a "personal and confidential nature," going to the "biographical core of personal information," including information about "intimate details of lifestyle and personal choices of the individual," which the s.8 right to privacy is needed to protect, : *Plant*, supra, para. 19. As LaForest J. noted in *R. v. Dymont*, [1988] S.C.J. No.82 at pp.429-430, privacy in relation to information "is based on the notion of the dignity and integrity of the individual" derived from the assumption that "all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit."

See also *R. v. Dowsell*, [1999] O.J. No. 816 (Q.L.) (Ont.C.J.).

M. THE SS. 7 and 24(1) ANALYSIS

[181] Before embarking upon this s. 24(1) analysis, I propose to first deal with the relationship between s.7 and s.8 of the Charter.

i. The relationship between s.7 and s.8 of the Charter

[182] This relationship was considered in various decisions of the Supreme Court of Canada. In *Reference re s.94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, Lamer J. (as he then was) stressed that ss. 8-14 of the Charter address specific deprivations of the rights guaranteed by s. 7 of the Charter.

[183] In *Reference re ss.193 and 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123, (the *Prostitution Reference* case) Lamer J. (as he then was) stated at para. 69:

...it is neither wise nor necessary to subsume all other rights in the Charter within s.7. A full and generous interpretation of the Charter that extends the full benefit of its protection to individuals can be achieved without the incorporation of other rights and freedoms within s.7.

[184] In *R. v. Mills* (1999), 139 C.C.C. (3d) 321 (S.C.C.) McLachlin and Iacobucci JJ. explored the connection between ss. 7 and 8 of the Charter as follows at paras 87-8:

The present appeal asks how to define the privacy rights of third parties in light of the accused's right to gain access to evidence in order to make full answer and defence. As the right to make full answer and defence is a principle of fundamental justice protected by s. 7 of the Charter, it is helpful to explore the connection between ss. 7 and 8 of the Charter. In *Re B.C. Motor Vehicle Act*, supra, at p. 502, Lamer J. stated for the majority:

Sections 8 to 14, in other words, address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s. 7. It would be incongruous to interpret s. 7 more narrowly than the rights in ss. 8 to 14.

Of course, later cases have held that the text of the Charter supports some differences between ss. 7 and 8. For example, s. 8 applies to corporations whereas s. 7 does not: *Hunter v. Southam*, supra; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577. In *CIP Inc.*, supra, at p. 854, this Court held that the concern that there be no incongruity between ss. 7 and 8-14 related to the principles of fundamental justice and not to the scope of life, liberty and security of the person.

Given that s. 8 protects a person's privacy by prohibiting unreasonable searches or seizures, and given that s. 8 addresses a particular application of the principles of fundamental justice, we can infer that a reasonable search or seizure is consistent with the principles of fundamental justice. Moreover, as we have already discussed, the principles of fundamental justice include the right to make full answer and defence. Therefore a reasonable search and seizure will be one that accommodates both the accused's ability to make full answer and defence and the complainant's privacy right.

[185] As the right to make full answer and defence is a principle of fundamental justice protected by s. 7 of the Charter, it is helpful to explore the connection between ss. 7 and 8 of the Charter. In *Re B.C. Motor Vehicle Act*, supra, at p. 502, Lamer J. stated for the majority:

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Given that s. 8 protects a person's privacy by prohibiting unreasonable searches or seizures, and given that s. 8 addresses a particular application of the principles of fundamental justice, we can infer that a reasonable search or seizure is consistent with the principles of fundamental justice.

[186] In *Cunningham v. Canada* (1993), 80 C.C.C. (3d) 492 (S.C.C.) at p. 499 McLachlin J. stated:

... The principles of fundamental justice are concerned not only with the interests of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests both subjectively and procedurally.

ii. Corporations and s. 7

[187] In the above quotation from *R. v. Mills*, supra, there is a reference to *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927, in which the Court stated at pp. 1002-3:

In our opinion, a corporation cannot avail itself of the protection offered by s. 7 of the Charter. First, we would have to conceive of a manner in which a corporation could be deprived of its "life, liberty or security of the person". We have already noted that it is nonsensical to speak of a corporation being put in jail...

And at p. 1004:

... read as a whole, it appears to us that this section [section 7] was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights. "Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings. In this regard, the case of *Big M Drug Mart*, supra, is of no application. There are no penal proceedings pending in the case at hand, so the principle articulated in *Big M Drug Mart* is not involved.

[188] In *R. v. Pheasant*, supra, three people were charged with GST fraud. They challenged the use of demands (similar to the ITA Requirements) after reasonable and probable grounds to lay criminal charges existed. The accused alleged breaches of ss. 7 and 8 of the Charter.

[189] In rejecting the applicant's s. 7 argument, the Court noted at para. 43 that Revenue Canada had never spoken with them:

It is useful to note that this is not a situation where the Crown is seeking to tender any statements of the applicants. It has long been held that corporations have no s.7 interests, but that individuals who control or work on behalf of corporations may do so: *Irwin Toy Ltd. v. Quebec (Attorney-General)* (1989), 58 D.L.R.(4th)577; *Branch and Levitt*, supra, para. 39-40. This application is clearly distinguishable from those cases upon which the applicants rely involving taxpayers and their corporations as targets. In those cases, statements given by the targets to the state provided an air of reality for a potential s. 7 breach, and the issue of standing did not arise. In this case, Revenue Canada never spoke to the applicants during the course of the audit, nor when these Requirements were sent out to the banks. I reject Ms. Simone's submission that statements given to Revenue Canada by other officers, directors and agents of the various organizations can be the basis for any breach of any s. 7 interest in the applicants.

[190] The Court also rejected an analogy between personal banking records and corporate banking records at para 46:

I am also satisfied that the applicants cannot rely on any common law contractual duty of confidentiality owed by banking institutions to their customers. The documents at issue were not personal banking records, but records of the non-profit and charitable organizations. Whatever contractual relationship existed, existed between the banks and the organizations, not between the banks and the applicants. I note, furthermore, that the common law duty of confidentiality as set out in *Tournier*, supra, has an express exception for situations where "the circumstances give rise to a public duty of disclosure." The statutory powers under the Excise Tax Act imposed a duty on the banks to release the documents and records as required. The records were held in the possession of the bank, and the Request to Produce was a most unobtrusive means of acquiring the information.

[191] This approach has been reiterated and was recently applied by the Federal Court Trial Division in *Kligman*, supra, a post-Jarvis decision dealing with documents produced pursuant to section 231.2 ITA requirements that were issued to persons and corporations during a CCRA investigation: the Court excluded the documents resulting from Requirements served on natural persons and found that s. 7 of the Charter did not preclude the admission of the documents resulting from the Requirements served on the corporations. *Beaudry J.* stated at paras. 91-5:

In *Jarvis*, the Supreme Court noted that where the s.7 requirements of fundamental justice are engaged by a finding that the predominant purpose of an investigation is penal in nature, self-incrimination is the primary principle of fundamental justice on which the determination will be based. However, the Court added that protection against self-incrimination does not mean an absolute ban on requirements to provide information. The right of a person not to provide information adverse to his liberty interest must be balanced against the opposing principle of fundamental justice which posits that relevant evidence should be available to the trier of fact in the search for the truth.

With these conflicting principles in mind, I am inclined to follow the findings in *Jarvis and Ling* that CCRA cannot expect taxpayers to provide information that has the effect of assisting the state in its efforts to deprive them of their liberty. Accordingly, I find that the rights of Kligman and Sandler would be compromised by requirements to provide information to further an investigation which is geared mainly toward assessing criminal liability.

Notwithstanding this conclusion, it is not possible in this case to proceed directly to a finding that the Charter rights engaged in ss. 7 and 8 are immediately in play and that the Requirements ought to be quashed in their entirety. In *Jarvis and Ling*, the Supreme Court gave ample guidance on the effects of CCRA investigations on the rights of physical persons. However, the cases did not expressly address the rights of corporations in the context of such inquiries. It is therefore necessary to address this important distinction, which is more than a mere nuance.

An adversarial relationship between the state and the taxpayer does crystallize when the predominant purpose of the inquiry is to determine penal liability. This is a valid statement whether the taxpayer is a physical person or a corporation. However, the interests engaged in that relationship will differ depending on the nature of the taxpayer. The Supreme Court alluded to this possibility in *Jarvis and Ling* when it stated that the scope of a Charter right will vary according to circumstances. Such variances in circumstances underscore the importance of analyzing such rights using a contextual approach.

A corporation cannot enjoy life, liberty or security of the person. Accordingly, s. 7 of the Charter does not apply to corporations. The Supreme Court has held that a corporation cannot invoke this right in order to shield itself from criminal investigation or prosecution. This rule was originally stated in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [cite given]. The rule has been reiterated in *Thomson* and *British Columbia Securities Commission*, *supra*. It therefore remains only to be determined whether s. 8 can be applied in respect of the corporate applicants.

[192] Counsel for the accused points out that a consideration of "standing" is inappropriate when considering s. 7. This is a proposition with which I agree. It is in my view that it is crucial to consider the character of the "individual" being dealt with by the state. The accused in this case was not compelled personally to produce anything during the investigation; no personal banking records are sought to be introduced or relied upon. Rather, corporate records are sought to be tendered and relied upon. Section 7 has no application and therefore cannot form a basis for relief for the accused.

[193] Apart from the corporate records, however, the accused submits that there was also other information obtained from third parties pursuant to Requirements after the predominant purpose became penal liability. He refers specifically to the records of Gerald Byerlay and the undisclosed information given to Revenue Canada by Mr. Miles and Mr. Miller. It is therefore necessary for me to continue with my s. 7 breach analysis.

iii. The s. 7 breach

[194] In *R. v. D'Amour* (2002), 166 C.C.C. (3d) 477 (Ont.C.A.), Doherty J.A. points out that the protection afforded to an individual against self-incrimination by s. 7 of the Charter cannot be described exhaustively or in the abstract. As Iacobucci J. said in *R. v. White*, *supra*, at p. 276:

The principle against self-incrimination demands different things at different times, with the task in every case being to determine exactly what the principle demands, if anything, within the particular context at issue.

[195] The context in which an accused's s. 7 claim arises usually embraces both an alleged state compelled production of material and a subsequent use of that material against the appellant in criminal proceedings. In *R. v. D'Amour*, *supra*, Doherty J.A. stated at pp. 489-91:

It is well established that the protection afforded by the principle against self-incrimination can extend to the use in a subsequent proceeding of material previously obtained from an accused by state compulsion: *R. v. S.(R.J.)*, *supra*. However, not every subsequent use of anything and everything obtained through state compulsion will run afoul of s. 7. The "demands" of the principle against self-incrimination in any given situation must take into account not only the extent to which the rationale underlying the principle is engaged, but also the extent to which other competing fundamentally important societal interests deserve recognition: *R. v. White*, *supra*, at p. 276.

The rationale driving the principle against self-incrimination is as simple as it is important. Where the state alleges wrongdoing, it cannot force the target of that allegation to assist the state in proving the allegation. This rationale reflects the high premium placed on personal autonomy and individual privacy by the principles of fundamental justice. Those principles start from the premise that individuals are entitled to choose whether to co-operate with the state and, if they choose not to, to be left alone by the state. The rationale underlying the principle also reflects the hard learned lessons of history. Conscripted evidence is notoriously unreliable and the line between state compulsion and state abuse can be a fine one.

The rationale described above addresses those situations in which it can be said that the evidence that the state seeks to use was created by the person against whom the state seeks to use it. Statements, oral or written, are created by the author and any subsequent attempt to use those statements against the author effectively conscripts the author into the prosecution army. The protection against self-incrimination as one of the principles of fundamental justice has also been extended to protect an accused against subsequent use of any evidence that could not have been obtained by the state but for a compelled statement or testimony given by the accused: *R. v. S.(R.J.)*, *supra*.

Documents that exist prior to, and independent of, any state compulsion do not, however, constitute evidence "created" by the person required to produce those documents. With certain narrow exceptions, neither the compelled production of such documents, nor the subsequent use in a criminal proceeding of such documents, attracts the protection of the principle against self-incrimination: *Thomson Newspapers Ltd. v. Canada* (Director of Investigation and Research,

Restrictive Trade Practices Commission) (1990), 54 C.C.C. (3d) 417, per Sopinka J. at pp. 554-56, per L'Heureux-Dubé J. at pp. 538-39; *British Columbia Securities Commission v. Branch* (1995), 97 C.C.C. (3d) 505 (S.C.C.) at 524-25 (S.C.C.); *R. v. Fitzpatrick*, supra, at pp. 154-55; *R. v. Jarvis* (2000), 149 C.C.C. (3d) 498 (Alta. C.A.) at 510-13, leave to appeal to S.C.C. granted [2001] S.C.C.A. No. 86.

British Columbia Securities Commission v. Branch, supra, is the leading authority. In that case, the appellants argued that provincial securities legislation requiring them to produce certain corporate documents to securities investigators contravened their right against self-incrimination in a manner that was inconsistent with s. 7 of the Charter. Sopinka J. and Iacobucci J., who jointly wrote for the majority, drew a clear distinction between the compelled production of communications brought into existence through state compulsion and documents that were independent of any such compulsion. They said at pp. 524-55:

The rationale both at common law and under s. 7 of the Charter for these principles is that in certain circumstances compellability would impinge on the right to silence. This right, however, attaches to communications that are brought into existence by the exercise of compulsion by the state and not to documents that contain communications made before such compulsion and independently thereof. The participation of the compelled witness in the process of production is a relevant consideration, in so far as the state may lack alternate means of acquiring the information. This is a distinction that is well recognized in our law and is applied generally to the rules of privilege.

....

We know of no instance in which it was suggested that the common law right of silence which protected communications by a suspect to the police extended to documents of a suspect.

In a concurring judgment, L'Heureux-Dubé J. wrote at pp. 542-43:

A clear line must be drawn between, on one hand, the compelled production of pre-existing documents and, on the other hand, the compelled production of documents, which are themselves produced pursuant to a statutory compulsion. While the latter may, indeed, engage some self-incriminatory concerns since the individual will have generated them under state compulsion, it is evident that the former should not engage such concerns since they have not been generated subject to any such compulsion.

[196] At para. 40 of *D'Amour*, supra, Doherty J.A. continued:

Sopinka J. and Iacobucci J. also recognized that documents created under an obligation imposed by statute could attract the protection against self-incrimination. This was confirmed in *R. v. Fitzpatrick*, supra, where the relevant statute required that the accused keep the records which the prosecution sought to use against him.

[197] Sopinka J. and Iacobucci J. also acknowledged that there were situations in which the possession of a document had a communicative component, as for example where that possession was relied on to prove that the possessor had knowledge of the contents of the

document. In their view, where production had a communicative aspect, production of the document and any use of it in subsequent proceedings should be approached in the same way as compelled testimony or statements: *British Columbia Securities Commission v. Branch*, *supra*, at pp. 525-6.

[198] The documents that were obtained as a result of the Requirements that were issued after March 6, 1986 were obtained as a result of a s. 7 breach. It is important to note, however, that in the case at bar these were pre-existing documents that existed independent of any state compulsion. They were also not created under statutory obligation. Can it nevertheless be held that that evidence should be excluded under s. 24(1) of the Charter?

iv. Exclusion of evidence under s. 24(1) of the Charter

[199] There now seems to be some support for the suggestion that evidence can be excluded under s. 24(1) of the Charter. In *R. v. Spyker* (1990), 63 C.C.C. (3d) 125 (B.C.S.C.) Shaw J. reached the conclusion that he could exclude evidence under s. 24(1) of the Charter and did so. This issue was raised in *R. v. Letourneau* (1994), 87 C.C.C. (3d) 481 (B.C.C.A.) but the Court did not feel it necessary to answer that question in that case. In *R. v. White* (1999), 135 C.C.C. (3d) 257 (S.C.C.) Iacobucci J. stated at p. 292:

Although I agree with the majority position in *Harrer*, *supra* ([1995] 3 S.C.R. 562) that it may not be necessary to use s.24(1) in order to exclude evidence whose admission would render the trial unfair, I agree with McLachlin, J.'s finding in that case that s.24(1) may appropriately be employed as a discrete source of a Court's power to exclude such evidence. In the present case, involving an accused who is entitled under s.7 to use immunity in relation to certain compelled statements in subsequent criminal proceedings, exclusion of the evidence is required. Although the trial judge could have excluded the evidence pursuant to his common law duty to exclude evidence whose admission would render the trial unfair, he chose instead to exclude the evidence pursuant to s.24(1) of the Charter. I agree that he was entitled to do so.

[Emphasis added]

[200] Iacobucci J. also stated at pp. 289-90:

The possibility of excluding evidence under s.24(1) of the Charter was first addressed by this Court in *R. v. Therens*, [1985] 1 S.C.R. 613, 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 655. Le Dain, J., who dissented in the result in *Therens*, found that the Court below had erred in holding that evidence obtained in violation of the accused's Charter rights could be excluded under s.24(1). Le Dain, J.'s reasons were focussed upon the lower Court's finding that there were two separate tests for the exclusion of evidence under s.24, one test under s.24(1) and another under s.24(2), with an accused having the choice between the two types of remedy. Le Dain, J. stated, at p.647-48:

I am satisfied from the words of s.24 that s. 24(2) was intended to be the sole basis for the exclusion of evidence because of an infringement or a denial of a right or freedom guaranteed by the Charter. It is clear, in my opinion, that in making explicit provision for the remedy of exclusion of evidence in s.24(2), following the general terms of s.24(1), the framers of the Charter

intended that this particular remedy should be governed entirely by the terms of s.24(2). It is not reasonable to ascribe to the framers of the Charter an intention that the Courts should address two tests or standards on an application for the exclusion of evidence - first, whether the admission of the evidence would bring the administration of justice into disrepute, and if not, secondly, whether its exclusion would nevertheless be appropriate and just in the circumstances. The inevitable result of this alternative test or remedy would be that s.24(2) would become a dead letter.

Estey, J., writing for four (including himself) of the eight members of the Court who decided the appeal, agreed with Le Dain, J. that s.24(2) was the appropriate mechanism for the exclusion of the evidence in the particular case. Dickson, C.J., and Lamer, J. (as he then was), declined to comment on the possibility that evidence might be excluded under s.24(1) rather than s.24(2). The conclusion of the majority in *Therens* that evidence cannot be excluded as a remedy under s.24(1) of the Charter, but must meet the test of exclusion under s.24(2), was acknowledged in *R. v. Collins*, [1987] 1 S.C.R. 265 at p.276, 33 C.C.C. (3d) 1, 38 D.L.R. (4th) 508, per Lamer, J., and *R. v. Strachan*, [1988] 2 S.C.R. 980 at p.1000, 46 C.C.C. (3d) 479, 56 D.L.R. (4th) 673, per Dickson, C.J.

The Court in *Therens* was dealing with evidence that had been obtained in violation of the accused's Charter rights. None of the members of the Court who wrote in *Therens* adverted to the possible exclusion of evidence obtained in conformity with the Charter but whose admission into evidence would itself violate the Charter. In my view, although there are statements in *Therens* to the effect that s.24(2) is the only appropriate mechanism for the exclusion of evidence under the Charter, those statements should be understood in the specific context of the case, in which the lower Court had found that there could be two separate tests for the exclusion of illegally obtained evidence under s.24. *Therens* should not be seen as placing unnecessary limits on the power of a Court to exclude evidence whose admission would render a trial unfair in contravention of one or more of the legal rights set out in the Charter.

[201] While s. 24(1) allows the Court to fashion remedies where Charter infringements occur there should not be a wholesale parallel system for the administration of Charter rights.

[202] In *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at p. 196, Lamer C.J.C. had this to say about s. 24(1) of the Charter:

... When a person can demonstrate that one of his Charter rights has been infringed, access to a Court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow Courts to fashion remedies when constitutional infringements occur.

[203] LaForest J. did write, however, in *R. v. Mills*, [1986] 1 S.C.R. 863 at p. 971:

It should be obvious from the foregoing remarks that I am sympathetic to the view that Charter remedies should, in general, be accorded within the normal procedural context in which an issue arises. I do not believe s.24 of the Charter requires the wholesale invention of a parallel system for the administration of Charter rights over and above the machinery already available for the administration of justice.

[204] In *R. v. Harrer* (1995), 101 C.C.C. (3d) 193 (S.C.C.), however, the Court held that s. 24(1) of the Charter applies to prospective breaches and allows a court to exclude evidence which has not been obtained as a result of a Charter breach, but which would render the trial unfair contrary to s. 11(d) of the Charter: see p.211 (per McLachlin J.) (as she then was); *New Brunswick (Minister of Health and Community v. G.(J.))*, [1999] 3 S.C.R. 46 at para. 51.

[205] Before *Harrer* was decided, Wood J.A. had expressed the same opinion, in dissent in *R. v. Fitzpatrick* (1994), 90 C.C.C. (3d) 161 (B.C.C.A.) where he stated at p. 194:

Finally, there is the question of a remedy. It is clear that s.24(2) of the Charter has no application to the circumstances of this case. The evidence in question was not "obtained" in a manner which infringed any of the rights or freedoms guaranteed to Fitzpatrick by the Charter. It is its potential use which poses such a threat.

A strict reading of s.24(1) would lead to the conclusion that Fitzpatrick's right to apply to a Court of competent jurisdiction to obtain such a remedy as the Court considers appropriate would arise only after his residual right against self-incrimination under s.7, or his right to a fair trial under s.11(d), had been breached by the admission of his regulatory declarations in evidence against him. But it has been held that the jurisdiction of the Court to grant relief under s.24(1) applies not only in the case of an actual interference with the rights and freedoms guaranteed in the Charter, but extends as well to the granting of relief in anticipation of such interference: see *Operation Dismantle Inc. v. Canada* (1985), 18 D.L.R. (4th) 481, [1985] 1 S.C.R. 441, 13 C.R.R. 287 (S.C.C.), and *R. v. Vermette* (1988), 41 C.C.C.(3d) 523, 50 D.L.R.(4th) 385, [1988] 1 S.C.R.985 (S.C.C.). Accordingly, the trial judge had the jurisdiction to exclude the evidence of Fitzpatrick's regulatory declarations by making the appropriate order under s.24(1) of the Charter.

[206] The appeal in *Fitzpatrick*, 102 C.C.C. (3d) 144, (S.C.C.) was dismissed by the Supreme Court of Canada; nevertheless the statement by Wood J.A. is still a succinct statement of the law.

[207] In *R. v. Jageshur* (2002), 169 C.C.C. (3d) 225 (Ont.C.A.), a case involving the legality of a reverse sting operation, Doherty J.A. points out that s. 24(2) has no application when the evidence was not obtained in a manner that infringed a Charter right. He pointed out, however, that evidence could be excluded when a s. 7 breach is proved. He stated at paras. 67-9:

Although the remedial powers of s. 24(2) were not engaged, the broader powers in s. 24(1) of the Charter would have been available to the respondent had he established a breach of s.7. Those powers include the power to exclude evidence: *R. v. White* (1999), 135 C.C.C. (3d) 257 at 290-91 (S.C.C.); *R. v. Harrer* (1995), 101 C.C.C. (3d) 193, per McLachlin J. concurring at 210-211. These cases hold that evidence may be excluded under s. 24(1), even if it was not obtained in violation of the Charter, if its admission into evidence would render the trial unfair.

There is no claim in this case that the admission of the evidence would impair trial fairness. It may well be, however, that evidence may also be excluded under s. 24(1) where the exclusion is essential to maintain the integrity of the process: see *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.) at pp.36-37; *R. v. Xenos* (1991), 70 C.C.C. (3d) 374-75 (Que.C.A.).

The respondent's application to exclude evidence should have been brought under s. 24(1) of the Charter. In determining whether exclusion would be the appropriate remedy, the trial judge would have had to examine the substance of the remedy sought and not the label used by counsel. Although the remedy was framed in terms of the exclusion of evidence, it was in reality an application to terminate the prosecution. Had the respondent established a breach of s.7, the trial judge would have been required to decide whether it was "appropriate and just" to foreclose the prosecution of the respondent. The case law limiting the availability of a stay of proceedings to the "clearest of cases" would have had direct application to that decision.

[208] Apart from *Harrer*, the following cases all stand for the proposition that a trial judge enjoys a general discretion to exclude evidence on the basis of the trial judge's duty, enshrined in s. 11(d) of the Charter, to ensure a fair trial: *R. v. Seaboyer*, (1991), 66 C.C.C. (3d) 321 (S.C.C.); *United States of America v. Shulman* (2001), 152 C.C.C. (3d) 294 (S.C.C.); *R. v. Acuri* (2001), 157 C.C.C. (3d) 21 (S.C.C.); *R. v. Gagnon* (2000), 147 C.C.C. (3d) 193 (Ont.C.A.). In determining whether admission of evidence would render a trial unfair, the trial judge engages in a balancing exercise, balancing the probative value of the evidence against its prejudicial effect. Prejudice means the danger that the jury will use the evidence for an improper purpose despite the judge's instructions to the contrary.

[209] In *R. v. L.(D.O.)* (1994), 85 C.C.C. (3d) 289 (S.C.C.) at p. 309, L'Heureux-Dubé J. stressed that a fair trial must encompass a recognition of society's interests. She stated at p. 312:

Based on this Court's pronouncements that the principles of fundamental justice reflect a spectrum of interests from the rights of the accused to broader social concerns, a fair trial must encompass a recognition of society's interests. Our Canadian society has a vested interest in the enforcement of criminal law in a manner that is both fair to the accused and sensitive to the needs of those who participate as witnesses. In *R. v. B.(K.G.)*, [1993] 1 S.C.R. 740, this Court recognized the need to balance the accused's interests in a criminal trial with the interests of society: (see also *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at pp 603-4 and 622)].

v. Fair hearing and fundamental justice

[210] It must be remembered that fundamental justice does not entitle the accused to the most favourable procedures. In *R. v. Lyons*, [1987] 2 S.C.R. 309 at p.362, La Forest J. stated:

It seems to me that s.7 of the Charter entitles the appellant to a fair hearing; it does not entitle him to the most favourable procedures that could possibly be imagined.

(a) What "fairness" implies

[211] Fairness includes the interest of the state as represented by the public. In *R. v. Corbett*, [1988] 1 S.C.R. 670, La Forest J. stated, in dissent at p. 745:

..."fairness" implies, and in my view demands, consideration also of the interests of the state as representing the public. Likewise the principles of fundamental justice operate to protect the integrity of the system itself, recognizing the legitimate interests not only of the accused but also of the accuser.

[212] Similarly, in *R. v. E.(A.W.)*, [1993] 3 S.C.R. 155 at p. 198 it was pointed out that fundamental justice embraces more than the rights of the accused. The Court held that an assessment of the fairness of the trial process must be made "from the point of view of fairness in the eyes of the community and the complainant" and not just the accused.

[213] In *R. v. Harrer*, *supra*, McLachlin J. (as she then was) stated at para. 45 that a fair trial is one that appears fair from the perspective of both the accused and the community. She stated that "a fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused."

[214] In *R. v. Bradford* (2001), 151 C.C.C. (3d) 363 O.J. No. 107 (Ont.C.A.) Weiler J.A., for the Court, stated at p. 369:

In assessing the prejudice to the accused's right to make full answer and defence as secured by s. 7 of the Charter, it is important to bear in mind that the accused is entitled to a trial that is fundamentally fair and not the fairest of all possible trials. As stated by McLachlin J. in *O'Connor*, *supra*, at pp. 78-79:

...the Canadian Charter of Rights and Freedoms guarantees not the fairest of all possible trials, but rather a trial that is fundamentally fair: *R. v. Harrer*, [1995] 3 S.C.R. 562. What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice but fundamentally fair justice.

In a similar vein, Justices McLachlin and Iacobucci commented in *R. v. Mills*, [1999] 3 S.C.R. 668 at 718 that fundamental justice embraces more than the rights of the accused and that the assessment concerning a fair trial must not only be made from the point of view of the accused but the community and the complainant. The fact that an accused is deprived of relevant information does not mean that the accused's right to make full answer and defence is

automatically breached. Actual prejudice must be established: *Mills*, supra, 719-720, citing *R. v. La*, [1997] 2 S.C.R. 680 at 693.

[215] See also *R. v. Latimer* (2001), 150 C.C.C. (3d) 129 (S.C.C.) where the Court stated at para. 50:

Nonetheless, while the trial judge's approach was imperfect, the benchmark for measuring trial fairness is not perfection. The critical question is whether the trial judge's approach rendered the appellant's trial unfair. The inquiry is necessarily specific to the facts of the case under consideration; the determination of whether the timing of a particular ruling rendered a trial unfair must be made on a case-by-case basis.

[216] At p. 152 the Court again reiterated that "the assessment of trial fairness is specific to the facts of the particular case."

(b) Actual prejudice must be shown

[217] In *R. v. Caster* (2001), 159 C.C.C. (3d) 404 (B.C.C.A.), the Court reminds us that a court should not grant a remedy under s. 24 of the Charter until it determines that the accused's Charter rights have actually been violated. Huddart J.A. stated at pp. 418-9:

A court is precluded from granting a remedy under section 24 until it determines the accused's Charter rights have actually been violated. When the constitutional violation on which the accused relies for a remedy under section 24 is that state conduct has deprived him of his right to a fair trial, or that he has been deprived of his liberty in a manner not in accordance with fundamental justice, he must establish actual prejudice. Rarely will the assertion of prejudice suffice.

In *La*, supra, [[1997] 2 S.C.R. 680] at para. 25, Sopinka J. stated that where the Charter claim is based on lost evidence, "the accused must establish actual prejudice to his right to make full answer and defence". In *R. v. Carosella*, [1997] 1 S.C.R. 80, Justice L'Heureux-Dubé wrote at para. 91:

While it is true that, with regard to certain rights, a degree of prejudice can be inferred, such is not always the case. Indeed with respect to most Charter rights, the accused must demonstrate some degree of prejudice before the court can reach a determination that a violation has occurred. In other words, an accused cannot argue that he is unable to have a fair trial, to take one example, in a vacuum. He or she must show the effect of a designated action which purportedly violates his rights. This effect is the prejudice. The aforementioned case of *Finta*, supra, [*R. v. Finta*, [1993] 1 S.C.R. 1138] is one such example. In that situation, the delay in prosecuting the accused was not itself sufficient to establish a violation of the Charter. Actual prejudice needed to be shown.

Then, she concluded at para. 106:

In summary, there are ample legal and policy reasons for placing the onus upon the accused to demonstrate that he or she suffered a real likelihood of prejudice. The burden is not an unmanageable one, and is consistent with established jurisprudence. It is not proper to state that a Charter right has been violated and that a fair trial cannot be had based on pure speculation.

Justice Bastarache came to a similar conclusion in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R.307, in the context of unreasonable delay. At para. 133 he wrote: "there must be more than merely a lengthy delay for an abuse of process; the delay must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected."

vi. Conclusion on the exclusion of evidence as a result of the s. 7 breach issue

[218] At the outset permit me to say that with respect to the Requirements that were issued to Mr. Miles and Mr. Miller at their request, there is no evidence as to what information was received from them. The suggestion that the information that they provided to Revenue Canada Officials must have been stolen is merely a suggestion. There is absolutely no proof of this allegation. As stated previously, there has been no proof on a balance of probabilities of a breach of the accused's s. 7 rights with respect to these two individuals.

[219] In dealing with the contextual analysis in which I have to now engage, it is necessary for me to again repeat that in *Jarvis*, *supra*, *Iacobucci* and *Major JJ.* gave the following overview of the statutory context of the Income Tax Act beginning at para. 48:

Governments, indisputably, require revenue in order to finance their operations and to implement social programmes. Currently, the collection of federal income tax -- a measure first introduced at that level during the First World War by The Business Profits War Tax Act, 1916, S.C. 1916, c. 11, and The Income War Tax Act, 1917, S.C. 1917, c. 28, and thought to be temporary -- comprises a crucial source of federal revenue, not to mention a crucial source of revenue for a good number of provincial governments (see *Del Zotto v. Canada*, [1997] 3 F.C. 40 (C.A.), at para. 19, per Strayer J.A., whose dissenting reasons were affirmed by a unanimous panel of this Court: [1999] 1 S.C.R. 3). In this connection, because the ITA controls the manner in which federal income tax is calculated and collected, this Court has recognized it as being "essentially a regulatory statute": *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at p. 641, per Wilson J. (See also: *La Forest J.*, concurring in the same case, at p. 650, where he described the ITA as "essentially of an administrative nature"; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 506, per La Forest J.; *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338, at p. 354, per Cory J.; *143471 Canada Inc. v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339, at p. 378, per Cory J.; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 46, per Lamer C.J. and *Iacobucci J.*) The ITA is both detailed and complex.

[220] They continued at para. 51:

It follows from the tax scheme's basic self-assessment and self-reporting characteristics that the success of its administration depends primarily upon taxpayer forthrightness. As Cory J. stated in *Knox Contracting*, *supra*, at p. 350: "The entire system of levying and collecting income tax is dependent upon the integrity of the taxpayer in reporting and assessing income. If the system is to work, the returns must be honestly completed." It is therefore not surprising that the Act exhibits a concern to limit the possibility that a taxpayer may attempt "to take advantage of the self-reporting system in order to avoid paying his or her full share of the tax burden by violating the rules set forth in the Act" (*McKinlay Transport*, *supra*, at p. 637). The nature of the tax collection scheme, however, creates an obstacle in this regard:

Often it will be impossible to determine from the face of the return whether any impropriety has occurred in its preparation. A spot check or a system of random monitoring may be the only way in which the integrity of the tax system may be maintained.

(*McKinlay Transport*, *supra*, at p. 648)

Accordingly, "the Minister of National Revenue must be given broad powers in supervising this regulatory scheme to audit taxpayers' returns and inspect all records which may be relevant to the preparation of these returns"

[221] The context in which these s. 7 breaches have to be analysed has already been canvassed earlier in this judgment. It is in this context that I find that the accused has not established on a balance of probabilities that the evidence should be excluded under s. 24(1) of the Charter. I am not satisfied that the admission of this evidence would render the trial unfair. I am also not able to find on the facts before me on this *voir dire* that the exclusion of this evidence is essential to maintain the integrity of the process.

[222] In arriving at this conclusion, I also take into consideration the fact that none of this evidence was made by the accused under compulsion of statute. I take into consideration that the law that existed at the time these Requirements were issued did not preclude Revenue Canada from using them.

[223] Applying the test in *R. v. S.(R.J.)*, [1995] 1 S.C.R. 451 to the accused's bank records and the evidence of Mr. Byerlay's engineering qualifications, I find that the evidence should not be excluded because their existence pre-existed the date on which penal consequences was the predominant purpose of the investigation by Revenue Canada. In addition to that, proof of such records was available without a Charter breach.

[224] In arriving at the decision not to exclude the evidence notwithstanding the s. 7 breach, where I have found a s. 7 breach, I have also weighed the public interest in getting to the truth against the basic procedural fairness to the accused.

[225] On the basis of the foregoing, the application to exclude this evidence under s. 24(1) is therefore dismissed.

[226] I now turn to the s. 24(2) analysis.

N. THE SS. 8 and 24(2) ANALYSIS

[227] Having found that Revenue Canada's use of its Requirement power after March 6, 1986, infringed the accused's rights under s. 7 of the Charter and that Revenue Canada committed some breaches under s. 8, I must now engage in an analysis under s. 24(2) to determine whether the evidence obtained from these Requirements and other evidence obtained in breach of s. 8 of the Charter is admissible at trial.

[228] I not only repeat the analysis that I completed in *R. v. Wilder No.3*, but also wish to add to that analysis. The first part of the s. 24(2) analysis requires a determination of whether the evidence was "obtained in a manner that infringed or denied any rights or freedoms guaranteed" by the Charter. Once it has been determined that a Charter violation has occurred in the course of obtaining the evidence, the analysis proceeds to the second aspect of s. 24(2), the consideration of whether the admission of the evidence would bring the administration of justice into disrepute.

i. Appeal from ruling under s. 24(2) of the Charter

[229] In his very able submissions, counsel for the accused argued that although the evidence that was obtained as a result of these Requirements was documentary in nature, the Supreme Court of Canada in *Jarvis* did not take issue with the trial judge's reasoning that the evidence ought to be excluded under s. 24(2) of the Charter. This is true, but that Court has held time and time again that deference should be shown to the s. 24(2) analysis of trial judges. In *R. v. Duguay*, [1989] 1 S.C.R. 93, the Supreme Court of Canada prescribed the outer limits of interference by that Court at p. 98:

It is not the proper function of this court, though it has jurisdiction to do so, absent some apparent error as to the applicable principles or rules of law, or absent a finding that is unreasonable, to review findings of the courts below under s. 24(2) of the Charter and substitute its opinion of the matter for that arrived at by the Court of Appeal.

[230] The same self-imposed restraint should apply between an appellate court and a trial court: *R. v. Goncalves* (1993), 81 C.C.C. (3d) 240 (S.C.C.); *R. v. Greffe*, [1990] 1 S.C.R. 755 at p.783; *R. v. Mellenthin*, [1992] 3 S.C.R. 615 at p. 625; *R. v. Wise*, [1992] 1 S.C.R. 527 at p. 539; and *R. v. Stillman*, [1997] 1 S.C.R. 607.

[231] It is therefore my view that the fact that the Supreme Court of Canada did not take issue with the s. 24(2) analysis of the trial judge in *Jarvis* does not necessarily mean that they approved of his analysis.

ii. Causal link between the Charter breach and the evidence obtained

[232] It is not necessary to establish that evidence has been obtained as a direct result of a Charter breach in order to engage the exclusionary rule under s. 24(2). In *R. v. Strachan* (1988), 46 C.C.C. (3d) 479 (S.C.C.), Dickson C.J.C. (as he then was) suggested that a "causal connection" was too narrow a test to apply in deciding whether evidence was "obtained in a manner" that infringed an accused's rights. He suggested instead that the appropriate analysis should take into consideration each link in the chain. At pp. 498-9 he stated:

...Accordingly, the first inquiry under s.24(2) would be to determine whether a Charter violation occurred in the course of obtaining the evidence. A temporal link between the infringement of the Charter and the discovery of the evidence figures prominently in this assessment, particularly where the Charter violation and the discovery of the evidence occur in the course of a single transaction. The presence of a temporal connection is not, however, determinative. Situations will arise where evidence, though obtained following the breach of a Charter right, will be too remote from the violation to be 'obtained in a manner' that infringed the Charter. In my view, these situations should be dealt with on a case-by-case basis. There can be no hard and fast rule for determining when evidence obtained following the infringement of a Charter right becomes too remote.

See also *R. v. Ross* (1989), 46 C.C.C. (3d) 129 (S.C.C.) at p. 138.

[233] This issue was also addressed by the Supreme Court of Canada in *R. v. Black* (1989), 50 C.C.C. (3d) 1. The accused in this case had led the police to a knife after her rights had been infringed under s. 10(b) of the Charter. At issue was whether the knife constituted derivative evidence obtained as a result of a Charter breach. Wilson J. stated at p. 19:

...the events which took place at the appellant's apartment were sufficiently proximate to cross this first hurdle under s.24(2). Indeed, the knife in this case is derivative evidence obtained as a direct result of 'a statement or other indication' made by the appellant. Its discovery is causally connected to the violation of the appellant's s.10(b) right. While the Chief Justice suggests in *Strachan* that 'causal connection' is too narrow a test to apply in deciding whether evidence was 'obtained in a manner' that infringed the applicant's rights, I do not believe he meant to preclude the use of the causal connection test in cases where such connection was clearly present and the evidence obtained was clearly derivative evidence. The Chief Justice was, I believe, at pains to establish a broader test than 'causal connection' and one which, in my view, is also met in this case since the breach of the appellant's s.10(b) right was an ongoing one from the time she was advised of the change in the charge. From that point on, despite the fact that the appellant had asked to speak with her lawyer, the police sought to obtain incriminating evidence from her. The breach of the appellant's s.10(b) rights and the discovery of the knife are, in my view, inextricably linked or, in the Chief Justice's words, occurred "in the course of a single transaction".

[234] In *R. v. Grant* (1993), 84 C.C.C. (3d) 173, the Supreme Court of Canada found that while the Charter breach that occurred in the course of an earlier warrantless search was not causally linked to the evidence subsequently tendered as a result of that search, the breach was nevertheless "an integral component in the series of investigative tactics which led to the unearthing of the evidence in question." The gap in the temporal link was not sufficient to remove the finding of the evidence from the s. 24(2) analysis.

[235] Most of the analysis regarding the strength of the causal connection between a breach and the impugned evidence must be done within the confines of the second branch of the s. 24(2) test. In *R. v. Goldhart* (1996), 107 C.C.C. (3d) 481 (S.C.C.), the Court distinguished between the analysis of causation under the first branch of the s. 24(2) analysis and the role of causation in other aspects of the Charter analysis, such as the consideration of secondary and derivative evidence as a basis for exclusion. Sopinka J. stated at p. 495:

Although Therens and Strachan warned against over-reliance on causation and advocated an examination of the entire relationship between the Charter breach and the impugned evidence, causation was not entirely discarded. Accordingly, while a temporal link will often suffice, it is not always determinative. It will not be determinative if the connection between the securing of the evidence and the breach is remote. I take remote to mean that the connection is tenuous. The concept of remoteness relates not only to the temporal connection but to the causal connection as well. It follows that the mere presence of a temporal link is not necessarily sufficient. In obedience to the instruction that the whole of the relationship between the breach and the evidence be examined, it is appropriate for the court to consider the strength of the causal relationship. If both the temporal connection and the causal connection are tenuous, the court may very well conclude that the evidence was not obtained in a manner that infringes a right or freedom under the Charter. On the other hand, the temporal connection may be so strong that the Charter breach is an integral part of a single transaction. In that case, a causal connection that is weak or even absent will be of no importance. Once the principles of law are defined, the strength of the connection between the evidence obtained and the Charter breach is a question of fact. Accordingly, the applicability of s. 24(2) will be decided on a case-by-case basis as suggested by Dickson C.J. in Strachan.

(a) Application of the law to the facts of this case

[236] Defence counsel submits that contrary to the instructions of the accused's lawyers, Revenue Canada Officials entered his business premises in Aldergrove and spoke to Mr. Russ. and Mr. Breitzman without either the accused's permission or a warrant. He submits that in doing so, Revenue Canada infringed the accused's rights under the Charter and that evidence obtained from Mr. Russ and Mr. Breitzman on a much later date should accordingly be excluded.

[237] I find, firstly, that the Revenue Canada Officials were entitled to enter the accused's business premises without his permission. Section 231.1(1)(c) of the Act permits Revenue Canada Officials to "enter into any premises or place where any business is carried on" for purposes related to the administration or enforcement of the Act. Subsection (2) provides:

Where any premises or place referred to in paragraph (1)(c) is a dwelling-house, an authorized person may not enter that dwelling-house with the consent of the occupant except under the authority of a warrant under subsection (3).

[238] It necessarily follows, therefore, that neither the consent of the accused nor a warrant is required where the material premises are not a dwelling-house, as was the case here. It is true that Jarvis holds that s. 231.1 cannot be used to further an investigation into penal consequences (at para. 96). I have, however, already found as a fact that that did not occur until after March 6, 1986, the date of the initial meeting with Messrs. Breitzman and Russ at the Aldergrove plant. It was only after that meeting that the penal liability of the accused became a focal point in the investigation.

[239] In the alternative, based on the law as enunciated above, I find that if the accused's Charter rights were breached as alleged, the connection between the breach and the securing of the evidence from Mr. Breitzman and Mr. Russ was too remote. As Sopinka J., writing for a unanimous Court, observed at para. 40 of Goldhart, evidence will be excluded under s. 24(2) only where there exists a sufficiently strong causal and/or temporal link between the Charter breach and the discovery of the evidence. He distinguished between the discovery of a witness and the witness's subsequent testimony. At para. 43, he said:

... The discovery of the person cannot simply be equated with securing evidence from that person which is favourable to the Crown. The person charged has the right to remain silent and in practice will usually exercise it on the advice of counsel. The prosecution has no assurance, therefore, that the person will provide any information let alone sworn testimony that is favourable to the Crown. In this regard it has been rightly observed that testimony cannot be treated in the same manner as an inanimate object.

[240] The causal and temporal connections between the discovery of a witness and the subsequent testimony of the witness are generally tenuous and remote, as Sopinka J. pointed out at para. 45, because the material event for purposes of the Charter analysis is not the discovery of the witness but the intervening decision of the witness to testify, and because the knowledge of the witness cannot be discovered unless and until the witness voluntarily discloses it.

[241] As a result of my finding that the connection between the breach and the impugned evidence is too remote, I need not engage in the s. 24(2) analysis any further regarding this breach.

[242] I do, however, find a sufficient causal connection between Revenue Canada's use of its Requirement power after March 6, 1986, and the evidence it obtained as a result of those Requirements, and thus will engage in a s. 24(2) analysis with respect to the remaining breaches.

iii. Factors to consider under s. 24(2)

[243] It is now well established that a s. 24(2) analysis comprises three components:

1. whether the admission of the impugned evidence would render the trial unfair;
2. the seriousness of the Charter breach; and
3. the effects of the admission of the impugned evidence on the administration of justice.

R. v. Collins (1987), 33 C.C.C. (3d) 1 (S.C.C.)

(a) Trial fairness

[244] The Supreme Court of Canada in R. v. Stillman (1997), 113 C.C.C. (3d) 321, building on R. v. Collins, supra, and more recent authorities, summarized the steps to be taken when assessing the issue of trial fairness. Cory J. stated at para. 119:

1. Classify the evidence as conscriptive or non-conscriptive based on the manner in which the evidence was obtained. If the evidence is non-conscriptive, its admission will not render the trial unfair and the court will proceed to consider the seriousness of the breach and the effect of exclusion on the repute of the administration of justice.
2. If the evidence is conscriptive and the Crown fails to demonstrate on a balance of probabilities that the evidence would have been discovered by alternative non-conscriptive means, then its admission will render the trial unfair. The Court, as a general rule, will exclude the evidence without considering the seriousness of the breach or the effect of exclusion on the repute of the administration of justice. This must be the result once an unfair trial would necessarily bring the administration of justice into disrepute.
3. If the evidence is found to be conscriptive and the Crown demonstrates on a balance of probabilities that it would have been discovered by alternative non-conscriptive means, then its admission will generally not render the trial unfair. However, the seriousness of the Charter breach and the effect of exclusion on the repute of the administration of justice will have to be considered.

(1) Was the evidence collected as a result of the Requirements conscriptive?

[245] Defence counsel argues that the documents which were received as a result of the breach of the accused's s. 7 rights was conscriptive evidence. As I understand his argument, he submits that "but for" the illegality the evidence would not have been obtained by Revenue Canada Officials. In order for me to deal with this issue, it is necessary for me to canvass my understanding of the law with respect to the difference between conscriptive and non-conscriptive evidence.

(2) The law

[246] In *R. v. Stillman*, supra, in defining non-conscriptive evidence Cory J. stated at para. 75:

If the accused was not compelled to participate in the creation or discovery of the evidence (i.e., the evidence existed independently of the Charter breach in a form useable by the state), the evidence will be classified as non-conscriptive.

Further, in defining conscriptive evidence, Cory J. stated at para. 80:

Evidence will be conscriptive when an accused, in violation of his Charter rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples.

[247] In *R. v. Burlingham* (1995), 97 C.C.C.(3d) 385 (S.C.C.) it was confirmed that evidence may be considered conscriptive if it was found as a result of other conscriptive evidence, like a statement.

[248] In *Stillman*, Cory J. gave a few examples of conscriptive evidence at para. 94:

The compulsion which results in self-incrimination by a statement or the taking of bodily substances or the use of the body itself may arise in a number of ways such as the forced participation in a line-up identification (*R. v. Ross*, [1989] 1 S.C.R. 3); providing a breath sample (*R. v. Bartle*, [1994] 3 S.C.R. 173); providing DNA samples - blood (*Borden*, supra); telling the police where to find evidence (*Burlingham*, supra); and making an incriminating statement (*R. v. Manninen*, [1987] 1 S.C.R. 1233).

[249] It is now declared that conscription can only be an issue if the body is somehow integral to the evidence. This general principle is also subject to some refinements. For instance, where blood is taken and stored in the hospital and taken pursuant to warrant, it is non-conscriptive, whereas the blood will be constructive evidence when the blood is seized from the person of the accused by the State. This distinction is pointed out in *R. v. Colbourne* (2001), 157 C.C.C. (3d) 273 (Ont.C.A.) where Doherty, J.A. stated at para. 58:

I agree with the trial judge's characterization of the blood sample as non-conscriptive evidence. The same was initially taken from the appellant with his consent by hospital personnel for medical reasons. The hospital personnel were not acting on behalf of the police. The police subsequently seized the sample when it was in the possession of the hospital. In my view, *R. v. Calarusso* (1994), 87 C.C.C. (3d) 193 (S.C.C.), controls. under that authority, the blood sample is properly characterized as non-conscriptive evidence. *R. v. Stillman* (1997), 113 C.C.C. (3d) 321

(S.C.C.), the authority relied on by the appellant, speaks to the seizure of bodily substances from the person of the accused by the state. Nothing said in *R. v. Stillman*, *supra*, detracts from the authority of *R. v. Colarusso*, *supra*. Once it is accepted that the evidence was non-conscriptive, it follows that its admission into evidence would not adversely affect the fairness of the trial.

[250] In *R. v. Feeney* (1997), 115 C.C.C. (3d) 129 (S.C.C.) the seizure of a bloody shirt did not trigger trial fairness concerns. Even though the accused had been wearing the shirt and was asked to step into the light to permit a better view by the police. Sopinka J. stated that the accused's "body was not integral to the taking of the bloody shirt and thus the shirt is not conscriptive".

[251] Part of the confusion in trying to draw the distinction between conscriptive and non-conscriptive evidence arose because of statements made in *R. v. Mellenthin* (1992), 76 C.C.C. (3d) 481 (S.C.C.). In *Mellenthin* the accused was stopped at a roadblock. The police officer who pulled over the accused noticed a gym bag in the back seat of the vehicle. The officer asked the accused to hand over the gym bag to him. The gym bag contained narcotics. The Supreme Court of Canada in excluding the evidence held that the evidence seized by the officer was conscriptive because it could not have been obtained but for the participation of the accused. In *R. v. Richardson* (2001), 153 C.C.C. (3d) 449 (B.C.C.A.), the facts were almost identical to those in *Mellenthin*. McEachern C.J.B.C., in holding that the evidence was non-conscriptive, stated at pp. 460-1:

In my judgment, however, subsequent cases have overtaken *Mellenthin*. First, *R. v. Stillman* (1997), 113 C.C.C. (3d) 321 (S.C.C.), seems to have become the current locus classicus on conscripted evidence. Although *Mellenthin* is mentioned in passing, and is not overruled, I think *Stillman* limits conscripted evidence to statements and furnishing bodily substances in violation of the Charter. The summary of the Court's view is found in paras. 74,77 and 80...

(3) Conclusion on this issue

[252] On the basis of the foregoing, I am satisfied that the documents received by Revenue Canada as a result of the breach of the accused's s. 7 Charter rights was non-conscriptive evidence. The accused's body was not integral to the evidence obtained.

[253] The admission of evidence that pre-existed the state action and could have been discovered by investigative means not involving the accused does not render a trial unfair: *R. v. Burlingham*, *supra*; *R. v. Collymore* (1999), 138 C.C.C. (3d) 306 (Ont.C.A.) at p. 320; and *R. v. Belnavis* (1997), 118 C.C.C. (3d) 405 (S.C.C.) at p. 423. In *R. v. Feeney*, *supra*, Sopinka J. stated at p. 165:

If the conscriptive evidence would have been obtained even if the Charter had not been breached, the evidence is discoverable, and its admission, despite the conscription of the Accused would not affect trial fairness.

[254] In *R. v. Stillman*, *supra*, Cory J. stated at p. 360:

... where an alternate non-conscriptive means [of obtaining the evidence] exists and the Crown has established on a balance of probabilities that the police would have availed themselves of it, the admission of the evidence would not affect the fairness of trial.

[255] I have no hesitation in concluding that the documentary evidence obtained pursuant to the impugned Requirements constitutes non-conscriptive evidence, the admission of which will not render the trial unfair.

[256] I further note that the evidence obtained from the banks through the Requirements and the qualifications of Mr. Byerlay could have been discovered by investigative means not involving the accused. With respect to the certificates that were received from the National Bank pursuant to Requirements, I noted at para. 30 of *R. v. Wilder No.3*:

The Certificates form part of the escrow agreement. The escrow agreement is made between the investors in a particular company that has indicated that it has incurred expenses which qualify investors for tax credits under Part VIII of the Income Tax Act, that company and the bank. The certificates, along with the escrow agreement, would be available to anyone who is a party to the agreement, including the investors, the accountants, the bank and the accused. The certificate would also be something which would be produced if bank personnel were brought to court on a subpoena.

[257] Similarly, Mr. Ma testified that information regarding the bank accounts of any individual could be obtained by way of subpoena served on the bank and an affidavit from branch personnel. I agree with that proposition. Similarly, in my view, it was not necessary for the Revenue Canada Officials to have used Requirements in order to obtain the qualifications of Mr. Byerlay. In my view, they could have been obtained by other lawful means.

(b) Seriousness of the violation

(1) The law

[258] The seriousness of the Charter violation bears upon the disrepute into which the administration of justice will be brought if the evidence is admitted. The seriousness of the breach is to be "assessed in light of whether it was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, willful or flagrant": *R. v. Therens* (1985), 18 C.C.C. (3d) 481 (S.C.C.). The Supreme Court of Canada more recently stated that "disregard for established procedures, combined with the failure to proceed properly when that option was available, are factors supporting" the exclusion of evidence: *R. v. Law* (2002), 160 C.C.C. (3d) 449 (S.C.C.).

[259] Willful, flagrant or deliberate breaches of an accused's Charter rights, in order to obtain incriminating evidence, would usually tend to favour exclusion of the evidence. It has been held by some of the cases that this behaviour tends to bring the administration of justice into disrepute. See *R. v. Duguay*, supra; *R. v. Genest*, [1989] 1 S.C.R. 59; *R. v. Manninen*, [1987] 1 S.C.R. 1233; and *R. v. Greffe*, [1990] 1 S.C.R. 755.

[260] In *R. v. Caslake* (1998), 121 C.C.C. (3d) 97 (S.C.C.) the majority of the Court held that when considering the seriousness of the breach the Court should look at some or all of the following factors:

...the obtrusiveness of the search, the individual's expectation of privacy in the area searched, the existence of reasonable and probable grounds; and the good faith of the police. (at para. 34)

[261] In *R. v. Feeney*, *supra*, Sopinka J., for the majority, (which included Cory J.), suggested that evidence which may appear to affect the fairness of the trial may be admissible under s. 24(2) if the violation was the result of a "technicality". I find the printing of the photos taken at the accused's Organic project in Morris, Manitoba to fall under this category. If there was a breach, it was a technical one and consequently the evidence derived from the printing of those photos is admissible evidence.

[262] On the basis of the foregoing, it is also my view that the use of Requirements to obtain records from third parties after the predominant purpose of the investigation became the penal liability of the accused amounts to a serious breach of the accused's rights. It is therefore necessary for me to explore whether the Revenue Canada Officials were acting in good faith or bad faith when they embarked upon this illegal procedure. Before I do this however, I propose to deal with the issue of reasonable and probable grounds.

(2) Reasonable and probable grounds

[263] With regard to s. 8, the accused states that the paragraphs of the affidavit in support of the search warrant that contain reference to information compelled during the investigation must be excised on review. It is his submission that after this excision process, there is not enough information such that the issuing judge could have issued the warrants. He argues as well that there is misleading information in the affidavit and that after the excision of this information there were, as well, insufficient grounds on which the issuing judge could have granted the warrants.

[264] In support of the appropriateness of the relief sought, the accused alleges bad faith on the part of Revenue Canada in relation to the alleged s. 7 and s. 8 infringements.

[265] I have dealt with all of these issues in an earlier portion of this judgment. The evidence that was seized as a result of unconstitutional "Baron" warrants was seized only after an authorizing judge was satisfied that he had reasonable and probable grounds to issue the warrant. After reading the affidavit in support of the search warrants, I am also satisfied that Revenue Canada Officials had reasonable and probable grounds to believe that an offence had been committed by the accused when they conducted the searches pursuant to the unconstitutional warrants. The suggestion that certain paragraphs of the affidavit in support of the search warrants should be excised becomes untenable in view of my finding of fact as to when the predominant purpose of the investigation became the penal liability of the accused.

[266] With respect to the Requirements issued to the National Bank, I am also satisfied that Revenue Canada had sufficient reasonable and probable grounds to obtain a search warrant for that bank if they felt that it was necessary to obtain a search warrant. I am satisfied that at the time these Requirements were issued to that bank, a warrant was not necessary in order to obtain the information.

(3) Good Faith

[267] Police do not act in bad faith where they mistakenly believe that they were relying on statutory or other legal authority: *R. v. Grant*, supra; *R. v. Wiley* (1993), 84 C.C.C. (3d) 161 (S.C.C.); *R. v. Plant* (1993), 84 C.C.C. (3d) 203 (S.C.C.); *R. v. Duarte* (1990), 53 C.C.C. (3d) 1 (S.C.C.). It also does not constitute bad faith on the part of the police where they act under a bona fide misunderstanding of an unclear legal principle: *R. v. Colarusso* (1994), 87 C.C.C. (3d) 193 (S.C.C.).

[268] Cory J., writing for the Court, stated in *R. v. Wise*, supra, at p. 268 that "good faith has been established in situations where the violation stemmed from police reliance upon a statute or from the following of a procedure which was later found to infringe the Charter." However, in *R. v. Sutherland* (2000), 150 C.C.C. (3d) 231 (Ont.C.A.), Cathy J.A. noted that "the reasons in *Hosie* [(1996), 49 C.R. (4th) 1 (Ont.C.A.)] called for a renewed sense of responsibility by officers seeking search warrants." He emphasized that a lax attitude towards compliance with this duty should not be rewarded by a finding that the police actions were undertaken in good faith.

[269] A police officer's subjective belief is generally relevant in assessing whether the officer breached the Charter in good or bad faith. An honest though mistaken belief may not show good faith but it will generally refute a finding of bad faith: *R. v. Chau* (2000), 150 C.C.C. (3d) 504 (Ont.C.A.).

[270] On the issue of good faith, Sopinka J. stated as follows in *R. v. Grant* (1994), 84 C.C.C. (3d) 173 (S.C.C.) at p. 201:

In contrast to the officers who this Court determined not to have acted in good faith in *Kokesch*, supra, this Court reflected on the instances in which officers have been considered to have acted in good faith pursuant to the s.24(2) determination (at p.231):

In each of those cases, the police acted pursuant to express statutory authority that rendered the particular search lawful. The police are entitled, indeed they have a duty, to assume the search powers granted to them by Parliament are constitutionally valid, and to act accordingly. The police cannot be expected to predict the outcome of Charter challenges to their statutory search powers, and the success of a challenge to such a power does not vitiate the good faith of police officers who conducted a search pursuant to the power.

[271] In *R. v. Fliss* (2002), 161 C.C.C. (3d) 225 (S.C.C.), good faith of the police was an important factor in persuading the Supreme Court of Canada that the impugned evidence should not be excluded. At para. 84, the Court wrote:

On the second question, the seriousness of the Charter breach, it is beyond dispute that the police officer acted in good faith. They applied for and received prior judicial authorization for the surreptitious recording. The authorization was not quashed because of false statements or misstatements in the supporting affidavit. The trial judge simply disagreed with the authorizing judge about the sufficiency of the allegations. This is a stronger case for the Crown than *Duarte* itself where the evidence gathered in violation of s. 8 of the Charter was nevertheless admitted because the breach "stemmed from an entirely reasonable misunderstanding of the law by the police officers who would otherwise have obtained the necessary evidence to convict the accused in any event" (p.60). Here the officers correctly understood the law and, in the opinion of the authorizing judge, they had complied with it.

[272] An additional factor relevant to this aspect of the s. 24(2) inquiry is whether the Charter infringement was an isolated incident or part of a larger pattern of disregard for Charter rights on the part of law enforcement officials.

[273] A trial judge is obliged to assess the seriousness of the Charter breach on the basis of the evidence adduced before him or her: *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.). The accused in that case had been asked by the police to give them the clothes that he was wearing when they spoke to him. The accused had argued that, on the evidence, he had been subjected to the equivalent of a strip search and that consequently, the seizure of his clothing amounted to a most serious violation of his privacy rights. He cited *R. v. Golden* (2001), 159 C.C.C. (3d) 449 (S.C.C.) in support of his position. Doherty J.A. stated at paras. 31-2:

The trial judge was obliged to assess the seriousness of the breach based on the evidence adduced before him and not by reference to the presumed effect of searches conducted in different circumstances. On the evidence put before the trial judge, the appellant was not subjected to a strip search as described in *R. v. Golden*, *supra*. While the seizure of his clothing was clearly an intrusive act, it was not akin to stripping him for the purpose of viewing or examining his most private areas. The seizure occurred in a private room with only one other person present. No force or intimidation was used and the appellant was immediately with a fresh set of his own clothing. No attempt was made to examine the appellant's body. The appellant did not testify on the voir dire and it is sheer speculation to suggest that he was somehow humiliated or traumatized by the seizure. The trial judge found that the seizure was effected quickly and without any apparent embarrassment to the appellant. The evidence supported these findings.

The seizure also occurred after a lawful arrest and while the appellant was lawfully in police custody. In such circumstances, a person has a reduced expectation of privacy: *R. v. Beare* (1988), 45 C.C.C. (3d) 57 at 77 (S.C.C.).

1. Application to the facts

[274] Good faith is clearly a primary consideration in assessing the seriousness of a Charter breach. It is under this heading that defence counsel makes a frontal attack on the admissibility of the evidence the Crown seeks to introduce, arguing that Revenue Canada Officials acted in bad faith during the course of their investigation of the accused. He alleges a number of instances of bad faith on the part of Revenue Canada.

[275] Defence counsel submits that the Revenue Canada Officials in this case acted in bad faith in that they had complete disregard for judicial authority prior to the Jarvis decision from the Supreme Court of Canada; that they failed to make full and frank disclosure and misled the authorizing judge by omitting various relevant facts from their information in support of the search warrants; that during the investigation phase, Revenue Canada Officials indiscriminately seized items without a search warrant when the accused's liberty was at stake.

[276] I have already held that the extent to which Revenue Canada was entitled to employ its statutory Requirement powers under the Act to compel cooperation by taxpayers and third parties to further prosecutions for tax offences had not been conclusively settled until the Supreme Court of Canada's recent decision in Jarvis and Ling. Prior to these cases, there were a number of conflicting decisions across the country. Accordingly, and in light of the authorities cited above, I conclude that Revenue Canada did not act in bad faith in using Requirements to further its investigation of the accused.

[277] In my view the situation that existed in this case is analogous to the situation that was dealt with in R. v. Sieben, [1987] 1 S.C.R. 295. In that case the police used a writ of assistance instead of a search warrant to search a dwelling house of the accused. Subsequent to the use of the writ, such writs were held to be unconstitutional. Defence argued that the evidence which was obtained as result of the unconstitutional search should be excluded under s. 24(2) of the Charter. In ruling that the evidence should not be excluded, Lamer J. (as he then was) stated at p. 299:

The sole issue then is whether the admission of the evidence would bring the administration of justice into disrepute. In deciding this issue, I rely upon the principles, rules, and remarks in my judgment rendered this same day in R. v. Collins, [1987] 1 S.C.R. 265. It is obvious to me that the use of this evidence in the proceedings would in no way cause the trial to be unfair. The appellant seeks the exclusion of the evidence on the ground that the police officers carried out the search under a writ of assistance when a search warrant was necessary. This breach is made more serious by the fact that the search took place in a dwelling-house. However, I do not consider the breach to be sufficiently serious that the admission of the evidence would bring the administration of justice into disrepute. The trial judge held that one of the police officers had reasonable grounds to enter and search the premises, thus satisfying an obviously desirable requirement of the statute. The only reason that they did not obtain a search warrant is that they believed in good faith that a writ of assistance was sufficient. At that time, the statute authorizing

a search under a writ of assistance had not been declared to be inconsistent with the Charter. Finally, there was no suggestion that the police officers had carried out the search in an unreasonable manner.

Similarly, with respect to the use by Revenue Canada of the unconstitutional "Baron" warrants and the use of the Requirements, I am satisfied that the searches were carried out in a reasonable manner. I am also satisfied that the person who swore the affidavit in support of the unconstitutional warrants, Mr. Ma, had reasonable and probable grounds to enter and search the searched premises.

(c) Effect of exclusion on the administration of justice

[278] The third branch of the Collins test focuses the inquiry on the societal interest in the effective prosecution of crime. Under this heading, the Court must consider such matters as the seriousness of the offence, and the importance of the evidence to the Crown's case. In *R. v. V.(T.A.)* (2001), 48 C.R. (5th) 366 (Alta.C.A.) McClung J.A., for the Court, stated at para. 37:

The effect of the suppression of relevant evidence on the reputé of the justice system involves the consideration of such things as:

The degree of social evil represented by the crime in question, society's interest in the effective prosecution of crime, the reliability and discoverability of the evidence, whether the evidence is essential to substantiate the charge, and the response of the reasonable man to the exclusion of the evidence and acquittal of the accused.

R. v. Smith (1998), 219 A.R. 109 (Alta.C.A.). Here, reiterating the concerns long expressed by this Court about the unlawful possession of firearms, the admission of this evidence is not likely to bring the administration of justice into disrepute.

[279] In *R. v. Kitaitchik*, *supra*, (Ont.C.A.) Doherty J.A. stated at para. 47:

... The inquiry mandated by the third step in *R. v. Collins*, *supra*., seeks to put the seriousness of the Charter breach into the context of the specific prosecution by examining the adverse effect, if any, occasioned to the administration of justice by the exclusion of evidence. The last stage of the *R. v. Collins*, *supra*, inquiry asks whether the vindication of the specific Charter violation through the exclusion of evidence extracts too great a toll on the truth seeking goal of the criminal trial. In making that assessment, a court should consider the seriousness of the alleged offence, the reliability of the challenged evidence and the importance of that evidence to the case.

See also *R. v. Fliss*, *supra*.

[280] The general rule is that the more serious the offence, the greater the likelihood that the administration of justice would be brought into disrepute by the exclusion of the evidence. This is especially so, where the evidence is crucial to conviction: *R. v. Grant*, *supra*. See also *R. v. Laurin* (1997), 113 C.C.C. (3d) 519 (Ont.C.A.); *R. v. Puskas* (1997), 120 C.C.C. (3d) 548 (Ont.C.A.); and *R. v. Lauda* (1998), 122 C.C.C. (3d) 74 (Ont.C.A.), affirmed (1998), 129 C.C.C. (3d) 225 (S.C.C.).

[281] In *R. v. Sutherland* (2000), 150 C.C.C. (3d) 231, the Ontario Court of Appeal, in weighing the effect of exclusion versus the effect of admission, stated at pp. 242-3:

To some extent, whenever a guilty person evades convictions because of a Charter breach the administration of justice suffers. However, a balance must be found when Charter breaches are exposed in court to assure that innocent persons do not suffer by repetition of the breach. When the conduct of the police, who form an integral part of the administration of justice, falls below the expected standard, the protection of the public by the justice system suffers. The mere presence of the police officers at one's home in the middle of the night, for whatever reason, is a frightening event. Parliament has recognized that only in exceptional circumstances can the police exercise this unusually intrusive procedure. Those circumstances did not exist in this case.

[282] In deciding what would bring the administration of justice into disrepute, Lamer J. (as he then was) in *R. v. Collins* (1987), 33 C.C.C. (3d) 1, adopted the "reasonable man" test. He wrote at pp. 17-8:

The approach I adopt may be put figuratively in terms of the reasonable person test proposed by Professor Yves-Marie Morissette in his article "The Exclusion of Evidence under the Canadian Charter of Rights and Freedoms: What to Do and What Not to Do" (1984), 29 McGill, L.J. 521, at p.538. In applying s.24(2), he suggested that the relevant question is "Would the admission of the evidence bring the administration of justice into disrepute in the eyes of a reasonable man, dispassionate and fully apprised of the circumstances of the case?" The reasonable person is usually the average person in the community, but only when that community's current mood is reasonable.

[283] The accused at bar is charged with a serious offence involving very significant sums of money. In my view, excluding evidence obtained from the Requirements as a result of Revenue Canada's breach of his Charter rights, in the particular circumstances of this case, would indeed bring the administration of justice into disrepute.

(d) Balancing the conflicting considerations

[284] All of the above mentioned factors must be taken into consideration by the Court in an effort to strike a balance between the conflicting values. The Court must then weigh the effect of each upon the reputation of the administration of justice and decide whether admitting the evidence would adversely affect the reputation of the administration of justice.

[285] In *R. v. Klimchuk* (1992), 67 C.C.C. (3d) 385 (B.C.C.A.) Wood J.A. stated at p. 421:

When seeking to resolve the conflicting values raised in balancing these considerations, it is important to keep in mind that the power to exclude evidence under s.24(2) of the Charter does not exist, and should not be used, as a sanction for unlawful police conduct. On the other hand, when considering the impact that a Charter violation will have on the administration of justice, it is proper to take into account the long-term consequences of regularly admitting evidence obtained in consequence of such a violation.

For the sake of the community at large, it is both desirable and important that the police have every reasonable opportunity to investigate crimes and apprehend criminals. But for the sake of each of us, who collectively are that community, it is equally important that they achieve that goal in a manner consistent with constitutional values, indeed, it is the very essence of the social contract that they do so. To countenance the long-term wilful disregard of those values in the name of effective law enforcement would not just bring the administration of justice into disrepute, it would render the Charter meaningless.

[286] I conclude that the accused has failed to establish on a balance of probabilities that the evidence obtained as a result of the Requirements should be excluded at trial.

[287] Although I am of the view that Revenue Canada effected a serious Charter breach, the accused is alleged to have committed some very serious offences that, if proved, is an affront to the fundamental values of our society. In determining the admissibility of the banking records and the qualifications of Mr. Byerlay, I have considered that while the Charter violations are significant, a number of factors suggest that the admission of the evidence will not lead to unfairness in this particular case. These factors include:

- (a) Although the use of Requirements on third parties after the predominant purpose of the inquiry is penal liability is now clear by virtue of the Supreme Court of Canada's decision in *Jarvis*, it was not clear in 1985-87.
- (b) There is no evidence of institutional recklessness by any of the Revenue Canada Officials involved in this case.
- (c) The Charter breach did not arise from any bad faith on the part of the Revenue Canada Officials, but on the law as it existed at the time.
- (d) The evidence is non-conscriptive.
- (e) The allegations, if proven, amount to a very serious offence.

[288] The last issue with which I intend to deal on this voir dire is the issue of abuse of process.

O. ABUSE OF PROCESS

i. Position of the defence

[289] Counsel for the accused submits that the documentary exhibits were obtained through an abuse of legal authority in that Revenue Canada obtained the evidence via compulsory provisions of the Act during an investigation when they knew, or ought to have known, that they could not do so. He further submits that the taint of this behaviour runs to the grounds of the affidavit in support of the search warrants issued in this case and indicates bad faith on the part of Revenue Canada. He submits that there was such an affront to fair play and decency that to proceed with the trial would tarnish the integrity of the Court. In the circumstances of this case he submits that there was an abuse of process. He further submits that the only way to avoid having the administration of justice brought into disrepute is to enter a stay of proceedings.

ii. The law

[290] In determining whether there has been an abuse of process, the judge must weigh the affront to fair play and decency with the societal interest in the effective prosecution of criminal cases. If the former is clearly disproportionate then the administration of justice is best served by staying the proceedings. The threshold for a stay is high: it is only exercised in the clearest of cases. In weighing this, the judge must consider the following questions:

- is the evidence tainted to such a degree that allowing the prosecution to proceed would tarnish the integrity of the Court?
- would proceeding offend the principles of fundamental justice?

[291] The starting point in the analysis of an abuse of process claim is described in *R. v. Pan* (2001), 155 C.C.C. (3d) 97 (S.C.C.) by Arbour J. at para. 112:

... Where a claim of abuse of process is made, it is necessary to examine the particular facts of the case in order to determine whether, in all the circumstances, it would offend the principles of fundamental justice to proceed further.

[292] The Court may exercise its discretion to exclude evidence if its admission would render the trial unfair. The trial judge has a duty under the common law to exclude evidence, however obtained, that would result in an unfair trial (see *R. v. Harrer* (1995), 101 C.C.C. (3d) 193 (S.C.C.), especially paras. 23 & 24). For example, "to admit evidence gathered in an abusive fashion may well violate the principles of fundamental justice." (*R. v. Terry* (1996), 106 C.C.C. (3d) 508 (S.C.C.), McLachlin J., at p. 517).

[293] The abuse of process doctrine is one method of excluding evidence. Its rationale is outlined in *R. v. Conway*, [1989] 1 S.C.R. 1659 at para. 8:

Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (see *R. v. Jewitt*, [1985] 2 S.C.R. 128, at p.148), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the Court. The doctrine is one of

the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society" (Rothman v. The Queen, [1981] 1 S.C.R. 640, at p.689, per Lamer. J.). It acknowledges that Courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.

[294] R. v. Young (1984), 13 C.C.C. (3d) 1 (Ont.C.A.) at p. 31, per Dubin, J.A., (Howland, C.J.O. and Martin, J.A. concurring), affirmed by the Supreme Court of Canada in R. v. Jewitt, [1985] 2 S.C.R. 128, is the leading authority defining the test for abuse of process:

... there is a residual discretion in a Trial Court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a Court's process through oppressive or vexatious proceedings. This is a power, however, of special application which can only be exercised in the clearest of cases.

[295] In R. v. Regan (2002), 161 C.C.C. (3d) 97 (S.C.C.), LeBel J. gave us an analysis of the law with respect to abuse of process. He stated at paragraphs 49-52:

In the Charter era, the seminal discussion of abuse of process is found in R. v. O'Connor, [1995] 4 S.C.R. 411. The doctrine of abuse of process had been traditionally concerned with protecting society's interest in a fair process. However, in O'Connor, L'Heureux-Dubé J., writing for a unanimous Court on this issue (Lamer, Sopinka and Major JJ. dissenting on the application of law to the facts, subsumed the common law doctrine abuse of process into the principles of the Charter in the following terms, at para. 63:

[I]t seems to me that conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused.

L'Heureux-Dubé J. also acknowledged the existence of a residual category of abuse of process in which the individual's right to a fair trial is not implicated. She described this category, which is invoked in the present appeal, as follows in O'Connor, at para. 73:

This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness and vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

L'Heureux-Dubé J. thus held that now, when the courts are asked to consider whether the judicial process has been abused, the analysis under the common law and the Charter will dovetail (see O'Connor, at para. 71). In this manner, while it acknowledged that the focus of the Charter had traditionally been the protection of individual right, the O'Connor decision reflected and

accommodated the earlier concepts of abuse of process, described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (R. v. Power, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (R. v. Conway, [1989] 1 S.C.R. 1659, at p. 1667). In an earlier judgment, McLachlin J. (as she then was) expressed it this way:

... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice. I add that I would read these criteria cumulatively. [R. v. Scott, [1990] 3 S.C.R. 979, at p. 1007]

Under the Charter, the violation of specific fair trial rights may also constitute an abuse of process, as will a breach of the more general right to fundamental justice (see O'Connor, at para. 73).

Finally, this Court's most recent consideration of the concept of abuse of process arose in the administrative context. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, it was held that a 30 month delay in processing a sexual harassment complaint through the British Columbia human rights system was not an abuse of process causing unfairness to the alleged harasser. For the majority, Bastarache J. came to this decision on the basis that abuse of process has a necessary causal element: the abuse "must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected" (para. 133). In *Blencoe's* case, it was held that the humiliation, job loss and clinical depression which he suffered did not flow primarily from the delay, but from the complaint itself, and the publicity surrounding it (*Blencoe*, at para. 133; see also *United States of America v. Cobb*, 2001 SCC 19).

[296] That a stay of proceedings should only be entered in the "clearest of cases" has been supported by *R. v. Conway*, supra; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Carosella*, [1997] 1 S.C.R. 80; *R. v. La*, [1997] 2 S.C.R. 680; and *R. v. Campbell*, [1999] 1 S.C.R. 565.

iii. Conclusion on this issue

[297] I have instructed myself on the law as enunciated above. I can see absolutely no evidence on this voir dire that leads me to the conclusion that a stay of proceedings should be granted in this case. This is certainly not one of the "clearest of cases."

[298] The application to stay these proceedings as an abuse of process is therefore denied.

P. CONCLUSION

[299] On the basis of the foregoing, the accused's application to have the evidence excluded is dismissed and the application for a stay of proceedings is also denied.

"S.R. Romilly, J."

The Honourable Mr. Justice S.R. Romilly

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