Protections Against Self-Incrimination in Income Tax Audits, Investigations, and Inquiries

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PRÉCIS

La *Loi de l'impôt sur le revenu* (la « Loi ») confère à l'Agence des douanes et du revenu du Canada (auparavant Revenu Canada et ci-après l'Agence) une vaste gamme de pouvoirs d'enquête, qui aident habituellement à la vérification et à la confirmation des renseignements fiscaux, sans qu'il soit prévu que les renseignements ainsi obtenus mènent à des accusations d'ordre criminel contre le contribuable faisant l'objet de l'enquête. Lorsque « l'objet prédominant » de l'enquête de l'Agence est ou devient la recherche de preuves pouvant servir dans une poursuite éventuelle au criminel, les droits du contribuable en vertu de la Charte sont en cause, plus précisément le droit en vertu de l'article 8 de la Charte à la protection contre les fouilles, les perquisitions ou les saisies abusives et le droit en vertu de l'article 7 à la protection contre l'auto-incrimination. Dans cet article, les auteurs examinent la portée et l'application du concept de la protection contre l'auto-incrimination en vertu de la Charte dans les cas de vérifications, d'enquêtes et de demandes de renseignements en vertu de la Loi. Dans le cas de vérifications et d'enquêtes, les tribunaux ont soutenu qu'il incombe aux enquêteurs de l'Agence d'informer le contribuable de la possibilité d'auto-incrimination si l'objet prédominant de l'enquête est la recherche de preuves possibles en vue d'une poursuite éventuelle. De plus, le contribuable qui fait l'objet de la vérification ou de l'enquête ne peut pas être contraint à répondre aux questions de l'Agence.

Par contre, la Cour suprême du Canada a récemment soutenu, dans l'affaire *Del Zotto v. Canada*, qu'une enquête officielle en vertu de l'article 231.4 de la Loi ne viole pas nécessairement les droits du contribuable en vertu des articles 7 ou 8 de la Charte, même lorsque l'objet prédominant de l'enquête consiste à rechercher des preuves en vue d'une poursuite éventuelle contre le contribuable. Cette décision sonne-t-elle le glas du critère de l'objet prédominant? Non, selon les auteurs. Le critère de l'objet prédominant permet d'établir si les déclarations

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faites par un contribuable en vertu d'une disposition d'une loi sont recevables en preuve dans une poursuite criminelle ultérieure. Les tribunaux ont soutenu que lorsque l'objet prédominant de l'enquête est de nature criminelle, les déclarations du contribuable ne sont pas recevables en preuve à moins que le contribuable n'ait été informé qu'il n'est pas tenu de collaborer. Il en découle accessoirement que le contribuable a le droit de ne pas répondre aux questions qui lui sont posées. Cette règle porte donc sur l'utilisation d'une catégorie restreinte de déclarations. Dans l'affaire *Del Zotto*, la Cour suprême n'a pas donné d'avis sur l'utilisation de preuves obtenues durant l'enquête, mais sur l'appareil administratif lui-même. Ainsi, la cour a souscrit à la conclusion selon laquelle le fait de savoir si l'utilisation de preuves obtenues durant une enquête contrevient aux droits du contribuable en vertu de la Charte doit être établi par le tribunal au moment où ces preuves sont déposées.

Toutefois, les limites, le cas échéant, qui seront imposées à l'utilisation, lors d'une poursuite au criminel ultérieure, de preuves incriminantes fournies par un contribuable durant une enquête, demeurent obscures. Cette utilisation est d'autant plus problématique à la lumière de l'arrêt récent de la Cour suprême dans l'affaire *R v. White*, dans lequel la cour a conclu que, dans certains contextes, des renseignements donnés obligatoirement en vertu d'une loi, peu importe le but dans lequel ils ont été obtenus, ne peuvent pas servir dans le cadre d'une poursuite ultérieure au criminel. En se fondant sur l'arrêt *White*, les auteurs croient qu'il est très peu vraisemblable qu'un tribunal permette que le témoignage d'un contribuable en vertu de l'article 231.4 soit déposé en preuve contre ce même contribuable dans le cadre d'une poursuite ultérieure au criminel. Deux causes présentement en appel devant la Cour suprême (*Jarvis* et *Ling*) seront sans doute très importantes et fourniront d'autres lignes directrices dans ce domaine.

ABSTRACT

The Income Tax Act ("the Act") provides the Canada Customs and Revenue Agency (formerly Revenue Canada) with a broad range of investigative powers, which are normally used to assist in the audit and verification of tax information without any anticipation that the information elicited will lead to the laying of criminal charges against the taxpayer under investigation. Where the "predominant purpose" of Revenue Canada's investigation is, or becomes, seeking evidence for use in a possible criminal prosecution, the Charter rights of the taxpayer are engaged—more specifically, the right under section 8 of the Charter to be free from unreasonable search and seizure and the right under section 7 of the Charter to be protected from self-incrimination. In this article, the authors explore the extent and operation of the Charter protection against self-incrimination in audits, investigations, and inquiries under the Act. In the case of audits and investigations, the courts have held that there is an onus on Revenue Canada investigators to caution a taxpayer against possible self-incrimination where the predominant purpose of their inquiries is to seek evidence for a possible

prosecution; as a corollary, a taxpayer who is the subject of such an audit or investigation cannot be compelled to answer Revenue Canada's inquiries.

In contrast to that position, the Supreme Court of Canada recently held in *Del Zotto v. Canada* that a formal inquiry under section 231.4 of the Act does not necessarily violate the rights of a taxpayer under section 7 or 8 of the Charter, even where the predominant purpose of the inquiry is to seek evidence for a possible prosecution of that taxpayer. Does this decision sound the death knell for the predominant purpose test? In the view of the authors, no. The predominant purpose test determines whether statements made by a taxpayer under statutory compulsion are admissible in subsequent criminal proceedings. The courts have held that where the predominant purpose of the investigation is criminal in nature, such statements are not admissible unless the taxpayer has been cautioned that he or she need not cooperate. A necessary corollary is the taxpayer's right to remain silent when such questions are asked. This rule accordingly addresses the use of a limited category of statements. In *Del Zotto*, the Supreme Court was not opining on the use of any evidence obtained at the inquiry but on the administrative apparatus itself. In so doing, it endorsed the conclusion that whether any specific use of evidence obtained at such an inquiry would offend a taxpayer's Charter rights is a question that is to be determined by the court at the time such evidence is tendered.

What remains unclear are the limits, if any, that will be imposed on the use in subsequent criminal proceedings of incriminating evidence given by a taxpayer at such an inquiry. Such use is all the more problematic in light of the recent decision of the Supreme Court in *R v. White*, in which the court concluded that in certain contexts, statutorily compelled information, irrespective of the purpose for which it was obtained, may not be used in subsequent criminal proceedings. On the basis of the *White* decision, the authors think that it is quite unlikely that a court would permit evidence given by a taxpayer in an inquiry under section 231.4 to be introduced as evidence against that same taxpayer in subsequent criminal proceedings. Two pending appeals before the Supreme Court (*Jarvis* and *Ling*) will undoubtedly be very important in providing further guidance in this area.

Keywords: Administration; audits; seizure; requirements; investigations; tax evasion.

INTRODUCTION

Sections 231.1 to 231.6 of the Income Tax Act[1] provide the minister of national revenue ("the minister") with an array of investigative powers, some criminal (such as search warrants), some administrative (such as audits), and some of a hybrid character (such as the inquiry power). These powers can be grouped under five general headings:[2]

1) administrative search powers,[3]
2) requirements for information,[4]

3) criminal search and seizure powers,[5]
4) ministerial inquiry powers,[6] and
5) requests for foreign-based information.[7]

The operation and scope of these powers depend upon their character; that is, the courts will normally construe provisions permitting administrative investigations more broadly than those permitting criminal investigations. One of the most difficult issues facing the courts today is how to balance the rights of taxpayers against the legitimate objectives of Revenue Canada[8] in situations where administrative and criminal investigations overlap. Our aim in this article is to demonstrate how the jurisprudence in this area has evolved to date and to suggest where that evolution may lead.

The Audit

The audit power is clearly administrative in nature:

> While there is, in Canada, a high standard of public compliance with the law, a self-assessment tax system can be maintained only through vigilant and continuous inspection of returns. The primary purpose of the tax audit is to monitor and maintain the self-assessment system. As such, it plays an important role in the achievement of the objectives of the Department which are to collect the taxes imposed by law through the encouragement of voluntary compliance and to maintain public confidence in the integrity of the tax system.[9]

In maintaining a self-assessment based system, the Act requires taxpayers to keep records and books of account to determine taxes payable and authorizes Revenue Canada to audit these documents for any purpose related to the administration or enforcement of the Act.[10] Furthermore, the Act authorizes Revenue Canada to request information, records, documents, and any other pertinent information required to effect its auditing task.[11] Often, the minister is not attempting to prove dishonesty or malice on the part of the taxpayer, but is instead simply attempting to verify that the self-assessment undertaken by the taxpayer corresponds with the rules of the Act.

The field audit is the most common audit undertaken by Revenue Canada.[12] It usually entails a detailed examination of books and records and is ordinarily conducted at the taxpayer's place of business. Before undertaking a specific field audit, the auditor will ordinarily contact the taxpayer to arrange a convenient date and will then begin a review of the taxpayer's file.[13] Upon arrival at the taxpayer's place of business, the auditor is to present an official identification card.[14] If, following the audit, the taxpayer's return should require an adjustment, the auditor will discuss Revenue Canada's proposal of adjustment with the taxpayer and/or the taxpayer's representative.[15]

Criminal Investigations

The Act sets out several criminal offences in an effort to add teeth to the self-assessment obligations of the taxpayer. Among these offences are those dealing with the evasion of taxes, enumerated in section 239 of the Act. If found guilty of an offence under section 239, the taxpayer is liable on summary conviction to a fine of not less than 50 percent and not more than 200 percent of the amount of the tax that was sought to be evaded,[16] in addition to any penalty otherwise provided, and may be subject to imprisonment for a term not exceeding two years.[17] At the discretion of the attorney general, the taxpayer may alternatively be prosecuted by way of indictment and, if convicted, will be liable to a fine of not less than 100 percent and not more than 200 percent of the amount of the tax that was sought to be evaded, in addition to any penalty, and imprisonment for a term not exceeding five years.[18]

Section 231.3 of the Act provides a means for Revenue Canada officials to obtain a warrant to search and seize documents of a taxpayer for the purpose of gathering evidence to determine whether or not that taxpayer has been guilty of offences contrary to the Act. Pursuant to subsection 231.3(1), application for such a warrant is made ex parte to a judge of a superior court having jurisdiction in the province where the matter arises or to a judge of the Federal Court.[19] The evidence presented in support of the application must establish that the minister has reasonable grounds to believe the following:[20]

- that an offence under the Act has been committed;
- that a document or thing that may afford evidence of the offence is likely to be found; and
- that the building, receptacle, or place specified in the application is likely to contain such a document or thing.

Overlap Between Administrative and Criminal Investigations

In practice, the section 231.3 warrant, while a useful tool, presents a laborious hurdle for Revenue Canada to overcome in its continuing efforts to maintain compliance with the Act.[21] The investigatory powers inherent in sections 231.1, 231.2, and 231.4 of the Act provide a tempting alternative means to effect Revenue Canada's ends. However, the inherently intrusive nature of these investigatory powers raises very real concerns about their operation in relation to the protection of taxpayers' rights as guaranteed under the Canadian Charter of Rights and Freedoms.[22] Of particular concern is the fact that the investigatory powers of sections 231.1, 231.2, and 231.4, unlike the criminal search and seizure powers of section 231.3, may be exercised without the necessity of obtaining a warrant. The legitimacy of Revenue Canada's objectives notwithstanding, the Charter provides the taxpayer with specific safeguards against the potential self-incrimination that may occur during the course of such an "audit."

The possibility of overlap between administrative and criminal investigations obviously poses considerable risk that the rights of individual taxpayers may be sacrificed through the expedient use of administrative powers to pursue criminal investigations. In this article, in addition to reviewing the evolution of the jurisprudence in this area, we propose to highlight the taxpayer's rights and obligations, and in so doing, to protect the taxpayer from becoming the author of his or her own misfortune.

ADMINISTRATIVE SEARCH POWERS: SECTION 231.1

Investigatory Powers

Subsection 231.1(1) of the Act was designed to provide Revenue Canada with a mechanism through which it may review the affairs of the taxpayer. Pursuant to the Act, the minister has the authority to appoint an authorized person for any purpose related to the administration or enforcement of the Act to

- 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 the taxpayer under the Act;[23] and
- examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any other person.[24]

As has been discussed, these auditing powers provide a means for inspection without the requirement of a warrant.[25]

Section 231.1 further requires the owner or manager of the property or business and any other person on the premises or place to give the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of the Act and, for that purpose, requires the owner or manager to attend at the premises or place with the authorized person.[26] Under subsection 238(1) of the Act, a person who fails to comply with these requests is liable, on summary conviction, to a fine of not less than $1,000 and not more than $25,000, as well as any penalty, or to both the fine and penalty and up to 12 months' imprisonment.

Charter Concerns: Section 8 and Unreasonable Search and Seizure

One might argue that the investigatory powers granted to the minister pursuant to section 231.1, on its face, purport to usurp the taxpayer's right to be secure against unreasonable search or seizure as guaranteed by section 8 of the Charter. Section 8 of the Charter provides:

> Everyone has the right to be secure against unreasonable search or seizure.

The foundation for any section 8 analysis was established by Dickson J in *Hunter et al. v. Southam Inc.*, in which he wrote:

> The guarantee of security from *unreasonable* search and seizure only protects a *reasonable* expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from unreasonable search and seizure, or positively as an entitlement to a reasonable expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.[27]

Since this guarantee applies only to *unreasonable* search or seizure, as a prerequisite to the entitlement of such protection, the individual's expectation of protection must be, in and of itself, reasonable.[28]

The Ontario Court (General Division) had the opportunity to deal with the relationship between section 8 of the Charter and section 231.1 of the Act in *R v. Norway Insulation Inc.*[29] In that case, during the course of a routine audit, certain information was discovered which caused the auditor to suspect that the taxpayer had unreported sales. Accordingly, the auditor referred the file to Revenue Canada's Special Investigations Unit ("Special Investigations"). Although Special Investigations shared the auditor's suspicions, it concluded that the reasonable and probable grounds necessary to obtain a search warrant pursuant to section 231.3 were not present. Consequently, the file was sent back to audit with the request that other specific matters be investigated before Special Investigations could be satisfied that it had the requisite grounds to proceed with an application for a warrant.[30] On the basis of information subsequently obtained by audit staff, an information to obtain a search warrant was sworn, warrants were executed, and charges were laid.

At trial, the respondent submitted that subsection 231.1(1) of the Act is unconstitutional in that the section is so broad in its scope and application and so intrusive in its nature that it violates the taxpayer's right to be secure against unreasonable search or seizure as guaranteed by section 8 of the Charter. LaForme J of the Ontario Court (General Division) concluded that section 231.1 was valid legislation and did not violate the taxpayer's section 8 Charter right *as long as the purpose for which it was exercised was regulatory or administrative in nature*. As was noted by the trial judge, however, the accused faced the risk of a substantial fine and the possibility of two years' imprisonment. Consequently, LaForme J concluded that the present offence could not properly be categorized as a purely administrative matter but was, in fact, quasi-criminal. That is, the respondent was no longer simply being audited, but was, in fact, the subject of an investigation; accordingly, deprivation of liberty was at stake. LaForme J therefore concluded:

> [T]here appears to be a public interest to be served in ensuring that public officials who possess the ability to lay charges in *quasi*-criminal matters not be allowed

> unfettered powers of collecting evidence *beyond the point where they have turned their minds from mere administration or regulation to prosecution* [emphasis added].[31]

Charter Concerns: Section 7 and the Duty To Caution

At first blush, the right to be protected against self-incrimination as encompassed by the protection offered in section 7 of the Charter appears to be at odds with the power to compel taxpayer cooperation as provided by section 231.1 of the Act.[32] The issue of self-incrimination under the Act was discussed at length by the Alberta Provincial Court in *R v. Jarvis*.[33] In that case, before the commencement of the initial audit, the auditor had reviewed certain information pertaining to the taxpayer's income taxes. From this preliminary review, the auditor had formed certain suspicions of the taxpayer's wrongdoing and had decided that the matter would be forwarded to Special Investigations for possible prosecution. Notwithstanding this intention, the auditor arranged a meeting with the taxpayers to verify her suspicions and to gather incriminating information to that end. The auditor did not advise the taxpayer at this meeting that his file was no longer being dealt with as an audit (as opposed to an investigation), nor did she inform the taxpayer of his right to remain silent. Fradsham Prov. J framed the issues in the case as follows:

- Did the audit under section 231.1 of the Act become an investigation?
- If officials of the minister of national revenue were engaged in an investigation, were Charter rights of the accused engaged?
- If the investigation did trigger Charter involvement, what, if anything, was required to be done by the minister's officials?

The evidence presented at trial led Fradsham Prov. J to comfortably conclude that Revenue Canada, through its auditor, was using the power of subsection 231.1(1) to gather information for the purpose of prosecuting the taxpayer. Turning his attention to the second and third issues identified above, Fradsham Prov. J noted that this meeting between the Revenue Canada official and the taxpayer presented unique and conflicting duties and misconceptions:

> Jarvis was labouring under two forms of misapprehensions:
>
> (1) he did not know that he had the right to silence resulting from being under investigation (as opposed to being audited); and
>
> (2) he thought he had a legal duty to provide information to the Revenue Canada officials because of the operation of section 231.1(1) of the *Income Tax Act*.
>
> It is the second misapprehension which is most important in this case. From the point of view of the accused, it took him from the usual situation in which, under the common law (which he is deemed to know), he could have refused, with impunity, to answer the questions put to him by authorities, and put him into a situation in which the law imposed a positive duty on him to answer questions.[34]

Fradsham Prov. J reasoned that since Revenue Canada authorities knew that they were investigating Jarvis, they must have known, from their own policies, that such an investigation gives certain rights to the accused.[35] These rights notwithstanding,

Fradsham Prov. J was asked to examine the question whether the authorities were obligated to take the further step of informing the accused of his right to remain silent, by way of a caution.[36]

Fradsham Prov. J concluded that in the situation where a taxpayer has been led by the authorities to believe that a statutory requirement to answer questions continues to apply to that taxpayer when, in fact, it does not, the authorities have an obligation to inform the taxpayer that the requirement no longer applies. This can best be accomplished by informing the taxpayer that the authorities are involved in an investigation of his or her tax affairs with respect to a possible offence (as distinguished from an audit), and by providing the taxpayer with a caution.[37]

The duty to provide the taxpayer with a caution was further discussed by the Alberta Queen's Bench in *R v. Warawa*.[38] In that case, a search warrant was executed in the office of the accused with respect to a third party. In the exercise of the warrant, documents of the accused also were seized. Although the accused was advised that he could, if he wished, consult a lawyer with respect to the search warrant, the accused had no knowledge that he was, at that time, a suspect or that his records that were being seized would be used to form the basis of a criminal prosecution against him. In addition to the seizure of documents, questions were asked of the accused, to which he provided answers. The Crown subsequently sought to introduce those answers as evidence at trial.

Clark J, in his analysis of the situation, concluded that the accused thought that he was being subjected to another audit. Since he knew (or was deemed to know) what the rules were with respect to audit, the taxpayer felt that he had no choice but to give Revenue Canada officials what they requested.[39] As a result, Clark J concluded that there was an obligation to caution the accused:

> If the audits of the accused's clients and the accused had resulted simply in a reassessment so that the audit was confined to its regulatory function no caution would have been required. However, when [Special Investigations] takes that information and expands upon it for the purposes of investigating the accused the caution is required before the audit is conducted and expanded. . . .
>
> Unlike most criminal suspects the I.T.A. s. 231.1 conscripted the accused to cooperate by answering questions and providing documents if he was the subject of an audit under the I.T.A. Therefore the accused as a result of the failure of the [sic] Revenue Canada to tell him that the audits were in fact an investigation believed that he was still compelled by law to answer questions and provide information. This distinction from the more traditional situation makes the failure to caution him a very serious matter and a clear violation of s. 7 Charter rights.[40]

The Ontario Court (General Division) recently applied similar reasoning in *R v. Omstead*.[41] Although the *Omstead* case concerned an application to exclude certain evidence at the trial of a nurse charged with criminal negligence causing death, in his reasons, Browne J addressed the nature of the section 7 Charter right to remain silent. In so doing, he made a lengthy reference to the judgment of La Forest J in *R v. Fitzpatrick*, in which La Forest J concluded:

> Any state action that coerces an individual to furnish evidence against him or herself in a proceeding in which the individual and the state are adversaries violates the principle against self-incrimination. *Coercion, it should be noted, means the denial of free and informed consent* [emphasis added].[42]

It therefore appears well settled that when Revenue Canada undertakes an investigation, it must not proceed in any dealings with the taxpayer until a caution to that effect has been given. Until such a caution is offered, free and informed consent is an impossibility and, accordingly, the taxpayer's section 7 Charter rights stand in jeopardy.[43]

It is this distinction between an inspection for the bona fide purpose of ensuring compliance with the Act and an inspection conducted in the course of a quasi-criminal investigation that will weigh heavily in the balancing of the state's interest in maintaining compliance with the Act and the interests of the taxpayer.

The Predominant Purpose Test

The decision in *Norway Insulation* makes it clear that so long as the powers conferred by section 231.1 are being used to carry out the regulatory and administrative purposes for which they were intended, the taxpayer will be obliged to comply. Unfortunately, the distinction between a regulatory/administrative audit and a quasi-criminal investigation, while being of fundamental importance to the taxpayer vis-à-vis his or her entitlement to Charter protection, is not always as clear as the taxpayer might hope. In an effort to shed light on this distinction, the courts originally moved in the direction of a "predominant purpose" test.

LaForme J, in *Norway Insulation*, sought to fashion a method to assist in the determination of whether certain actions are undertaken to fulfill a regulatory objective or whether they are part of a criminal investigation. He first considered the test adopted by Ratushny J in *R v. Coghlan*, which reasoned:

> So long as the searches or seizures are for the *bona fide* purpose of determining compliance with the *Income Tax Act*, whether or not Revenue Canada suspects a criminal offence during that time, then in my view a search warrant is not required. However, as soon as Revenue Canada decides to lay criminal charges, it is then that the *Hunter* criteria . . . apply.[44]

LaForme J concluded that such a position could allow Revenue Canada to view the investigatory powers of subsection 231.1(1) as a means to avoid the necessity of obtaining warrants under any circumstances. All evidence could be obtained through specifically instructed auditors, and Revenue Canada could avoid the necessity of obtaining a warrant simply by relying on its *subjective* decision not to lay criminal charges. Such a test, LaForme J reasoned, stands contrary to the criteria espoused by the Supreme Court of Canada in *Hunter*, wherein Dickson J concluded:

> The purpose of an *objective* criterion for granting prior authorization to conduct a search or seizure is to provide a *consistent standard* for identifying the point at which the interests of the State in such intrusions come to prevail over the interests of the individual in resisting them [emphasis added].[45]

Despite the efforts of Revenue Canada to create policies to illuminate the distinction between an audit and an investigation, and despite the courts' willingness to protect the taxpayer from subversive investigations on the part of Revenue Canada, the more fundamental task is to be able to determine if and when an audit evolved into an investigation. Sopinka and Iacobucci JJ, writing for the majority of the Supreme Court of Canada in *BCS Com'n v. Branch*, offered the following guidance in construing the purpose of an inquiry:

> [T]he crucial question is whether the *predominant purpose* for seeking the evidence is to obtain incriminating evidence against the person compelled to testify or rather some legitimate public purpose. . . .
>
> In applying this test, the court must first determine the predominant purpose for which the evidence is sought. To qualify as a valid public purpose, compelled testimony in a criminal prosecution or prosecution under a provincial statute must be for the purpose of obtaining evidence in furtherance of that prosecution. Where evidence is sought for the purpose of any inquiry, we must first look to the statute under which the inquiry is authorized. The fact that the purpose of inquiries under the statute may be for legitimate public purposes is not determinative. The terms of reference may reveal an inadmissible purpose notwithstanding that the statute did not so intend. . . . Indeed, even if the terms of reference authorize an inquiry for a legitimate purpose in some circumstances, the object of compelling a particular witness may still be for the purpose of obtaining criminal evidence.
>
> It would be rare indeed that the evidence sought cannot be shown to have some relevance other than to incriminate the witness. . . . In such cases, if it is established that the predominant purpose is not to obtain the relevant evidence for the purpose of the instant proceeding, but rather to incriminate the witness, the party seeking to compel the witness must justify the potential prejudice to the right of the witness against self-incrimination [emphasis added].[46]

This "predominant purpose" test was recently applied by the Ontario Court of Justice in *R v. Feldberg*, in which Bassel Prov. J concluded:

> Although it started out as an audit, I find that by July 1994 *the main purpose and true nature* of this investigation was a criminal investigation [emphasis added].[47]

Although the task is highly speculative, and undoubtedly difficult, the courts have nevertheless been asked to take into consideration the entire context of the inquiry, and in particular, the legislative and regulatory background against which it stands, in construing the predominant purpose of the minister's actions.[48]

REQUIREMENTS FOR INFORMATION: SECTION 231.2

Investigatory Powers

The administrative power to require the production of information, now contained in section 231.2 of the Act, evolved from former subsection 231(3). Originally, subsection 231(3) empowered the minister to compel the production of information or documents without any requirement for judicial sanction and without any apparent limitation as to the persons whose affairs were the subject of the investigation.[49] This seemingly unlimited investigatory power was, however, curtailed by the Supreme Court of Canada in the pre-Charter decision of *James Richardson & Sons*,[50] in which the court held that Revenue Canada could not use the section to embark on a "fishing expedition." Section 231.2 was introduced in an effort to temper the scope of the minister's powers.

Unlike section 231.1, section 231.2 does not involve a physical search of the taxpayer's premises. Instead, subsection 231.2(1) empowers the minister to request any information or additional information, including a return of income or a supplementary return, and may further require a person to provide any other document.[51] As mentioned, certain limitations have, however, been placed on the investigatory powers of section 231.2. For example, subsection 231.2(2) prohibits the minister from making a requirement for either information or documents from third parties if that request relates to one or more unnamed third parties, unless the minister obtains an authorization from a Federal Court judge or a superior court judge having jurisdiction in the province in which the matter arises.[52]

The leading case on former subsection 231(3) (and, by extension, current section 231.2) is *R v. McKinlay Transport Ltd.*[53] In that case, the Supreme Court of Canada had the opportunity to examine the interplay between the operation of subsection 231(3) and the protection against unreasonable search or seizure guaranteed by section 8 of the Charter. The facts in *McKinlay Transport* are relatively straightforward. During the course of an income tax audit, Revenue Canada, pursuant to subsection 231(3), served the appellants with letters demanding information and the production of certain documents. The appellants failed to comply with the demand and were charged accordingly with "failure to comply" pursuant to subsection 238(2) of the Act.

Initially, a Provincial Court judge quashed the information, holding that subsection 231(3) violated the protection against unreasonable search or seizure as guaranteed by section 8 of the Charter. The Ontario Supreme Court allowed the respondent's appeal, concluding that what was authorized by subsection 231(3) did not amount to a "seizure" within the context of section 8 of the Charter. The decision of the Ontario Supreme Court was appealed unsuccessfully to the Ontario Court of Appeal and was ultimately appealed to the Supreme Court of Canada. The court was asked to determine whether the demand for documents authorized by subsection 231(3), when read together with the enforcement mechanism provided by subsection 238(2), constituted a "seizure" within the meaning of section 8 of

the Charter, and if so, whether such a seizure was unreasonable so as to violate that right.

The majority decision, delivered by Wilson J,[54] focused largely on the taxpayer's reasonable expectation of privacy. As discussed earlier, section 8 of the Charter guarantees the reasonable expectation to be secure against unreasonable search or seizure. Wilson J concluded that even when construed narrowly, subsection 231(3) envisages the compelled production of a wide array of documents and is not limited to those documents required to be prepared by the taxpayer under the legislation. Additionally, the legislation permits the minister to compel production from a person who may not even be a party to the audit.[55] These considerations led Wilson J to conclude:

> [The] compelled production reaches beyond the strict filing and maintenance requirements of the Act *and may well extend to information and documents in which the taxpayer has a privacy interest in need or protection* under s. 8 of the *Charter* although it may not be as vital an interest as that obtaining in a criminal or *quasi*-criminal context. I would therefore conclude that the application of s. 231(3) of the *Income Tax Act* to the appellants constitutes a seizure since it infringes on their expectations of privacy [emphasis added].[56]

Having determined that there was a privacy interest at risk, Wilson J shifted her focus to the reasonableness of the search.[57] She reasoned that since the taxpayer's privacy interest with regard to the documents in question vis-à-vis the minister's interest was relatively low, the seizure contemplated by subsection 231(3) could properly be deemed to be reasonable.[58] Wilson J concluded:

> [T]he 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. The Minister must be capable of exercising these powers whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act. . . . A spot check or a system of random monitoring may be the only way in which the integrity of the tax system can be maintained. If this is the case, and I believe that it is, then it is evident that the *Hunter* criteria are ill-suited to determine whether a seizure under subsection 231(3) of the *Income Tax Act* is reasonable. The regulatory nature of the legislation and the scheme enacted require otherwise.[59]

The rationale offered in *McKinlay Transport* is entirely consistent with the fact that the predominant purpose of the minister's investigation was clearly regulatory. As has been discussed, however, while a standard audit is undeniably an integral component of the administration of the Act, it is often the first step in a continuing process that may ultimately involve a criminal or quasi-criminal investigation of the taxpayer.

Beyond the Administrative Function

In the case of *R v. Caswell*,[60] the accused was charged under subsection 238(1) for failing to provide information and documentation as required by subsection 231.2(1). At issue was whether the taxpayer, in light of the section 7 Charter rights, could be compelled by statute to produce information demanded by Revenue Canada under subsection 231.2(1).

At trial, the Revenue Canada official testified that although he carried with him two different business cards, one that identified him as a member of the audit division and a second that identified him as a member of Special Investigations, at his meetings with the Caswells he presented them with only his audit division card. He further testified that pursuant to a memorandum of understanding between the Department of National Revenue, Taxation and the Department of the Solicitor General, it was the objective of Revenue Canada to use the information demanded under section 231 to determine, together with the police, whether any future action, be it criminal or otherwise, would be taken. Doherty J, in undertaking his analysis, recognized the limited application of the *McKinlay Transport* decision:

> The *McKinlay* case represents the purely administrative approach to the use of s. 231 because a taxpayer's privacy interest is low in relation to the taxation authority. . . . *McKinlay*, however, does not purport to answer the type of issue raised in the case at bar.[61]

In reaching his judgment, Doherty J relied on the conclusion of Maughan J in *R v. Harris*:

> To allow the prosecution . . . to proceed under the *Income Tax Act* would be to allow the provisions of the *Income Tax Act* to be used as a back door to circumvent the state's breach of the accused's *Charter* rights. In these circumstances, the accused is entitled to exercise his right to silence in the context of what is really a criminal investigation and not merely a purely administrative matter. . . . I find to do otherwise would bring the administration of justice into disrepute.[62]

Doherty J concluded that the section 231.2 requirement notices, despite being issued under the guise of a regulatory scheme, were, in these circumstances, intended to be used as an investigatory tool for the purposes of gathering evidence for a criminal prosecution. Accordingly, the Caswells were entitled to invoke their Charter right to remain silent at the investigatory stage and could not be compelled to respond to the minister's section 231.2 requirement demand.

Clearly, whether a taxpayer's Charter rights will be engaged will depend on the nature of the information sought and a determination of the context of the request by Revenue Canada as either an audit or an investigation. The *McKinlay Transport* decision makes it clear that for the purposes of an audit, the seizure powers provided by section 231.2 will be deemed reasonable and will thereby avoid Charter scrutiny. Equally clear, however, is the fact that the courts will not

condone the surreptitious use of the investigatory provisions of the Act to compel the taxpayer to provide criminal evidence for the minister under the cloak of a regulatory function.[63]

SEARCH WARRANTS

As noted, section 231.3 of the Act requires that in order for a warrant to be obtained, evidence must be presented under oath to establish certain reasonable grounds. The manner in which that evidence was obtained and the timing of its disclosure will ultimately determine the validity of the warrant. Returning to the *Jarvis* decision,[64] Revenue Canada had obtained search warrants that relied, in part, on statements made by Jarvis that were elicited through Revenue Canada's failure to caution him, contrary to his section 7 Charter rights. In other words, the information obtained during the audit was gathered for the purpose of satisfying the evidentiary requirements of section 231.3 of the Act. Without this information, counsel for Jarvis argued, the application for the search warrants would not have been granted and, accordingly, the searches conducted by Revenue Canada were warrantless searches. As a result, counsel argued, the material seized by Revenue Canada in those searches was seized in violation of Jarvis's section 8 Charter right. Fradsham Prov. J, having excised Jarvis's statements from the information supporting the warrants, concluded that the warrants could not have been obtained on the remaining contents of the information and excluded the evidence obtained through the use of those warrants.[65]

Subsequently, however, the Alberta Court of Appeal rejected the conclusion reached by Fradsham Prov. J. As explained by Berger JA of that court,[66] in the determination of whether the warrants were properly obtained, the relevant inquiry should be whether, on all the facts, the prosecution was aided in its evidence-gathering mission such that the minister's investigators were "bootstrapped" into a position where they obtained a search warrant that would otherwise have been unattainable. Berger JA elaborated:

> In my opinion, the principled reason for invalidating a search warrant is the conclusion supported by evidence adduced on review that the deponent did not have reasonable and probable grounds to seek the warrant in the first place. Averments premised upon evidence obtained as a result of a *Charter* breach will be excised, thereby eroding to a greater or lesser extent the factual foundation for the deposition. False evidence will also be excised by the reviewing judge. That which remains will then be considered to determine whether the deponent's assertion of "reasonable and probable grounds" survives scrutiny. Because the *voir dire* conducted for that purpose is precipitated by a challenge to the validity of the search warrant, the evidence adduced necessarily informs that issue.[67]

Although Berger JA concluded that in this case the voir dire revealed sufficient evidence that a warrant could have been issued, he was careful to note that this was not a case of inclusion of facts obtained during an unconstitutional search or

an attempt to shore up a voidable warrant in reliance upon the fruits of the search that it purported to authorize.[68] Where a warrant is obtained by these latter means, it remains open to bring an application to quash such a warrant and to attack the resulting warrantless search.

The Charter protections afforded the taxpayer during an audit were strongly enforced in a recent decision of the Ontario Court of Justice (General Division). In *R v. Saplys*,[69] the applicants challenged the validity of a search warrant obtained by Special Investigations.[70] The applicants submitted that information and documents gathered from the audit were used to form the basis of the reasonable grounds presented to obtain a warrant. The applicants argued that the use of the audit to obtain an evidentiary foundation for criminal charges against them amounted to a warrantless search and seizure. Furthermore, the applicants contested that the taxpayer's right to silence was violated by the auditor's misleading him as to the true nature of the audit.

In response to these accusations, the Crown submitted that Special Investigations had closed its criminal investigation in respect of the accused; therefore, any subsequent audit was regulatory in nature, and no caution was required. Furthermore, since the auditor was kept unaware of any involvement by Special Investigations, the auditor was at all times free of any bias in undertaking the audit inspection.

Despite the Crown's efforts to frame the search in a regulatory context, MacKenzie J's conclusions on the matter were unequivocal and should serve as a clear warning to Revenue Canada to keep the audit and special investigations functions separate and apart:

> I find that the regulatory audit power was utilized by SI for the purpose of facilitating the investigation of the applicants.
>
> The Crown's contention that [the auditor] did not have knowledge of the contents of the memorandum and therefore could not be said to have improperly used his power to audit the applicants cannot be accepted. For a state agency to permit an auditor embarking upon an apparent compliance audit to be insulated from knowing the true nature of his assignment in order to further a stale or stymied criminal investigation runs counter to the notion of a state agency utilizing its powers to obtain compliance by citizens with taxing statutes for another purpose, *viz.*, to further a criminal investigation, so as to bypass a citizen's rights protected under the *Charter*.
>
> It is particularly repugnant when the tax regime is founded on initial self-assessment and the regulatory branch of the tax administration is understood by taxpayers and their advisors as having responsibility for compliance and not for investigation into suspected criminal wrongdoing and the gathering of evidence in such investigations.
>
> To allow the insulation of [the] audit in furtherance of SI's criminal investigation would, in my opinion, give SI *carte blanche* to engineer substantial impairment, if not eradication, of the *Charter* rights of taxpayers under investigation by the simple expedient [of] using an unwitting auditor to conduct an apparent compliance audit for the predominant purpose of aiding a criminal investigation. . . . Whether [the

> auditor] knew or did not know of the ultimate purpose of his audit is irrelevant to the propriety of the investigation by SI driving such audit and its impact on the *Charter* rights of Saplys.[71]

INQUIRY PROCEEDINGS: SECTION 231.4

The Inquiry and Charter Concerns

Section 231.4 of the Act permits the minister to authorize an inquiry into anything relating to the administration or enforcement of the Act. Once the decision to hold an inquiry has been made, the minister will ordinarily apply to the Tax Court of Canada for an order to appoint a hearing officer. The hearing officer has all the powers conferred on a commissioner by the Inquiries Act,[72] to summon witnesses and to enforce their attendance and compel their testimony. Usually, counsel from the Department of Justice is also employed to assist in the inquiry.[73]

The constitutionality of such an inquiry was recently questioned in the case of *Del Zotto v. Canada*,[74] in which the taxpayer argued that section 231.4 violated sections 7 and 8 of the Charter. The appellant, Angelo Del Zotto, was suspected of tax evasion and was advised by Revenue Canada officials that they intended to charge him accordingly under paragraphs 239(l)(a) and (d) of the Act. Subsequently, a hearing officer was appointed pursuant to section 231.4 of the Act, and an inquiry was initiated into the affairs of Del Zotto. Although Del Zotto was not summoned as a witness, Herbert Noble, a lawyer and business executive, was summoned to appear with all documents in his possession or control relating to the financial affairs of Del Zotto for the taxation years in question.[75] Del Zotto submitted that because subsection 231.4(3) provides a hearing officer with the power to issue a subpoena *duces tecum*, which, absent reasonable and probable grounds, amounts to a de facto warrantless seizure, section 231.4 of the Act infringed section 8 of the Charter.[76] Del Zotto, aware that the rigours of the *Hunter* criteria do not apply to seizures in the administrative or regulatory context,[77] argued that since section 231.4 was being used to build a case for prosecution under section 239 of the Act, the context was not administrative or regulatory, but criminal.[78] Accordingly, the full rigours of the *Hunter* criteria ought to apply.

MacGuigan JA, writing for the majority,[79] examined section 8 of the Charter and concluded that the right to be secure against search or seizure under section 8 of the Charter has evolved into the right to the reasonable security of one's privacy.[80] Further,

> [s]ince section 8 protects the privacy rights of people, not places, Del Zotto had a reasonable expectation of privacy over documents and information held by other people at different places.[81]

As a result, the majority of the Federal Court of Appeal concluded that the minister did not have the right to conduct a criminal investigation into the financial affairs of a taxpayer by initiating an inquiry pursuant to section 231.4 of the Act, but

must instead conduct a judicial inquiry pursuant to the standard for any criminal investigation[82]—that is, with reasonable and probable cause. MacGuigan JA quoted the following passage from the decision of the Federal Court of Appeal in *Baron v. Canada*:

> The requirements of a self-reporting and self-assessing income tax system may justify an easing of *Charter* . . . standards where the primary purpose of a search is simply to ensure that taxes are paid as and when due. Where as here, however, we are dealing with provisions whose stated aim is the discovery and preservation of evidence for the purpose of a criminal proceeding nothing less than the fully panoply of *Charter* protection is appropriate.[83]

Having resolved the matter under section 8 of the Charter and with the respondent having advanced no justification under section 1 of the Charter, MacGuigan JA did not proceed to deal with the section 7 argument and allowed the appeal, declaring section 231.4 of the Act and subpoenas issued thereunder of no force or effect under section 52(1) of the Constitution Act, 1982. This decision, however, would be reversed by the Supreme Court of Canada.

Expectation of Privacy Revisited

On further appeal of the *Del Zotto* judgment, the Supreme Court set aside the majority decision of the Federal Court of Appeal and restored the trial judgment, for the reasons offered by Strayer JA in his dissenting opinion at the Federal Court of Appeal. In his reasons, Strayer JA first focused on the question of Del Zotto's section 7 rights and reasoned that because Del Zotto had not yet been subpoenaed to appear before the inquiry, his right against *self*-incrimination had not yet been engaged; therefore, it was at best premature to address this constitutional question.[84]

A more lengthy discussion followed on the applicability of section 8 of the Charter. The reasoning offered by Strayer JA followed that of Rothstein J at the Federal Court Trial Division. Rothstein J argued that the categorization of section 239 as "criminal" should not necessarily lead to the conclusion that a seizure undertaken in furtherance of section 239 is ipso facto unreasonable (thereby requiring adherence to the *Hunter* criteria). He argued that the applicability of the criteria established in *Hunter* does not depend entirely on whether the search and seizure is undertaken in pursuit of a "criminal" or "regulatory" process, but instead depends on a full weighing of all the circumstances.[85] For guidance on how to undertake this task, Rothstein J turned to the "scale of interests" test developed by the Supreme Court in *Baron*.[86] Following the rationale of Wilson J in *McKinlay Transport*, Rothstein J concluded that the greater the intrusion into the privacy of the individual, the more likely it will be that safeguards akin to those in *Hunter* will be required. Accordingly, he concluded:

> I find on the facts, the case at bar resembles the case of *Thomson*, in the sense that the *modus operandi* of a tax inquiry involves compelling a person to appear for

> examination under oath and to bring with them certain documents, under a *subpoena duces tecum*. For the purposes of the scale of interests articulated in *Baron*, this would place the inquiry as a lesser form of intrusion than a search of a private premises. The present case also resembles *Thomson* in that the plaintiffs' expectation of privacy pertains to business affairs, which is relatively low in comparison with matters of a personal or intimate nature. . . . In keeping with *Thomson*, the inquiry would not require the application of the *Hunter* standards.[87]

Similarly, Strayer JA concluded that the mere characterization of the process as criminal does not necessarily mean that the preconditions for a search as established in *Hunter* must be adhered to before a section 231.4 inquiry may proceed. Strayer JA reasoned that one must look to *the totality of the context* in which the search or seizure occurs in order to determine whether it is really being undertaken in a criminal or regulatory context. The manner in which these matters must be judged involves many considerations, including the nature and purpose of the legislative scheme in question; the mechanism for discovery or production, and the degree of potential intrusiveness therein; and the availability of judicial supervision. Therefore, although the Crown had acknowledged that the predominant purpose of the inquiry was to seek evidence for a possible prosecution of Del Zotto under paragraphs 239(1)(a) and (d) of the Act, the inquiry, when examined for the purpose of determining Del Zotto's reasonable expectation of privacy, did not ipso facto operate in a criminal context. The paragraphs of the Act in question, Strayer JA argued, were designed to ensure compliance with a self-reporting regulatory scheme and were made criminal strictly for "instrumental" reasons.[88] Furthermore, the taxpayer had little expectation of privacy with respect to the information contained in the documents requested in the subpoena *duces tecum*, and certain safeguards were in place.[89]

At the Court of Appeal, MacGuigan JA, in response to suggestions that documents produced in the course of a regulated business have a lesser privacy right than do documents that are personal, had written:

> Such business records [as required by the regulation of the securities industry] dedicated to a special regulated purpose, are a long way from the general records of a taxpayer in the course of administering his/her affairs. These general records cannot be swept into the kind of narrow category appropriate under securities legislation.
>
> Anything to do with his financial affairs over six years may include many items of a very personal and private nature such as personal expenditures (e.g. gifts to friends and relatives, reading materials), donations (e.g. to churches, charities or political parties), personal tastes (e.g. food, clothes), his relationship with family members (what they give to him), and so on. Documents and information concerning his financial affairs over six years, without limitation, could reveal incredibly intimate and personal details about his preferences, habits, opinions, hopes and activities. The same is true for witnesses who have knowledge of his financial affairs . . . . Simply put, as the appellants emphasized, an investigation into all cash received and all cash spent is necessarily, in today's modern world, a look into most of a person's private life.[90]

Strayer JA, however, in response to the same characterization of the documents as being private in nature, concluded:

> There cannot be the exaggerated claims to privacy connected with the administration of the *Income Tax Act* which the appellants assert. The Act requires all manner of disclosure. The taxpayer must, for example, disclose: his place of residence; his age; his social insurance number; his marital status or whether he is living common law; his sources and amounts of income; his dependants, their ages and possible physical conditions if handicapped; the amounts and objects of his charitable or political donations, if he is to claim tax credits; whom he employs and entertains if he seeks to deduct the costs as business expenses; and details of his pension arrangements.[91]

Accordingly, Strayer JA concluded that it is only when particular uses of that subpoena power, or *subsequent uses of evidence obtained thereby*, actually jeopardize the taxpayer's section 7 or 8 Charter protections that those protections need to be invoked.[92] By adopting this reasoning, the Supreme Court of Canada has endorsed Strayer JA's implicit shift away from the predominant purpose test.[93]

Does this decision sound the death knell for the predominant purpose test? In our view, no. The predominant purpose test is one that determines whether statements made by a taxpayer under statutory compulsion are admissible in subsequent criminal proceedings. The courts have held that where the predominant purpose of the investigation is criminal in nature, such statements are not admissible unless the taxpayer has been cautioned that he or she need not cooperate. As a necessary corollary, the taxpayer has a right to remain silent when such questions are asked. Thus, this is a rule that goes to the use of a limited category of statements. In *Del Zotto*, the Supreme Court was not opining on the use of any evidence obtained at the inquiry but on the administrative apparatus itself. In so doing, it endorsed the conclusion that whether any specific use of evidence obtained at such an inquiry would offend a taxpayer's Charter rights is a question that is to be determined by the court at the time such evidence is tendered. What remains unclear, however, are the limits, if any, that will be imposed on the use of incriminating evidence given by a taxpayer at such an inquiry in subsequent criminal proceedings.

STATEMENTS MADE UNDER STATUTORY COMPULSION

The Supreme Court of Canada recently released a decision that will undoubtedly affect future submissions concerning the admissibility of evidence obtained by Revenue Canada pursuant to the Act. In *R v. White*,[94] the Supreme Court was asked to decide the primary question whether the admission into evidence in a criminal trial of statements made by an accused under compulsion of the British Columbia Motor Vehicle Act[95] offends the principle against self-incrimination as embodied in section 7 of the Charter.[96] The court's treatment of this question would provide a clear indication of its willingness to protect the section 7 right of an accused.

The facts in the case were relatively straightforward. The accused, Ms. White, in an effort to avoid hitting two deer, swerved her vehicle and hit a man at the side of the road. She panicked and continued home without stopping as required under section 252(1)(a) of the Criminal Code. The next day, she contacted the police to report the accident, and a policeman was subsequently dispatched to her home. Ms. White repeated the circumstances of the accident to the officer and inquired about the condition of the man she had hit. The officer informed her that the man had died and further informed her of the possible charges she might face as a result.

The officer advised Ms. White of her section 10(b) Charter rights.[97] Upon speaking with her attorney, Ms. White told the officer that, on her lawyer's advice, she would not provide a statement with respect to the accident. She was informed by the officer that, notwithstanding her Charter rights, she would be required to provide a statement pursuant to the MVA; however, that statement could not be used against her in court.[98]

Ms. White was subsequently charged under the Criminal Code with failing to stop at the scene of an accident. At trial, the Crown sought to adduce evidence of Ms. White's conversations with the police, elements of which were necessary in order to link her to the scene of the accident. Ms. White testified that she understood that she was under a statutory duty to report the accident and believed that the police had attended her home to compile an accident report. As a result, she believed that she was obligated to comply.[99] The trial judge, despite concluding that the statements were voluntary, nevertheless allowed a defence motion that asserted that Ms. White's section 7 Charter right had been infringed. Without the benefit of Ms. White's statements, a motion to dismiss the charge on the basis that the Crown had adduced no evidence as to the identity of the person driving the vehicle involved in the accident was granted.

The decision of the British Columbia Supreme Court was unsuccessfully appealed to the British Columbia Court of Appeal, and was ultimately appealed to the Supreme Court of Canada, where it was heard on November 13, 1998. On June 10, 1999, the Crown's appeal was dismissed. The majority decision, delivered by Iacobucci J, provided a thoughtful and thorough discussion in respect of statutorily compelled testimony and its relation to the protection against self-incrimination afforded by the Charter.[100] Iacobucci J emphasized the importance of context since, he reasoned, the principle against self-incrimination demands different things at different times. The task, therefore, is to determine exactly what the principle demands, if anything, within the particular context at issue.[101]

The Crown based its submissions largely on the decision of the Supreme Court of Canada in *R v. Fitzpatrick*,[102] a case that involved enforcement proceedings in the regulatory context of the commercial fishery in British Columbia. In *Fitzpatrick*, the accused had made oral hail reports of his daily catch by radio and had recorded daily testing logs of his estimated catch as required by British Columbia's fishery regulations. When he was subsequently charged with the provincial offence of overfishing, the Supreme Court permitted his hail reports and

fishing logs to be introduced as evidence since their introduction, the Supreme Court reasoned, would not violate the principle against self-incrimination.

In an effort to properly distinguish *Fitzpatrick* from the case before the court, Iacobucci J contrasted the contexts of these cases by comparing, in turn, each of the four contextual concerns inherent in a section 7 analysis as discussed by the court in *Fitzpatrick*: (1) the possible existence of coercion; (2) the question of an adversarial relationship; (3) the concern of unreliable confessions; and (4) the risk of abuse of power by the state.[103] The product of the Supreme Court's analysis is a lucid body of contextual analysis that will prove invaluable to any practitioner questioning the constitutionality of the self-incriminatory aspects of the Act.[104]

Existence of Coercion

The first concern canvassed, notwithstanding the fact that the information was statutorily compelled, was whether the information provided could, in its context, be viewed as being offered with free and informed consent. In the *Fitzpatrick* case, the Supreme Court concluded that the obligations imposed on the accused were imposed with his free and informed consent, since the accused, in deciding whether or not to participate in the commercial fishing industry, did so with the full understanding of his reporting obligations and the penalties for non-compliance therewith, and was aware that his reports might be used against him in subsequent proceedings. Similar contentions were forwarded by the Crown with respect to Ms. White, specifically that driving is a voluntary, regulated activity.

Although the court agreed that driving is a voluntary activity, and that drivers are deemed to be aware of their obligations and responsibilities, it nevertheless concluded that driving is not freely undertaken in the same manner as one freely participates in a regulated industry. On this point, Iacobucci J wrote:

> While the state should not be perceived as being coercive in requiring drivers to report motor accidents, the concern with protecting human freedom which underlies the principle against self-incrimination cannot be considered entirely absent in this context. As I view the matter, the issue of free and informed consent must be considered a neutral factor in the determination of whether the principle against self-incrimination is infringed by s. 61 of the *Motor Vehicle Act*.[105]

This analysis by Iacobucci J presents an interesting question with respect to the existence of coercion during an audit or an inquiry, or pursuant to a request for information. As in the *Fitzpatrick* case, the documents commonly requested of the taxpayer are records that the taxpayer is required to maintain. In contrast to the situation in *Fitzpatrick*, however, it is not one specific industry that is subjected to such mandatory record keeping, but all industries—and, in fact, all taxpayers.[106]

As a consequence of the scope of this obligation, the context is, arguably, more closely aligned with that facing Ms. White than with that facing a commercial fisherman in British Columbia. In much the same way that the choice to

drive is not truly as free as the choice to enter a specific industry, neither is the choice to pay taxes. In fact, as one of life's only two certainties, the taxpayer is no more free to opt out of paying taxes than to opt out of death. Accordingly, as the court concluded in *White*, it stands to reason that the issue of free and informed consent of the taxpayer ought to be considered a neutral factor in the determination of whether the principle against self-incrimination is infringed by sections 231.1, 231.2, and 231.4 of the Act.[107]

Adversarial Relationship

In *Fitzpatrick*, the Supreme Court concluded that the reports and logs maintained by the accused were made in a context that was "entirely free of psychological or emotional pressure."[108] The same cannot be said of a police visit under the MVA, as was noted by Iacobucci J:

> The provincial decision to vest the responsibility for taking accident reports in the police has the effect of transforming what might otherwise be a partnership relationship into one that is potentially adversarial.[109]

Very often, the court reasoned, a police officer who is receiving an accident report is simultaneously investigating a possible crime in relation to which the driver is a suspect. Section 61(4) of the MVA requires an officer to obtain information; however, section 10(b) of the Charter simultaneously requires the officer to inform the interviewee of his or her Charter rights. The result of this paradox is a context of "pronounced psychological and emotional pressure."[110]

The situation described by Iacobucci J in *White* is not unlike that encountered by a taxpayer upon finding him or herself before a section 231.4 inquiry. In such a situation, the taxpayer is clearly testifying in a context of pronounced psychological and emotional pressure and cannot therefore be said to be freely consenting to provide his or her testimony. The situation is, however, less clear in the context of an audit undertaken pursuant to section 231.1 or a request for information made pursuant to section 231.2 of the Act. In *R v. Ling*, the British Columbia Court of Appeal considered this component of the analysis with respect to an audit undertaken pursuant to section 231.1 and concluded:

> The psychological and emotional pressure which was absent in *Fitzpatrick* but present in *White* is not present in this case. Pre-existing books and records were created in the course of the appellant's business activities over a period of years, in the absence of such pressures. The appellant was not under criminal investigation at the time the records were made and he was therefore not exposed to the type of psychological and emotional pressure found in *White*.[111]

Unreliable Confessions

Of concern to Iacobucci J was that under the compulsory reporting provisions of the MVA, the prospect of unreliable confessions is very real. A motorist's fear of

police prejudice should he or she decide not to answer police questions, especially when coupled with the motorist's fear of implicating him or herself in any wrongdoing, presents the very real possibility that a motorist may answer questions in a less than truthful or complete manner.

In contrast, Iacobucci J concluded that the hail reports and fishing logs relied upon by the Crown in the *Fitzpatrick* prosecution could not be properly characterized as "confessions," since they existed independent of any inquiry and were tangible, "real" evidence. Furthermore, the fact that these reports could be used in a criminal prosecution did not introduce the possibility that they may be falsified, since there already existed a financial incentive to such falsification. Similarly, there exists a pre-existing financial incentive for a taxpayer to falsify the documents commonly requested pursuant to sections 231.1, 231.2, and 231.4 of the Act. Unlike fishing logs and hail reports, however, the verbal responses of the taxpayer to questions posed by Revenue Canada officials are clearly tantamount to a confession, as in *White*. The information derived thereby is the direct product of the proceedings undertaken by the minister. Accordingly, the argument that won the court's favour in *White*—specifically, that utterances made in the presence of an imposing figure of authority are the very statements that section 7 was designed to protect—is, arguably, equally applicable to oral statements compelled of the taxpayer by sections 231.1, 231.2, and 231.4 of the Act.

The Alberta Court of Appeal in *Jarvis* was careful not to automatically extend this protection beyond the utterances of the compelled taxpayer:

> [T]he principle against self-incrimination does not provide absolute protection against all uses of information that has been compelled by statute or otherwise. It follows that the broad proposition that no information obtained by statutory compulsion for the purpose of a statute's regulatory scheme can be used in proof of a charge with penal consequences under that statute, is a misstatement of the law.[112]

In addition to oral statements that may be made under the compulsion of sections 231.1, 231.2, and 231.4 of the Act, these sections may also result in certain documents being provided to the minister. Although these communications are obtained by the minister as a direct result of the proceedings undertaken, they are not the product of the proceedings. This distinction was discussed at length by the Alberta Court of Appeal in *Jarvis*:

> It must be remembered . . . that both *R. v. White*, *supra*, and *British Columbia Securities Commission v. Branch*, *supra*, distinguish between oral admissions made under compulsion and documents containing communications made before such compulsion and independently thereof. Whereas in certain circumstances compulsion will impinge on the right to silence, the Court in *British Columbia Securities Commission* noted (at p. 525):
>
> > We know of no instance in which it was suggested that the common law right to silence which protected communications by a suspect to the police extended to documents of a suspect.

> Indeed, the ongoing statutory requirements of the *Income Tax Act* for retention of books and records by every taxpayer and the corresponding obligation to make such available for later inspection and potential use in prosecution by the tax authorities are essential to the self-reporting income tax system; they impose no obligations that arise from *Charter* prohibited compulsion.
>
> The relevant inquiry, pursuant to *British Columbia Securities Commission* v. *Branch*, *supra*, is whether the accused has discharged the evidentiary burden of showing a plausible connection between the compelled testimony and the evidence sought to be adduced. If that is established, in order to have the evidence admitted, the Crown must first satisfy the Court on a balance of probabilities that the authorities would have discovered the impugned derivative evidence absent the compelled testimony. *R.* v. *S.(R.J.)*, [1995] 1 S.C.R. 451 . . . .
>
> Again, the findings of fact in the context of the legislative and regulatory background inform the resolution of the issue. The Appellant conceded at trial that the Appellant's bank records were discoverable by Revenue Canada prior to any dealings with the Appellant.[113]

Abuse of Power

The final point of comparison between *White* and *Fitzpatrick* addressed by the Supreme Court was the possibility that such legislation may encourage an abuse of power by the state. Turning first to the situation before the court in *Fitzpatrick*, Iacobucci J concluded that since it is not abusive to prosecute on the basis of true reports that are required to be completed as a condition of "voluntary" participation in a specific industry, and since the alternative to such compulsory self-reporting would be far more intrusive, the effect of the legislation would not be an abuse of power by the state.

The situation in *White*, however, is much different. After noting that section 61 of the MVA was not designed to assist the police in the investigation of specific crimes, Iacobucci J concluded that it would be an abuse of power to use the provision to assist in a criminal prosecution.[114]

Unlike the MVA, the Act does contain enforcement provisions and does operate with the objective to ensure and maintain taxpayer compliance. Accordingly, it is arguable that the balance that must be struck is the balance between the protection against self-incrimination and the overall effectiveness of a self-assessment taxation system. This argument notwithstanding, it must be remembered that the overall effectiveness of the Act is contemplated therein by providing, in section 231.3, the means whereby the minister may construct a case to punish offenders. In the final analysis, however, the weight afforded to the minister's objectives may ultimately shape the context under which the state's actions must be examined and, if the minister is successful in convincing the court of the importance of these objectives, may allow the minister greater latitude in what will be deemed appropriate.

In the *Ling* case, the British Columbia Court of Appeal clearly took the position that income tax matters would merit a significant degree of latitude by affording considerable weight to the minister's objectives:

> The broad proposition the appellant has put forward claiming *Charter* immunity for all statutorily compelled documents and statements would necessarily apply to the books and records a person is compelled to maintain by s. 230 of the Act, as well as to statements made to an auditor in explanation of the contents of those records. Acceptance of the appellant's proposition would entail both use and derivative use immunity to protect that person's s. 7 *Charter* right against self-incrimination. That would almost certainly mean that investigators would not be able to refer to any information obtained in an audit when obtaining a search warrant. . . .
>
> It must be recognized that in a self-reporting and self-regulating scheme such as that established under the Act, there must be provisions for effective monitoring. Provisions for keeping business records and making them available upon request [are] fundamental to the scheme. Little expectation of privacy can attach to records that taxpayers know in advance must be made and kept available for inspection and audit. The records reflect taxpayers' voluntary compliance with the statutory requirements of the taxation scheme and are necessary for routine administration of the Act, quite apart from any investigation into wrongdoing. If the appellant's proposition were accepted, monitoring would be extremely difficult, if not impossible, and a substantially more intrusive scheme might well be required to ensure the collection of revenue for the operations of government.[115]

CONCLUSIONS

We think that when taxpayers are compelled to give evidence in the course of administrative investigations under the Act, the law continues to be that if the "predominant purpose" of the investigation is to facilitate a criminal prosecution, Revenue Canada must caution the taxpayer of his or her section 7 Charter right to remain silent. Where Revenue Canada fails to do that, statements made by the taxpayer will not be admissible in subsequent criminal proceedings. Similarly, searches made pursuant to search warrants obtained through the use of such statements will amount to warrantless searches in violation of the taxpayer's section 8 Charter rights.[116] We think that the decision of the Supreme Court of Canada in *White* bolsters these conclusions and should make Revenue Canada, if anything, more cautious about stepping across the line between administrative and criminal investigations.

We think that the decision of the same court in *Del Zotto* is largely confined to the totality of the context in which that inquiry occurred, including the fact that it was not the taxpayer from whom the Crown sought to compel evidence but a third party[117] and, most significantly, the fact that the court was clear in its conclusion that the taxpayer's rights were not yet in jeopardy. Although the use of such evidence in subsequent criminal prosecutions remains uncertain, in light of the recent decision of the Supreme Court in *White*, we think that it is quite unlikely that an attempt to use evidence given by a taxpayer at a section 231.4 inquiry against that taxpayer in a subsequent criminal prosecution would succeed.

We think that, as a practical matter, taxpayers involved in potentially difficult investigations should be proactive. Counsel should make a written request of the

auditor involved to confirm that no criminal investigation of the taxpayer is contemplated and further confirm that the taxpayer will be advised once that position changes. If Revenue Canada refuses to provide such a confirmation, we think that the taxpayer should be entitled to exercise his or her section 7 Charter right to remain silent in the face of the investigation. If Revenue Canada gives such an assurance and it subsequently proves to be false, we think that the courts will likely exclude all statements made by the taxpayer from the date of such assurance.

Notwithstanding the implications of the *Del Zotto* decision, the recent analysis undertaken by the Supreme Court in *White* has provided the taxpayer with a useful tool with which an argument can be fashioned—particularly in respect of compelled oral testimony—that information statutorily compelled from the taxpayer ought not to be used against the taxpayer in a subsequent criminal proceeding. Further guidance from the Supreme Court of Canada with respect to where on the contextual spectrum income tax matters may fall in relation to *Fitzpatrick* and *White* will surely be forthcoming in the pending appeals of both *Jarvis* and *Ling*, and will undoubtedly be very important in future prosecutions under the Act.

Notes

1 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as "the Act"). Unless otherwise stated, statutory references in this article are to the Act.

2 These general headings are found in William I. Innes, *Tax Evasion* (Scarborough, ON: Carswell) (looseleaf). A detailed account of the legislative history of sections 231 to 231.6 can be found therein at section 8, "Investigative Techniques."

3 Section 231.1.

4 Section 231.2.

5 Section 231.3.

6 Section 231.4.

7 Section 231.6. Discussion of this section is beyond the scope of this article; however, its operation is discussed in *Tax Evasion*, supra note 2, at 8-46.1 and following.

8 Now the Canada Customs and Revenue Agency. Since the cases in this article primarily involve the former "Revenue Canada," we will use the term "Revenue Canada" throughout to refer to both Revenue Canada and the Canada Customs and Revenue Agency.

9 *Information Circular* 71-14R3, "The Tax Audit," June 18, 1984, paragraph 2.

10 The extent of the power contained in the phrase "any purpose related to the administration of the Act" was first interpreted by the Supreme Court of Canada in *Canadian Bank of Commerce v. Attorney General of Canada*, [1962] SCR 729, in which the court held such power to be extremely broad and further concluded that there existed no statutory basis for curtailing that authority. More recently, however, the court, in *James Richardson & Sons Ltd. v. MNR*, [1984] 1 SCR 614, concluded that former subsection 231(3) (now section 231.2) could not be construed as authorizing a "fishing expedition" but is available for the purpose of obtaining information relevant to the tax liability of some specific person or persons only if that tax liability is the subject of a genuine and serious inquiry.

11 The auditor may additionally seek information from third parties. Common targets of such an inquiry include chartered banks, other lending institutions, accountants, stock brokers, and lawyers. Historically, most field audits involved routine third-party checks of banks and law offices: Revenue Canada, *Taxation Operations Manual* (Ottawa: Revenue Canada) (looseleaf) (herein referred to as "TOM"), section 47(14)1.

12 For a more detailed account of the audit process, see IC 71-14R3, supra note 9.

13 TOM section 14(47)4, "Initial Observations and Interview," suggests that appointments be prearranged and that a reminder letter be sent in advance of the audit.

14 IC 71-14R3, supra note 9, at paragraph 22.

15 The auditor is charged with determining the correct tax payable according to the facts of the case, the Act, and the policies of the department: TOM 14(47)1.2.

16 Paragraph 239(1)(f).

17 Paragraph 239(1)(g).

18 Subsection 239(2).

19 As required by subsection 231.3(2), the application is to be based on evidence given under oath.

20 The judge hearing the application has a discretion whether to issue a warrant, even if the proceeding requirements are met by the evidence presented on behalf of the minister.

21 Section 487 of the Criminal Code, RSC 1985, c. C-46, as amended, provides an alternative means for Revenue Canada officials to obtain a warrant. Section 487, like section 231.3 of the Act, requires that the justice to whom application is made must be satisfied that there are reasonable grounds to believe that the prescribed items will be found in a building, receptacle, or place.

22 The Canadian Charter of Rights and Freedoms, part I of the Constitution Act, 1982, being schedule B to the Canada Act 1982, (UK), 1982, c. 11, proclaimed in force on April 17, 1982, with the exception of section 15, which came into force on April 17, 1985.

23 Paragraph 231.1(1)(a).

24 Paragraph 231.1(1)(b).

25 To accomplish this objective, the Act permits the authorized person to 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 (paragraph 231.1(1)(c)). The power of the authorized person to enter into premises is limited, however, with respect to a dwelling-house, defined under section 231 of the Act to mean the whole or part of a building or structure kept or occupied as a permanent or temporary residence. Where an authorized person wishes to enter a dwelling-house, he or she must either obtain the consent of the occupant or have obtained a warrant as required by subsection 231.1(3).

26 Paragraph 231.1(1)(d).

27 (1984), 11 DLR (4th) 641, at 652 (SCC).

28 Once the reasonableness of the expectation had been determined, Dickson J addressed the criteria that then must be met in order for the search itself to be deemed reasonable. These criteria, as summarized by Wilson J in *Thomson Newspapers v. Canada* (1990), 67 DLR (4th) 161, at 214 (SCC), require

> (a) a system of prior authorization by an entirely neutral and impartial arbiter who is capable of acting judicially in balancing the interests of the state against those of the individual;
>
> (b) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable ground, established under oath, to believe that an offence has been committed;

(c) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds to believe that something which will afford evidence of the particular offence under investigation will be recovered; and

(d) a requirement that the only documents which are authorized to be seized are those which are strictly relevant to the offence under investigation.

29 (1995), 23 OR (3d) 432 (Gen. Div.).

30 Ibid., at 432-33. These directions were given in direct violation of Revenue Canada's own policies. In recognition of the difficulty in differentiating between the audit function and the investigatory function, and in an effort to brighten the line between these functions, Revenue Canada addressed the procedure to be followed in respect of files that have been referred to Special Investigations for review but are returned to an auditor because of a lack of sufficient evidence for further action by Special Investigations: TOM section 1142.2(3), as quoted by Fradsham Prov. J in *Jarvis*, infra note 33, at 477 (Alta. Prov. Ct.): "(A) It may occur that initial information in a referral indicates that fraud characteristics are present but the information at hand is not sufficiently complete or strong enough to warrant a preliminary investigation, without obtaining additional information. In circumstances such as these, the referral should be declined and returned to the Originating Section, with a covering memorandum or comments on the T134 clearly explaining why the T134 cannot be accepted on the basis of the information provided. Special investigation staff should not put themselves in a position of directing the audit process for the purpose of gathering information for a search warrant. This documented audit trail may be necessary at a later date to distinguish between the audit and investigation functions. Where additional work is contemplated for the purpose of gathering information for a search warrant the T134 should be accepted by Special Investigations and the taxpayers (sic) rights under the *Charter* must be considered as outlined in TOM 11(10)0."

31 Supra note 29, at 444, quoting from the decision of the trial judge.

32 The right against self-incrimination is expressly provided for in section 13 of the Charter, which provides, "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence." However, the protection afforded thereby is very narrow in scope. As a consequence, the courts have turned to section 7 of the Charter to provide, as a matter of fundamental justice, a residual right against self-incrimination at the point where an individual is being compelled to testify at a proceeding other than his or her own trial.

The right to silence has been adopted as a principle of fundamental justice encompassed by section 7 of the Charter. It was so adopted by Cory J in *R v. Woolley* (1988), 40 CCC (3d) 531 (Ont. CA), and discussed in *R v. S (RJ)* (1995), 121 DLR (4th) 589 (SCC). The right to silence will serve to protect an individual from being required to answer the police if under a criminal investigation: *Del Zotto v. Canada*, [1997] 2 FC 428 (FCTD).

33 The decision in *R v. Jarvis* was divided into two separate judgments. In *R v. Jarvis*, [1997] 5 WWR 461 (Alta. Prov. Ct.), Fradsham Prov. J concluded that the auditor had improperly used administrative provisions under section 231.1 of the Act to gather evidence. In *R v. Jarvis*, [1997] 7 WWR 757 (Alta. Prov. Ct.) (herein referred to as "*Jarvis (2)*"), Fradsham Prov. J held that the banking information obtained after the date on which the audit became an investigation also was to be excluded.

These decisions were appealed to the Court of Queen's Bench of Alberta in *The Queen v. Jarvis*, 98 DTC 6308, where Lutz J, the summary conviction appeal court judge, concluded that the trial judge's finding that Revenue Canada's audit had changed to an investigation was not an unreasonable finding of fact, and therefore upheld it. Lutz J further agreed with the conclusion that the appellant ought to have been cautioned with respect to his right to silence and that the information obtained thereafter was tainted and ought to be excluded. Nevertheless, Revenue

Canada had also obtained evidence pursuant to search warrants. While the trial judge had concluded that there was insufficient "untainted" evidence to justify the issuance of those warrants and therefore excluded the evidence obtained on such searches, Lutz J disagreed. He found that there was sufficient evidence not tainted by Charter violations to support the original issuance of the warrants, and that, accordingly, the evidence obtained in those searches should not have been excluded. For that reason, he ordered a new trial.

Lutz J's decision was upheld by the Alberta Court of Appeal (*R v. Jarvis* (2000), 193 DLR (4th) 656 (Alta. CA)): see the discussion in note 37, infra, and the accompanying text. Leave to appeal to the Supreme Court of Canada was granted on May 17, 2001: *R v. Jarvis*, [2001] SCCA no. 86.

34 *Jarvis*, ibid., at 485 (Alta. Prov. Ct.).

35 Bassel Prov. J, in *R v. Feldberg*, [1998] OJ no. 5216 (Prov. Div.), upon reviewing Revenue Canada's policies concluded, at paragraph 47, "The clear goals and objectives in T.O.M. policy 110 with regard to criminal prosecutions, and by the very document under which [the investigator] works, are set out objectives [sic] to draw from suspects the full extent of their knowledge of the matters under investigation. The T.O.M. also notifies the Special Investigator that an auditor obtaining information from a taxpayer during a routine audit . . . is not a person in authority, whereas T.O.M. then sets out that an investigator is deemed by the courts to be a person in authority whose primary function is to pursue criminal prosecutions of persons involved in income tax offences. It requires the giving by the Special Investigator, to the person under investigation, the full protection of the *Charter*."

36 The caution discussed is not to be confused with a Charter warning. As Fradsham Prov. J explained, in *Jarvis*, supra note 33, at 485 (Alta. Prov. Ct.), "[i]n considering this specific question, it is important to distinguish between a *Charter* warning and a caution. The particular issue before me does not involve the *Charter*. We are not dealing with an accused who was arrested or detained. We are simply dealing with the issue of whether this accused should have been cautioned (i.e. told that he need not answer questions) when he was attending a meeting after having been misled by Revenue Canada into believing that he had a positive, statutory obligation to answer questions."

37 The Alberta Court of Appeal in *Jarvis*, supra note 33, left this finding undisturbed, concluding, at paragraph 35, "The learned trial judge found that the predominant purpose of Revenue Canada auditors . . . was to obtain evidence to incriminate the Appellant and not to further some legitimate audit or other public purpose. . . . Given the standard of appellate review, I see no basis upon which to interfere in that regard. . . . Fradsham Prov. J., accordingly, correctly concluded that a s. 7 infringement had been established by the Appellant and properly excluded his utterances."

38 (1997), 56 Alta. LR (3d) 67, at paragraphs 132 to 136 (QB).

39 Ibid., at paragraph 133.

40 Ibid., at paragraphs 134 to 135. Fradsham Prov. J in *Jarvis*, supra note 33 (Alta. Prov. Ct.), similarly concluded that Jarvis laboured under the misconception that he continued to be compelled by law to answer questions, and described the failure to caution Jarvis as very serious and a violation of his section 7 Charter rights.

41 [1998] OJ no. 4821 (Gen. Div.).

42 [1995] 4 SCR 154, at 172-73, quoted by Browne J in *Omstead*, supra note 41, at paragraph 34.

43 *Jarvis*, supra note 33, at 486 (Alta. Prov. Ct.). The scope of the duty to caution the taxpayer must not, however, be overstated, as explained by the Federal Court of Appeal in *Tyler v. MNR*, 91 DTC 5022, at 5027: "[I]n the context of the tax audit the deprivation does not amount to a breach of fundamental justice. In the tax audit *per se* there is no suspect and no accused. The procedure is entirely administrative in nature. See e.g. *R. v. McKinlay*, *supra*, per La Forest J."

44 [1993] OJ no. 1599, at 16 (Prov. Div.), quoted by LaForme J in *Norway Insulation*, supra note 29, at 442.

45 *Hunter*, supra note 27, at 658.

46 (1995), 123 DLR (4th) 462, at paragraphs 7 to 9 (SCC).

47 Supra note 35, at paragraph 47. The Saskatchewan Provincial Court, per Diehl Prov. Ct. J, in *R v. Melnychuck*, [1998] SJ no. 710, aff'd. [2001] SJ no. 385, concurred, at paragraph 43: "The 'predominant purpose in determining whether inquiries leave the realm of audit and enter the realm of investigation' is [the] central . . . approach to be taken."

48 The "predominant purpose" has been widely relied upon to suggest that once a civil audit is used for the ends of a criminal investigation, the criteria set out in *Hunter*, supra note 27, must be satisfied. There have, however, been instances in which this position has not been followed. For example, in *R v. Bjellebo*, [1990] OJ no. 965 (Gen. Div.) the court held that only after the time that Revenue Canada actually had reasonable and probable grounds to believe that an offence had been committed were constitutional criteria engaged. We think that this decision is more than somewhat suspect insofar as it seems to run contrary to a considerable amount of authority. See also, more recently, *R v. Pheasant*, [2000] OJ no. 4237 (Sup. Ct.), discussed infra note 93.

49 For a detailed discussion of the history of section 231.2, see *Tax Evasion*, supra note 2, at 8-5.

50 Supra note 10.

51 "Document" is defined by section 231 of the Act to include money, a security, and a record. "Record" is defined by subsection 248(1) to include an account, an agreement, a book, a chart or table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan or return, a statement, a telegram, a voucher, and any other thing containing information, whether in writing or in any other form.

52 Subsection 231.2(3) requires that, before a judge may authorize the making of a ministerial requirement with respect to an unnamed person or group, (1) the person or group must be ascertainable, and (2) the requirement must be made to verify compliance by the person or group with any duty or obligation under the Act. Subsection 231.2(4) requires the minister, if he or she has obtained judicial authorization pursuant to subsection 231.2(3), to serve such authorization, together with the subsection 231.2(1) requirement. A third party receiving such a requirement may, pursuant to subsection 231.2(5), apply within 15 days to the judge who granted the authorization, or to another judge of the same court, for a review of the authorization.

53 [1990] 1 SCR 627.

54 Lamer J concurring, L'Heureux-Dubé and La Forest JJ concurring in separate judgments, and Sopinka J concurring with the result for different reasons.

55 Bassel Prov. J noted in his reasons in *Feldberg*, supra note 35, at paragraph 51, that in June 1997, Revenue Canada changed its TOM policy, after consultation with the Department of Justice, to the effect that requirements were no longer to be used for a person under *investigation*, and that a warrant is recommended instead. More recently, however, in *R v. Derose*, [2000] AJ no. 1407 (Alta. Prov. Ct.), evidence was given that in the course of an investigation, information from a taxpayer's accounts is not obtained pursuant to a warrant but through the use of letters of requirement. This apparent change in procedure was explained as being the result of the Department of Justice's having informed legal sources at Revenue Canada that this was the view to be taken of the Supreme Court of Canada's decision in *Del Zotto*, infra note 74.

56 *McKinlay Transport*, supra note 53, at 642.

57 The standard of reasonableness is a flexible standard. As explained in the reasons of Sopinka and Iacobucci JJ in *Branch*, supra note 46, at paragraph 52, "it is clear that the standard of reasonableness which prevails in the case of a search and seizure made in the course of enforcement in the criminal context will not usually be the appropriate standard for a determination

made in an administrative or regulatory context: *per* La Forest J. in *Thomson Newspapers*. The greater the departure from the realm of criminal law, the more flexible will be the approach to the standard of reasonableness. The application of a less strenuous approach to regulatory or administrative searches and seizures is consistent with a purposive approach to the elaboration of s. 8: *Thomson Newspapers*."

58 Wilson J quoted (supra note 53, at 645-46) the following commentary by Alan D. Reid and Alison H. Young, "Administrative Search and Seizure Under the Charter" (1985), vol. 10, no. 2 *Queen's Law Journal* 392-429, at 398-400:

> There are facets of state authority, generically associated with search or seizure, that are so intertwined with the regulated activity as to raise virtually no expectation of privacy whatsoever. . . . *Other activities are regulated so routinely that there is virtually no expectation of privacy from state intrusion. Annual filing requirements for banks, corporations, trust companies, loan companies, and the like are inextricably associated with carrying on business under state licence.*
>
> There are other situations in which government intrusion cannot be as confidently predicted, yet the range of discretion extended to state officials is so wide as to create in the regulatee an expectation that he may be inspected or requested to provide information at some point in the future. This may arise in the form of an inspection carried out either on a spot check basis, or on the strength of suspected non-compliance. The search may be in the form of a request, for information that is not prescribed as an annual filing requirement, but is required to be produced on a demand basis. For the most part, there is no requirement that these powers be exercised on belief or suspicion of non-compliance. Rather, they are based on the common sense assumption that the threat of unannounced inspection may be the most effective way to induce compliance. They are based on a view that inspection may be the only means of detecting non-compliance, and that its detection serves an important public purpose [emphasis added].

59 *McKinlay Transport*, supra note 53, at 648-49.

60 [1994] BCJ no. 437 (Prov. Ct.).

61 Ibid., at paragraph 22.

62 July 9, 1993, Vancouver registry no. 41594, at 13 (BC Prov. Ct.), quoted in *Caswell*, supra note 60, at paragraph 28. The court in *Norway Insulation*, supra note 29, at 438, offered a similar warning in respect of section 231.1: "Section 231.1(1) is designed as a regular audit tool to ensure compliance with the Act. It is not designed to gather evidence for the purpose of a criminal prosecution. It should not be used to bootstrap the ministry investigators into a position where they can obtain a warrant which would otherwise be unattainable." A similar conclusion was reached by the Alberta Provincial Court in *Jarvis 2*, supra note 33, at 762, per Fradsham Prov. J: "[S]ection 231.1 is designed to provide Revenue Canada with a mechanism by which it can monitor the affairs of taxpayers, and . . . the self reporting nature of the taxation scheme justifies such a power. However the ability to demand information without judicial review is limited to the audit/monitoring function of Revenue Canada. . . . The section does not provide that power for purposes of *prosecutions* under the Act."

63 The British Columbia Supreme Court in *R v. Lim*, [1997] BCJ no. 1277, concluded that in a situation where a criminal matter draws Revenue Canada's attention to a particular taxpayer, the suitable remedy would be an order compelling the accused to comply with the requirement letter but declaring that he is entitled to claim effective immunity from subsequent derivative use in the criminal proceeding with respect to the compelled information.

64 Supra note 33.

65 Since a warrantless search is prima facie unreasonable, Fradsham Prov. J was required to examine the criteria established by Lamer J in *R v. Collins*, [1987] 3 WWR 699 (SCC), which are to be used in the determination of whether such searches can nevertheless be deemed reasonable. As

established in the *Collins* case, in order for a warrantless search to be deemed reasonable it must be authorized by law, the law itself must be reasonable, and the manner in which the search was carried out must have been reasonable. At issue in the *Jarvis* case were two distinct searches. The first search in question was of Jarvis's home. Fradsham Prov. J had little difficulty concluding that a warrantless search of an individual's home was unreasonable. As a result, the search violated Jarvis's section 8 Charter rights and the evidence gathered therefrom was inadmissible. The more difficult question facing Fradsham Prov. J was in respect of the second search, which was a search of the home of Jarvis's accountant. Fradsham Prov. J reasoned that the protection guaranteed by section 8 of the Charter is directed to the security of the person and, accordingly, can attach to objects not in the possession of the individual seeking its protection. Fradsham Prov. J wrote, supra note 33, at 508 (Alta. Prov. Ct.), "It is reasonable for the taxpayer to use the services of professionals (such as accountants); it is therefore reasonable for the taxpayer to provide the professional advisor with the taxpayer's financial records. In my view, it follows that such a taxpayer would have a reasonable expectation of privacy." Similar reasoning has been adopted in Ontario. Finlayson JA of the Ontario Court of Appeal in *R v. Pugliese* (1992), 8 OR (3d) 259, at 265-66, similarly concluded:

> Section 8 of the *Charter* is directed to the protection of the security of the person, not the protection of his property, and it is the appellant's personal exposure to the consequences of the search and seizure that gives him the right to challenge, not the search warrant itself, but the admission into evidence at his trial of the fact of the search and the account of what was seized. . . .
>
> Accordingly, s. 8 is available to confer standing on an accused person who had a reasonable expectation of privacy in the premises where the seizure took place, even though he had no proprietary or possessory interest in the premises or in the articles seized.

66 Supra note 33, at paragraphs 43 to 59 (Alta. CA).

67 Ibid., at paragraph 47.

68 On this point, Berger JA referred to *R v. Carrier* (1996), 181 AR 284 (CA), in which Coté JA stated, at 302, "Nor do we want [the police] to get a warrant on the basis of some earlier *Charter* breach, and then shore up the voidable warrant with the fruits of the search which it purported to authorize."

69 [1999] OJ no. 394 (Ont. Gen. Div.).

70 Although the audit in the *Saplys* case was undertaken pursuant to provisions of the Excise Tax Act, the discussion therein is nevertheless valuable, since, as stated by MacKenzie J, ibid., at paragraph 33, "[i]n my view, there are no . . . differences in principle between the regulatory/compliance functions and the special investigative functions under either the *Income Tax Act* or the *Excise Tax Act*."

71 Ibid., at paragraphs 21 to 24.

72 Inquiries Act, RSC 1985, c. I-11, as amended. Sections 4 and 5 provide:

> 4. The commissioners have the power of summoning before them any witnesses, and of requiring them to
>
> (a) give evidence, orally or in writing, and on oath or, if they are persons entitled to affirm in civil matters on solemn affirmation; and
>
> (b) produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.
>
> 5. The commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases.

73 For a detailed examination of the operation of section 231.4, see *Tax Evasion*, supra note 2, at 8-43 to 8-46.

74 [1997] 3 FC 40 (FCA), rev'd. [1999] 1 SCR 3.

75 This situation is not unlike that in the *Jarvis* case, supra note 33, in which certain documents were requested of the taxpayer's accountant. In that case, the trial judge concluded that although documents of the type in question traditionally did not merit a high expectation of privacy, the fact that they were in the possession of a professional for the purpose of his profession justified an expectation that those documents would not be subjected to seizure. In the *Del Zotto* case, however, no evidence was led to suggest the existence of any special relationship between Del Zotto and Noble.

76 This argument is consistent with the reasoning of the majority in *McKinlay Transport*, supra note 53, that a requirement to produce documents pursuant to section 231.2, when coupled with the enforcement mechanism of section 238, constitutes a "seizure" as contemplated by section 8 of the Charter.

77 Ibid., at 647, per Wilson J.

78 In support of this position, the plaintiffs relied extensively on the decision in *Knox Contracting Ltd. v. Canada*, [1990] 2 SCR 338, at 348-49, in which Cory J, writing for the majority, stated:

> Section 231.3 provides for the issuance of search warrants where they may afford evidence of an "offence" under the Act. Section 239 describes those offences. They are by their very nature criminal. . . . The section speaks of fraud, deception, destruction and alteration of documents, false statements, false documents and the wilful evasion of income tax.
>
> It is readily apparent that those who commit these offences have deliberately committed acts which by their very nature come well within the definition of what constitutes criminal law. . . . The fact that these offences may be prosecuted upon indictment and that terms of imprisonment of up to 5 years may be imposed serves to further strengthen the conclusion that these offences are criminal in nature.

The relevance of the *Knox Contracting* decision to the current context was recently questioned by Allen Prov. Ct. J in *Derose*, supra note 55, at paragraph 46: "It is important to understand that this case involved a determination of the powers that could be undertaken by the province as opposed to the federal government. Cory J. based his ruling upon the criminal nature of the [sic] s. 231.3 and 238(1) of the *Income Tax Act*. If the issuance of the search warrants were criminal orders in criminal proceedings under s. 91(27) of the *British North America Act*, then they were interlocutory orders from which no appeal is possible. If the issuance of search warrants was based upon the head of power created by s. 91(3) of the *British North America Act* dealing with taxation, then the appellants would be able to appeal the review to a provincial court of appeal."

79 The majority decision was delivered by MacGuigan JA, with Henry DJ concurring and Strayer JA dissenting.

80 *Del Zotto*, supra note 74, at 73 (FCA).

81 Ibid., see headnote at 43. This reasoning is not unlike that of Fradsham Prov. J in extending the accused's section 8 Charter protection to documents in the home of his accountant. See the discussion in note 65, supra.

82 From his reading of Revenue Canada's TOM, MacGuigan JA concluded in *Del Zotto*, supra note 74, at 70 (FCA), "There can be no doubt from reading the Department's own understanding of what an inquiry is about that it can be thought of only in a criminal investigatory context."

83 [1991] 1 FC 688, at 693-94 (FCA), per Hugessen JA, quoted in the FCA decision in *Del Zotto*, supra note 74, at 71.

84 Arguments with respect to the accused's right to remain silent, the right to "fundamental unfairness," the right not to speak, and the right to know the case to meet were also forwarded as section 7 rights of Del Zotto but were quickly dispensed with.

85 See *Del Zotto*, supra note 32, at paragraph 88, wherein Rothstein J pointed to the argument presented by La Forest J in *Thomson*, supra note 28, at 226-27, in which La Forest J, to support

his characterization of the Combines Investigation Act, compared it with the Income Tax Act and in so doing noted, "As a final comment, I would point out that the *Combines Investigation Act* is not, as regards sanctions, unlike the *Income Tax Act*. . . . Under s. 239 of the latter Act, a taxpayer can be liable to imprisonment. . . . All of these offences relate to conduct that might well be discovered by the exercise of the power to order the production of documents which s. 231(3) [now section 231.2] confers on the Minister of National Revenue. This has not prevented this Court from characterizing s. 231(3) as a regulatory or administrative power of investigation; see *R. v. McKinlay Transport Ltd.*, *supra*." While it is true that the court in *McKinlay Transport*, supra note 53, did find subsection 231(3) to be a regulatory tool, it did so in a context in which the section was clearly being used as such. This conclusion did not foreclose the possibility that this regulatory tool might be used improperly for criminal investigations. When, as in the *Caswell* case, supra note 60, section 231.2 was used in an investigatory context (as opposed to an audit context), the court concluded that the minister could not compel the taxpayer to provide documents because the taxpayer was entitled to the protection of the Charter.

86 *Baron v. Canada*, [1993] 1 SCR 416, at 444-45: "Physical search of a private premises . . . is the greatest intrusion of privacy short of a violation of bodily integrity. It is quite distinct from compelling a person to appear for examination under oath and to bring with them certain documents, under a subpoena *duces tecum* (*Thomson Newspapers*, *supra*), or to produce documents on demand (*McKinlay Transport*, *supra*). Both La Forest and L'Heureux-Dubé JJ. acknowledged in *Thomson Newspapers*, *supra*, at pp. 520 and 594, respectively, that the power to search premises is more intrusive of an individual's privacy than the mere power to order production of documents."

87 *Del Zotto*, supra note 32, at paragraph 84 (FCTD). It should, however, be kept in mind that Wilson J's comments in *McKinlay Transport* were made in respect of a purely regulatory/administrative context. Rothstein J's analysis arguably fails to take into account that the distinction between a regulatory audit and a criminal investigation has already been made in the case at bar. Revenue Canada had explicitly stated that the section 231.4 inquiry into the affairs of Del Zotto was undertaken in an effort to gather evidence to charge Del Zotto under section 239 of the Act. The matter proceeded, at all times, in the context of a criminal investigation; consequently, *Thomson*, supra note 28, and its related discussion of the need to relax the criteria in respect of regulatory searches and seizures are inapplicable.

Note Sopinka J's reasoning in *Baron*, supra note 86, at 444, where quoting in part from La Forest J in *R v. Wholesale Travel Group Inc.*, [1991] 3 SCR 154, he stated "that 'what is ultimately important are not labels (though these are undoubtedly useful), but the values at stake in the particular context,' and . . . that the potential five-year prison term upon conviction of the offence was a deprivation of liberty requiring much greater safeguards to conform with ss. 7 or 11(d) than the provisions at issue in *Thomson Newspapers Ltd.* [cite omitted]."

88 *Del Zotto*, supra note 74, at 59 (FCA), citing language used by La Forest J in *Thomson*, supra note 28. Presumably "instrumental" is used in the sense of ensuring or enforcing compliance as opposed to describing acts, such as murder, that are *malem in se*.

89 Strayer JA noted that the taxpayer may insist that the scope of subsection 231.4(1) be strictly adhered to, and this may challenge the relevance of a requested document or information. By invoking this right, Strayer JA suggested that personal documents having nothing to do with the collection of income tax need not be produced. Strayer JA also placed significance on the fact that a subpoena *duces tecum* can be attacked generally or in respect of a particular document either before the hearing officer or, if necessary, on judicial review, if it can be demonstrated that in the particular circumstances someone's constitutional right is about to be violated. Furthermore, he noted, the process provides explicit recognition of the right to be represented by counsel.

90 Supra note 74, at 80-82 (FCA). See also the comments of the Alberta Court of Queen's Bench, in the *Warawa* case, supra note 38, at paragraph 140: "From a review of the list of documents seized it is clear that the information seized contains a great deal of personal information with

respect to the accused's lifestyle. His VISA bills disclose his personal spending habits, his receipts disclose his religious affiliation, other records disclose Alberta Health Care and drugstore transactions, all of which would disclose information concerning his health and numerous other records which disclose a great deal of information about the lifestyle of the accused and his wife. Their use in a subsequent criminal prosecution will make that information available to the public."

91 Supra note 74, at 59 (FCA).

92 Ibid., at 43.

93 This shift away from the predominant purpose test is arguably reflected in the recent decision of the Ontario Superior Court of Justice in *R v. Pheasant*, supra note 48, in which Lane J stated, at paragraph 66, "My analysis of the conflicting jurisprudence leads me to believe that the full flowering of the 'Norway' case is waning. There seems to be a recognition that the logical conclusion of that line of reasoning is dysfunctional, and ignores the realities of how civil audits and criminal investigations are intertwined in the context of self-reporting regulatory schemes operated in the public interest. Although the Canadian courts have not yet embraced the American position, *Del Zotto* has reaffirmed the significance of the 1990 *McKinlay Transport* and *Thomson Newspapers* decisions, and the need for a case-by-case approach which rejects simplistic distinctions based on characterizations of powers as criminal, *quasi*-criminal, administrative or regulatory. *I adopt the approach outlined by Strayer J.A. that one must look at the total context of the particular process in question* [emphasis added]."

94 [1999] 2 SCR 417.

95 Motor Vehicle Act, RSBC 1979, c. 288, as amended (herein referred to as "the MVA").

96 Section 61 of the MVA establishes a statutory regime requiring and regulating the reporting of motor vehicle accidents in British Columbia. Sections 61(1) and (1.1) require a driver to report an accident in circumstances in which the accident has caused death or personal injury, or has caused property damage in excess of a certain amount.

97 Section 10(b) of the Charter guarantees that everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right.

98 Although section 61(7) of the MVA extends "use immunity" to an accident report in subsequent proceedings, this issue was not raised by Ms White at trial since the MVA is a provincial statute and it would be ultra vires to apply its provisions to a federal prosecution.

99 Similar arguments were presented to and accepted by the Alberta Queen's Bench in *Warawa*, supra note 38. See the discussion above in the text accompanying notes 38 and 39.

100 Iacobucci J writing for the majority (Lamer CJ and Gonthier, McLachlin, Bastarache, and Binnie JJ), with L'Heureux-Dubé dissenting in part.

101 *White*, supra note 94, at paragraph 45.

102 Supra note 42.

103 The *Fitzpatrick* case is discussed in *White*, supra note 94, at paragraphs 49 to 52.

104 As stated by Berger JA in *Jarvis*, supra note 33, at paragraph 32 (Alta. CA), "[a]lthough the principle against self-incrimination has the status of an overarching principle within our criminal justice system, the residual protections captured in s. 7, as with all *Charter* rights, are specific and depend upon the context. They are contextually sensitive. The importance of context was underlined by Iacobucci J. in *R. v. White*."

105 Supra note 94, at paragraph 55.

106 As discussed by Allen Prov. Ct. J in *R v. Derose*, supra note 55, at paragraph 137, "[t]he filing of Income Tax returns is not entirely the same as becoming a licenced fisher. However, there are benefits that accrue to the individual who pays taxes because of his sharing in the substantial benefits of living in this country. Anyone who is paying taxes is aware of that burden and the implication of keeping proper records that may result in prosecution."

107 The British Columbia Court of Appeal in *R v. Ling*, [2000] BCJ no. 2082, notice of appeal to the Supreme Court of Canada filed August 7, 2001, had the opportunity to consider this question and concluded, at paragraphs 66 to 67:

> In a self-reporting taxation system, a person who reports a certain amount of income or claims a deduction does so voluntarily. At a later date, the person can scarcely be heard to say that he was coerced by the state into completing documents that may be required under the Act in a particular way. Being called upon to support the accuracy of the tax return by reference to business records or other documents within the context of the present statutory scheme, also cannot be viewed as the product of coercion by the state.
>
> *I agree with the respondent that coercion is, at most, a neutral factor in the circumstances of this case* [emphasis added].

108 *White*, supra note 94, at paragraph 56.

109 Ibid., at paragraph 58.

110 Ibid..

111 Supra note 107, at paragraph 72.

112 Supra note 33, at paragraph 32 (Alta. CA).

113 Ibid., at paragraphs 36 to 39.

114 *White*, supra note 94, at paragraph 72.

115 Supra note 107, at paragraphs 75 to 76.

116 Although such warrants may be saved if there is sufficient "untainted" information supporting them.

117 Arguably, that third-party evidence could have been obtained under, for example, section 231.1 or 231.2 of the Act whether the taxpayer was being investigated for a criminal violation or not.