Les Plastiques Algar (Canada) Ltée v. Canada (Minister of National Revenue)

Federal Court of Appeal Decisions

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Docket: A-79-03

Citation: 2004 FCA 152

CORAM: DESJARDINS J.A.

LÉTOURNEAU J.A.

NADON J.A.

BETWEEN:

LES PLASTIQUES ALGAR (CANADA) LTÉE ET AL.

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

AND BETWEEN:

MODERN WOOD FABRICATORS (M.W.F.) INC.

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

AND BETWEEN:

SNAPSHOT THEATRICAL PRODUCTIONS INC.

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Montreal, Quebec, on January 13, 2004.

Judgment delivered at Ottawa, Ontario, on April 6, 2004.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRING REASONS BY: NADON J.A.

DISSENTING REASONS BY: DESJARDINS J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] I have had the benefit of reading the reasons for judgment of my colleague, Desjardins J.A.

Availability of judicial review proceedings

[2] I agree with her that the motions judge made no error when he ruled that the appellants could challenge by way of judicial review the respondent's requirements to provide information issued on behalf of the Minister of National Revenue (Minister) pursuant to subsection 231.2(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act).

[3] I do not accept the respondent's contention that the appellants should comply with the requirements and, as it was done in *R.* v. *Jarvis*, [2002] 3 S.C.R. 757, later oppose the admissibility into evidence of the information thus provided. In *Jarvis*, the documents had already been obtained and the only option left to the accused in his criminal trial for tax evasion was to object to their admissibility. The respondent's contention means that a taxpayer would be prohibited from asserting preventively his Charter right to protection against unreasonable searches and seizures and from impeding its imminent violation. He would only be entitled to apply for a discretionary remedy under section 24 (2) of the Charter. This would seriously undermine the beneficial and protective effect of the Charter.

[4] In *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145, at page 160, Dickson J. stressed the

importance of prior authorization before a search is conducted:

If the issue to be resolved in assessing the constitutionality of searches under s. 10 were in fact the governmental interest in carrying out a given search outweighed that of the individual in resisting the governmental intrusion upon his privacy, then it would be appropriate to determine the balance of the competing interests after the search had been conducted. Such a *post facto* analysis would, however, be seriously at odds with the purpose of s. 8. That purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation.

(Emphasis in original)

Wilson J. extended this rationale to seizures in *Thomson Newspapers Ltd.* v. *Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425. At paragraph 93, she wrote:

In my opinion, Dickson J.'s remarks with regard to searches are equally applicable to seizures. It makes no sense to say that s. 8 is only engaged once the private information becomes public. If that were the case, the protections afforded by s. 8 would be completely illusory. The fact that an individual can challenge the validity of the order before producing the documents goes, in my opinion, not to the question whether a seizure has occurred but to the question whether the seizure is a reasonable one.

(Emphasis added)

[5] Furthermore, I believe that the Supreme Court made it clear, in the *Jarvis* case, *supra*, that subsection 231.2(1) of the Act is not available for the purpose of criminal investigations, i.e. investigations whose predominant purpose is to establish the penal liability of the taxpayer. At pages 803-804 and 809, Iacobucci and Major JJ. wrote in this respect:

In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1)...

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

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

(My emphasis)

These conclusions of the Supreme Court mean that, in the context of a criminal investigation, barring exigent circumstances, searches and seizures are subject for their validity to prior judicial authorization. Their legality cannot be secured by an after-the-fact validation as it turned out to be the case in the present instance.

[6] I should add that the Supreme Court's conclusions relating to the availability of the requirement powers in subsection 231.2(1) of the Act do not distinguish between a physical and a corporate taxpayer: such powers are not available for the purpose of advancing a criminal investigation. I agree with my colleague that the motions judge, after having found that the investigation was a criminal investigation

my colleague that the motions judge, after having found that the investigation was a criminal investigation, could not use Charter considerations to authorize the use of the requirement powers. The Charter protections are a corollary to a finding that the investigation is a criminal investigation. They cannot be resorted to in order to undermine, or circumvent, the legal consequences of that finding.

The determination of a preliminary issue

[7] Whether the inquiry's predominant purpose was to establish the penal liability of the taxpayers was a key issue common to all five applicants before the motions judge. Two of the applicants were individuals who were the directors of the three other corporate applicants. The conclusion of the judge was adverse to the Minister who did not appeal it with respect to the two individuals. However, the Minister attacked that conclusion in the context of this appeal by the corporate appellants.

[8] At the hearing, an issue arose as to whether the Minister could re-litigate this adverse conclusion without either appealing it or filing a cross-appeal in the present appeal. The Minister, having failed to appeal against the decision favourable to the two individuals on this issue, the argument goes, would be prohibited from seeking a reversal of that conclusion. Concerns were expressed about the possibility of conflicting decisions whereby the very same inquiry would receive two different and incompatible qualifiers: criminal in nature for two of the applicants and civil or administrative for the other three.

[9] Upon careful consideration of the matter, I have come to the conclusion that the doctrine of issue estoppel, which can arise when a party wants to re-litigate an issue that has been decided in an earlier case, does not apply in the present case because there is no identity of parties acting in the same qualities: *Toronto (City)* v. *Canadian Union of Public Employees Local 79 (C.U.P.E.)* 2003, S.C.C. 63, paragraph 23; *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development)*, [2001] 4 F.C. 451, paragraph 45. The doctrine requires for its application that the parties to the earlier judicial decision on the issue be the same as the parties to the proceedings in which the estoppel is raised. The corporate applicants are legal entities and parties different from the individuals.

[10] I am also satisfied that the Minister did not have to file a cross-appeal under Rule 341 of the *Federal Court Rules, 1998* because he is not seeking a different disposition of the order appealed from. He is, in fact, simply submitting an additional reason for which the order should be maintained and, therefore, the appeal dismissed.

Whether the motions judge erred in finding that the investigation was a criminal investigation

[11] Unlike my colleague, I believe that the motions judge committed no error when he came to the conclusion that the appellants were the subject of a criminal investigation. The motions judge found that there was overwhelming evidence to that effect on the record. Unfortunately, he mentioned only one reason in support of his finding, namely, that investigator Faribault, whose function at the Special Investigation (SI) branch of the Canadian Customs and Revenue Agency (CCRA) was to investigate and gather evidence of a tax evasion offence (see his testimony at pages 113, 119-120 and 124 of the Appeal Book), admitted that such was the purpose of the investigation. At paragraph 90 of his reasons for order, he wrote:

The evidence on the record as a whole leads to the conclusion that the predominant purpose of the investigation of CCRA, from its outset, was prosecution of the applicants for tax evasion and eventual imposition of penal sanctions against them. The statements on discovery by Faribault are not the only indicia of this predominant purpose; they are simply among the most succinct elements of evidence which support this conclusion. Accordingly, I find that the predominant purpose of the investigation was prosecution of the applicants for tax evasion.

(My emphasis)

I will come back later to the impact of that witness' statement.

[12] In *Jarvis*, at paragraph 94, the Supreme Court gave a non-exhaustive list of factors to be considered in determining whether the relationship between the state and a taxpayer has reached a point where it has become adversarial:

In this connection, the trial judge will look at all factors, including but not limited to such questions as:	À cet égard, le juge de première instance examinera tous les facteurs, y compris les suivants :
(a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?	a) Les autorités avaient-elles des motifs raisonnables de porter des accusations? Semble-t-il, au vu du dossier, que l'on aurait pu prendre la décision de procéder à une enquête criminelle?
(b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?	b) L'ensemble de la conduite des autorités donnait-elle à croire que celles-ci procédaient à une enquête criminelle?
(c) Had the auditor transferred his or her files and materials to the investigators?	c) Le vérificateur avait-il transféré son dossier et ses documents aux enquêteurs?
(d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?	d) La conduite du vérificateur donnait-elle à croire qu'il agissait en fait comme un mandataire des enquêteurs?
(e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?	e) Semble-t-il que les enquêteurs aient eu l'intention d'utiliser le vérificateur comme leur mandataire pour recueillir des éléments de preuve?
(f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's *mens rea*, is the evidence relevant only to the taxpayer's penal liability?	f) La preuve recherchée est-elle pertinente quant à la responsabilité générale du contribuable ou, au contraire, uniquement quant à sa responsabilité pénale, comme dans le cas de la preuve de la *mens rea*?
(g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation?	g) Existe-t-il d'autres circonstances ou facteurs susceptibles d'amener le juge de première instance à conclure que la vérification de la conformité à

la loi était en réalité devenue une enquête criminelle?

[13] These factors are designed to assist in the determination of the predominant purpose of an inquiry. They apply unless there is a clear decision to pursue a criminal investigation. At paragraph 93, before listing the factors, the Supreme Court wrote:

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

(My emphasis)

The evidence reveals that such a decision was made.

[14] In the present instance, the SI branch of the CCRA began, on November 12, 1998, a criminal investigation of a number of charitable organizations with respect to charitable donations. Targeted were the "Rabbinical College of Montreal", "Construit toujours avec Bonté", "Yeshiva Oir Hochaim", "L'Association Gimilis Chasodim Chava B'nei Levi" and others. It investigated tax evasion offences under section 239 of the Act which are criminal in nature: *Knox Contracting Ltd.* v. *Canada*, [1990] 2 S.C.R. 338, at pages 350 and 356. The appellants had made very substantial donations to the Rabbinical College of Montreal and, in one case, to Yeshiva Oir Hochaim. I reproduce the three lists of donations as they appear in the Appeal Book:

MODERN WOOD FABRICATORS (M.W.F.) INC.

LIST OF DONATIONS

Year ended February 28, 1993	
College Rabinique de Montreal	54 000 $
Year ended February 28, 1994	
College Rabinique de Montreal	212 000
Year ended February 28, 1995	
College Rabinique de Montreal	128 000
Year ended February 28, 1996	
College Rabinique de Montreal	200 000
Yeshiva Oir Hochaim	100 000
Year ended February 28, 1998	

College Rabbinique 50 000

* *

LES PLASTIQUES ALGAR (Canada) Ltée

LIST OF DONATIONS

Year ended May 31, 1994

College Rabbinical de Montreal 86 000 $

Year ended May 31, 1995

College Rabinique de Montreal 72 000

College Rabinique de Montreal 18 000

Year ended May 31, 1996

College Rabbinique de Mtl 36 000

Year ended May 31, 1997

College Rabbinique de Mtl 100 000

Year ended May 31, 1998

College Rabbinique de Mtl 50 000

* *

SNAPSHOT THEATRICAL PRODUCTIONS

LIST OF DONATIONS

Year ended December 31, 1994

College Rabbinique de Montreal 36 000 $

[15] Therefore, in October 1999, in the context of that criminal investigation, the CCRA began an investigation of the appellants. It sent an informal requirement to one of them, Les Plastiques Algar (Algar), requesting various documents and informations, relative to donations made to the Rabbinical College of Montreal, including charitable donations receipts, with respect to taxation years 1994 to 1998. The following month, the CCRA informed Algar that the investigation against it was suspended. However, in the meantime, the criminal investigations continued against the targeted beneficiaries of the charitable donations.

[16] A charge of tax evasion under section 239 of the Act was laid against the charitable organization "Construit toujours avec Bonté" and the organization pleaded guilty on September 20, 2000 to that charge which consisted in the delivery of false charitable gift receipts. On September 21, 2000, the SI branch of the CCRA completed the investigation of the Rabbinical College of Montreal and, for reasons that were not provided to us, no criminal charges were laid against that institution.

[17] On October 18, 2000, the SI branch of the CCRA informed Algar that its file had been internally reassigned to another investigator by the name of Faribault. On January 12, 2002, investigator Faribault, on behalf of the Minister, sent letters to the three appellants requesting various documents and informations, such as cancelled cheques, bank statements, donation receipts and accounting books and records, all related to the donations to the Rabbinical College of Montreal.

[18] I have related these facts in chronological order because they shed a needed light on the context in which the appellants were summoned to provide information pursuant to subsection 231.2(1) of the Act. An investigation was actually undertaken with respect to false charitable donations and receipts. The investigation first looked at the recipients of the donations. Evidently, a fraudulent scheme of that nature requires, for success, the participation of accomplices, i.e. donors. I believe that the SI branch of the CCRA then turned its attention to the search and identification of the accomplices as well as to the search of evidence which could incriminate them and, by the same token, the charitable organizations which received the fraudulent donations. In fact, the investigation by Mr. Faribault was purely an extension of the so far unsuccessful criminal investigation directed initially towards the Rabbinical College of Montreal. Mr. Faribault was now trying to obtain evidence of fraud by looking at the same matter, but from a different perspective, i.e. that of the donors.

[19] Indeed, Mr. Faribault, at page 132 of the Appeal Book, admitted that much in his cross-examination under oath:

Q - [Me Rheault] Alors, votre objectif, donc... si je comprends bien, votre objectif principal à l'égard des requérants était d'établir qu'ils avaient commis une évasion fiscale, c'est ça?

R - [M. Faribault] Enquêter l'évasion fiscale, oui...

Q - [Me Rheault] Oui.

R - [M. Faribault] ... c'est...

Q - [Me Rheault] Mais si évidemment, ça arrivait pas en bout de ligne, vous avez toujours l'opportunité de cotiser au civil?

R - [M. Faribault] Voilà.

Q - [Me Rheault] O.K. O.K. Mais vous êtes pas en train de me dire que votre objectif principal dans le dossier ici, c'était simplement d'établir des cotisations d'impôt?

R - [M. Faribault] Non...

(My emphasis)

[20] Counsel for the respondent, in an effort to attenuate the adverse impact of that admission, contends that that statement of Mr. Faribault merely represents his personal views or motivation. He relies upon a decision of the Supreme Court of the United States in *United States* v. *La Salle National Bank*, 98 S.Ct. 2357, at page 2367, (1978), which held that while a special agent is an important actor in the process, his motivation is hardly dispositive of the issue. With respect, I think that, in the present factual context, it is an unfair and inaccurate characterization of Mr. Faribault's clear stated objective to view his testimony as a mere expression of his personal motivation.

[21] As I have already mentioned, Mr. Faribault resumed the suspended investigation against the

appellants undertaken in the context of a broader criminal investigation of a fraudulent scheme involving charitable organizations and their donors. He was in charge of the file, autonomous and making the appropriate decisions to lead it to its ultimate admitted objective, i.e. the gathering of evidence of a tax evasion offence under section 239 of the Act. At page 120 of the Appeal Book, he admitted that such was his main responsibility and function:

Q - [Me Rheault] Dans le présent dossier... ici, on mentionne "*Où l'on soupçonne qu'il y ait eu évasion fiscale*", dans le présent dossier, vous aviez des soupçons qu'il y... qu'il y avait eu évasion fiscale au moment où vous avez émis les demandes péremptoires. C'est exact?

R - [M. Faribault] Des soupçons? Oui.

Q - [Me Rheault] Donc... et votre principale responsabilité comme enquêteur des enquêtes spéciales était de... d'enquêter dans ce cas qui occupe les requérants ici...

R - [M. Faribault] Oui.

Q - [Me Rheault] ... dans le but de recueillir des preuves de toute infraction criminelle, conformément au paragraphe 7, qui ont pu être commises, et si de telles preuves sont recueillies, de prendre les... des dispositions en vue de porter l'affaire devant les tribunaux en vertu de l'article 239 de la loi?

R - [M. Faribault] Oui.

(My emphasis)

This is consistent with paragraph 7 of Circulaire 73-10R3, dated February 13, 1987, entitled "Évasion fiscale" which reads:

"*La principale responsabilité des enquêtes spéciales est d'enquêter sur les cas importants où l'on soupçonne qu'il y a eu évasion fiscale, dans le but de recueillir des preuves de toute infraction criminelle qui a pu être commise, et si de telles preuves sont recueillies, de prendre des dispositions en vue de porter l'affaire devant les tribunaux en vertu de l'article 239 de la loi. Les enquêtes spéciales ont aussi la responsabilité de faire connaître au public les condamnations judiciaires dans le but de décourager l'évasion fiscale chez les autres contribuables et de favoriser les divulgations volontaires.*"

If unsuccessful in that endeavour, it could still lead to a tax reassessment: see the excerpt from Mr. Faribault's testimony, at page 132 of the Appeal Book, previously cited.

[22] Moreover, the facts of our case are quite distinguishable from the facts in the *La Salle National Bank* case. In making its statement that the motivation of a special agent is hardly dispositive, the U.S. Supreme Court referred to the multilayered system of reviews of decisions in place and found that the motivation of a single agent attempting to build a criminal case, without regard to the enforcement policy of the Service as an institution, does not necessarily overturn the institutional responsibility of the Service to calculate and to collect civil fraud penalties. Obviously, the U.S. system is different from ours. In addition, in our case, the file was with the SI branch and assigned by that authority to a specific investigator to conduct a criminal investigation of a tax evasion offence. I would also point out that the *La Salle National Bank* case goes back some 26 years and contained strong dissenting views. No attempt has been made by counsel for the respondent to show that the ruling of the majority still represents the state of the law in this respect.

[23] Counsel for the respondent also argued that Mr. Faribault had no reasonable grounds to believe that an offence had been committed. The fact is that Mr. Faribault knew that between November 11, 1998

and September 22, 2000 a colleague of the SI branch had investigated the legitimacy and legality of donations made to the Rabbinical College of Montreal and to "Construit toujours avec Bonté". He knew that tax evasion charges had been laid successfully against "Construit toujours avec Bonté". He knew that the investigation against the Rabbinical College of Montreal had been so far inconclusive. Bearing in mind the context, I think that Mr. Faribault's testimony under cross-examination at the examination discovery dispels all my doubts as to what his real beliefs and objectives were when he resumed the investigation against the appellants.

[24] Counsel for the respondent finally argued that the investigator Faribault had no reasonable grounds to apply for a search warrant since he had no reasons to believe that a crime had been committed. I believe it is more accurate to say that he had suspicions that a crime had been committed, but not enough evidence at this stage to seek a warrant. That is why Mr. Faribault who, by his own admission, was conducting a criminal investigation, resorted to the requirement powers of subsection 231.2(1) which eliminate the hurdle of prior judicial scrutiny. A short review of his testimony is instructive in this respect.

[25] At pages 137 and 140 of the Appeal Book, Mr. Faribault testified as to what the policy was regarding his gathering of evidence of a tax evasion offence:

Q - [Me Rheault] Donc... mais il y a une... il y a une politique, là, qui est reflétée au paragraphe 13, applicable aux enquêtes spéciales, qui est celle à l'effet que... je... et je lis :

"*L'enquêteur doit donc obtenir tous les documents et registres en la possession ou sous le contrôle du contribuable qui peuvent servir d'éléments de preuve, et les conserver sous sa garde et son contrôle jusqu'à ce qu'ils soient présentés au Tribunal*."

C'est exact?

R - [M. Faribault] Oui, oui. Oui.

Q - [Me Rheault] Puis pour les fins de preuve, comme enquêteur, votre rôle c'est d'obtenir les originaux?

R - [M. Faribault] À un moment donné, oui. À un stade de l'enquête, oui.

[...]

Q - [Me Rheault] Puis la politique du ministère au moment des demandes péremptoires était exposée dans cette circulaire-là, ici, entre autres, et dans le cadre de cette politique-là, on demandait à l'enquêteur d'obtenir les documents et les registres en la possession ou sous le contrôle du contribuable qui peuvent... qui pourraient servir de... d'éléments de preuve, et de les conserver jusqu'à ce qu'ils soient présentés au Tribunal, c'est exact?

R - [M. Faribault] Dans la circulaire, oui, c'est indiqué, oui.

Q - [Me Rheault] Puis est-ce que c'était ça la politique du ministère à l'époque?

R - [M. Faribault] Bien, oui.

(My emphasis)

[26] Mr. Faribault explains at page 145 what he was trying to do to fulfill, as an investigator, his necessary obligation to gather the evidence of the tax evasion offence that he was investigating:

Q - [Me Rheault] Vous, comme enquêteur, vous deviez vous satisfaire que vous aviez des motifs raisonnables et probables de croire qu'une infraction avait été commise, avant d'aller demander

motifs raisonnables et probables de croire qu'une infraction avait été commise, avant d'aller demander l'émission d'un mandat de perquisition?

R - [M. Faribault] Oui.

Q - [Me Rheault] Puis dans le présent dossier comme vous l'avez mentionné tantôt, vous entreteniez des soupçons qui ont... qui ont résulté, là, à l'enquête que vous avez amorcée, mais vous nous dites que vous ne... n'aviez pas des motifs encore, là, raisonnables et probables de croire qu'une infraction d'évasion fiscale avait été commise?

R - [M. Faribault] Oui.

Q - [Me Rheault] Donc vous avez pas procédé, là, à... à demander un mandat de perquisition?

R - [M. Faribault] Non.

Q - [Me Rheault] Vous avez plutôt procédé par le biais de demandes péremptoires?

R - [M. Faribault] Oui.

Q - [Me Rheault] Selon l'article 231.2 de la loi?

R - [M. Faribault] Oui.

(My emphasis)

[27] In my respectful view, Mr. Faribault who was embarked upon a criminal investigation of the appellants attempted to do, indirectly, what he could not do directly, i.e. obtain the incriminating evidence without a warrant. The events go back to a time when the line between the use of the requirement powers and the search powers pursuant to a warrant was blurred and the decision in *Jarvis* had not yet been rendered: see the facts in *Jarvis* and in *R.* v. *Ling*, [2002] 3 S.C.R. 814 which attest to the blurring. In any event, both the admission and conduct of Mr. Faribault reveal that he was clearly engaged into the criminal investigation of the appellants and that a clear decision to that effect had been made.

[28] There would be no need for me to consider the factors identified by the Supreme Court. I will, nonetheless, do it and review the evidence on the record to ascertain whether the factors also establish that the respondent's investigation had crossed the Rubicon to become a criminal investigation. The record before us is somewhat succinct, probably more so than it was before the motions judge. In any event, the transcript of the cross-examination of investigator Faribault of the SI branch has been included in the Appeal Book. I will analyse the first two factors together since the relevant facts already enumerated are intertwined.

Factor	Facteur
(a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?	a) Les autorités avaient-elles des motifs raisonnables de porter des accusations? Semble-t-il, au vu du dossier, que l'on aurait pu prendre la décision de procéder à une enquête criminelle?
(b) Was the general conduct of	b) L'ensemble de la conduite des

the authorities such that it was consistent with the pursuit of a criminal investigation?	autorités donnait-elle à croire que celles-ci procédaient à une enquête criminelle?

[29] Factor (a) addresses two different issues that may arise at different times in the process. A decision to proceed with a criminal investigation may be made early in the process and such investigation may eventually, at a later stage, provide the authorities with the required reasonable grounds to lay a charge. However, a criminal investigation does not cease to be a criminal investigation because, in the end, the authorities do not have reasonable grounds to lay charges or no charges are laid. It may be that the criminal investigation is inconclusive with respect to the commission of an offence or that, although conclusive in that respect, the offenders have yet to be identified. It is the very purpose of a criminal investigation to determine whether a crime has been committed and by whom so that charges can be laid. L'Heureux-Dubé J. said in *Starr* v. *Houlden*, [1990] 1 S.C.R. 1366, at page 1425, from a criminal law perspective, "specific individuals are targeted for the express and exclusive purpose of indicting them".

[30] The fact that the authorities have reached a stage in their inquiry where they have reasonable grounds to lay charges is not, in and of itself, sufficient to conclude that the threshold has been crossed and that the inquiry has become a criminal investigation: see *Jarvis, supra*, paragraph 93. It is, however, an important factor to be considered in the determination of the subsequent relationship between the parties. "In most cases", the Supreme Court writes, "if all ingredients of an offence are reasonably thought to have occurred, it is likely that the investigation function is triggered": *ibidem*, paragraph 89. This is no doubt the case when the situation has reached a stage where charges can be laid. Usually, the criminal investigation is over since the laying of charges is the outcome of the investigation.

[31] Conversely, the fact that there are yet no reasonable grounds to lay charges does not mean that the on-going inquiry is not a criminal investigation because, as I have already pointed out, the purpose of such investigation is to lead to a point where the prosecuting authorities acquire reasonable grounds to lay charges. As the second question in factor (a) indicates, it is important to look at the record to see if it appears "that a decision to proceed with a criminal investigation could have been made". I note that the test is cast in terms of a mere possibility as opposed to a probability and that the Supreme Court itself has underlined that fact.

[32] In the present instance, not only a decision to proceed with a criminal investigation could have been made as factor (a) indicates, but such investigation was actually undertaken as evidenced by the facts and the admission and conduct of investigator Faribault of the SI branch.

(c) Had the auditor transferred his or her files and materials to the investigators?	c) Le vérificateur avait-il transféré son dossier et ses documents aux enquêteurs?

[33] This factor as defined does not apply because the appellants' files were at all times with the SI branch of the CCRA which was conducting a criminal investigation of a fraudulent ring of charitable donations and receipts. The appellants were generous donors to one of the charitable organisation under criminal investigation and were part of that investigation.

(d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?	d) La conduite du vérificateur donnait-elle à croire qu'il agissait en fait comme un mandataire des enquêteurs?

[34] This factor does not apply in the case at bar.

(e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?	e) Semble-t-il que les enquêteurs aient eu l'intention d'utiliser le vérificateur comme leur mandataire pour recueillir des éléments de preuve?

[35] This factor does not apply directly *per se*. However, if what was really intended was a mere compliance audit and if the criminal investigation was really closed, why wasn't the file sent to the audit section to achieve that result. This would have had the advantage of dissipating any ambiguity as to the real objective of the investigation although, in my view, the testimony of investigator Faribault left none when he clearly stated the objective of the investigation that he had undertaken.

(f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's *mens rea*, is the evidence relevant only to the taxpayer's penal liability?	f) La preuve recherchée est-elle pertinente quant à la responsabilité générale du contribuable ou, au contraire, uniquement quant à sa responsabilité pénale, comme dans le cas de la preuve de la *mens rea*?

(My emphasis)

[36] Factor (f), as worded, which states its objective in terms of mere relevancy of the evidence and exclusive relevancy with respect to penal liability, is difficult to apply in the present instance. By definition, an investigation with a predominant purpose is an investigation that has secondary or subsidiary purposes. Therefore, the evidence sought and obtained for the predominant or primary purpose may also be relevant and useful to the secondary purpose. Even if the evidence is sought to establish the penal liability of the taxpayer, such evidence will generally remain relevant to establish his tax liability and civil penalties. It may be, for example, that the evidence obtained in the context of a criminal investigation of a taxpayer falls short of proving a crime beyond a reasonable doubt, but still reveals irregularities in that taxpayer's compliance with the Act which affect his tax liability. As the U.S. Supreme Court said in the *LaSalle National Bank* case *supra*, at page 2365, "the Government does not sacrifice its interest in unpaid taxes just because a criminal prosecution begins". Thus, it is difficult, if not impossible to say, that the evidence will be, or is relevant, *only* to the taxpayer's penal liability even though this was the primary reason why that evidence was sought and obtained and even though the taxpayer's penal liability was the predominant purpose of the investigation.

[37] All the evidence sought from the appellants, i.e. cancelled cheques, bank statements, accounting books and records, was in connection with their donations to the Rabbinical College of Montreal whose investigation led to the sending, on March 3, 2000, of a notice of revocation of its charitable registration for alleged numerous and serious irregularities relating to transfers of money and books and records keeping. That evidence was relevant to establish their penal liability. It could be used also to complement the unsuccessful criminal investigation of the Rabbinical College of Montreal and establish its involvement in

the alleged organized fraud. The appellants' penal liability could not be proven solely with the evidence obtained from the College in the course of the criminal investigation that it was subject to.

(g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation?	g) Existe-t-il d'autres circonstances ou facteurs susceptibles d'amener le juge de première instance à conclure que la vérification de la conformité à la loi était en réalité devenue une enquête criminelle?

[38] This factor does not apply in this case.

Conclusion

[39] Like the motions judge, I have come to the conclusion that the investigation of the appellants was a criminal investigation. It was led at all times by the SI branch of the CCRA whose primary function is to fight tax evasion and establish the penal liability of taxpayers in this respect. The investigator in charge of the file clearly stated that the investigation was a criminal investigation and that its purpose was to gather evidence of a tax evasion offence committed by the appellants. His evidence has remained uncontradicted. It is significant that none of his superiors came to testify that this was not the case. He testified that he resorted to the requirement powers of subsection 231.2(1) of the Act because he did not yet have reasonable grounds to apply for a warrant to obtain the evidence that he wanted. The events occurred at a time when the line between the requirement powers of subsection 231.2(1) and the search powers of subsection 231.3(1) was blurred.

[40] Furthermore, the investigation of the appellants was a resumption of the earlier criminal investigation that had been suspended. In addition, it was interconnected with other criminal investigations of charitable organizations. All these interconnected investigations were conducted by the SI branch of the CCRA. The evidence sought was relevant to the penal liability of the appellants as donors as well as that of the beneficiaries of the donations. The relevant factors, when analysed in their proper context, also point to an investigation whose predominant is criminal in nature. If this investigation of the appellants is not a criminal investigation, one is then left to wonder what is, and what will ever be, a criminal investigation.

[41] For these reasons, I would allow the appeal with costs and set aside the decision of the motions judge. Rendering the judgment that he should have rendered, I would allow the application for judicial review with costs and quash the requirements for production of documents issued on behalf of the Minister on January 12, 2001 against the appellants, Les Plastiques Algar (Canada) Ltée, Modern Wood Fabricators (M.W.F.) Inc. and Snapshot Theatrical Productions Inc.

"Gilles Létourneau"

J.A.

NADON J.A. (concurring)

[42] For the reasons which my colleague Létourneau J.A. gives, I would also allow this appeal with

costs. However, as I have reached this conclusion only after much hesitation, a few words are in order.

[43] I need not recite the facts, as they are clearly set out in the Reasons of my colleagues Desjardins and Létourneau JJ.A., which I have had the benefit of reading in draft.

[44] For their respective conclusions, my colleagues rely on the Supreme Court of Canada's decisions in *R. v. Jarvis*, [2002] 3 S.C.R. 757, and *R. v. Ling*, [2002] 3 S.C.R. 814. In *Jarvis*, the Supreme Court elaborated a test so as to determine the boundary between the audit and investigation functions of Revenue Canada. At paragraphs 93 and 94 of its Reasons in *Jarvis*, the Supreme Court directed trial judges to consider, absent a clear decision on the part of Revenue Canada to pursue a criminal investigation, a number of factors with a view to making the proper determination.

[45] In these Reasons, I wish to address one of the issues dealt with by both of my colleagues, namely whether, at the time the Requirements to provide information and documents were sent to the appellants, pursuant to paragraph 231.2(1)*(b)* of the *Income Tax Act*, R.S.C. 1996, ch. 1, 5th Supplement (the "Act"), Revenue Canada had made a clear decision to pursue a criminal investigation.

[46] At paragraph 27 of his Reasons, Létourneau J.A. concludes that, at the relevant time, the investigator, Mr. Faribault, was clearly "embarked upon a criminal investigation of the appellants". Although that conclusion is sufficient to dispose of the issue, Létourneau J.A. then goes on to examine, in light of the evidence, the factors set out in *Jarvis* at paragraph 94. That examination leads him to conclude that an adversarial relationship between the state and the appellants was in existence when the Requirements were sent.

[47] Desjardins J.A. arrives at a different conclusion. At paragraphs 112 to 122 of her Reasons, she deals with the issue of whether a clear decision to pursue a criminal investigation had been made at the time the Requirements were sent and, at paragraphs 118 and 122, she makes the following remarks:

[118] When Faribault's statements are analysed in context, it cannot be said, under the *Jarvis* test, that a clear decision had been made to pursue a criminal investigation. Nothing of that sort could have been decided at that stage. The directive given by CCRA to Faribault was an assignment to look principally for evidence of a penal nature. It cannot be drawn from that directive that CCRA had made the decision to pursue a criminal investigation. Such decision could not be made. CCRA had no evidence on which to base such a decision and no search warrant could have been issued to implement it.

[...]

[122] It is my view that "a clear decision to pursue a criminal investigation" had not been made and could have been made at that preliminary stage. Paragraphs 88 and 93 of *Jarvis* stand for the proposition that it is for the judge to objectively assess the nature of the inquiry and determine whether a clear decision is made to pursue the taxpayer for a criminal offence. If a clear decision is made, an analysis of the enumerated factors is not necessary. A contextual analysis of circumstances and attitudes is superfluous, because the evidence is clear. I do not understand *Jarvis* to say, however, that from a mere directive to conduct principally a penal investigation in circumstances where there is not one iota of evidence and where no search warrant can be issued, one can draw the conclusion that a decision to pursue a criminal investigation has been made.

[48] As I understand Desjardins J.A.'s Reasons, the fact that the investigator believed that he was conducting a criminal investigation, or that he had been so instructed by his superiors, is not determinative of the issue. As she states at paragraph 122, it is for the trial judge to determine whether, in a given case, a criminal investigation has been undertaken. In order to make that decision, the judge must examine all of the evidence and decide whether there was a proper basis or foundation to justify the commencement of a

the evidence and decide whether there was a proper basis or foundation to justify the commencement of a criminal investigation. That approach appears to be the one which the Supreme Court instructs judges to take when assessing the factors listed at paragraph 94 of *Jarvis* and, in particular, when assessing factor (a):

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

[49] I repeat that the Supreme Court, at paragraphs 93 and 94 of its Reasons, instructed trial judges to have recourse to the enumerated factors only when a clear decision to pursue a criminal investigation has not been made. However, that approach is not applicable here, because the issue is whether a clear decision to proceed with a criminal investigation has been made, and not whether a criminal investigation ought to have been commenced.

[50] In order to properly understand paragraphs 93 and 94 of *Jarvis,* it must be remembered that the conduct of the inquiry in both *Jarvis* and *Ling* was, at all times, in the hands of the auditors and not in the hands of the investigators. That is the context which drives both decisions and, in particular, the discussion commencing at paragraph 85 of *Jarvis*, the sub-title of which is "Delineating the Bounds Between Audit and Investigation: Nature of the Inquiry".

[51] In *Jarvis* and *Ling*, the Supreme Court sought to elaborate a test which would allow judges to determine whether an inquiry conducted by auditors had, in fact, become a criminal investigation, even though the matter remained at all times in their hands. The discussion which commences at paragraph 85 and which concludes at paragraph 99 can only be understood in that context. That is why, at paragraphs 88 and 89 of its Reasons in *Jarvis*, the Supreme Court speaks of crossing the Rubicon and determining the predominant purpose of an inquiry.

[52] Of the seven factors listed in paragraph 94 of *Jarvis*, three of these factors, (c), (d) and (e), have in mind the investigative branch. They are as follows:

(c) Had the auditor transferred his or her files an materials to the investigators?

(d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?

(e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?

[53] These factors must be read in the light of what the Supreme Court states at paragraph 92:

[92] Whether a matter has been sent to the investigations section is another factor in determining whether the adversarial relationship exists. Again, though, this, by itself, is not determinative. An auditor's recommendation that investigators look at a file might result in nothing in the way of a criminal investigation since there is always the possibility that the file will be sent back. Still, if, in an auditor's judgment, a matter should be sent to the investigators, a court must examine the following behaviour very closely. If the file is sent back, does it appear that the investigators have actually declined to take up the case and have returned the matter so that the audit can be completed? Or, does it appear, rather, that they have sent the file back as a matter of expediency, so that the auditor may use ss. 231.1(1) and 231.2(1) to obtain evidence for a prosecution (as was found to be in the case in *Norway Insulation, supra*)?

[54] When factors (c), (d) and (e), and paragraph 92 are read in their proper context, it is clear that the Supreme Court, in elaborating its test, intended to prevent the audit section from conducting a disguised criminal investigation. That is why, at paragraph 92 of *Jarvis*, the Supreme Court states that whenever the audit section sends a matter to the investigative section, the judge must pay close attention. The purpose of

audit section sends a matter to the investigative section, the judge must pay close attention. The purpose of the exercise is, as I have already indicated, to assess whether a criminal investigation has begun.

[55] In the various scenarios outlined at paragraph 92 of *Jarvis*, i.e. where the audit section has referred a matter to the investigative section, it is clear that the assumption which the Supreme Court makes is that no decision to commence a criminal investigation has yet been made. In directing judges to pay close attention, the Supreme Court is reminding judges that there is a line which the auditors cannot cross.

[56] At paragraph 97 of *Jarvis*, the Supreme Court outlines another scenario, i.e. where parallel investigations are being conducted by the audit and the criminal investigation sections. In such a situation, the Court states that the audit inquiry can continue to resort to subsections 231.1(1) and 231.2(1), but makes it clear that once a criminal investigation has been undertaken, a taxpayer cannot be forced by the investigators to comply with the Requirement powers of subsections 231.1(1) and 231.2(1). Specifically, the Court says at paragraph 97:

[...] It may well be that there will be circumstances in which the CCRA officials conducting the tax liability inquiry will desire to inform the taxpayer that a criminal investigation is also underway and that the taxpayer is not obliged to comply with the requirement powers of subsections 231.1(1) and 231.2(1) for the purpose of a criminal investigation.

[57] What is before us in this case is a situation quite different from that which prevailed in *Jarvis* and *Ling*. When the Requirements were sent, the matter was clearly in the hands of an investigator. On that part of the evidence, which Létourneau J.A. recites at paragraphs 14 to 17 of his Reasons, there cannot be much doubt that the matter had been sent to Mr. Faribault for the specific purpose of carrying out a criminal investigation. Whether or not, when the Requirements were sent, Revenue Canada and Mr. Faribault had sufficient information to commence a criminal investigation is, in my respectful view, irrelevant. The plain fact is that Mr. Faribault had been directed to conduct a criminal investigation and that is what he was doing.

[58] Consequently, when no clear decision to commence a criminal investigation has been made, it is entirely proper to go to factor (a) so as to determine whether there were reasonable grounds to lay charges and whether the record was such as to justify the commencement of a criminal investigation. That approach has as its objective the determination of whether a matter in the hands of auditors has become a criminal investigation, even though it has not been referred to the investigative section with a mandate to commence a criminal investigation. However, when the matter is in the hands of the investigators, as is the case here, and they are clearly conducting a criminal investigation, there is no necessity of examining the factors set forth at paragraph 94 of *Jarvis*.

[59] For these reasons, I can only give an affirmative answer to the question of whether a clear decision to conduct a criminal investigation had been made when the Requirements were sent to the appellants. I would, therefore, dispose of the appeal in the manner proposed by Létourneau J.A.

"Marc Nadon"

J.A.

DESJARDINS J.A. (dissenting)

[60] Three corporate appellants, Les Plastiques Algar (Canada) Ltée., Modern Wood Fabricators (M.W.F.) Inc. and Snapshot Theatrical Productions Inc. appeal a decision of a Motions Judge of the Federal Court (reported at [2003] F.C.J. No. 70) holding that their rights under sections 7 and 8 of the *Canadian*

Court (reported at [2005] F.C.J. No. 70) holding that their rights under sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* (the Charter) were not violated when they were served with requirements to provide documents pursuant to paragraph 231.2(1)(*b*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act).

[61] In the Federal Court, two individuals, Messrs Sam Kligman and Allan Sandler, directors of the corporate appellants, were also parties to the proceedings. The Motions Judge held in their favour under section 7 of the Charter. Consequently, they are not parties to this appeal.

[62] At issue are the scope of the Minister's powers to conduct an inquiry into the affairs of the three corporate taxpayers and the determination of the moment at which the predominant purpose of the inquiry became an investigation, as a consequence of which their rights under the Charter were allegedly violated.

I. The Facts

[63] Before the Motions Judge, the two individuals and the three corporations challenged, by way of judicial review, letters issued on January 12, 2001, by the Special Investigations division (SI) of the Canada Customs and Revenue Agency (CCRA) titled Requirements to Provide Information and Documents (the requirements). The letters addressed to the three corporations

were sent pursuant to paragraph 231.2(1)(*b*) of the Act while those addressed to the two individuals were sent pursuant to paragraphs 231.2(1)(*a*) and (*b*) of the Act.

[64] CCRA stated in those letters that it required information from the five taxpayers with respect to donations made to four charitable organizations, being the Montreal Rabbinical College, the Yeshiva Oir Hochaim, l'Association Gimilis Chasodim Keren Chava B'Nei Levi and Les Amis Canadiens des Institutions de la Terre Sainte.

[65] CCRA required information for various periods between 1994 to 1998 inclusive. The relevant periods differed for each party. Les Plastiques Algar (Canada) Ltée was required to produce documents regarding six charitable donations all made to the Montreal Rabbinical College between 1994 and 1998 totalling $362,000. Modern Wood Fabricators (M.W.F.) Inc. was required to produce documents related to six charitable donations made from 1995 to 1998 totalling $744,000 to the Montreal Rabbinical College and Yeshiva Oir Hochaim. Snapshot Theatrical Productions Inc. was asked to produce documents in connection to a $36,000 charitable donation made to the Montreal Rabbinical College in 1994.

[66] The information required from Kligman and Sandler, the two individuals, consisted of account numbers (and the identification of the banks and branches at which the accounts were held) from which cheques were drawn to pay the donations and the cancelled cheques related to these donations. The material requested from the three corporations included cancelled cheques, bank statements and donation receipts related to donations to the organizations mentioned in the letters. Also requested were the cash disbursements journal, general ledger, adjusting entries and trial balance for the periods specified in the letters.

[67] Each of the five letters concluded with the following:

Your attention is directed to subsections 238(1) and (2) of the *Income Tax Act* for default in complying with this requirement.

[68] At the time the requirements were issued, two registered charities had been investigated by Gaétan Ouelette, an SI investigator, for falsely issuing tax receipts. The first, Construit Toujours avec Bonté, had pleaded guilty to an offence under paragraph 239(1)(*d*) of the Act. The other, the Montreal

Rabbinical College, was not charged and no further charges would be laid against it (see the affidavit of the SI investigator André Faribault, A.B. p. 75, p. 77, par. 17).

[69] The appellants claimed deductions in respect of donations to the Montreal Rabbinical College but not in respect of donations to Construit Toujours avec Bonté.

[70] The five taxpayers challenged by way of judicial review the requirements of the Minister on the basis that their constitutional rights under sections 7 and 8 of the Charter had been violated. A notice under section 57 of the *Federal Courts Act* (R.S. 1985, c. F-7) was given.

II. The decision of the Motions Judge

[71] Relying on the decisions of the Supreme Court of Canada in *R. v. Jarvis*, [2002] 3 S.C.R. 757 (*Jarvis*), and *R. v. Ling,* [2002] 3 S.C.R. 814 (*Ling*), the Motions Judge stated that while taxpayers are bound to cooperate with CCRA auditors for tax assessment purposes, an adversarial relationship crystalizes between CCRA and the taxpayer when the predominant purpose of the inquiry is the determination of a taxpayer's penal liability.

[72] At that stage, he said at paragraphs 74 and 75 of his reasons, the fundamental protection against self-incrimination guaranteed by the Charter comes into play. As a matter of statutory construction, the inspection and requirement powers granted by subsections 231.1(1) and 231.2(1) cannot be used for the purpose of criminal investigations. Rather, search warrants must be obtained pursuant to section 231.3 of the Act. He reiterated the non-exhaustive list of factors set out by the Supreme Court of Canada to assist in the determination of whether the taxpayer's penal liability had become the predominant purpose of the inquiry. He concluded, based on his reading of the evidence, that there was "from the outset" an investigation where penal sanctions were sought by CCRA. He stated, at paragraph 90 of his reasons:

[90] The evidence on the record as a whole leads to the conclusion that the predominant purpose of the investigation of CCRA, from its outset, was prosecution of the applicants for tax evasion and eventual imposition of penal sanctions against them. The statements on discovery by Faribault are not the only indicia of this predominant purpose; they are simply among the most succinct elements of evidence which support this conclusion. Accordingly, I find that the predominant purpose of the investigation was prosecution of the applicants for tax evasion.

[Emphasis added.]

[73] The Motions Judge concluded, at paragraphs 91 and 92 of his reasons, that the section 7 Charter rights of the two individuals concerned would be in jeopardy if the requirements were maintained. He wrote:

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

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

toward assessing criminal liability.

[Emphasis added.]

[74] With regard to the three corporations involved, the Motions Judge concluded at paragraphs 95, 103 and 104 of his reasons that section 7 did not apply to corporations, and that their privacy interests in the requested records were minimal under section 8 of the Charter. He wrote:

[95] A corporation cannot enjoy life, liberty or security of the person. Accordingly, s. 7 of the Charter does not apply to corporations. The Supreme Court has held that a corporation cannot invoke this right in order to shield itself from criminal investigation or prosecution. This rule was originally stated in Irwin Toy Ltd. v. Québec (Attorney General), [1989] 1 S.C.R. 927. The rule has been reiterated in Thomson and British Columbia Securities Commission, supra. It therefore remains only to be determined whether s. 8 can be applied in respect of the corporate applicants.

[...]

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

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

[75] The Motions Judge then applied subsection 24(1) of the Charter and, in doing so, he quashed the requirements received by the individuals but upheld those received by the corporate appellants. He said, at paragraphs 110 and 111 of his reasons:

[110] Subsection 24(1) allows me to provide "such remedy as the court considers appropriate and just in the circumstances" in the event of a breach of the Charter. Technically, a Charter breach has not yet occurred since the evidence has not yet been delivered. However, I have found that the Charter rights of Kligman and Sandler will be violated if they are compelled to provide the materials sought by CCRA. It is possible to order that they provide what they have been told to provide by the Requirements, and leave it to the presiding judge to make a decision as to the exclusion or admission of that evidence in the event that Kligman and Sandler are charged with tax evasion. However, Iacobucci and Major JJ. addressed this hypothesis in Jarvis at para. 91:

Although the respondent argued that such situations could be remedied by the courts, we view it as preferable that such situations be avoided rather than remedied.

[111] I agree. Accordingly, I exercise my discretion under subsection 24(1) of the Charter to quash the Requirements issued personally to Sandler and Kligman. As I have found no breach of the Charter in respect of the Requirements issued to the corporate applicants, these Requirements shall be upheld.

III. **The position of the parties**

[76] The three corporate appellants claim that, having made the finding that the predominant purpose of the inquiry conducted by the SI division was to determine the corporate appellants' penal liability, the full panoply of their rights under sections 7 and 8 of the Charter applied and that, as a result, the requirements should have been quashed.

[77] The respondent claims that the reviewing judge exceeded his jurisdiction in finding that the *Jarvis* and *Ling* analyses, which were developed in the context of a criminal trial, applied to pre-charge proceedings such as a judicial review application to quash the requirements to produce tax records. The respondent further claims that the Motions Judge erred in finding that the predominant purpose of CCRA's requirements was to determine the corporate appellants' penal liability. He submits that, notwithstanding these errors, the reviewing judge correctly held

that section 7 of the Charter does not apply to corporate entities and that the use of the requirements to compel the corporate appellants to produce pre-existing banking and business records did not violate their rights under section 8 of the Charter.

IV. The relevant statutory provisions

[78] The Act provides the following:

Part XV - Administration and Enforcement

231.1: Inspections	231.1: Enquêtes
(1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,	(1) Une personne autorisée peut, à tout moment raisonnable, pour l'application et l'exécution de la présente loi, à la fois:
(*a*) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, and	*a*) inspecter, vérifier ou examiner les livres et registres d'un contribuable ainsi que tous documents du contribuable ou d'une autre personne qui se rapportent ou peuvent se rapporter soit aux renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit à tout montant payable par le contribuable en vertu de la présente loi;
(*b*) examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any	*b*) examiner les biens à porter à l'inventaire d'un contribuable,

relating to, the taxpayer or any other person, an examination of which may assist the authorized person in determining the accuracy of the inventory of the taxpayer or in ascertaining the information that is or should be in the books or records of the taxpayer or any amount payable by the taxpayer under this Act,

and for those purposes the authorized person may

(*c*) subject to subsection 231.1(2), enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept, and

(*d*) require the owner or manager of the property or business and any other person on the premises or place to give the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person.

Prior authorization

(2) Where any premises or place referred to in paragraph 231.1(1)(c) is a dwelling-house, an authorized person may not enter that dwelling-house without the consent of the occupant except under the authority of a warrant under subsection 231.1(3).

Application

(3) Where, on ex parte application by the Minister, a judge is satisfied by information on oath that

(*a*) there are reasonable grounds to believe that a dwelling-house

l'inventaire d'un contribuable, ainsi que tout bien ou tout procédé du contribuable ou d'une autre personne ou toute matière concernant l'un ou l'autre dont l'examen peut aider la personne autorisée à établir l'exactitude de l'inventaire du contribuable ou à contrôler soit les renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit tout montant payable par le contribuable en vertu de la présente loi;

à ces fins, la personne autorisée peut:

c) sous réserve du paragraphe (2), pénétrer dans un lieu où est exploitée une entreprise, est gardé un bien, est faite une chose en rapport avec une entreprise ou sont tenus ou devraient l'être des livres ou registres;

d) requérir le propriétaire, ou la personne ayant la gestion, du bien ou de l'entreprise ainsi que toute autre personne présente sur les lieux de lui fournir toute l'aide raisonnable et de répondre à toutes les questions pertinentes à l'application et l'exécution de la présente loi et, à cette fin, requérir le propriétaire, ou la personne ayant la gestion, de l'accompagner sur les lieux.

Autorisation préalable

(2) Lorsque le lieu mentionné à l'alinéa (1)c) est une maison d'habitation, une personne autorisée ne peut y pénétrer sans la permission de l'occupant, à moins d'y être autorisée par un mandat décerné en vertu du paragraphe (3).

Mandat d'entrée

(3) Sur requête ex parte du ministre, le juge saisi peut décerner un mandat qui autorise

is a premises or place referred to in paragraph 231.1(1)(c),

(*b*) entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, and

(*c*) entry into the dwelling-house has been, or there are reasonable grounds to believe that entry will be, refused,

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

(*d*) order the occupant of the dwelling-house to provide to an authorized person reasonable access to any document or property that is or should be kept in the dwelling-house, and

(*e*) make such other order as is appropriate in the circumstances to carry out the purposes of this Act,

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

Requirements to provide documentation or information231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act, including the collection of any amount payable under this Act by any person, by notice served

une personne autorisée à pénétrer dans une maison d'habitation aux conditions précisées dans le mandat, s'il est convaincu, sur dénonciation sous serment, de ce qui suit:

a) il existe des motifs raisonnables de croire que la maison d'habitation est un lieu mentionné à l'alinéa (1)c);

b) il est nécessaire d'y pénétrer pour l'application ou l'exécution de la présente loi;

c) un refus d'y pénétrer a été opposé, ou il existe des motifs raisonnables de croire qu'un tel refus sera opposé.

Dans la mesure où un refus de pénétrer dans la maison d'habitation a été opposé ou pourrait l'être et où des documents ou biens sont gardés dans la maison d'habitation ou pourraient l'être, le juge qui n'est pas convaincu qu'il est nécessaire de pénétrer dans la maison d'habitation pour l'application ou l'exécution de la présente loi peut ordonner à l'occupant de la maison d'habitation de permettre à une personne autorisée d'avoir raisonnablement accès à tous documents ou biens qui sont gardés dans la maison d'habitation ou

devraient y être gardés et rendre tout autre ordonnance indiquée en l'espèce pour l'application de la présente loi.

Production de documents ou fourniture de renseignements

231.2 (1) Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et, pour l'application et l'exécution de la présente loi, y compris la perception d'un montant

personally or by registered or certified mail, require that any person provide, within such reasonable time as is stipulated in the notice,

(*a*) any information or additional information, including a return of income or a supplementary return; or

(*b*) any document.

[...]

Search warrant

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

Evidence in support of application

(2) An application under subsection 231.3(1) shall be supported by information on oath establishing the facts on which the application is based.

Evidence

(3) A judge may issue the warrant referred to in subsection 231.3(1) where the judge is satisfied that there are reasonable grounds to believe that

(*a*) an offence under this Act was committed;

payable par une personne en vertu de la présente loi, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne, dans le délai raisonnable que précise l'avis:

a) qu'elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;

b) qu'elle produise des documents.

[...]

Requête pour mandat de perquisition

231.3 (1) Sur requête ex parte du ministre, le juge saisi peut décerner un mandat écrit qui autorise toute personne qui y est nommée à pénétrer dans tout bâtiment, contenant ou endroit et y perquisitionner pour y chercher des documents ou choses qui peuvent constituer des éléments de preuve de la perpétration d'une infraction à la présente loi, à saisir ces documents ou choses et, dès que matériellement possible, soit à les apporter au juge ou, en cas d'incapacité de celui-ci, à un autre juge du même tribunal, soit à lui en faire rapport, pour que le juge en dispose conformément au présent article.

Preuve au soutien de la requête

(2) La requête visée au paragraphe (1) doit être appuyée par une dénonciation sous serment qui expose les faits au soutien de la requête.

Preuve

(3) Le juge saisi de la requête

(*b*) a document or thing that may afford evidence of the commission of the offence is likely to be found; and

(*c*) the building, receptacle or place specified in the application is likely to contain such a document or thing.

[...]

Offences and punishment

238. (1) Every person who has failed to file or make a return as and when required by or under this Act or a regulation or who has failed to comply with subsection 116(3), 127(3.1) or 127(3.2), 147.1(7) or 153(1), any of sections 230 to 232 or a regulation made under subsection 147.1(18) or with an order made under subsection 238(2) is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

(*a*) a fine of not less than $1,000 and not more than $25,000; or

(*b*) both the fine described in paragraph 238(1)(*a*) and imprisonment for a term not exceeding 12 months.

Compliance orders(2) Where a person has been convicted by a court of an offence under subsection 238(1) for a failure to comply with a provision of this Act or a regulation, the court may make such order as it deems proper in order to enforce compliance with the provision.

Saving

(3) Where a person has been convicted under this section of failing to comply with a provision of this Act or a regulation, the person is not liable to pay a penalty imposed

peut décerner le mandat mentionné au paragraphe (1) s'il est convaincu qu'il existe des motifs raisonnables de croire ce qui suit:

a) une infraction prévue par la présente loi a été commise;

b) des documents ou choses qui peuvent constituer des éléments de preuve de la perpétration de l'infraction seront vraisemblablement trouvés;

c) le bâtiment, contenant ou endroit précisé dans la requête contient vraisemblablement de tels documents ou choses.

[...]

Infractions et peines

238. (1) La personne qui ne produit ou ne présente pas ou ne remplit pas une déclaration de la manière et dans le délai prévus à la présente loi ou à son règlement ou qui contrevient au paragraphe 116(3), 127(3.1) ou (3.2), 147.1(7) ou 153(1) ou à l'un des articles 230 à 232 ou à une disposition réglementaire prise en vertu du paragraphe 147.1(18) ou encore qui contrevient à une ordonnance rendue en application du paragraphe (2) commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire et outre toute pénalité prévue par ailleurs:

a) soit une amende de 1 000 $ à 25 000 $;

b) soit une telle amende et un emprisonnement maximal de 12 mois.

Ordonnance d'exécution

(2) Le tribunal qui déclare une personne coupable d'une infraction prévue au paragraphe

liable to pay a penalty imposed under section 162 or 227 for the same failure unless the person was assessed for that penalty or that penalty was demanded from the person before the information or complaint giving rise to the conviction was laid or made.

Other offences and punishment

239. (1) Every person who has

(*a*) made, or participated in, assented to or acquiesced in the making of, false or deceptive statements in a return, certificate, statement or answer filed or made as required by or under this Act or a regulation,

(*b*) to evade payment of a tax imposed by this Act, destroyed, altered, mutilated, secreted or otherwise

disposed of the records or books of account of a taxpayer,

(*c*) made, or assented to or acquiesced in the making of, false or deceptive entries, or omitted, or assented to or acquiesced in the omission, to enter a material particular, in records or books of account of a taxpayer,

(*d*) wilfully, in any manner, evaded or attempted to evade compliance with this Act or payment of taxes imposed by this Act, or

(*e*) conspired with any person to commit an offence described in paragraphs 239(1)(a) to 239(1)(d),

is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

(*f*) a fine of not less than 50%, and not more than 200%, of the

infraction prévue au paragraphe (1) peut rendre toute ordonnance qu'il estime indiquée pour qu'il soit remédié au défaut visé par l'infraction.

Réserve

(3) La personne déclarée coupable, par application du présent article, d'avoir contrevenu à une disposition de la présente loi ou de son règlement n'est passible d'une pénalité prévue à l'article 162 ou 227 pour la même contravention que si une cotisation pour cette pénalité a été établie à son égard ou que si le paiement en a été exigé d'elle avant que la dénonciation ou la plainte qui a donné lieu à la déclaration de culpabilité ait été déposée ou faite.

Autres infractions et peines

239. (1) Toute personne qui, selon le cas:

a) a fait des déclarations fausses ou trompeuses, ou a participé, consenti ou acquiescé à leur énonciation dans une déclaration, un certificat, un état ou une réponse produits, présentés ou faits en vertu de la présente loi ou de son règlement;

b) a, pour éluder le paiement d'un impôt établi par la présente loi, détruit, altéré, mutilé, caché les registres ou

livres de comptes d'un contribuable ou en a disposé autrement;

c) a fait des inscriptions fausses ou trompeuses, ou a consenti ou acquiescé à leur accomplissement, ou a omis, ou a consenti ou acquiescé à l'omission d'inscrire un détail important dans les registres ou livres de comptes d'un

amount of the tax that was sought to be evaded, or

(*g*) both the fine described in paragraph 239(1)(*f*) and imprisonment for a term not exceeding 2 years.

[...]

[Emphasis added.]

contribuable;

d) a, volontairement, de quelque manière, éludé ou tenté d'éluder l'observation de la présente loi ou le paiement d'un impôt établi en vertu de cette loi;

e) a conspiré avec une personne pour commettre une infraction visée aux alinéas a) à d),

commet une infraction et, en plus de toute autre pénalité prévue par ailleurs, encourt, sur déclaration de culpabilité par procédure sommaire:

f) soit une amende de 50 % à 200 % de l'impôt que cette personne a tenté d'éluder;

g) soit à la fois l'amende prévue à l'alinéa f) et un emprisonnement d'au plus 2 ans.

[...]

[Non souligné dans l'original.]

[79] Sections 7, 8 and subsection 24(1) of the Charter provide:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

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

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux

circonstances.

V. Was a cross-appeal necessary?

[80] A preliminary matter was raised as to whether the respondent had the obligation to file a cross-appeal if he wished to attack the finding of the Motions Judge that the predominant purpose of the inquiry conducted by CCRA was the determination of the penal liability of the corporate appellants for tax evasion.

[81] This query may be summarized along the following lines.

[82] The finding of the Motions Judge that the predominant purpose of the inquiry was penal in nature was binding on the corporate appellants, on the individuals and on the respondent. The respondent, not having cross-appealed, is prevented from reopening the judge's finding *vis-à-vis* the corporate appellants since by doing so, he is making a collateral attack on a vital point of the Motions Judge's reasons in a proceeding where he was a party. The corporate appellants could reasonably expect that the only issue on appeal would be related to the application of sections 7 and 8 of the Charter. By not cross-appealing, the respondent takes the corporate appellants by surprise.

[83] I hold that the respondent is entitled to question, as he does, the finding of the Motions Judge that the dominant purpose of the inquiry was penal in nature, although he has not filed a cross-appeal.

[84] The statutory source for an appeal in this Court lies in section 27 of the *Federal Courts Act*, which reads:

27. (1) An appeal lies to the Federal Court of Appeal from any of the following decisions of the Federal Court:	**27.** (1) Il peut être interjeté appel, devant la Cour d'appel fédérale, des décisions suivantes de la Cour fédérale :
(*a*) a final judgment,	*a*) jugement définitif;
[...]	[...]
(4) For the purposes of this section, a final judgment includes a judgment that determines a substantive right except as to any question to be determined by a referee pursuant to the judgment.	(4) Pour l'application du présent article, est assimilé au jugement définitif le jugement qui statue au fond sur un droit, à l'exception des questions renvoyées à l'arbitrage par le jugement.
[Emphasis added.]	[Non souligné dans l'original.]

[85] Subsection 2(1) of the *Federal Courts Act,* defines "final judgment" as follows:

"final judgment" means any judgment or other decision that determines in whole or in part any substantive right	« jugement définitif » Jugement ou autre décision qui statue au fond, en tout ou en partie, sur un droit d'une

whole or in part any substantive right of any of the parties in controversy in any judicial proceeding;	tout ou en partie, sur un droit d'une ou plusieurs des parties à une instance.

[86] Rule 341(1) of the *Federal Court Rules*, 1998, [SOR/98-106] makes it clear that a respondent who intends to participate in an appeal shall, within 10 days after service of the notice of appeal, serve and file a notice of appearance; or where he seeks a different disposition of the order appealed from, a notice of cross-appeal.

[87] Rule 341(1)(*a*) and (*b*) reads:

341. (1) A respondent who intends to participate in an appeal shall, within 10 days after service of the notice of appeal, serve and file	**341.** (1) L'intimé qui entend participer à l'appel dépose et signifie, dans les 10 jours suivant la signification de l'avis d'appel :
(*a*) a notice of appearance in Form 341A; or	*a*) soit un avis de comparution établi selon la formule 341A;
(*b*) where the respondent seeks a different disposition of the order appealed from, a notice of cross-appeal in Form 341B.	*b*) soit, s'il entend demander la réformation de l'ordonnance portée en appel, un avis d'appel incident établi selon la formule 341B.
[Emphasis added.]	[Non souligné dans l'original.]

[88] A cross-appeal is only appropriate where the respondent seeks a disposition different from that of the judgment under appeal. (See *Roberts v. Canada,* [1999] F.C.J. No. 1529; *Air Canada v. Canada (Commissioner of Competition)*, [2002] F.C.J. No. 424, at paragraphs 32 and 33).

[89] In the case at bar, the respondent could not have filed a cross-appeal against the corporate appellants since that part of the disposition of the case which dealt with the corporate appellants was favourable to him. The cross-appeal is directed at the decision under appeal and not at the reasons for judgment (*Redpath Industries Ltd. v. Fednav Ltd.* (F.C.A.), [1994] F.C.J. No. 397). The respondent was under no obligation to cross-appeal that part of the decision that dealt with the individuals in order to reach the corporate appellants.

[90] The corporate appellants appealed the decision. This gave the respondent the opportunity to raise all issues that were before the Motions Judge. In *Devinat v. Canada* (*Immigration and Refugee Board*) (*C.A.*), [2000] 2 F.C. 212, leave to appeal to the S.C.C. refused [2000] 2 S.C.R. vii) this Court held, at paragraph 12, that "an appeal from the judgment by the appellant allows the respondent to make all the arguments it considers relevant and which have a bearing on the questions of law or fact that were before the Motions Judge or that led to the judgment". It is open to the respondent therefore to try to convince this

Court that the Motions Judge erred on some issues, although he may have come to the right conclusion in the end.

[91] John Sopinka and Mark A. Gelowitz state at page 7 of their book *The Conduct of an Appeal*, 2nd ed. (Toronto: Butterworths, 2000):

The importance of a lower court's reasons for judgment should not, of course, be understated. As mentioned above, those reasons often contain the foundation upon which an appellate court will draw its conclusions concerning whether the judgment or order below was based upon a reviewable error, and those reasons are generally the focus of an appeal.

[92] The corporate appellants were not taken by surprise. Appellants generally know or ought to know that an appeal of a judgment opens for scrutiny the grounds on which it is based. In casting doubt on the Motions Judge's finding that the predominant purpose of the inquiry was penal in nature, the respondent is not making a collateral attack on the decision rendered below. A collateral attack presupposes that a party attacks in the wrong forum a decision which could have been attacked directly but was not. In *Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.),* [2003] S.C.J. No. 64, 2003 S.C.C. 19, Arbour J. for the Court cited, at paragraph 33, the case of *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at page 599, where it was said that the rule against collateral attack:

has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

The respondent is in the proper forum. He was taken here by an appeal process lodged by the corporate appellants who, by doing so, took all the risks inherent to an appeal.

[93] I conclude that the respondent does not seek a different disposition than the one arrived at by the Motions Judge and, consequently, that it would have been inappropriate for him to cross-appeal. Since the corporate taxpayers are appealing the decision of the Motions Judge, it is open to the respondent to oppose those reasons which he finds in error. The decision of the Motions Judge has become *res judicata* between the respondent and the individuals but not between the respondent and the corporate appellants.

VI. Issues

[94] The issues before us are the following:

(1) Whether the Motions Judge exceeded his jurisdiction in finding that the *Jarvis* and *Ling* analyses apply not only to criminal proceedings but also to pre-charge proceedings, such as a judicial review directed at the requirements;

(2) Whether the Motions Judge erred in finding that the letters issued under section 231.1 of the Act were requirements issued for the predominant purpose of determining the corporate appellants' penal liability;

(3) Whether the Motions Judge erred in deciding that the requirements did not infringe the corporate appellants' rights against self-incrimination under section 7 of the Charter and their rights against unreasonable search and seizure pursuant to section 8 of the Charter.

VII. Analysis

(1) Charter protection and pre-charge proceedings

[95] The Motions Judge made no error in applying *Jarvis* and *Ling* to the case at bar.

[96] It is uncontested that the issues examined in both *Jarvis* and *Ling* were raised during criminal trials for tax evasion. But as recognized by Iacobucci and Major JJ. in *Jarvis*, at paragraph 91, "[i]t would be a fiction to say that the adversarial relationship only comes into being when charges are laid". The adversarial relationship may appear at an earlier stage. It is at this stage that the taxpayer needs the protection of the Charter. It is then that he should obtain it. Iacobucci and Major JJ. have explained that situations where Charter rights are violated should be avoided rather than remedied (paragraph 91 of their reasons). The Motions Judge was therefore justified in applying the analyses developed in those two cases in order to determine the validity of the requirements on a judicial review application.

(2) The letters issued under section 231.1 of the Act

[97] In *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 (*McKinlay*), Wilson J. qualified the Act as "essentially a regulatory statute" since it controls the manner in which federal income tax is calculated and collected (at paragraph 20). In the same decision at paragraph 37, La Forest J. in concurring reasons described the Act as "essentially of an administrative nature."

[98] Based on self-assessment and self-reporting characteristics, the success of the administration of the tax scheme depends primarily upon a taxpayer's honesty. As Cory J. noted in *Knox Contracting*, "[t]he entire system of levying and collecting income tax is dependent upon the integrity of the taxpayer in reporting and assessing income." (*Knox Contracting Ltd. v. Canada,* [1990] 2 S.C.R. 338 at paragraph 18). To short-circuit the possibilities that taxpayers may omit to report revenues, "a system of random monitoring may be the only way in which the integrity of the tax system can be maintained." (*McKinlay*, at paragraph 33).

[99] To achieve such an end, the Minister is granted broad supervisory powers to audit and inspect relevant documents to the productions of those returns. However, to be effective, the self-enforcing regulatory scheme that is the Act requires resort to adequate investigation and the existence of effective penalties (*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425).

[100] In *Del Zotto v. Canada*, [1997] F.C.J. No. 795, r'ved [1999] 1 S.C.R. 3 (*Del Zotto*) Strayer J.A., dissenting, but confirmed by a unanimous panel of the Supreme Court of Canada, noted at paragraph 50 of his reasons that, when trying to label the Act as 'regulatory' or 'criminal', "one must look at the total context of the particular process in question." Strayer J.A. stated at paragraph 51 that "the nature and the purpose of the legislative scheme whose administration or enforcement is in question" constitute contextual elements to be considered in the interpretation of provisions related to mandatory production of documents.

[101] The Act already requires from the taxpayer to disclose an important amount of information. As found by Strayer J.A. at paragraph 62 of his reasons:

[62] [...] 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. If he is employed he must disclose many of these details not only to Revenue Canada but

arrangements. If he is employed he must disclose many of these details not only to Revenue Canada but also to his employer so that mandatory tax deductions can be made.

[102] Subsection 238(1) of the Act sets out a summary conviction offence that is triggered by non-compliance with the filing requirements or with other of the Act's provisions - including subsections 231.1(1) and 231.2(1) and the documentary retention rules imposed by subsection 230(1) (see *Jarvis*, paragraph 55).

[103] For its part, section 239 creates a number of additional offences. In *Del Zotto, supra*, Strayer J.A., at paragraph 61, described section 239 as a section "designed to ensure compliance with the self-reporting requirements of the *Income Tax Act*". The existence in the Act of section 239 does nothing to alter its regulatory or administrative nature but rather ensures that taxpayers act in conformity with its requirements. Non-compliance with the mandatory provisions of the Act can, however, lead to criminal charges being laid under section 239, which bears the formal hallmark of criminal legislation.

[104] At that stage, the Charter must receive contextual application (*Jarvis*, at paragraph 63). The powers of the Minister, under subsections 231.1(1) and 231.2(1), which are available "for any purpose related to the administration or enforcement" of the Act, do not include the prosecution of offences under section 239 (*Jarvis*, at paragraph 78). Recourse must be had to subsection 231.3(1), which sets out an *ex parte* application process for a warrant to search "for any document or thing that may afford evidence [of] the commission of [the] offence [under this Act]" (*Jarvis*, at paragraph 81).

[105] The Court in *Jarvis* noted, at paragraph 88, that "where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use inspection and requirement powers under ss. 231.1(1) and 231.2(1)" of the Act. The Minister must then apply to the court for a search warrant pursuant to section 231.3 of the Act. At that stage, officials have crossed the Rubicon. The adversarial relationship between the taxpayer and the state is engaged and the inquiry has become an investigation (paragraph 88).

[106] An analysis is required to determine whether the Rubicon has been crossed (*Jarvis*, at paragraph 88). The predominant purpose of the inquiry in question may be found in a clear decision to pursue a criminal investigation. Apart from that clear decision, one must weigh all the factors that have a bearing on the nature of the inquiry in order to characterize the inquiry. A finding on the predominant purpose of an inquiry is a question of mixed fact and law. In *Jarvis*, at paragraphs 88, 93 and 94, the Court sets the test in the following manner:

[88] [...] In essence, officials "cross the Rubicon" when the inquiry in question engages the adversarial relationship between the taxpayer and the state. There is no clear formula that can answer whether or not this is the case. Rather, to determine whether the predominant purpose of the inquiry in question is the determination of penal liability, one must look to all factors that bear upon the nature of that inquiry.

[Emphasis added.]

[...]

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

[Emphasis added.]

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

[Emphasis added.]

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

(b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?

(c) Had the auditor transferred his or her files and materials to the investigators?

(d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?

(e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?

(f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's *mens rea*, is the evidence relevant only to the taxpayer's penal liability?

(g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation?

[Emphasis in original.]

[107] The Minister acknowledged that criteria (*c*), (*d*), (*e*) and (*g*) of the analysis did not apply since at no time was the Audit Section of CCRA ever involved. The Motions Judge noted, at paragraph 84 of his reasons, that although the list of factors was not exhaustive, his analysis would focus on factors (*a*), (*b*) and (*f*).

[108] The Motions Judge did not, however, proceed with an analysis of the three factors he mentioned. He quoted an excerpt from Faribault's testimony in examination for discovery and then promptly concluded that, "from the outset", the predominant purpose of the investigation

was the determination of penal liability. He said at paragraph 90, which I repeat, that:

The evidence on the record as a whole leads to the conclusion that the predominant purpose of the investigation of CCRA, from its outset, was prosecution of the applicants for tax evasion and eventual imposition of penal sanctions against them. The statements on discovery by Faribault are not the only indicia of this predominant purpose; they are simply among the most succinct elements of evidence which support this conclusion. Accordingly, I find that the predominant purpose of the investigation was prosecution of the applicants for tax evasion.

Yet, the Motions Judge pointed to not even one of the indicia he found, "on the record as a whole", to support his conclusion.

[109] The Supreme Court of Canada in *Jarvis*, at paragraph 100, stated:

Whether or not a given inquiry is auditorial or investigatory in nature is a question of mixed fact and law. It

involves subjecting the facts of a case to a multi-factored legal standard (Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748, at para. 35) and, accordingly, Judge Fradsham's finding is not immune from appellate review.

[110] That same Court observed in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, that questions of law can sometimes be mistaken for questions of mixed fact and law. Iacobucci and Major JJ. wrote at paragraph 27:

[27] Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In Southham,