SELF INCRIMINATION and DERIVATIVE USE IMMUNITY: An update

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"It has, for a great many years, been considered unfair and indeed unjust to seek to convict on the basis of a compelled statement or confession"

...

"There must always be a reasonable control over police actions if a civilized and democratic socieity is to be maintained."

R. v. Stillman
SCC, No. #24681, March 20, 1997

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I. INTRODUCTION

The constitutional challenge to the validity of s. 5 of the *Canada Evidence Act*, in the criminal context in *R. v. S. (R.J.)* [1995] 1 SCR 451, *R. v. Primeau* [1995] 2 SCR 60, *R. v. Jobin* [1995] 2 SCR 78 and in the administrative context in *B.C. Securities Commission v. Branch* [1995] 2 SCR 3 required the Supreme Court of Canada to address one of the most important question of its the second decade of *Charter* jurisprudence.

In the lead up to the release of the decisions many analysts were of the view that a majority of the Court would conclude that compulsion statutes which force citizens to incriminate themselves must provide both use immunity and *some form* of derivative use immunity in order not to violate the *Charter* s. 7 rights to privacy and silence.

This paper will examine these Supreme Court decisions and some of the impacts that have begun to flow from them.

A. Background to the Issues

From 1982 until 1990 *Charter* challenges to statutory compulsion regimes were dismissed, inter alia, upon the basis that *Charter* s. 7 did not provide residual protection against self-incrimination supplementary to the specific protections explicitly conferred by *Charter* s. 11(c) and 13.

This reasoning was primarily based upon the then prevailing judicial view as to the limited scope of the right to remain silent under the *Charter* and the limited scope of the historical Canadian "privilege" against self-incrimination: *Transpac Tours Ltd. v. Dir. of Investigation and Research* (1986) 24 CCC (3d) 103 (BCSC); *Haywood Securities Inc. v. Inter-Tech Resource Group* (1988) 24 DLR (4th) 124 (BCCA); *Thompson Newspapers Ltd. Dir. of Investigation and Research* (1988) 30 CCC (3d) 145 (Ont.C.A.); contra: *R.L. Craine v. Coutoure* (1983) 10 CCC (3d) 199 (Sask Q.B.).

On March 29, 1990, the interpretation of the scope of the right to silence and the applicability of *Charter* s. 7 was revolutionized by the Supreme Court of Canada's decision in *Thompson Newspapers Ltd. v. Canada* [1990] 1 SCR 425.

Thompson Newspapers involved a *Charter* s. 7 constitutional challenge to the statutory compulsion of witnesses at a restrictive trade practice inquiry authorized by s. 17 of the *Combines Investigation Act.* Regrettably, only five Supreme Court Justices heard the appeal. The present Chief Justice refused to address the *Charter* s. 7 issue as, in his view, the Constitutional Questions Notice that had been given at commencement of the proceedings was inadequate and because the constitutionality of the *Canada Evidence Act*, s. 5 was, in effect, in issue. As a result, because of the broad implications that the Court's ruling would have entailed, the present Chief Justice wanted broader argument and more complete intervention. Two of the remaining four Justices (Wilson and Sopinka, JJ) held that the *Combines* s. 17 violated *Charter* s. 7 because it subverted the right to silence without guaranteeing derivative use immunity. The other two justices (La Forest and L'Heureux-Dube, JJ) found no violation, but primarily because La Forest, J. was of the view that the inquiry in question involved "regulatory offences" as opposed to proceedings involving allegations of true crime.

Although *Thompson Newspapers* left many questions unanswered, the fundamental recognition of the breadth and depth of the rights to privacy and silence embodied in *Charter* s. 7 continued during 1990 with the release of *R. v. Hebert* [1990] 2 S.C.R. 151 on June 21, 1990 and of *R. v. Chambers* [1990] 2 S.C.R. 1293 on October 18, 1990.

In the wake of *Thompson*, appellate Courts explored the expanded rights conferred by *Charter* s. 7, as well as *Charter* s. 11(d), to restrain state compulsion procedures in the diverse contexts presented by public inquiries into alleged criminal conduct (*Phillips v. Nova Scotia* (1993) 100 D.L.R. (4th) 79 (N.S.C.A.)) and threats to the right to privacy and silence presented by the manipulation of criminal procedural rules (*R. v. Zurlo* (1990) 57 CCC (3d) 407 (Que. C.A.); *R. v. Praisoody and the Queen* (1991) 61 CCC (3d) 404 (Ont.Gen. Div.).

Prophylactic orders in civil discovery proceedings became accepted as necessary to the protection of the *Charter* s. 7 right to silence when criminal proceedings were implicated: *Cheung v. B.C. (A.G.) (1993) 76 B.C.L.R. (2d) 305 (BCSC).*

Trial Courts found evidence obtained through statutory compulsion procedures inadmissible in subsequent criminal proceedings in a variety of contexts as reflect in *R. v. Spyker* (1990) 63 B.C.L.R. (3d) 125 (B.C.S.C.) and *R. v. Mascia* (1993) C.L.L.C. 14-309.

The pace of change that was characteristic of this area of the law was best reflected in the fact having followed the restrictive approach to the right to silence *in B.C. Securities Commission v. Branch* (1990) 43 B.C.L.R. (2d) 286 (B.C.S.C.) Wood, J.A., as he then was, held in *R. v. Fitzpatrick*, (1994) 90 CCC (3d) 161 (BCCA), in dissent, that evidence created by way of statutory compulsion procedures mandated by the *Fisheries Act* was inadmissible in subsequent criminal proceedings, even in the extreme "regulatory" context of a *Fisheries Act* prosecution.

B. Post-*Hebert* / Pre-*S. (R.J.)* Jurisprudence

As all of these cases indicate, prior to *S (R.J.)*, Canadian Courts struggled, in various ways, to temper the unfairness that flowed from the *Canada Evidence Act's* failure to provide for derivative use immunity. As indicated, in light of *Hebert*, trial Courts sought to restrain the State, pursuant to *Charter* s. 24(1), from introducing statements made for administrative or regulatory purposes in subsequent criminal proceedings. In effect, the Courts sought to supplement the simple use immunity provided by the *Canada Evidence Act* through *Charter* s. 24(1).

Such relief was even granted preemptively. In *Samson v. Canada*, unreported, March 23, 1994 Ottawa Registry Number: T2737-93, Madam Justice Tremblay-Lamer of the Federal Court Trial Division applied *Hebert* in the context of a challenge to an Inquiry Subpoena issued in the *Competition Act* context to create a defacto constitutional exemption from the application of *C.E.A.* s. 5.

Declaring the Subpoena null and void, Her Ladyship found, at p. 14,

> "When there is a certainty that the suspect is the person who will be charged and his testimony will not serve to assist the conduct of the investigation in general, but rather his own prosecution, the suspect should not be compelled to testify. That is a rule of fundamental justice. I feel the situation is one in which the government has made a wrong use of its power against the individual. Accordingly, s. 7 of the *Charter* exists to restore the balance."

In yet another context, Mr. Justice MacAdam of the Nova Scotia Supreme Court invoked the Court's inherent jurisdiction to stay *Securities Act* proceedings in that province in *Williams v. Deputy Superintendent of Insurance*, unreported, June 29, 1994, No: 93-334, pending the disposition of related criminal charges.

As laudable as all of these developments were, the fact remained that statutory compulsion without derivative use, or perhaps modified transactional immunity, remained at the root of the unfairness that drove the Courts to fashion these various ad hoc remedies. As the Supreme Court approached *C.E.A.* s. 5 fundamental questions as to its *Constitution Act* s. 52(1) philosophy were engaged.

C. A Judicial or Legislative Resolution ?

The *Constitution Act,* 1982, s. 52 provides:

> "52(1) The Constitution of Canada, is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

Early *Charter* jurisprudence, in particular *Hunter v. Southam* (1984) 14 CCC (3d) 97 and *Singh v. Canada* (1985) 17 D.L.R. (4th) 422, emphasized the Legislative responsibility to re-enact laws found to be violative of the *Charter.*

In later decisions, such as *R. v. Corbett* (1988) 41 CCC (3d) 385; *R. v. Thompson* (1990) CCC (3d) 225 and *R. v. Dersch* (1990) 60 CCC (3d) 132 the Supreme Court strove to interpret legislation in a manner consistent with the *Charter.*

Lately, as reflected in *Baron v. Canada* (1993) 78 CCC (3d) 510 the Court appears to have been prepared to read down legislation, but only if requested to do so by the defending government. Indeed, the Court did just that in *R. v. Grant* (1993) 84 CCC (3d) 173. On the other hand, in *Rodriguez v. B.C.* (1993) 85 CCC (3d) 15 the Court emphasized that this should not be done where a range of policy alternatives are available to Parliament or the Legislatures to satisfy constitutional standards.

The positions of the parties respecting the validity of *C.E.A.*, s. 5 put all of these competing approaches into sharp relief.

The government defenders of *C.E.A.* s. 5 argued that simple use immunity combined with limited exclusion of derivative evidence in any subsequent criminal prosecution pursuant to *Charter* s. 24(1) principles was all that *Charter* s. 7 required.

In this respect the governments in effect adopt the view of LaForest, J. in *Thompson Newspapers,* supra, at p. 519, to the effect that "the best course Parliament could adopt" in achieving a proper balance between the rights of the individual and the public would be to accord the trial judge in any subsequent criminal trial a discretion to exclude evidence derivative of compulsion procedures.

In contrast, in *Thompson Newspapers*, Wilson, J. and Sopinka, J. would simply have struck down s. 5 on the basis that an invalid law could not be allowed to remain; that citizens facing compulsion are entitled to know whether the law authorizing such compulsion is constitutionally valid.

Thus the question for the Court in S. (R.J.) et al. was whether the granting of individual s. 24(1) remedies, constitutional exemptions, and/or injunctions to stay certain types of statutory inquisitions are constitutionally inappropriate in principle - for the reasons expressed by McLachlin, J. in R. v. Seaboyer, (1992) 66 CCC (3d) 321 - that the granting of such relief achieves, in essence, exactly what striking down would do - yet imposes on the individual citizen the burden of establishing the constitutional right, its breach, and entitlement to relief on a case by case basis over and over again.

In addition, the Court was required to consider whether the granting of such relief inevitably is less respectful to the role of the legislature as these ad hoc approaches necessarily require the Court to determine matters of policy which, in the view of some, should properly be left to the legislature in the wake of a declaration of invalidity pursuant to the *Constitution Act,* 1982, s. 52.

Whether there should be absolute or discretionary derivative use immunity is arguably a legislative question. Whether modified transactional immunity is simpler to administer and thus more attractive as a policy option is a matter for debate. The determination of who bears the onus to establish derivative origin (on the accused) or to negate the same (on the Crown) are quintessential policy questions.

Finally, the Court was required to consider whether the only effect of the remedy approach adopted by LaForest in *Thompson* is to telescope these difficult derivative use / transactional immunity policy questions into the *Charter* s. 24(2) forum and jurisprudence. This assessment ultimately involved consideration of whether simply collapsing the policy and procedural questions associated with nature and scope of derivative use immunity into *Charter* s. 24(2) exclusion policy in subsequent criminal proceedings unacceptably appropriates these questions into judicial policy formulated on a case by case basis.

Ultimately, what S. (R.J.) et. al. put in issue is the Court's assessment of the proper division of responsibility between the legislative and judicial branches of the Canadian democratic experiment.

II. THE NEW RIGHT TO SILENCE REGIME: The Criminal Context

Criminal investigation and prosecution procedure was truly revolutionized by the release, February 2, 1995, of the Supreme Court of Canada's decision in *S. (R.J.) v. Her Majesty the Queen, supra.* In this decision a five-judge majority of the Court (Iaccobucci, Cory, Major, La Forest, JJ. concurring Lamer, CJC) upheld the compulsion provisions of the *Canada Evidence Act*, s.5(1) by supplementing the simple use immunity provisions of s. 5(2) with *Charter* s. 7 "residual derivative use immunity".

In addition, a second majority, consisting of other Judges, merged to provide Canadians with additional *Charter* s. 7 protection. This second five-judge majority, (Lamer CJC concurring with Sopinka, McLaughlin JJ, with separate concurring judgments by L'Heureux Dube, Gonthier JJ) held that a court of competent jurisdiction is entitled to grant *Charter* s. 24(1) "compulsion exemption" where, in effect, the state seeks to compel the citizen to testify for the predominant purpose of building or advancing a criminal prosecution. Finally, the second five-judge majority, with the tacit concurrence of the first majority, also held that, in some circumstances, criminal charges cannot proceed against a citizen who has been subjected to unfair pretrial statutory compulsion.

The apparent complexity of the ratios of *S (R.J.)* arise not so much from the individual reasons for judgment but rather from the multi-faceted interrelationship of the effect of the various cross-concurrences. Ultimately, the diversity of views arise because each segment of the Court approached the management of the conflict between statutory compulsion procedures and the right to silence in a different way.

In one set of reasons, four justices, represented by Iaccobucci, J., held that the exclusion of undiscoverable evidence derived from statutory compulsion procedures will, in most cases, adequately vindicate *Charter* s. 7. In Iaccobucci's view, the issue of "whether the police can be armed with Subpoenas" should be addressed through the abuse of process doctrine and constitutional ultra vires considerations.

In contrast, Sopinka, J., joined by McLachlin, J., focused upon common law compellability rules to craft compulsion exemptions governed by defined criteria. In the view of these Judges, this was required because the exclusionary rule embodied by residual derivative use immunity simply cannot remedy certain privacy invasions, in particular where the State acquires strategic advantages through compulsion by obtaining information respecting the future accused's defences.

In turn, L'Heureux Dube J., joined by Gonthier, J., while in essential concurrence with Sopinka J.'s concerns about the limitations and impracticality of the first majorities' residual derivative use rules, focused upon the State's purpose in seeking compulsion as the defining factor which should inform the adjudication of compulsion exemption claims. In addition, in the view of these judges, a bright line was required in order to prohibit unfair and colourable compulsion of citizen/suspects. Accordingly, these judges endorsed emphatic stay of proceedings sanctions where colourable prior compulsion was identified in subsequent criminal proceedings.

In the end, the pivotal judgment of Chief Justice Lamer elevated elements of each of these approaches into majority sanctioned components of the new Canadian right to silence regime.

A. Residual Derivative Use Immunity

The facts of *S. (R.J.)* were simple. The Crown sought to compel *S.* to testify in separate proceedings against *M.*, who was charged as a party to offences said to have been committed by *S.*. The practice of compelling separately charged substantive co-accused to testify against each other was first subject to *Charter* criticism in *Regina v. Crooks* (1982) 2 CCC (3rd) 57 (Ont.High Court of Justice).

The approach adopted by Mr. Justice Iaccobucci on behalf of the first majority of the court focused on the structure and language of the *Charter*, as well as the original intent of its framers, as determinative of the content of the supplementary protection required by the right to silence guaranteed by *Charter* s. 7.

These considerations, and a discursive review of the history of the rule against self-incrimination in Canada, and globally, resulted in Justice Iaccobucci's conclusion that the fundamental policy justification for the common law protection against self-incrimination rests upon the idea that the Crown must establish a "case to meet". In the end, all common-law protections also reflect a basic distaste for self-conscription. To this end, the State, and not the accused, should be expected to produce a case. The positive provisions of *Charter* s. 11(c) and the presumption of innocence guaranteed by *Charter* s. 11(d) dictate the same result. The absence of a defence reciprocal duty of disclosure, as confirmed in *R. v. Stinchcombe* (1991) 3 S.C.R. 326, also complimented the principle against self-incrimination. Accordingly, in His Lordship's view, at para. 47, "pretrial silence has been elevated to the status of a constitutional right".

Yet in His Lordship's view "the deafening silence" of the English common law position (para. 132) was both unsupportable and inconsistent with the intent of the *Charter* framers as evidenced by *Charter* s. 13. Acknowledging that nothing short of broad derivative use immunity, effectively transactional immunity, can protect against some forms of state derivative use of compelled evidence His Lordship effectively made a policy decision to adopt a "Canadian solution" (para. 139); the coupling of compellability with evidentiary immunity.

Having adopted this compromise, His Lordship immediately and candidly acknowledges "the Achilles heel" of this approach. In His Lordship's words, at par. 141:

> "For if it be accepted that a person can always be compelled as a witness and that protection by way of evidentiary immunity will always be sufficient, then it must also be accepted that we have gone a considerable distance toward diluting the principle of the case to meet without ever having said so."... [emphasis in original]
>
> "To put the matter another way, the *Charter*'s structure as described above is founded upon the Crown's obligation to make a case, but it also assumes a general rule of compellability coupled with evidentiary immunity. If, however, the *Charter* places no limits on when this structure may be invoked, then the *Charter* could, in fact, condone an inquisition of the most notorious kind. Such condonation would bespeak an impossible dualism. To ask a question by paraphrasing a concern voiced in Thompson Newspapers, supra (per Sopinka J. at 606): are we prepared to arm the police with subpoena powers?"

Ultimately, in the view of this segment of the Court, inquisitorial proceedings animated by a self incriminatory purpose are subject to "essential objection" (para. 146). This objection could find form in ultra vires considerations (para. 153) or the abuse of process doctrine (para. 158). On the assumption that such doctrines could cure abusive compulsion Iacobucci, J. went on to dismiss the challenge to *C.E.A.* s. 5. In his view, striking down was unnecessary as this would only be required if the solution to the absence of derivative use immunity should be considered by the legislature in consequence of the complexity of the policy consideration involved.

Thus, on the premise that the solution was not "complex", Iaccobucci, J. embarked upon the quest.

B. The Canadian Compromise

In His Lordship's view, the scope of residual derivative use immunity entailed defining what is "derivative" of compelled disclosure. Wigmore (para. 58) defined a "clue fact", broadly, as being a fact "which increases the probability that a subordinate fact will be discovered and thus that an ultimate fact, and the crime, will be proved". Yet, in collapsing his analysis of what is derivative into contemporary *Charter* s. 24(2) jurisprudence Iacobucci, J. adopted, at the outset, a very narrow purely evidentiary definition of what constitutes derivative use: Was the evidence discoverable? Could it have been obtained "but for" the participation or assistance of the accused ? (para. 179-191).

In this analysis it is assumed that the accused would not knowingly assist the state in its effort to establish a case. In the Court's words, at para. 187:

> "Once a breach occurs, any evidence thereafter obtained which could not have been obtained but for the voluntary assistance of the accused will tend to be regarded as self-incriminatory evidence which impacts upon the fairness of the trial. It is generally assumed that, but for the breach, the accused would not have cooperated."

In addition, the reference is to evidence *qua* evidence. Physical objects, observations, and bodily fluids may exist prior to a *Charter* breach, but they do not exist as evidence unless the state has a means to acquire them for trial. In the Court's words, at para 191:

> "Accordingly, I think that derivative evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of a witness, ought generally to be excluded under s. 7 of the *Charter* in the interests of trial fairness. Such evidence, although not created by the accused and thus not self-incriminatory by definition, is self-incriminatory nonetheless because the evidence could not otherwise have become part of the Crown's case. To this extent, the witness must be protected against assisting the Crown in creating a case to meet."

In addition, the use of the word "could" in this test involves (at para. 195) "an inquiry into logical probabilities, not mere possibilities...the important consideration...is whether the evidence, practically speaking, could have been located". [emphasis in original]

C. Onus

Although the accused will bear the onus of establishing entitlement to exclusion, in the first instance, the accused (at para. 203) "can raise the issue... by demonstrating a plausible connection between the proposed evidence and the prior testimony." A voir dire will then be required. In the end "as a practical matter the burden is likely to be borne by the Crown, since it is the Crown which can be expected to know how evidence was, or could have been, obtained".

This was a mere restatement of the law in *R. v. Bartle* (1995) 92 CCC (3d) 287 (SCC) at pg. 314. Speaking on behalf of the full Court (L'Heureux Dube' and Gonthier dissenting) Lamer, CJC, although recognizing that *R. v. Collins [1987] 1 SCR 265* imposed the overall burden of persuasion under *Charter* s. 24(2) on the party seeking exclusion of evidence, went on to say, at page. 31:

> "However, just because the applicant bears the ultimate burden of persuasion under s. 24(2) does not mean that he or she will bear this burden on every issue relevant to the inquiry. As a practical matter, the onus on any issue will tend to shift back and forth between the applicant and the Crown, depending on what the particular contested issue is, which party is seeking to rely on it and, of course, the nature of the *Charter* right which has been violated. As Sopinka, Lederman and Bryant state at p. 397 of their text, *The Law of Evidence in Canada:*
>
> > The applicant's burden under s. 24(2) is quite unlike an ordinary civil burden to establish facts....Furthermore the true burden is in practice bound to drift towards the Crown, since many factors in the equation are within the peculiar knowledge of the Crown (e.g., good faith, urgency, availability of other investigative techniques); and, perhaps more important, it is the Crown that is functionally responsible for the maintenance of the administration of justice."

Sound policy reasons support the Court's comments in *Bartle*, confirmed in *S. (R.J.)*, and the shift of the evidentiary onus to the Crown respecting these issues. This policy was best expressed in the majority and dissenting opinions of the United States Supreme Court in *Kastigar v. U.S.* [1972] 32 Led (2d) 212. These opinions reflect arguments that transactional immunity was necessary to 5th Amendment compliance because derivative use immunity was impossible to enforce.

In the majority view, at page 226:

> "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence" 378 US at 79 n. 18, 12 L Ed 2d at 695.
>
> This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution that the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."

In the dissenting opinion of Mr. Justice Douglas enforcement difficulties justified transactional immunity, as in his words, at page. 231:

> "I do not see how it can suffice merely to put the burden of proof on the government. First, contrary to the Court's assertion, the Court's rule does leave the witness "dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." Ante, at 460, 32 L Ed 2d at 226. For the information relevant to the question of taint is uniquely within the knowledge of the prosecuting authorities. They alone are in a position to trace the chains of information and investigation that lead to the evidence to be used in a criminal prosecution. A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary to prove it. And of course it is no answer to say he need not prove it, for though the Court puts the burden of proof on the government, the government will have no difficult in meeting its burden by mere assertion if the witness produces no contrary evidence. The good faith of the prosecuting authorities is thus the sole safeguard of the witness' rights. Second, even their good faith is not a sufficient safeguard. For the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony."

Because the paths of information through the investigative bureaucracy are indeed long and winding the *Collins* s. 24(2) onus rule has now been formally amended in *Stillman*, infra.

D. Compulsion Exemption

The approach to the conflict between statutory compulsion and the right to silence adopted by Sopinka and McLachlin, JJ is in stark contrast. Implicitly, the judgment of these members of the Court was driven by the concerns that the first majority approach both failed to control the *non-evidentiary* use of compelled evidence and was impractical.

In the first instance (para. 319) "the derivative use immunity approach address the problem at the wrong end.... Once the accused has testified attempting to contain the damage may be like closing the barn door after the horses have escaped". For example, the accused might be required to reveal possible defences, the names of potential witnesses and other evidence. This would provide the state with important and diverse strategic advantages capable of upsetting the balance of the adversarial system.

In the second instance (para. 324-325)

> "...derivative use immunity requires that the evidence which is adduced against the party who has been compelled be screened. I cannot see how in virtually every case a voir dire of the whole of the evidence can be avoided....I question the theory that the difficulties encountered in applying derivative use immunity in the United States, will be appreciably reduced by adopting the 'but for' test...This issue requires the proof of a hypothetical. Would the evidence have been discovered but for the compelled testimony? While the first issue can be based on what actually happened, the second must be based on what did not but would have happened. Clearly, as Iaccobucci, J. acknowledges, the burden of proof will rest with the Crown. It will not be an easy one to meet. I expect that the difficulties experienced with derivative use immunity in the United States will be repeated here leading to interminable admissibility proceedings and resulting in virtual transactional immunity."

Thus, in the view of Sopinka, J. it was preferable to resolve the issue of compellability before the evidence is given. There would then and there be finality to the matter.

Accordingly, in the view of Sopinka, J., a citizen charged (and perhaps not yet charged - yet to be determined. See: Impacts, *infra*) is entitled to exemption from compulsion, as a principle of fundamental justice, if it can be shown that the prejudice to the citizen's interest overbears the state interest in obtaining the evidence. Factors relevant to this determination are, at para. 326:

> "1. the relative importance of the evidence to the prosecution in respect of which the accused is compelled;
>
> 2. whether the evidence can be obtained in some other manner;
>
> 3. whether the trial or other disposition of the charge against the accused whose evidence is sought to be compelled could reasonably be held before he or she is called to testify;
>
> 4. the relationship between the proposed questions to the accused witness and the issues in his or her trial;
>
> 5. whether the evidence of the accused witness is likely to disclose defences or other matters which will assist the Crown notwithstanding the application of s. 5(2) of the Canada Evidence Act;
>
> 6. any other prejudice to the accused witness, including the effect of publication of his or her evidence."

As a general rule the appropriate time to raise the issue of compellability is at the moment of compulsion. Failure to raise the matter at the appropriate time, or an adverse ruling in that regard, will not necessarily preclude the matter being renewed in subsequent proceedings. As well, in Sopinka, J.'s view (at para. 322.):

> "It follows that a person who is wrongfully compelled to testify when that person was not compellable has suffered a breach of his or her *Charter* rights. In some cases, the unfairness of compelling a witness to testify will not appear until after the witness has given evidence.
>
> In such circumstances, the person so compelled should not be precluded from seeking a remedy at the trial stage in proceedings against that person. One of the available remedies for breach of *Charter* rights is a stay of proceedings. The circumstances under which a stay is an appropriate remedy will fall to be determined in future cases in which that issues arises."

Finally, Justice Sopinka summed up his concurrence with the reasons of L'Heureux Dube, J. in this way, at para. 301:

> "...while our approaches are not fundamentally different and the test of compellability is practically the same, I arrive at the test on the basis of different principles with a different emphasis in its application."

E. Concurring Approaches

The "not fundamentally different" approach of L'Heureux-Dube, J. was also based upon concerns about the prolixity and difficulty of the first majority approach and the unfair non-evidentiary advantages the state obtains through compulsion procedures.

In the view of L'Heureux Dube, J., the Court had already rejected the first majority approach to the determination of what is derivative in *R. v. Strachan* (1988) 2 SCR 980, in these words:

> "Isolating the events that caused the evidence to be discovered from those that did not is an exercise in sophistry. Events are complex and dynamic. It will never be possible to state with certainty what would have taken place had a *Charter* violation not occurred."

Accordingly, in the words of Justice L'Heureux Dube, at para. 251:

> "I share my colleague Sopinka J.'s concern that the more likely result is that the difficulties experienced with derivative use immunity in the United States will be repeated here, leading to interminable admissibility proceedings and resulting in virtual transactional immunity."

In Her Ladyships' view the application of the 'but for' test also lead to inconsistency. Noting that the Court had found in *Thompson Newspapers* that document production was not protected under *Charter* s. 7, L'Heureux Dube, J. observed, at para. 255:

> "According to the "but for" principle, documents which are so well hidden that they would not have been found "but for" the individual's cooperation are "self-incriminating". Indeed, many state intrusions into an individual's private sphere, be it their body, their breath, or their house, implicitly require the accused's cooperation, subject to penalty for obstruction of justice, "but for" which certain evidence would not come to light."

In Her Ladyship's view compulsion exemptions operate more clearly and efficiently. In Her view, where the predominant purpose of the compulsion is to build a case against the witness, and the relationship between the state and the citizen is adversarial, the right to silence is engaged and compulsion, with all its effects, is unjustifiable. In Her words, at para. 273: "Fairness that is fundamental to justice represents our constitutional bottom line". Accordingly, at para. 277:

> "Attempts to by-pass the procedural safeguards that are intrinsic to the notions of dignity and individual liberty contained in the *Charter* and to our conception of fundamental trial fairness are fundamentally unfair conduct that violates the principles of fundamental justice."

Presumably, this would occur where the State sought to colourably invade solicitor-client privilege or defence confidentiality. The Canadian exploration of this issue was begun in *R. v. Desjardins* (1991) 88 Nfld & P.E.I.R. 149 (Newfld S.C.).

In Her Ladyship's words, at para. 278:

> "Fundamentally unfair conduct will most frequently occur when the Crown is seeking, as its predominant purpose (rather than incidentally), to build or advance its case against that witness instead of acting in furtherance of those pressing and substantial purposes validly within the jurisdiction of the body compelling the testimony. The Crown will be predominantly advancing its case against the accused when, by calling the witness, it is engaging in a colourable attempt to obtain discovery from the accused and, at the same time, is not materially advancing its own valid purposes."

Procedurally, at para. 284:

> "At the Subpoena Stage, when the state seeks to compel an individual in circumstances which the witness argues gives rise to self-incriminatory concerns, the state shall disclose to the trial judge or tribunal the general purpose for which it seeks to compel that individual's testimony and the relative importance of that evidence to the prosecution in respect of which the witness is compelled. Then, the witness may attempt to demonstrate fundamentally unfair conduct from the fact of the compulsion: see, *e.g,. Batary, supra.*"
>
> As a practical matter, fundamentally unfair conduct may be quite difficult to establish at the Subpoena Stage, since the Crown's real purpose may not be apparent at that point. Information that may establish this violation, such as particular colourable lines of questioning by the Crown at the accused's trial, will only become available and properly appreciable at the Trial Stage."

And at para. 288:

> "At the Trial Stage, the court will essentially be asking itself whether, if what is now known had been known at the time the state sought to compel the witness, an exception would have been made to the general rule of compellability and the subpoena would have been quashed. It can, in effect, profit from the fact that hindsight is always 20/20. The difficulty is that the damage to the witness' right to silence and to the integrity of the judicial system has now occurred. Through fundamentally unfair conduct, the state may have gained important and diverse strategic advantages. As Iacobucci, J. admits, derivative use immunity is only capable of containing part of this damage. Hence, once fundamentally unfair conduct contrary to s. 7 of the *Charter* is demonstrated, the court must impose a remedy which it considers appropriate and just in the circumstances, pursuant to s. 24(1) of the *Charter*. Generally, such a remedy is a stay of proceedings."

F. The Real Compromise

Faced with a Court divided into two four-justice camps in S. (R.J.) Chief Justice Lamer concurred with both Justice Iaccobucci (thus upholding s. 5 *C.E.A.* and creating residual derivative use immunity) and Justices Sopinka, and by necessary implication Justice L'Heureux Dube', (thus providing for the availability of compulsion exemption in some circumstances). The additional protection of possible compulsion exemption was required because, in His Lordship's view, at para. 3:

> "In some situations, however, forcing a witness to testify will violate the case to meet principal in a manner that cannot be remedied by an exclusionary rule. For example, the compelled testimony might reveal an accused's defence strategy, or bring to light crimes of which the state was previously unaware."

In sum, in His Lordship's view, and thus for the Court in S. (R.J.), the "police" will not be permitted to be armed with subpoena powers.

G. Procedural Direction in the Criminal Context

In the pure criminal context in *Jobin*, and *Primeau*, *supra* released April 3, 1995 at the same time as *Branch*, the Court applied S(R.J.) to more diverse facts, albeit that the evidentiary foundation for the full application of the criteria defined in S(R.J.) were not before the Court. Accordingly, the significance of these decisions is confined to the direction that a citizen subpoenaed to testify in criminal proceedings is required to adopt the procedural approach to challenging such an order mandated in *Dagenais v. CBC* [1994] 3 SCR 835.

In effect the procedural route to challenge such a subpoena is determined by the level of court issuing the order. A subpoena issued by a provincial court is to be challenged by way of an application to a superior court judge through the expanded certiorari described in *Dagenais* which, in effect, permits the certiorari court to grant both the traditional relief available in certiorari proceedings and the remedies that would be otherwise available through s. 24(1) of the *Charter*. In addition, an immediate appeal is available from the grant or refusal of such an order through the operation of *Criminal Code* s. 784(1) with a further appeal, with leave, to the Supreme Court though s. 40(1) of the *Supreme Court Act.*

As certiorari does not lie from subpoenas issued by a superior court, such orders, at p. 7: "should be challenged by seeking leave to appeal directly to this Court pursuant to s. 40(1) of the *Supreme Court Act.*", as cumbersome as this may be.

III. FURTHER DEVELOPMENTS: Derivative Use Immunity in the Regulatory Context

A. The Emergence of Consensus

On April 13, 1995 the Supreme Court delivered its decision in *B.C.S.C. v. Branch*, supra, argued at the same time as *S. (R.J.)*.

In *Branch* the Court, composed of **seven** judges, spoke through a decision authored **jointly** by Sopinka and Iacobucci, JJ. For those analysts of the fragmented *S. (R.J.)* decision the symbolism of unanimity that this unique joint judgment represents (authored by the leaders of two of the divergent approaches in *S (R.J.)*.), could not have been more powerful. As if to further underline the significance of the developing common ground in the Supreme Court regarding these vital issues the new majority began its judgment by emphasizing, at page 2:

> "In S. (R.J.) a majority of this Court held that the principle against self-incrimination, one of the principles of fundamental justice protected by s. 7 of *the Canadian Charter of Rights and Freedoms*, requires that persons compelled to testify be provided with subsequent "derivative-use immunity" in addition to the "use immunity" guaranteed by s. 13 of the *Charter*. In addition, a majority of the members of the Court (albeit a different majority) were of the view that courts could, in certain circumstances, grant exemptions from compulsion to testify.
>
> This appeal presents the opportunity to build on the consensus reflected in S. (R.J.) and achieve greater clarity and guidance on the rules to be applied in this area. Specifically, we offer additional comments on derivative-use immunity and the circumstances relating to exemptions from compulsion to testify."

The Court continued:

> "With respect to derivative-use immunity, it should be remembered that what was discussed by Iacobucci, J. on the subject was intended to be comments of general application only and that further refinement will have to await development that can only take place through the consideration of cases as they arise."

The Court then commenced the process of "further refinement".

The "refinements" offered are these:

1. Burden of Proof on the Accused Respecting Derivative Use Immunity

at page 3:

> "...the general *Charter* rule would operate, namely, the party claiming a *Charter* breach must establish it on a balance of probabilities. Iacobucci, J. went on to state that as a practical matter the Crown will likely bear the burden of responding because it is the Crown which can be expected to know how evidence was, or would have been, obtained. This means that the accused has the evidentiary burden of showing a plausible connection between the compelled testimony and the evidence sought to be adduced. Once this is established, in order to have the evidence admitted, the Crown will have to satisfy the court on a balance of probabilities that the authorities would have discovered the impugned derivative evidence absent the compelled testimony."

2. Entitlement to Compulsion Exemption

at page 4-5:

> "...any test to determine compellability must take into account that if the witness is compelled, he or she will be entitled to claim effective subsequent derivative use immunity with respect to the compelled testimony or other appropriate protection.... the crucial question is whether the predominant purpose for seeking the evidence is to obtain incriminating evidence against the person compelled to testify or rather some legitimate public purpose.
>
> This test strikes the appropriate balance between the interests of the state in obtaining the evidence for a valid public purpose on the one hand, and the right to silence of the person compelled to testify on the other.

Accordingly, the new majority seems to have adopted the global compulsion exemption approach urged by L'Heureux Dube' and Gonthier, JJ in S.(R.J.) instead of that advocated by Sopinka and McLachlin. The Court continued:

> In apply this test, the Court must first determine the predominant purpose for which the evidence is sought. To qualify as a valid public purpose, compelled testimony in a criminal prosecution or prosecution under a provincial statute must be for the purpose of obtaining evidence in furtherance of that prosecution....In other proceedings, discerning the purpose is more complex. Where evidence is sought for the purpose of an inquiry, we must first look to the statute under which the inquiry is authorized. The fact that the purpose of inquires under the statute may be for legitimate public purposes is not determinative. The terms of reference may reveal an inadmissible purpose notwithstanding that the statute did not so intend: see Starr v. Houlden, [1990] 1 SCR 1366. Indeed, even if the terms of reference authorize an inquiry for a legitimate purpose in some circumstances, the object of compelling a particular witness may still be for the purpose of obtaining incrimination evidence....
>
> ...if it is established that the predominant purpose is not to obtain the relevant evidence for the purpose of the instant proceeding, but rather to incriminate the witness, the party seeking to compel the witness must justify the potential prejudice to the right of the witness against self-incrimination....
>
> ...Further, if the witness can show any other significant prejudice that may arise from the testimony such that his right to a fair trial will be jeopardized, then the witness should not be compellable."

This last additional ground for compulsion exemption, prejudice to fair trial interests, appears to have been adopted from criteria 6 in the list of relevant factors outlined by Sopinka, J. in S(R.J.). Undoubtedly the consolidation of this additional basis for compulsion exemption into the new majority approach in *Branch* was the ground upon which the new majority consensus was founded.

3. Burden of Proof Respecting Compulsion Exemption

at page 5-6

> "We recognize that the purpose of calling a particular witness will not be readily apparent and that such purpose must be inferred in many cases from the overall effect of the evidence proposed to be called. If the overall effect is that it is of slight importance to the proceeding in which it is compelled but of great importance in a subsequent proceeding against the witness in which the witness is incriminated, then an inference may be drawn as to the real purpose of the compelled evidence. If that relationship is reversed then no such inference may be drawn....
>
> ...As in the case of any breach of *Charter* rights, the burden of establishing a breach is on the party alleging it. In this context, the burden of proof with respect to the predominant purpose of the compelled testimony will be on the witness who asserts that it is not sought for a legitimate purpose. If this is established, the witness should not be compelled unless the party seeking to compel the witness justified the compulsion as referred to above."

Having utilized *Branch* as a platform to develop the unanimity *S.(R.J.)* lacked, the Court turned to the application of these principles in the regulatory context.

Branch and *Levitt* were officers of a reporting issuer listed on the Vancouver Stock Exchange. As such they were summoned pursuant to s. 128(1) of the *British Columbia Securities Act* to attend for examination in respect of the affairs of the companies involved and were required by such summonses to produce all documents in their possession relating to the companies affairs. In response they asserted an absolute right to silence and launched a wholesale challenge to s. 128(1). The unfortunately over broad constitutional question framed in the Supreme Court of Canada asked whether s. 128(1) of the *Securities Act* violated sections 7 and 8 of the *Charter.*

Understandably, framed so boldly, the Court held that, given the importance of securities regulation, "inquires of limited scope" were justified.

Accordingly, at page 19:

> "The inquiry is of the type permitted by our law as it serves an obvious social utility. Hence, the predominant purpose of the inquiry is to obtain the relevant evidence for the purpose of the instant proceedings, and not to incriminate Branch and Levitt. More specifically, there is nothing in the record at this stage to suggest that the purpose of the summonses in this case is to obtain incriminating evidence against Branch and Levitt."

B. Availability to Corporations

As corporations do not enjoy *Charter* s. 7 rights, they do not enjoy the right to be free from self-incrimination.

Yet, critically, in the view of the seven judge majority, the compelled testimony of the individual corporate officers may be inadmissible in subsequent regulatory enforcement proceedings, at page 20:

> "Clearly, the individuals Branch and Levitt are entitled to claim the protection of subsequent derivative use. This is a protection that is afforded to witnesses notwithstanding that the source of their evidence may derive from corporate activity....On the other hand, the protection depends on the applicability of s. 7 of the *Charter*. This Court has held that s. 7 does not apply to a corporation."

Accordingly, the compelled evidence of a corporate officer during securities investigation proceedings may be admissible against the corporation of which the individual was an officer in subsequent enforcement proceedings.

C. Expectation of Privacy in Documents

> Equally critically, at least per *Branch* but subject to *Stillman*, *infra*, pre-existing documents not brought into existence as a result of statutory compulsion may also not be inadmissible in subsequent enforcement proceedings.

Nor, in the Courts view, does s.8 impose a warrant requirement for the production of documents in the regulatory context given the reduced expectation of privacy in business records and the fact that a demand for production is the least intrusive means by which the state may pursue its critical protective role in respect of securities regulation.

In many respects it is unfortunate that the Supreme Court's decision in this important terrain arose from such an unfocused, inarticulate wholesale challenge. Yet the breadth of the challenge is understandable given that is was first initiated in the British Columbia Courts in 1988.

The tragedy is that the issue as framed led the Court to an over broad analysis. The true issues in regulatory proceedings in 1997 no longer involve the outmoded labeling of proceedings as "regulatory", "quasi criminal" or "criminal", as if such categorizations, in and of themselves dictate the rigor and applicability of *Charter* guarantees in the many diverse contexts revealed in a "regulated" industrial society. As Sopinka, J. said in *Baron*, the important issue is not labels but values. As Wilson said in McKinley, what values are at stake is defined by who is demanding what for what purpose. Future cases with more sharply defined issues will demand more focused answers to what fairness requirements are predicates to valid regulatory enforcement proceedings.

IV. POST *S.(R.J.)* / *BRANCH* JURISPRUDENCE: How will these principles be applied in practice?

A. Criminal Context

Many of the pre-*S.(R.J.)* trial court ad hoc *Charter* s. 24(1) remedy rulings have been reversed.

In *R. v. Fitzpatrick* [1995] 4 SCR 154 the Supreme Court applied licensing theory to admit into evidence, in a fisheries prosecution, logs that the accused was required by statute and his license to create. In effect, the Court held s. 7 was not engaged as the accused had no expectation of privacy in relation to documents created as a result of a reasonable regulatory requirement.

In *Philips v. Nova Scotia* [1995] 2 SCR 97, the Supreme Court authorized the Westray Inquiry to proceed, subject to potential *Charter* s. 11(d) conditions, in light of the fact that the accused mine managers would be entitled to derivative use immunity in any subsequent criminal proceedings.

In *Samson v. Canada* [1995] 3 FC 306 the Federal Court of Appeal ordered that the Quebec notaries were indeed subject to compulsion at a *Competition Act*, s. 10 inquiry as the *Competition Act*, s. 45(1)(c) proceedings were "regulatory offences" and not "real crimes".

The determination of what evidence is derivative and the development of discoverability rules is just beginning.

In *R. v. Goldhart* [1996] 2 SCR 463 the Court examined the requirements that there by some nexus between a *Charter* violation and otherwise undiscoverable evidence, often arising as a result of a causal or temporal connection, before evidence may be excluded as derivative.

In *R. v. Stillman*, S.C.C., No. #24631, March 20, 1997 (a detailed discussion of which is beyond the scope of this paper) the Court has now held that the touchstone categorization of evidence obtained in violation of the *Charter* as either "real" or "self-criminatory" for the purposes of the *Collins* "trial fairness" criteria required by *Charter* s. 24(2) should be abandoned. In its stead the Court has adopted a "conscriptive" / "non-conscriptive" classification system for the purposes of a determinative rule of exclusion.

Evidence that is conscriptive, and its derivatives, whether or not "real", will be excluded if such evidence could not have been obtained from an independent source or would not have been inevitably discovered. After summarizing the new rules the Court provided a "short form" summary, at page 51, para. 119.

1. "Classify the evidence as conscriptive or non-conscriptive based upon the manner in which the evidence was obtained. If the evidence is non-conscriptive, its admission will not render the trial unfair and the court will proceed to consider the seriousness of the breach and the effect of exclusion on the repute of the administration of justice.

2. If the evidence is conscriptive and the Crown fails to demonstrate on a balance of probabilities that the evidence would have been discovered by alternative non-conscriptive means, then its admission will render the trial unfair. The Court, as a general rule, will exclude the evidence without considering the seriousness of the breach or the effect of exclusion on the repute of the administration of justice. This must be the result since an unfair trial would necessarily bring the administration of justice into disrepute.

3. If the evidence is found to be conscriptive and the Crown demonstrates on a balance of probabilities that it would have been discovered by alternative non-conscriptive means, then its admission will generally not render the trial unfair. However, the seriousness of the Charter breach and the effect of exclusion on the repute of the administration of justice will have to be considered."

More expansively, from *Stillman*:

1. What is derivative ?

In summary, at page 43, para. 99:

> "A subset of conscriptive evidence is "derivative evidence". This is a term frequently used to describe what is essentially conscriptive "real" evidence. It involves a Charter violation whereby the accused is conscripted against himself (usually in the form of an inculpatory statement) which then leads to the discovery of an item of real evidence. In other words, the unlawfully conscripted statement of the accused is the necessary cause of the discovery of the real evidence."

2. What is the role of "discoverability" or the "but for" principle ?

In summary, at page 44, para. 102:

> "If the evidence under consideration is classified as conscriptive, that is to say self-incriminating, which in the case of statements includes derivative evidence, then it will be necessary to take the second step of the analysis and determine whether the admission of the evidence would render the trial unfair.
>
> The admission of self-incriminating evidence in the form of statements or bodily substances conscripted from the accused in violation of the Charter and evidence derived from unlawfully conscripted statements will, as a general rule, tend to render the trial unfair. Nevertheless, in recent cases it has been held that the admission of conscriptive evidence will not render the trial unfair where the impugned evidence would have been discovered in the absence of the unlawful conscription of the accused. There are two principal bases upon which it could be demonstrated that the evidence would have been discovered. The first is where an independent source of the evidence exists. The secondly is where the discovery of the evidence was inevitable."

(a) What is an "independent source" ?

In summary, at page 45, para. 103

> "In certain circumstances, the police may have had an alternative non-conscriptive means by which they could have obtained the impugned evidence, notwithstanding the fact that they obtained it by conscriptive means. Evidence which would have been obtained without the accused's participation yet, the accused was still compelled to participate, will nonetheless be classified as conscriptive evidence. The existence of an alternate mean of obtaining the evidence has no bearing on how the evidence is classified."

Obviously, this test raises more questions than it answers. "Could" and "would" are not synonymous. How can hypothetical conduct be evaluated in any meaningfully empirical way ?

(b) What is an "inevitable discovery" ?

By illustration, the Court contrasted the police discovery of the knife in *R. v. Black* [1989] 2 SCR 138 with the police discovery of the gun in *R. v. Burlingham* [1995] 2 SCR 387.

In sum, in light of *Stillman*, investigative agencies who seek to compel a citizen in regulatory or administrative proceedings in the hope of being able to subsequently mount criminal proceedings against that citizen do so at their peril. Abusive regulatory compulsion may lead to a stay of subsequent criminal proceedings. Or, perhaps worse, the government will be required to demonstrate the independent source or inevitable discovery of all evidence plausibly connected to the compulsion or face automatic first stage *Collins* exclusion.

B. Mutual Legal Assistance

Pursuant to s. 17 and 18 of the *Mutual Legal Assistance in Criminal Matters Act* S.C. 1988 c. 37, Canadian citizens can be ordered, by a Canadian Court, to cooperate with a criminal investigation by a foreign state by answering questions and producing documents that might assist the investigation.

In *U.S. v. Ross* (1995) 100 CCC (3d) 320, the Quebec Court of Appeal rejected a *Charter* s. 7 general compulsion immunity claim and upheld a testimonial compulsion order, directed at non-targets, which also specified that any evidence given "could not be used either in Canada or the United States, directly or indirectly, to incriminate the person giving the statement...".

In *U.K. v. Hrynyk* (1996) 107 CCC (3d) 104, MacPherson, J. of the Ontario Court (General Division) rejected a constitutional attack upon *M.L.A.T.* s. 18 brought by a non-target who had been ordered to testify but who had also been provided with protective use and derivative use immunity in the compulsion order.

My co-panelists, including Mr. Frankel, will describe the impacts of the Federal Court of appeal's recent confirmation of the decision of Wetson, J. in *Schriber v. A.G. Canada* (1996) 108 CCC (3d) 208 requiring Canadian investigative agencies to obtain prior authorization from a Canadian Court as a condition precedent to requesting that foreign authorities obtain evidence abroad, notwithstanding the Supreme Court's decision in *Terry v. U.S.A.* (1996) 106 CCC (3d) 508.

C. Securities and Administrative Inquiries

Does *Charter* s. 7 protect an independent and free standing right to "privacy" that is broader than that conferred by *Charter* s. 8 ? Does *Charter* s.7 require that regulatory investigative compulsion proceedings be circumscribed by limiting relevant standards? What is a "document produced in the course of business" in relation to which a lower expectation of privacy is deemed to exist. Can it possibly be that the probing mandated by a securities investigation as authorized by s.127 (1) (e) (ix) of the *British Columbia Securities Act* (and other analogous legislation in other Provinces), into "the relationship that may at any time exist or have existed between that person and any other person by reason of any other relationship" is subject to no *Charter* limitations whatsoever?

These questions were raised, and dismissed, at first instance, by D.B. McKinnon, J. in *B.C. Securities Commission v. Stallwood* [1995] B.C.J. No. 1321. On appeal to the Court of Appeal from a single judge's refusal to stay inquiry proceedings pending appeal McFarlane, J.A. in *B.C. Securities Commission v. Stallwood* [1996] BCJ, No. 797 upheld a dismissal of an application for compulsion exemption on the basis that "the only evidence to which counsel could refer us was material indicating that the Commission shares with the police any evidence discovered which may bear on potential criminal liability. In my view it is appropriate to do so."

While many agencies are endeavoring to segregate administrative and criminal investigative functions, here in B.C. the Attorney General has established the combined Securities Fraud Office, notwithstanding the rule in *R. v. Colarusso* (1994) 87 CCC (3d) 193 (SCC) that *Charter* s. 8 is violated when the criminal law enforcement arm of the state appropriates evidence acquired under other statutory schemes for administrative or regulatory purposes.

Undoubtedly, the S.F.O. has considered these issues in great detail.

Courts in other provinces have begun to consider related issues. In R. v. Quaida, March 8, 1996, Marshall, J. found that a warrantless search of a fire scene pursuant to the *Ontario Fire Marshalls Act* violated *Charter* s. 8 with the result that real evidence was excluded in subsequent arson proceedings. Although similar *Charter* s. 8 findings were subsequently made in similar cases, such as R. v. Phan, Unreported, Ontario Court (General Division) No. 151-95, September 9, 1996 and R. v. Mole, Unreported, Ontario Court (General Division) No. 549/95, October 11, 1996, because of good faith, *Charter* s. 24(2) exclusion did not follow.

As indicated by Iaccobucci, J. in S. (R.J.), division of powers questions may also be engaged where administrative and criminal investigations overlap. In Stromberg v. Law Society of Saskatchewan, Unreported, Sask. Q.B., No. 3228, January 18, 1996, Mr. Justice Baynton considered whether disciplinary proceedings, instituted by the Law Society alleging that prominent members had engaged in conduct unbecoming in channeling payments of money to former politicians, were ultra vires the province as offending Parliament's exclusive *Constitution Act*, 1986 s. 91(27) jurisdiction over criminal law.

In finding the disciplinary proceedings ultra vires, essentially for the reasons given by the Supreme Court in Starr v. Houlden (1990) 68 D.L.R. (4th) 641, the Stromberg Court held, at page 37:

> "An ongoing criminal investigation into the same conduct as that being investigated in a disciplinary proceeding, is not a bar to the continuation of the disciplinary proceeding. *Voutsis v. College of Physicians and Surgeons* (1987) 57 Sask. R. 60 (Q.B.). The manner however in which the police investigation is being conducted, and the degree of cooperation or collaboration between the parallel investigations, may be relevant to the determination of the pith and substance of the disciplinary proceeding."

D. Income Tax

The enforcement of the *Income Tax Act* has, to date, demonstrated the application of the principles of residual derivative use immunity most clearly.

As early as October 1991 in R. v. Roberts, unreported Newfld P.C., October 1, 1991 No. 91280002 it was held that *I.T.A.* s. 231.1 audit processes could not be used to advance a tax evasion investigation. The Ontario Court of Justice (General Division) elaborated upon this principle in 1995 in The Queen v. Norway Insulation, 95 D.T.C. 5328. This principle was further applied in The Queen v. Olsen Ltd., Ontario Court (Provincial Criminal Division) August 2, 1995.

On June 29, 1995 in *R. v. Harris*, Unreported, Vancouver Registry No: CC931055, Mr. Justice Oliver confirmed an abuse of process stay order entered by Maugham, P.C.J. respecting *I.T.A.* s. 238(1) charges of failing to comply with requirements to provide financial information issued in respect to a seizure of money that had been declared inadmissible under *Charter* s. 24(2) in predicate narcotics related criminal proceedings.

In related developments, in *O'Neill Motors Ltd. v. Queen,* Unreported, Tax Court of Canada No: #94-820 (IT)G, Bowman, J. applied Charter s. 24(1) to set aside a tax assessment based upon evidence ruled inadmissible in prior tax evasion criminal proceedings.

On February 15, 1995 *I.T.A.* s. 239 tax evasion charges were stayed by the Crown in *R. v. National Research Corporation* et al., Unreported, Calgary Provincial Court Registry No: # 31423072-P1-0101-0108-0201-0214-0409-0414 after judicially required disclosure of Calgary District Office and Special Investigations files revealed that an Inquiry conducted under *I.T.A.* s. 231.4 had been used to gain evidence to support an undisclosed but intended evasion prosecution and to probe the possible defences of the targets.

In *Delzotto v. Queen* [1997] FCJ No. 85, decided January 24, 1997, Rothstein, J. found that *I.T.A.* s. 231.4 inquiries are not subject to *Hunter v. Southam* standards. However, the question of a target's potential exemption from 231.4 compulsion was not addressed because Delzotto had not been personally subpoenaed. In addressing the considerations that would have been required had this been so Rothstein, J. analyzed *S. (R.J.)* and *Branch* and concluded, at p. 11:

> "In terms of whether such an ostensible use of a section 231.4 inquiry would be possible, if it were the case that a hearing officer issued a subpoena to a taxpayer who was under investigation pursuant to section 239 of the Income Tax Act, the taxpayer could challenge whether he was compellable not merely on the basis of an observation that the police cannot have subpoena powers, but also pursuant to the predominant purpose test laid out by the Supreme Court in Branch. Branch stands for the proposition that police cannot have subpoena powers because, according to the predominant purpose test, the authorities cannot hide behind the veneer of a nominally administrative proceeding in order to conscript an individual who is the target of a criminal investigation into giving self-incriminating testimony. If the predominant purpose of the inquiry is that of building a case against the taxpayer for the purposes of a criminal or quasi-criminal prosecution, then the taxpayer will receive constitutional protection under section 7 from being conscripted against himself by means of the subpoena based on the principle of self-incrimination."

Finally, on February 25, 1997 in R. v. Jarvis, Unreported, Calgary Provincial Court #60325974P10101, Fradsham, J. applied *Charter* s. 24(2) to exclude all evidence from tax evasion proceedings obtained by search warrant from the offices of the taxpayer and his accountant. I summarize the structure of this judgment as it reflects the perils that the utilization of statutory compulsion procedures entail for investigative agencies:

1. Revenue Canada's policy stipulates that tax leads from informants are to be handled by Special Investigations, but in this case, the tax compliance auditor took charge of the tax lead (pp. 11-13).

2. Revenue Canada's policy specifically states (pp. 15-16):

   > Special investigation staff should not put themselves in a position of directing the audit process for the purpose of gathering information for a search warrant .... Where additional work is contemplated for the purpose of gathering information for a search warrant the T134 should be accepted by Special Investigations and the taxpayers rights under the Charter must be considered as outlined in TOM 11(10)0 ....

3. The tax compliance auditor was in reality conducting an evasion investigation and not a compliance audit when she interviewed the taxpayer, but the taxpayer was not advised of this (p. 24).

4. Revenue Canada must not use section 231.1(1) to further an investigation as opposed to an audit (p. 25).

5. Accordingly, there was an obligation on the auditor to caution the taxpayer prior to interviewing him.

6. Since the taxpayer was being investigated (as opposed to audited) the *I.T.A.* s. 231.1 legal compulsion to cooperate no longer exited and Jarvis enjoyed the section 7 Charter right to silence (p. 37).

7. The failure to caution Jarvis resulted in a violation of his section 7 Charter rights (p. 38)

8. "The audit interview provided Revenue Canada with a great deal of information. It is all tainted by the section 7 Charter breach and must be excised from the Information to obtain the search warrant". (p. 55)

9. "Revenue Canada could have obtained all the seized documents (including those from the April 11th meeting) without offending the Charter if it had only sought the warrant using all the evidence it had obtained prior to the audit interview". (p. 73)

10. "Revenue Canada did not act in good faith when it violated the section 7 and 8 Charter rights of Mr. Jarvis" (p. 79-80)

11. Revenue Canada's acts (listed on pp. 78-79) "all bespeak a continuing disquieting attitude of deception towards the taxpayer. They are not acts of candor and forthrightness" (p. 80)

12. "In my view, considerable long-term adverse effects on the reputation of the judicial system would occur if the court were to admit the evidence obtained in these circumstances. Revenue Canada recognized in its own policies the inherent dangers in permitting audit functions and powers to be used to advance an investigation into possible offences". (p. 83)

IV. CONCLUSION

Most judges and right-minded citizens will agree that commercial crime investigation targets are entitled to know whether or not their friendly tax auditor or securities investigator is in reality a Trojan horse for an S.I. tax evasion or RCMP market manipulation investigation.

It is undoubtedly important to conduct efficient commercial / securities crime investigations.

Yet it is inevitable that "Joint forces" approaches will necessarily require full transparency of investigative purpose and full disclosure of intended evidentiary use. These are exacting standards. Such standards can no longer be resisted - there is no turning back.

All law enforcement agencies will be required to adapt.

DJM