

Indexed as:

R. v. Roberts

Between

Regina, and

David Roberts and Thomas Viccars

[1998] B.C.J. No. 3184

42 W.C.B. (2d) 152

Vancouver Registry No. 17195-01

British Columbia Provincial Court

Vancouver, British Columbia

Craig Prov. Ct. J.

Heard: September 14 to 30, 1998.

Submissions: October 20 and 21, 1998.

Judgment: December 18, 1998.

(79 pp.)

Income tax -- Enforcement -- Inquiry (incl. audit) -- Search and seizure -- Duty of investigators -- Civil rights -- Trials, due process, fundamental justice and fair hearings -- Criminal and quasi-criminal proceedings -- Notice of intended prosecution -- Right to remain silent (Charter, s. 7) -- Procedure contrary to fundamental justice -- Canadian Charter of Rights and Freedoms -- Violation of rights -- Remedies, stay of proceedings.

Application by the accused to stay their trial on charges of tax evasion and fraud because of abuse of process. The accused were five taxpayers who donated works of art in order to claim a tax credit under the Income Tax Act. The application for the credit was submitted to the Canadian Cultural Property Export Review Board. The Board suspected fraud. The special investigations branch of Revenue Canada became involved. Bourque, an investigator, contacted the taxpayers and their lawyer to obtain information. He claimed that he was conducting an audit. He never revealed that he was from special investigations and that he was really conducting a criminal investigation. He utilized the information that was improperly obtained and authored misleading information to

procure search warrants. He never provided warnings under the Canadian Charter of Rights and Freedoms before he interviewed suspects. Bourque was aware that his conduct was contrary to Revenue Canada policy. His supervisors were aware of this conduct but aided and abetted it. In order to avoid a stay, the Crown proposed not to rely on the information gathered by Bourque.

HELD: Application allowed and charges stayed. Bourque's activities were a wilful attempt to use the administrative audit process as an investigative tool. He committed a serious and intentional misuse of audit powers under the Income Tax Act and violated the Charter. The administration of justice would be prejudiced if the trial continued. To allow the Crown's case to proceed as it suggested would condone Revenue Canada's abusive conduct. The prejudice caused by the abuse would be perpetuated throughout the trial. When the investigators bypassed procedural safeguards in the Charter they engaged in fundamentally unfair conduct that violated the principles of fundamental justice.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 5, 7, 8, 11(d), 24(1).

Income Tax Act, ss. 118, 231, 231.1, 239(1), 239(1)(a), 239(1)(b).

Counsel:

David G. Butcher and Colleen Smith, for the Crown.

Craig C. Sturrock and Thomas M. Boddez, for David Roberts.

David J. Martin and Letitia Sears, for Thomas Viccars.

CRAIG PROV. CT. J.:--

TABLE OF CONTENTS

Preamble.....
Charges.....
Section 118 Tax Credit-
Application to Cultural Property Review Board.....
Genesis of the Charges.....
Evidence of Walden.....
Scam memo - Exhibit 127.1.....
Evidence of Cowley -
Receipt of Referral from Board.....
Evidence of Bourque - Audit vs. Investigation.....

Daniel Bourque, Patrick Cowley, Christopher Fleming, Thomas Spryza, Employees of Revenue Canada with Special Investigations

Grant Cowan
George Jones

Barrister & Solicitor

2 Evidence in the *voire dire* revealed in full detail the manner in which Revenue Canada investigated a suspicion of fraud communicated to its Special Investigations office in Ottawa by the Cultural Review Board. The defendants raised the issue of audit versus investigation in the framework of allegations *inter alia* that

"...the conduct of the investigation and prosecution herein infects the entire case against the Applicants, such that there is no way to isolate or contain the harm done. Under the guise of conducting an audit and as a result of ... misleading the taxpayers and their lawyer Bourque obtained statements from and underlying documentation regarding the Applicant's defence, crucial information which became the basis of his request for information ... from the U.S. Internal Revenue Service and, indeed, was the impetus for the balance of the investigation."

3 Although Revenue Canada secured documentary evidence throughout its investigation by using Demands and Search Warrants the Crown decided to withhold the entirety of that evidence in the face of an obvious challenge under sections 7 and 8 of the Charter of Rights. The purpose of the Crown was expressed by Mr. Butcher as follows:

"You will note that in the opening, I did not indicate that any of the exhibits were derived from or obtained from either of the two accused persons. The Crown's position is that these accused have no privacy interests in the documents sought to be tendered and no standing to challenge the admissibility of the evidence which the Crown seeks to tender. The Crown also takes the position that no abuse of process lies because all of the Crown's evidence that is being tendered could and would have been inevitably discovered as a result of information provided to Revenue Canada by the Canadian Cultural Property Export Review Board.

Transcript, Sept 14/98, page 6 lines 5-16.

4 On September 23, 1998, in the course of the *voire dire*, Mr. Butcher made the following concession:

MR. BUTCHER: My friends assert that this prosecution should be stayed as an abuse of process because, if I can put words in their mouth perhaps, this whole

case was a criminal investigation from the outset and constituted a flagrant and egregious abuse of Revenue's civil powers. Because of the way that the - I anticipated the case to go I did not interview these witnesses extensively before trial because I wanted them to give the evidence that they had without any direction, the kind of direction that sometimes lawyers give witnesses. I didn't therefore know. I was in a different position than counsel often is of counsel usually knows the evidence that's going to come from their witnesses. At least in direct when going into a case. I didn't know that here.

So I hadn't formulated a position as to whether or not Revenue's assertions that this was a civil matter until October 1994 was a position that would be tenable at law. I'm now of the view that it's not tenable at law.

We turn to a subsidiary question when dealing with the issue of abuse of process. How reasonable was their belief that this was a civil process? Does it - because that reasonableness has to be a factor in the assessment of whether or not it's an abuse. And what I'm trying to establish with this line of questioning is that the most significant facts that found the basis of the Crown's case today didn't become apparent at first and that the approach of Revenue was not so unreasonable as to constitute an abuse. That's why I'm asking those questions.

Transcript, Sept. 23/98, page 57, lines 13-43

CHARGES

5 David Roberts ("Roberts") and Thomas Viccars ("Viccars") (the "Defendants") are charged with 7 and 5 counts respectively under section 239(1) of the Income Tax Act.

6 Counts 1 to 7 allege that Roberts made false or deceptive statements in his own income tax returns for the 1991 and 1992 taxation years; attempted to evade income tax in 1991 and 1992 by falsely reporting charitable donations; and evaded compliance with the Income Tax Act by using documents which contained false information which were used to claim donation tax credits for four other taxpayers; Gordon Sim, Fred Romanuk, Feike Bylsma, and Margaret Bylsma-Howell.

7 Counts 8 to 12 allege that Mr. Viccars attempted to evade compliance with the Income Tax Act by trying to obtain cultural property income tax certificates on behalf of Roberts, Sim, Romanuk, Bylsma, and Bylsma-Howell by transmitting documents which contained false or deceptive statements.

8 A copy of the information is appended.

SECTION 118 TAX CREDIT - APPLICATION TO CULTURAL PROPERTY REVIEW BOARD

9 A taxpayer may donate cultural property to public institutions and apply for a tax credit under section 118 of the Income Tax Act. Since 1990 applications for tax credits have been received by the Canadian Cultural Property Export Review Board (the "Board"), a government agency created by the Cultural Property Export and Import Act. The Board has three distinct functions, one of which the certification of cultural property for tax purposes occupies approximately 98% of its time. The Board is composed of 10 members appointed by Order-in-Council representing the public at large, cultural institutions and collectors and dealers in cultural property. The day to day work of the Board is done by 9 professional employees of the Department of Canadian Heritage under the direction of the Board's Secretary, David Anderson Walden ("Walden"). In describing the work of his professional staff, Walden said they may be required to "...conduct additional research about the artist on the subject matter of the donation... sometimes obtain additional information required for the appraisal for fair market value", and after the Board's consideration of an application " ... to obtain the additional information as directed when additional information is required." Walden also said that on the direction of the Board that "If there was information that was ... needed to be dealt with, or involved from our perception, an income tax-related matter, we would refer it to the Revenue Canada".

10 I accept Walden's assessment of the Board that between 1977 when the Board began its work and 1990 when it was given the tax function...

"... that the Board had acquired significant experience and was recognized for its professional expertise, and the responsibility was, therefore, given to it to determine fair market value at the outset rather than conducting an audit subsequent to the filing of the tax return."

11 The audit he spoke of was performed by Revenue Canada audit section prior to 1990.

GENESIS OF THE CHARGES

12 In 1991 five taxpayers - Roberts, Gordon, Sim, Fred Romanuk, Dr. Feike Bylsma, and Dr. Margaret Bylsma-Howell (the "Sim group"), - donated cultural property, works of art of Frederick Brown, a noteworthy American artist, to the University of Lethbridge. They asserted a fair market value of \$1,192,000 (U.S.) supported by an appraisal of the Professional Art Dealers Association of Canada ("PADAC") and their applications were submitted by the University to the Board on May 7, 1993.

13 The five applications were submitted together and reviewed by the Board on June 7, 1993. Although some of its members were art dealers, none knew of Frederick James Brown, and when asked if this was unusual Walden said that ... "for a contemporary artist it would be unusual". Walden testified that the Board was immediately suspicious about all five applications and instructed him to "...request the price paid, from whom they'd been purchased and when they had

been acquired."

14 The Board's suspicion and that of Walden was that the values were far too high and that it involved fraud. I am satisfied that this suspicion of fraud began on June 7, 1993 and continued unabated.

15 On June 24, 1993 Walden wrote to the University of Lethbridge asking for sales invoices, date of purchase and the seller's identity. On August 25, 1993, he received Bills of Sale from the University. Walden requested of PADAC and received from it the two appraisals in support of its appraisal.

EVIDENCE OF WALDEN

16 Walden testified that after he had received the Bills of Sale we had some concerns ... and wished to pursue their contents with officials at Revenue Canada." He said he had previously contacted Revenue Canada on 5 or 6 occasions about agents involved in transactions, and the nature of transactions, but not about individual files. Walden's first contact with Revenue Canada concerning the Sim group of files was with Helen Finn in Audit, whom he had dealt with before, and his purpose was to determine who he should be speaking to at Revenue Canada.

Q You said, look, Helen, I'm concerned about fraud, who do I talk to? It's really that simple, I would suppose?

A More or less.

Q And so I appreciate you've indicated that you can't recall whether you called Cowley or he called you, but you indicated this morning that Exhibit 127.1, the suspected scam memo, accurately reflects what you told, or you believe you told Finn, I take it, it, as well, accurately reflects what you would have told Cowley when you spoke to him?

A I think it accurately reflects our position of that time.

Transcript - Sept. 14, 1998, Walden, page 69 lines 27-37.

Q Do you - does the memo accurately reflect what you were telling Revenue Canada officials when you were speaking to either Helen Finn, as you recall, or Pat Cowley?

A Yes, it does.

Q What was it at this stage that made you think that this case may be fraudulent?

A There were a number of factors: The volume of artwork being donated. The attributed fair market value. The fact that this large volume of work was being donated to the University of Lethbridge Art Gallery by donors resident in British Columbia. The artist was an American artist, no longer represented by a dealer; who was unknown to any of the Board members. And the fact that the artist's address was stated as being New York and bills of sales were received having been notarized in Arizona.

Transcript - Sept 14, 1998, Walden, page 54 lines 34-37, page 55 lines 1-10

Q Yes. And as a result of your conversation with Mr. Cowley you were able to advise the Board, both that you had brought the applications to the attention of Revenue Canada and that they were pursuing an investigation?

A That's correct. The other thing is that the bills of sale, which had been provided in August, were also presented to that September Board meeting.

Transcript, Sept 14/98, Walden, page 70 lines 41-47

Q Now, as indicated in Exhibit 127.8, there is a memorandum dated October 4th; it's not authored by you, but it purports to record a conversation with you. Did a Mr. Bourque contact you on the 4th of October and tell you that he was from Special Investigations in Vancouver and ask you questions?

A Yes.

Transcript, Sept 14/98, Walden, page 71 lines 7-13

17 Exhibit 127.1 (the scam memo) is dated September 21, 1993. By its reference suspected scam" and recording of Walden's request for help in proving that the Sim group of applications was fraudulent, the scam memo burdens Revenue Canada with the fact that it was embarking on a criminal investigation, one aspect of which was "to dig up evidence to discredit the claim".

"Memo To: Labelri.5th
From : Walshdo.5th
Date : 21-09-93 11:47
Re : suspected scam

Someone at the Winnipeg D.O. gave my name to David Walden, Secretary to the Cultural Property Export Review Board. (If I've got the story straight, someone from the Winnipeg D.O. actually called a Board member in Winnipeg and gave him my name - he passed it on to Mr. Walden) Mr. Walden called concerning a case he feels is fraudulent, but needs help in proving. The Board has a set of 5 applications from taxpayers in Vancouver for works being donated to the University of Lethbridge Art Gallery. All 5 works are by the same U.S. artist. The Board has been provided with notarized copies of bills of sale (all dated February '91). Mr. Walden is suspicious that the amounts shown on the bills of sale are greatly inflated, based on what he knows of this particular artist's work and usual selling prices. (One piece alone is listed as having sold for \$700,000 U.S., which is out of line with known sales figures for the artist.) The applicants are being represented by Viccars & Associates, a law firm in Vancouver. Mr. Walden's concern is that having been provided (at the Board's request, I gather) with notarized copies of the bills of sale, it is getting to the point where the Board will have to allow the applications unless they can dig up evidence to discredit the claim. He wondered, for example, whether the Canada-U.S. tax convention allows us to get information regarding the artist's '91 income (if the bills of sale are valid, his/her income for that year would be in excess of 1 million). I ventured that this sounded like something for S.I. (as opposed to regular audit activity), but that I would have you get back to him. (I originally indicated that I would have Carl get back to him, but on reflection I think it is more in your bailiwick, Richard). His number is 990-4161. (He is going to try to find out who the Winnipeg contact was, so he might have this info by the time you call). c.c. Carl, Ron"

18 The Canadian Oxford dictionary, 1998 defines "scam" as 20th Century North American slang - "a trick or swindle: a fraud".

19 The scam memo was not disclosed to the Defendants until 1998 when Mr. Butcher went to Ottawa to review the Sim file. It had been in the Ottawa office since September 1993 and its late

disclosure was not satisfactorily explained.

20 The late disclosure of the scam memo from the files of Revenue Canada, Ottawa was unsatisfactory and negligent at best. If this case had been in the hands of less diligent Crown and Defence counsel, the scam memo would not have been produced and the cross examination of Walden and Bourque would have lacked an essential documentary starting point.

21 The explanations in the evidence of Fleming, Spryza and Cowley amount to pointing the finger at each other as the person responsible for the grossly negligent handling of this vital document.

EVIDENCE OF COWLEY - RECEIPT OF REFERRAL FROM BOARD

22 On September 27, 1993 shortly after his contact with Ms. Walsh, the officer who wrote the scam memo, Walden was in conversation with Patrick Joseph Cowley ("Cowley") a senior officer with the Ottawa office of Special Investigations and I am satisfied beyond any doubt and infer that Walden made the same statements and allegations to Cowley which are recorded in the scam memo. Cowley had no specific recollection of Walden's conversation with him but did say that he was the conduit through which the Board's request was sent on to the Vancouver office of Special Investigations. In all the circumstances of this case and in his specific involvement I am satisfied that Cowley would at the very least have told the Vancouver office that the Board suspected fraud; that the Sim group of applications was a suspected scam.

Q Okay. Well, let me just take your answer. Are you saying then, when you said, "He may well have said this to me," what I've just reviewed with you that you accept his evidence given here that he did say these things to you?

A No, I'm saying that - how can I accept his - if I had notes that I had made of it, then I will be able to say, "Yes, he did say that to me." But I do not have notes and he says he said it to her. He says he said it to me. Okay.
I can't challenge him one way or the other and I can't refute it cause I didn't make notes of it.
And I didn't make notes of it because this thing was not that paramount to me. Someone was asking for assistance and I'm the conduit through which it will be sent to our Vancouver office, where it will appropriately be handled.

Q And in July of '97, to ask you, from the context and wording of those - of your own writings, the only ones we have, to accept that he told you what he says he told you on September 27, 1993. Do you agree with that?

Transcript, Sept 18/98, Cowley, page 91 lines 12-28.

A I guess so. Its -

Q And if he told you what he says he told you, you probably told Rod Jamieson what he told you, too, because you got to tell Rod what the case is about?

A Yeah, I would. If he told it to me, I would say I would convey the information onto Rod. I'm not about to withhold.

Q Right.

A I'm not going to give him half a loaf.

Q You had no reason to?

A That's right.

Transcript, Sept 18/98, Cowley, page 94 lines 12-27.

23 On September 27, 1993 a special investigation file was opened by Rod Jamieson, the officer in charge of the Vancouver office to deal with the Board's referral of the Sim group applications. Soon after, Jamieson turned the file over to Grant Cowan ("Cowan"), a group leader, and he in turn gave it to a junior member Daniel William Bourque ("Bourque") - Bourque had been in Special Investigations for just over one and one half years and was familiar with policies and procedures of Revenue Canada concerning the duty of an investigator to afford all taxpayers their guaranteed legal rights. It is a reasonable inference of fact that Jamieson told Cowan what he had learned from Cowley.

EVIDENCE OF BOURQUE - AUDIT vs. INVESTIGATION

24 When Jamieson opened the Sim group files on September 27, 1993 it was in response to the Board's concern that it was dealing with a tax fraud. Bourque gave a very different version of the file when first questioned by Mr. Martin about it and what was said to him by Cowan.

Q A What information did he give you? The file, that it was an interesting case and it involved some kind of art donation.

Q This interesting case, there's no discussion about how it came to SI?
A I think he would have just told me to look at the fax transmissions.

Transcript, Sept 16/98, Bourque, page 43 lines 26-28, lines 36-39

Q There's a notation on the file, open a file in N/O, which I take it means name of -
A Yes.

Q - Gordon Sim and cross-index other names and return to me.
A Yes.

Q Now, whose initials are those, from your work in the department?
A Rod Jamieson.

Q Okay. Was that endorsement there when you received these documents?
A Yes.

Q Okay. And so your evidence is that Cowan comes in, gives you this blue file, that very one?
A Yes.

Q And these pieces of paper and says interesting case, that's it?
A It's yours. Yeah, that's it.

Q You didn't say, wait a minute, Cowley, Investigations head office to Jamieson, Jamieson, open file, what's this about?
A It's an art donation.

Q Art donation.
A That's right.

Transcript, Sept 16/98, Bourque, page 44 lines 17-40

Q Yes. I mean, did you say, well, wait a minute, Mr. Cowan, don't you know anything about this?

A I called Cowley to find out about it.

Q A Okay. And when did you call him? That was October the 1st or the first couple days of October, maybe the 4th I can tell you. I can refer to my file and tell you.

Q Okay. Before you refer to this tab, what do you recall happening when you called Mr. Cowley in Ottawa?

A This is a pretty accurate description of what happened, I asked him what it was about.

Q A Yes, and what did he tell you? That the individual, that David Walden at the Canadian Culture Property Export Review Board was suspicious of the amounts, that he'd received this application for certification and he was suspicious of the amount that was paid for the artwork and the form of the receipt that was submitted for the purchase of the artwork.

Q And?

A That's it.

Q Well, did Mr. Cowley tell you anything about what Mr. Walden wanted Mr. Cowley to do about it?

A No.

Q About his suspicions?

A No.

Q Did Mr. Cowley tell you that Mr. Walden had told him that he believed that the applications were fraudulent and that he wanted help in digging up evidence to discredit the claim?

A No.

Q No?

A No. that word was never used

Q Which word?

A Fraudulent.

Q Oh.

A Or dig up anything to discredit.

Q Mr. Cowley never ever used the word -

A Q Not to me. Never ever said that Mr. Walden and the Canadian Cultural Property Review Board believed that the applications were fraudulent and wanted something done about it?

Transcript Sep 16/98, Bourque, page 45 lines 1-7, lines 34-47,
page 46 lines 1-22

A No. I just received it and my idea was that I was to gather information on behalf of the Canadian Cultural Property Export Review Board, that they had a request for certification and they wanted some audit work done so that they could make their decision.

Q A Audit work? Yes.

Q A Wait a minute, that's not your department. That's right.

Q You're special investigations. Your primary function is the pursuit of criminal prosecutions.

A You're right.

Q Well, wait a minute, why would you put your auditor hat on? Did somebody tell you to put your auditor hat on? That wasn't your job. You were in SI.

A Well, as I was mentioning yesterday, in SI, there was the need for understanding that we wore two hats, or I was given the - we wore two hats in SI, we were auditors and investigators. We were in a part of the Audit Division and we could carry on an audit function as well as the investigation function.

Transcript, Sept 16/98, Bourque, page 48 lines 40-47, page 49
lines 1-4, 18-26.

Q Okay, But let me just, for the moment, and without in any way conceding it, accept your assertion that you thought that at that time, will you not agree with me that at least what

was presented to you then and there was very great ambiguity about what you should do. You had four pieces of paper. According to you, you were about to embark upon a highly unusual thing, that is although I'm an SI officer and I've spent 20 months preparing myself to pursue criminal investigations, I am nonetheless going to transform myself into a simple auditor.

A Well, I didn't think it was -

Q A Did you ask for direction? I didn't think there was any transformation required and as I said, it was my understanding and, you know, I wish I could point to somebody and say, well, this person told me, but I can't at this time, but I know that it was our belief and understanding amongst the investigators there that we wore two hats and there was nothing preventing me from performing an audit. And that it was my belief and understanding, and I think the same of all the investigators there, that at the point in time, that it was all the question of fact. You know, when you had reasonable grounds to believe that an offence had been committed, then that's when a change took place and it became an investigation. Before that, your function is very similar, if not the same as an audit, or an auditor.

Transcript, Sept 16/98, Bourque, page 52 lines 31-47, page 53 lines 1-10.

Q Now, when you're saying we believe we could do an audit, that's not what you mean?

A Q No. No, you mean something else. Acquire-

A

Q A Tell us what you mean. Acquiring the documentation and whatever documentation, explanations, information underlying a claim on an income tax return, so auditing that claim and seeing whether or not it was in compliance with the Act.

Q Without that -

A For civil purposes.

Q A Without that being for criminal purposes? Yes. And Mr. Butcher may object, but what I've

Q heard you say this morning and I thought you repeated this afternoon is not only did you think that you could shed your status as a special investigator and conduct a mere civil audit, but everybody else in the department thought that too?

A That's my belief and to support it, I can just point to the actions that I took on this case. I mean, I wasn't hiding it. It was known to at least my supervisor.

Transcript, Sept 16/98, Bourque, page 55 lines 36-47, page 56 lines 1-10.

25 What Bourque was attempting to establish in the foregoing testimony was that his predominant purpose was to do an audit as an administrative function for civil purposes. His testimony was self-serving and intentionally deceptive as was his conduct in dealing with the Sim group and their lawyer, George Fordham Jones ("Jones") The following excerpts from Bourque's evidence are pertinent.

EVIDENCE OF BOURQUE - "EXPEDIENT" APPROACH TO TAXPAYERS

Q Is it the case that this packet reflects that you spoke to Feike Bylsma on the 2nd and on the 15th to Mr. Jones on the 15th and to - - on the 19th Mr. Jones wrote to you and said he'd been authorized to represent his clients?

A Yes.

Q So if I may summarize here, between the 7th of October and the 30 of November you received the Board's file on the 18th of October?

A Yes.

Q And then basically commencing November 2nd began the process of trying to interview the Bylsmas and deal with their lawyer etc., basically from that point in time?

A Yes.

Q So if we can look at you what you did in the month of October in summary, you spoke to Letkeman on the 1st, you spoke to Cowley on the 4th and to Walden on the 4th. You spoke to Walden on the 7th and asked him for his file and you got it on the 18th. When you got it, if you can focus on what you did in October, on the 18th did you review it?

A Yes

Transcript, Sept. 17/98, Bourque, page 7 lines 31-47, 8 lines 1-4.

Q With the abundance of information that was contained in that file did you make some inquiries after the 18th of October of all the various parties referred to in that application package?

A No, the inquiries I made after that date to November 30th were the ones that I just reviewed with you.

Q A You went straight to the taxpayer, really? That's right.

Transcript, Sept. 17/98, Bourque, page 8 lines 25-34

MR. MARTIN: 1.1, footnote 5, paragraph (g).

Q During the preliminary investigation stage the investigator should firstly consider concentrating his efforts in examining the available documentary evidence and the evidence of key witnesses before attempting to interview the taxpayer.

Correct?

A And your question is?

Q A That's what your policy mandates you to do, correct? Correct, but I believe it's a referral - in a typical investigation would be a referral to the audit work that's already been done, the audit file and paper trails suggested by information in the audit file. In this case there wasn't one so I was -

Q A Ergo-- doing it myself, creating an audit file.

Q A Ergo more - - for documents that underlie this transaction.

Q Ergo more important to abide by this rule. Therefore more important to abide by this rule, assemble some materials so -

A well, it's not a rule. It's a policy.

Q A Right, okay. But policies are to be ignored? No. But the policy says:

The investigator should firstly consider concentrating his efforts on examining. I approach the - the approach that took was the one that I thought was the most expedient.

Q Convenient too?

A In what way?

Q Well, it's very expedient, let's use your word to go to the taxpayer first, isn't it? Provide...

A Expedient, of course. [Emphasis Added]

Transcript, Sept 17/98, Bourque, page 10 lines 20-47, page 11 lines 1-11.

Q --- even as of the spring of 1997 when you were still in SI did you believe that you could conduct yourself the way you did in this case?

A I had no idea there was going to be this kind of problem in this case. I believed that before I had reasonable and probable grounds to believe that a fraud had been committed that I was - had the powers of S.231. I'm an officer of the department and can audit a tax - you know, and know the use of the word "audit" is causing a lot of confusion, but what I mean by that is that I can ask taxpayers to give me the documents that underlie the claims that they've made on their tax returns and I don't have to warn them, give them the Charter warning and they don't have the right to remain silence (sic) and all of that.

Transcript, Sept. 17/98, Bourque, page 24 lines 42 - 47, page 25 lines 1-9

Q --- And when you're in SI you're different from an auditor. The purpose of your inquiry is to discharge your primary function which is, in the words of 11(10) 1.1(1)(d) that his Honour has referred you to, to pursue the criminal prosecution of individuals involved in income tax offences. That's what your case and primary function is sir. That's why you are a person in authority. Do you understand that?

A I understand that.

Transcript, Sept 17/98, Bourque, page 26 lines 11-19.

Q --- You have the files October 18th. You've got them for a couple of weeks. You don't make the inquiries that I reviewed with you this morning, correct?

A Correct.

Q Instead you decide to go for the taxpayers to interview the taxpayers, correct?

A Correct.

Q And for all the reasons you've given you decided not to warn them.

A I never had an opportunity to make the decision -- I've never interviewed any of the individuals.

Transcript, Sept. 17/98, Bourque, page 30 lines 28-38

Had they agreed to an interview I would have met with them, told them who I was, that I was with Special Investigations [re the Board and donations that they claimed] and wouldn't have given them a Charter warning.

Transcript, Sept 17/98, Bourque, page 30, lines 46-47, page 31, lines 1-4.

Unless they started - yes at the - and then if they incriminated, if they said something incriminating - I would have stopped them there and given them the charter warning. --I can't do it before.

Q A -why-? Because we haven't achieved that reasonable and probable grounds to believe an offence has been committed.

Q No, you can always do it, you can adopt a position of conservatism but there's a down side to it, isn't there?

- the people might not admit something.

A I agree with that, your logic there. You're right.

Transcript, Sept 17/98, Bourque, page 32, lines 11-27.

Q You spoke to [the Bylsma's] on November 2 and you told them you were from the audit division. Why?

A I told them I was from the audit division so that they would agree to an interview with me and I would have told them Special Investigations when I was face-to-face with them. That was my intention, conscious and deliberate.

Q To refer yourself as from audit division.

A Yes.

Q --- would you go to their home?

A Yes.

Q --- you'd then reveal

A I would

Q --- that you're from SI.

A Yes.

Q A That's your current evidence, anyway? Yes. And that's as I said, was a conscious and deliberate thing that I did there.

Q A --- why did you do that consciously? To get them to agree to the interview and then once I'm there tell them that I was from investigations. Basically to get them to agree to the interview.

Q --- and why do you want them to agree to the interview?

A So that I can interview them, ask them questions.

Transcript, Sept. 17/98, Bourque, page 33, lines 42-47; page 34 lines 1, 5 & 6, 19-38.

Q --- By telling them that you were from Audit instead of SI it would get them to agree to the interview. Right?

A SI is part of the audit division, so I didn't feel that I was lying to them.

Q A Would you agree - that you were misleading them? Yes.

Transcript, Sept 17/98, Bourque, page 35 lines 2-8, 13-17.

Q Why not tell them "Look my name is Dan Bourque. I'm from Special Investigations Bureau of Revenue Canada. I'd like to interview you about this donation."

Q Why not tell them that on the 2nd of November at 1:40?

A Because I thought that they might not agree to the interview. If you did it that way, then I felt it was unlikely that they would agree to the interview.

Q - because that's what people generally do. - they don't agree to the interview.

A Yes

Q They call their lawyer and say "I've had a Revenue Canada police officer call me and tell me what my rights are." Right?

A Right.

Transcript, Sept 17/98, Bourque, page 37, lines 4-17 & 21-39.

Q So you would agree with me that you then therefore on the 15th of November 1993 misled Mr. Jones to get the interview?

A Yes.

Transcript, Sept 17/98, Bourque, page 42, lines 40-43.

Q - You just were going to stick to this course you were on of misleading the taxpayer and misleading him - lawyer, Mr. Jones, in order to get them to agree to a meeting, right?

A Right.

Transcript, Sept 17/98, Bourque, page 43, lines 12-16.

Q --- (Jones) wrote back a letter that must have pleased you, correct?

A No, it didn't please me. I wanted an interview with the taxpayers. I didn't want Mr. Jones to interject himself between myself and the taxpayers. I mean it was okay --- I didn't mind that he would be there but I didn't want to - he still seems to be on this with - with this idea of the questions in writing.

Q Yes

A And so it wasn't what I wanted

Q A --- tell me why. --- you might never get to the end of it. It's not a good way to approach an interview

Q It's not expedient?

A It's not expedient. [Emphasis Added]

Transcript, Sept 17/98, Bourque, page 43, line 42; page 44, lines 3 to 19.

REJECTION OF BOURQUE'S EVIDENCE

26 I reject Bourque's claim that he was carrying out an administrative function as an auditor and find as a fact that he was engaged in a criminal investigation. In characterizing his initial course of action as "most expedient" he revealed himself to be an investigator who would ignore the internal directives and policy of Revenue Canada. His adoption of expedience was intended to secure for Revenue Canada the benefits of unfettered interviews with suspects and the use of demands under section 231 of the Income Tax Act. To achieve this advantage Bourque had to be deceptive and misleading throughout the investigation, and deceptive and misleading in giving in evidence the assertion that he was only doing an audit. In his capacity as an officer of Revenue Canada and as a person in authority he showed disdain for the Charter.

27 I accept and adopt the defendant's argument that the conduct of Bourque was contrary to law and explicit policy which is ipso facto conduct in bad faith.

EVIDENCE OF GEORGE JONES - LAWYER FOR TAXPAYERS

28 George Jones, a Victoria lawyer for almost 40 years, represented the Sims group and Viccars during Bourque's investigation. He impressed me as a man of integrity who testified honestly and frankly about his involvement in this case.

29 On November 2, 1993 Bourque made his first contact with Feike Bylsma, one of the Sim group of taxpayers. On November 15, 1993, at the request of Bylsma, Bourque contacted George Jones who quite properly took the position that he would speak for his clients and he produced authorizations from his clients to enable this to be done. He did this because of Bourque's adamant assertions that he was performing an audit and not investigating a suspected fraud.

Q Now, this memo of Mr. Bourque's November 15, 1993, there's nothing here to indicate anything about whether this is a civil or a criminal matter. Do you recall when you discussed this with Mr. Bourque, discussed these matters with him on November 15, 1993, do you recall did he identify himself as being from Special Investigations, did he say it was an investigation versus an audit, or whether it was - there was anything criminal in relation to

the meetings and questions that he wanted to have?
A Oh - oh, definitely not. If he had, we wouldn't even have been having conversations.

Transcript, Sept. 30/98, Jones, page 11 lines 14-37.

30 By letters dated November 30, 1993 Bourque wrote to all five of the Sim group stating that their tax returns were under review "and an auditor from this office will contact you -- to examine your records and discuss a charitable donation -" The letters were sent to Jones by his clients and he gave the following testimony about Bourque's action.

Q Now, you were provided, I take it, with these letters, the one to Romanuk and Roberts and Bylsma.

A Yes, I - I would have received those from either the - either Romanuk and directly or through Mr. Roberts.

Q Now, did you draw any conclusions or were you - make any inferences as to the way this letter was drafted as to what was going on here? And in particular, D Bourque, audit 447-20, did that have any significance to you?

A Well, actually, that's the only part I read. Perhaps I was a bit negligent. I don't know. That's what - that's what's - that - that's what this came out and hit me in - in the face as audit, and from conversations that I had then and subsequently with Mr. Bourque by phone, I understood that this was an audit and he was an auditor.

Q But the opening line here:

Your income tax return is currently under review and auditor from this office will contact you. The purpose is to examine your records and discuss a charitable donation.

Now, were you thinking that this was an audit or a criminal investigation, or what?
A I quite frankly, Your Honour, was suspicious about Mr. Bourque. He was - my clients had relayed certain matters to me that made me suspicious of him. I found him to be very aggressive in - in my conversations with him. He became very upset with me when I said that I was not going to let my clients meet with him and be cross-examined by him. My clients had complained about his conduct. And he - it was quite obvious then that he disliked me intensely and disliked the attitude I was taking. And so I was - I - I guess was sort of schizophrenic, I mean, and I couldn't tell, I wasn't sure whether it was really an audit or it was a special Investigations file, and yet every indication from him always remained that

this was an Audit file, solely an Audit file.

Q Well, if you go to tab 14, what we have there is a letter from Mr. Bourque to you, December 2, 1993. Do you see there again in the right-hand corner he identifies himself as D. Bourque, audit 447-20?

A Yes.

Q And he says there:

As we discussed by telephone today, I would like to meet with Feike Bylsma and Margaret Bylsma or one of them at your office. Purpose is to discuss the charitable donation. Have records available including appraisals and cancelled cheques, et cetera.

Again, in reference to - in looking at this letter and having regard to what you said about the telephone call with him, is that still your evidence that that was the impression that you had, or that was in specific what he told you, that this was an audit?

A Absolutely, Your Honour. There's just no question. When I would speak to Mr. Bourque on the phone about this, that - there - that he couldn't understand why I was taking the position I was - was in, and was upset by it because as far as he was concerned, this was just merely an audit. And my position was I guess I had to take him, you know, I was suspicious but I had to take these assurances as being gospel because he, you know, I mean, I had no reason to really disbelieve him except my own suspicion.

Transcript, Sept. 30/98, Jones, page 13 lines 20-47, page 14 lines 1-42.

31 Jones testimony gives graphic outline to the duplicity of Bourque.

BOURQUE'S CONTACT WITH REVENUE CANADA AUDITOR LETKEMAN

32 Bourque engaged in calculated deception of the taxpayers and their lawyer when he attempted to trick them into believing that all they were being subjected to was a civil audit. His actual state of mind and awareness of the Board's concern over fraud is inevitably evidenced through his contact with David Letkeman, a business auditor in Victoria office of Revenue Canada on October 1, 1993 and his subsequent discussion with Cowley on October 4th. Contact with Letkeman continued into January 1994.

Q That's the first thing that he communicated to you, that he, as a business auditor, felt that

A he had to talk to the chief of Special Investigations of his district office about the matter?
A Yes.

Q Correct?

A Yes.

Q In consequence of what he had been advised by Ms. Lismer that the Board believed that there were significant discrepancies between the values claimed by the taxpayers and the values placed on the artwork by the Board, right?

A Yes. So I assume that's what he wanted to discuss with Ed Toth.

Q Why would he, Mr. Leckeman, go to Mr. Toth, I mean as you understood it on the 1st of October?

A I don't know.

Q What inference did you draw from the fact that Mr. Letkeman went to Mr. Toth? A Mr. Letkeman must have thought that there was an indicator of fraud there.

Transcript, Sept 16/98, Bourque, page 81 lines 13-32.

Q Yes. Well, gee, then, not only has the Board referred the file to SI, Cowley's accepted it, Jamieson's accepted the assignment from Cowley, it looks like Leckeman and Toth are also on this same wavelength, it's not an SI file for criminal investigation?

A That there's people who have suspicions that - of these transactions, suspicions about whether or not there's fraud in the transactions.

Q Yes. So you had all that in mind on the 4th of October when you spoke to Pat Cowley, right, at tab 7?

A I called Cowley to ask him what it was all about.

Q Oh. So gee, that's interesting. In your internal correspondence within Revenue Canada on December 3rd, 1993 at tab 15, you accurately describe yourself as from Group 447 - 20, correct?

A Correct.

Q Gee, I thought Mr. Jamieson had written this, but you did. You told Mr. Beach in Toronto District Office, we're conducting an investigation. It's amazing, you know, you don't really refer to it being an audit.

A That's right.

Q No, we're conducting an investigation, a criminal investigation, right?

A An investigation. I felt that the investigation became a criminal investigation once you had reasonable grounds to believe that fraud had been committed and before that time, an investigation that's -

Q A Well, I know that that's your position, but - I was an investigator in Special Investigations.

Q A You didn't-I wrote him a memo saying I was doing an audit, it would cause confusion just like the confusion in the earlier correspondence we discussed to the taxpayers.

Q A It would cause confusion even within Revenue Canada? Sure.

Q It would even mislead the Toronto District Office too?

A yes.

Q Because I take it from what you've just said when they received a memo from you saying we are conducting an investigation, you believed that they would believe that it was a criminal investigation because it's a term of art, investigation, right?

A Right.

Q If you'd have put down, we are conducting an audit into the income tax affairs of, as you've just indicated, that would mislead Mr. Beach, he'd say, well, why, wait a minute. Rod Jamieson knows that we don't do audits. What is he talking about. That would confuse everybody, right?

A Correct.

Transcript, Sept 16/98, Bourque, page 81 lines 13-32, page 83 lines 43-47, page 84 lines 1-6, page 85 lines 4-42.

33 In December 1993 and into January 1994 Bourque continued with the subterfuge that he was only doing an audit and when faced with Jones' growing alarm he gave specious assurances to Jones that he was not conducting a criminal investigation.

Q Well, there's the December 9 Bourque memo that we just referred to, and I think you said this, and there's some evidence to indicate that you were having discussions with Mr. Bourque from time to time over the phone during this period of time, and in particular in the first week of January, 1994; in other words, two or three weeks prior to the January 25 meeting; is that correct?

A That's correct, Your Honour.

Q And in those conversations did Mr. Bourque maintain the same position with you?

A Absolutely, Your Honour

Q So if he hadn't, if he had told you that this was a criminal investigation, would you have allowed the meeting to have taken place on January 25 with Mr. Roberts, Mr. Bourque, and Mr. Taylor, the accountant.

A Never, Your Honour.

Transcript, Sept. 30/98, Jones, page 19 lines 1-17

MEETING AT JONES OFFICE - JANUARY 25, 1994

34 At the meeting on January 25, 1994 in Jones' office, Bourque was to hear Roberts' statement and when he was perceived by Jones to be cross-examining Roberts the meeting ended. In the aftermath, Jones continued to seek assurance from Bourque that Revenue Canada did not have in its possession any evidence that would indicate that fraud was involved. Bourque replied by letter dated January 31, 1994, coupling himself with his supervisor, Grant Cowan, in stating that "... we do not at this time have grounds to believe that an offence has been committed." [Emphasis Added]

"Thank you for meeting with me on January 25, 1994 and providing further documents relating to the donation of Frederick Brown artworks by your above noted clients. I can confirm that, as I told you in December, 1993 and as further stated by my supervisor Grant Cowan in a telephone conversation with you, we do not at this time have grounds to believe that an offence has been committed. I have not come to any conclusions about the further documents that were provided and will be continuing my review of this matter. We would certainly appreciate your clients' future cooperation with us."

Full text of Exhibit 127.22

DEMANDS UNDER SECTION 231

35 On February 25, 1994 Bourque and Cowan caused demands under section 231 of the Income Tax Act to be served on the Sims group of taxpayers and Viccars. When Jones demanded an explanation, Cowan wrote to him on April 21, 1994 (Ex. 127.32) in part stating:

"... one of my main concerns on this file has been that our work be completed as quickly as possible." [Emphasis Added]

"...I felt it necessary to establish a legal deadline for the production of all documents, and accordingly requirement letters were sent relating to documents alone."

36 Cowan alluded to Bourque formulating questions to be put to Jones' clients after review of documents.

37 Bourque testified that at the time the demands were issued, he and Cowan were of the view that the civil audit powers were still available because they did not have reasonable grounds to believe a fraud had been committed, and he assumed that everyone in the office would have done the same thing and would have been of the same view that section 231 compulsion could be used during a preliminary investigation.

38 Bourque testified that the documents he received from the IRS on December 28, 1995 provided him with information that gave him reasonable and probable grounds to believe that Viccars had committed an offence. Fleming nevertheless proceeded to issue a demand on January 31, 1996 seeking records held by Viccars.

CONCLUSION OF THE COURT - AUDIT vs. INVESTIGATION

39 The issuing of Demands on February 25, 1994, was to further the investigation of a suspected scam by the Sim group. When Bourque testified that since no audit had been done, and since he knew nothing of the Board's suspicions, and that he therefore was a special investigator doing a benign audit, he was being untruthful. He was using that which he perceived was a gray area in the law and in Revenue Canada policy to conscript the taxpayers and delve into their minds. Cowan aided and abetted him.

40 I conclude that the suspicions of the Board, as communicated to Revenue Canada, were reasonably held; that the reasonable suspicions of the Board were known to Cowley, in turn passed on to Jamieson, to Cowan and, finally, to Bourque. I am further satisfied that to avoid the singular policy of Revenue Canada requiring investigators to comply with our supreme law, Bourque and Cowan made a determination to use the charade of a so-called audit to avoid a truthful disclosure of their purpose, that being to investigate a reasonable suspicion of fraud; and that they were mindful at all times that to inform a citizen that they were conducting a criminal investigation (even if in the preliminary stage) entitling the citizen to remain silent and consult counsel, then they would not get a confession. Audit became the watchword. Expedience was a polite way of applying the discredited notion that the end justifies the means.

41 The referral by the Board had the same consequence as a referral under a T-134 by an auditor in the audit section. It burdened Special Investigations with a case that if not referred back at the outset, became an ongoing criminal investigation which required concomitant involvement of

section 7 of the Charter of Rights and meaningful steps to ensure that the specific guaranteed legal rights be afforded both for the immediate exigencies confronting the taxpayer and those which would probably occur.

42 It was established in evidence that members of Special Investigations in Vancouver occupied an exclusive area, separated from the audit section. They were also separated by the unique status in law as persons in authority, the policy of Revenue Canada and decisions of the Courts.

43 The pretense of an audit practiced on the Sim group, Jones and Viccars by Bourque and Cowan, did not allow them to shed the mantle of investigator and person in authority. Equally untenable was Bourque's attempt under oath to justify his procedure by the claims that he wore two hats, one as an auditor and another as an investigator. It is beyond doubt that at the very beginning Bourque and Cowan could have disclosed their true purpose and the true nature of the referral from the Board and used audit techniques and procedures as part of the investigation. Necessarily, this would have denied them the use of the compulsion of demands under section 231 and interrogation of the taxpayers.

APPLICATION FOR SEARCH WARRANTS - EVIDENCE OF BOURQUE AND COWLEY

44 It must be concluded that Bourque and Cowan were completely aware of Revenue Canada policy requiring a black and white distinction between an audit administrative function and a criminal investigative function. In dealing with the Sim group, Viccars and Jones, under the guise of an audit, Bourque used deception and only disclosed as much of the truth as would serve his purpose. The following series of answers reveals the way he used the truth, in the investigation and in applying for search warrants.

THE COURT: Yes. Well if Walden is saying then that his interest was continuing and so was the Board's that they had not made a determination with respect to fair market value and were going to give the University of Lethbridge an opportunity to do so, the Board was fully capable of doing what it was specially created for with the qualifications that Walden had. He didn't need any help from Revenue Canada to make a determination. So what was Revenue Canada doing with it? Since when does the Cultural Review Board need Special Investigations to do an audit when they're the ones who know what art's all about?

MR. MARTIN:

Q Can you answer His Honour's question?

A I - no, I don't know.

Q A Well, you don't know. I can suspect that in this situation they had bills of sale that were dated almost concurrently with the time of the donation and so they were in a difficult position to refute that the fair market value wasn't the one shown on the bills of sale. The best indicator of fair market value at a given time is the actual sale price.

Q Therefore-

THE COURT: I suppose there's always the possibility if the fair market value isn't established that there's a fraud involved. Only a possibility maybe but nevertheless it's there.

A I think that's what rose their - well, they had suspicions.

THE COURT: And so did you, right?

A Yes.

THE COURT: But you never disclosed to that anyone, up to the date we've reached.

A My suspicions?

THE COURT: Yes.

A I didn't disclose it to any of the individuals involved, that's correct.

Transcript, Sept 17/98, Bourque, page 71 lines 11 - 46

Q Why didn't you tell these people that the Board was suspicious and you were carrying out your duty to investigate criminal offences?

A I told them that the Cultural Review Board had sought our assistance in examining the transaction. It's as close as you can get, I think, to telling them that the Review Board had suspicions or problems with the transaction but I didn't use that word. I didn't say, "They're suspicious."

Q Give as much information as you can claim is literally true but don't tell them the substance of the situation. It's literally true that SI is part of audit. Tell literal but not substantive truth, correct? Get them into the interview, correct? Literal but not substantive truth, correct?

A Well, it was all true, what I told them.

Q Well

THE COURT: The definition you're both using is whether the truth stands alone or whether it should have that old phrase, the truth, the whole truth and nothing but the truth. The whole truth is more important than some of the truth.

MR. MARTIN: Yes.

Q Do you agree with that, sir?

A Yes.

Q That as a public official discharging your duties. As you agreed on the very first day of our discussion about this matter, that you had a duty to tell the person that you were dealing with what your purpose was. To use the words that I used the other day, when you approached a citizen that your demands for information was transparent as to investigative purpose and disclose the evidentiary - intended evidentiary use of the information you were going to obtain. That's His Honour's dominant point, I think, that he's asking you to respond to and that I'm asking you to respond to and that I'm asking you to respond to. I guess I have your answers.

A The - I agree with His Honour that it was the truth but it fell short of the whole truth.

Transcript, Sept 17/98, Bourque, page 74, lines 12-47, page 75 lines 1 & 2.

45 After using the compulsion of notices under section 231.2(1)(b) of the Income Tax Act on February 25, 1994 Bourque continued his investigation. In May Bourque went to the University of Lethbridge with Brian Rowden, a special investigator from the Victoria office, where they met the director of its Art Gallery, Jeffrey Spalding, who provided copies of documents and answered questions put to him by the investigators. Of significance to Bourque were the Deeds of Gift which were submitted by the Sim group with their 1991 Tax Returns and the subsequent correspondence of the University of Lethbridge evidencing enclosure of Deeds of Gift in 1992 and 1993. Bourque described his reaction to this discrepancy:

Each of the Deeds of Gift that were filed with the tax returns is dated in December of 1991. So I couldn't understand what was going on with this correspondence. Why was she sending Deeds of Gift in 1992 and again in 1993 when these deeds are dated in 1991? So obviously they'd been backdated, but why? I didn't know whether there'd been a mistake made on the original Deeds of Gift just to formalize this donation. And I discussed that with Grant Cowan and we couldn't really understand it.

So later on, in or about the end of October I was going through the documents again entering them in a database that I had prepared so I would be able to sort all the documents and organize them by date and by source. So I had a source code indicating where each document came from and then I could use that to sort the documents by source and also there's date field so I could sort the documents by date and source and organize a chronology in that way.

So anyway, I was doing that and I was looking at these letters and trying to understand them and what they meant and I went into Grant and I said "what about these letters?" And he said "Well, we talked about that and we couldn't figure it out." Then he came out to my desk and he sat down and we were looking at one of the tax returns of the deed of gift and I'm looking at it and they look a little peculiar because you can see that the typeface is different in different areas and you can see when you have whited something out and then photocopied it. Often some of the ink bleeds and through that you see these little speckles on there. So I was looking at that and then it just popped into my head that the documents were fakes and Grant looked at me and said "well, get one of the other ones."

And apparently he had been involved in a tax case where there -- some French individual did something similar. So he took the two document, put one over the other, held them up to the light and the signatures of Pam Clark and Howard Tenant and the other items on these things matched exactly which is very unlikely unless they came from the same document. And so that was the day that we realized that these documents were potentially fraudulent documents and that we should go back to the University of Lethbridge and ask Pam Clark about them." (Transcript. V.9, P. 6-8)

Transcript, Sept 24/98, Bourque, page 7 lines 24-47, page 8 lines 1-10.

46 Bourque and Cowan went again to the University of Lethbridge and conducted interviews with Pam Clark and Howard Tenant. Clark told Bourque she did not know how her signature came to be on the Deeds of Gift filed with the income tax returns. He was also told by the President's secretary that there was no record of these gifts having been made on the date shown on the Deeds.

47 It was at this time that Bourque claimed that he had reasonable and probable grounds to believe that Roberts and the other members of the Sim group had committed an offence.

48 Exhibit 127, a thirty-three-page information to obtain a search warrant was sworn by Bourque

on March 29, 1995 before Mr. Justice Hall and on April 25, 1995 search Warrants for 15 locations were obtained and executed. The Crown seeks to tender evidence from only six of these locations, the Bylsma residence, the University of Lethbridge, and accountants who represented the Bylsma's Sim and Romanuk.

49 In the Information sworn March 29, 1995, Bourque alleged that the Sim group that is David G. Roberts Fred, W. Romanuk, Feike Bylsma, Margaret Bylsma and Gordon T. Sim had committed offences under sections 239(1)(a) and 239(1)(b) of the Income Tax Act of filing a false document and evading taxes by claiming a false deduction. Notwithstanding Bourque's allegations, only one of the five taxpayers was subsequently charged with an offence.

50 In June 1995 Christopher Fleming, a senior member of the Vancouver office, assumed responsibility for the Sim group file and ultimately, on February 24, 1997, Fleming swore an Information charging only Roberts and Viccars with offences under section 239 of the Act. In Roberts' case the Thrust of the charge before the Court is that between December 31, 1990 and May 1, 1992, he evaded compliance with the Act by using a false Deed of Gift relied upon by each of the Sim group. In Viccars' case, that on August 11, 1993, he evaded compliance with the Act by mailing a false document to the Board to support the application for issuance of a Cultural Property Income Tax Certificate for each of the Sim group.

51 Having had the benefit of extensive and detailed examination of Bourque, it can be determined whether he intended to mislead Mr. Justice Hall as he did the taxpayers and Jones. In making this finding I will adopt the words of Madame Justice Southin in *R. v. Dellapenna* (1995) 62 B.C.A.C. 32, 31 C.R.R. (2d) 1. When considering a finding by a trial judge that the informant did not intentionally mislead Madame Justice Southin, stated:

"[37] By that, I take it the learned Judge meant that the informant did not swear this information saying to himself, "I am going to tell the justice of the peace a pack of lies." But the informant plainly did not say to himself, "Have I got this right" Have I correctly set out what I've done, what I've seen, what I've been told, in a manner that does not give a false impression?"

52 Paragraph two of the Information to obtain search warrants reads:

"In the course of his enquiries on or about October 1, 1993, the Informant was provided with copies of facsimile transmissions which were addressed to Pat Cowley, (hereinafter referred to as Cowley), a Senior Investigations Officer with the Department, attached to the Audit Technical Support Division, Head Office, Ottawa, Ontario, and which were addressed from David Walden, (hereinafter referred to as Walden), Secretary to the Board of the CCPERB, and on October 4, 1993 the Informant had a telephone conversation with Cowley. As a result of the aforementioned enquiries of October 1, 1993 and October 4, 1993, the Informant was informed of the following, which information the Informant does

verily believe to be true:

- (a) that Walden had been in contact with Cowley and expressed concern about a transaction involving the purchase and donation of the artwork of Frederick James Brown, which the CCPERB had been asked to certify for income tax purposes;
- (b) that the nature of Walden's concerns were:
 - i) that the content and format of the Bill of Sale issued by the artist to the purchasers of the artwork was unusual; and
 - ii) that the amounts paid for the artwork were more than would normally be paid for Frederick James Brown's artwork; and
- (c) that the CCPERB wanted Revenue Canada to look into the transaction and provide them with additional information about the transaction."

53 It was essential that Bourque tell Mr. Justice Hall who and what he was, what his function had been in relation to the Sim group, and what information had been given to him at the outset. Bourque swore that he was in the course of his "enquiries" on October 1, 1993 when he first received information from Cowley. It was misleading for Bourque to use the word "enquiry", which falls into a group of similar words, i.e., inquisition, investigation, inquest, probe, research and audit. The word "enquiries" was used in all paragraphs of the information in which he described the details of his investigation and this, together with the fact that he disclosed his use of compulsion under s. 231, was to persuade the Justice that enquiry and audit were synonymous and that he had not been conducting a criminal investigation. It was misleading and the purpose was to conceal that he had intentionally denied the Sim group and Viccars their right to refuse to comply and be interrogated.

54 In paragraph 2 of his Information, Bourque informs the Justice of "a transaction involving the purchase and donation of artwork" and the Board's expressed concern over it. He states his source as Cowley and a telephone conversation with Cowley on October 4, 1993 in which he was told of Walden's referral of the matter to Special Investigations. Bourque omitted any reference to the direct telephone conversation between himself and Walden that very same day, and subsequently on October 7th and, this renders sub paragraph 2(a) a half-truth and misleading.

Q Mr. Walden says, well, he spoke to a number of people about this matter. He spoke to Doris Walsh in the Charities Department on the 21st of October, 1993 and he says he told her that he was concerned about a case that he felt was fraudulent, but needs help in proving. He told her that he was suspicious - testified that he told her that he was suspicious that the

amounts shown on the bills of sale were greatly inflated, based on what he knows of this particular artist's work and usual selling prices. And he testified that he told her, on the 21st of September, that he, the Board, had received notarized copies of the bill of sale and it was getting to the point where the Board would have to allow the applications unless they could dig up evidence to discredit the claim. Did he tell you all of those things?

A I don't recall him telling me that.

Q He also told us that he told Mr. Cowley those things. You're sure he didn't tell you these things?

A I don't have a recollection of him telling me those things.

Q Because when you contacted him, you were the person who was going to do the investigation. You identified yourself as the investigator, correct?

A Yes.

Q Would you agree with me that if he told somebody in Charities about it while seeking the right person to talk to, and then he told Mr. Cowley about it, it's probable that when the investigator who's going to actually do the work called, he'd tell him about it, you?

A I don't recall him saying that to me.

Q Would you agree it's probable he said that to you? Because after all, you were the man that was going to do the work.

A Mm-hmm.

Q You were the essential person at the end of the day, through the referral process, that needed to know what he knew, correct?

A Well, if he'd have said that to me, I'd think that it would have - I would have had - felt some urgency to get things done quickly and I don't recall ever feeling that way about it, or that there was some impending deadline that I had to meet. Like you just said that he told them that unless he got something to discredit it, he would have to approve it, and just never felt that sort of pressure throughout this case and so I don't recollect.

Q Well, maybe he didn't tell you that aspect of it, but did he tell you? And I'm not conceding that he didn't, but for the moment, did he tell you that the Board was concerned about a case that was fraudulent and needs help proving?

A I don't recall him using the word "fraudulent," but I'll agree that he may have.

Q Well, did he use the words that the Board suspected a scam?

A He might have.

Transcript, Sept 16/98, Bourque, page 88 lines 21-47, page 89 lines 1-30.

55 In this portion of this testimony Bourque resorted to the "I don't recall" syndrome to avoid telling the truth.

56 Paragraph 2(b) is a diminution of Walden's referral and pales into insignificance when placed next to the scam memo.

57 In paragraph 2(c) Bourque uses the vernacular expression "to look into" rather than investigate or audit when referring to Walden's contact with Special Investigations.

58 I conclude that to create a false impression Bourque purposefully omitted reference to his direct discussion with Walden on October 4, 1993 and subsequent contact with him on October 7, 1993 even though he had recorded these calls in memoranda.

59 Cowley's evidence on disclosure in the Information to Obtain a Search Warrant was as follows:

If there's things there that may cause a judge to think [a] second before he will issue the warrant, then we make sure we put it in. because I teach in the course, that's the one thing we stress to them. It has to be positive and negative. There's no such thing as just tainting it so that we make sure we get our search warrant. It's always done on the basis that there has to be total disclosure, whether it's negative for us or not, and then let the judge make the decision as to whether or not they want to issue the warrants.

Transcript, Sept 18, 1998, Cowley, page 6, lines 3-12

60 Bourque admitted to depriving Mr. Justice Hall of the ability to carry out his function properly:

Q You'll agree with me in order to evaluate particularly information coming from Revenue Canada. ... one of the most essential and fundamental facts that they need to know is who you are:

A Yes

Q If his Lordship Mr. Justice Hall did not know who you were he would not be able to evaluate the significance of what is said at the top of page 6:

"the informant acting under the provisions of section 231.1 of the Income Tax Act."

A I agree.

Q And when that's combined with the drumbeat of inquiry, reference to your conduct as an inquiry rather than an investigation, will you agree with me that it conveys the overall impression combined with everything else that is said in the Information that there's just an audit going on and that that's what produced all this information?

A I don't - it may do that.

Q Yes. Will you therefore agree with me that Mr. Justice Hall was thereby deprived of the ability at the most fundamental level of evaluating indeed any of the issues that are now before his Honour?

A Yes

Transcript, Sept 23, 1998, Bourque, p19, lines 9-41

61 Cowley commented on non-disclosure in the Information to Obtain of the type engaged in by Bourque in the following terms:

Q ...if...an investigator had...misled a taxpayer in order to attempt to induce the taxpayer to agree to a face to face meeting with the Investigator, would you expect the investigator who was the deponent of an affidavit to disclose that to the court to whom he applied for search warrant?

A If in fact he had done that, yes, I guess you - I guess you would have to, yes.

Q And in your view, why would you have to do that?

A Because the individual had rights under the Charter and has given statements that they otherwise wouldn't have been required or had no compulsion on themselves to give except for the fact that they're under the assumption that this was an audit process, therefore regulatory and therefore they were required to answer the questions or face sanctions.

Transcript Sept 21, 1998, Cowley, page 29, lines 34-47; page lines 1-16

62 Cowley agreed that the same applied to misleading a taxpayer's lawyer.

PROSECUTION REPORT - EVIDENCE OF FLEMING

63 Christopher Fleming ("Fleming") became Bourque's supervisor in June 1995, and in September 1996 took on the "primary responsibility for completing the file." Fleming discussed the Sim group file with Bourque prior to September 1996. This was in the same period when Fleming was preparing the prosecution report, Exhibit 127.98. He was also in communication with counsel at the Department of Justice. The discussions concerned the evidentiary problem of audit vs. investigation. In this regard he testified:

Q There's no change, okay. So can I just step back from the detail here and put myself in your shoes on October 6, 1996 when you sent this letter to Mr. Stokes. You by that stage had realized there's an evidentiary problem because you were surfacing it - intending to surface it in your discussions with Mr. Stokes?

A That's a question?

Q Yes.

A Yes, sir.

Q I could say "correct" at the end of each question but it - maybe I'll do that. And that problem you'd thought about over the period of time that you were working up this preliminary or draft prosecution report, right?

A Yes.

Q And did you have discussions with Bourque about it? About this problem?

A Certainly. We discussed the interview that he'd conducted and the use of Requirements

probably numerous times, at various times in the development of the file.

Q A Between September of '95 and September of '96? Yes, we would have discussed it.

Q Numerous times?

A Quite likely, yes.

Q Is that when you sort of had, well a moment one day when you said to yourself, "Gee, you know, we might have a problem here"?

A I don't know if there was ever a point where I said that to myself. In every case that we do looking at the obtaining evidence under circumstances that the Charter would apply to and specifically in situations where there may be a Charter problem with the way we obtained evidence, those would be something we'd be sensitive to and would pay attention to. So in this particular case an interview that had taken place with the taxpayer or Mr. Roberts, rather, and at his lawyer's office in which a caution wasn't administered would have been something that on review we would have looked back on to see whether Mr. Bourque was - was justified in conducting himself in that matter and if not, what were the implications of that.

Q And you approached Mr. Bourque and said, "There may well be some legal problems here. We need to talk about it. What happened?" right"

A Certainly. And it's also quite likely Mr. Bourque would have approached me with - voicing the same concern.

Q When he was briefing you on the file as you were taking it over?

A Correct. And - yes, as I became involved with it.

Q Did he tell you, "Look," you know, as you start to get on top of the file once you assumed your role as his team supervisor in June of 1995 that, you know, "there may be some problems on this file."

A He was very-

Q A First taking over as his team supervisor? yes, he was certainly concerned about the initial interview that had taken place and whether the information that he'd obtained during that interview was ultimately useable. They had relied on the statements that had been made and subsequently on documents provided in order to obtain the search warrants. It was a concern of his. It was certainly a concern of mine. After extensive discussions at various times with Mr. Bourque I was of the opinion that he had been performing a purely administrative function at that time, that he had no suspicion of an offence taking place.

Q And just staying with that for a moment. His concern was I guess what yours became, "I interviewed Roberts, I didn't warn him in January of '94", right?

A Yes.

Q "Obtained information from him. In part based on that information I then went out and did Requirements," right?

A Correct.

Q And obtained a bunch more information there and then used the combined information and perhaps other pieces, but that became the essence of the search warrant which speaks for itself. I mean, it's structured around the information he obtained through the interview and the demand, right?

A Yes, it certainly does.

Q So as of June of '95 he was concerned, he communicated that to you, that that original not warning Mr. Roberts could kind of pollute the whole - the admissibility of all the evidence?

A Yes, it was - it was certainly a subject that he was aware of and he was sensitive to and drew it to my attention, primarily because I may not have been aware of it.

Q And the Special Investigations conducts investigations and the reason you identified a problem in June of 1995 is you know that in - that Special Investigations doesn't conduct audits, right?

A I disagree.

Q Okay.

THE COURT: Well, you'd agree though that special Investigations ought not to be doing an investigation and calling it an audit?

A Yes.

THE COURT: You'd agree with that, emphatically?

A Yes, Your Honour. I would emphatically agree with that.

MR. MARTIN: Okay.

THE COURT: Right. And you would not condone any investigator calling what an investigation was an audit, or what amounted to an investigation an audit?

A Yes, and holding himself out to be an auditor when he was an investigator.

Transcript, Sept 24/98, page 71 lines 18-40, page 72 lines 11-27, page 73 lines 19-43, page 74 lines 9-30, page 78 lines 30-47

64 In the prosecution report Fleming described the background of this case as follows:

In September 1993 the Canadian Cultural Property Export Review Board requested that Revenue Canada review a proposed donation of artwork by a artist named Frederick Brown to the University of Lethbridge. A specific concern was raised in regard to the valuation claimed for the donation.

The file was assigned to an investigator in the Vancouver district Office as the taxpayers involved all appeared to be resident in this area. A criminal investigation was not considered to have been commenced at that time. Subsequently, the investigator became concerned about discrepancies in the documentation submitted by the taxpayers to claim the non-refundable tax credits. A criminal investigation commenced in October 1994. Search Warrants were issued and executed in April 1995 at numerous locations.

65 When Fleming said that a criminal investigation had not commenced until October 1994 he was being deceptive. He was adopting Bourque's specious principle in testifying that "until he determined that there was evidence of fraud ... underlying a taxation issue " ... he was ... "conducting an administrative inquiry... servicing a lead from the Board or one of the miscellaneous other duties that ... investigators were expected to perform." Fleming's attempt under oath to justify what Bourque had done was a calculated use of equivocation.

66 I accept the Defence argument that Fleming "had three options in respect of disclosure of problems with the Crown's case when preparing a prosecution report. The first option is full disclosure, the second is not to mention the issue at all and the third option is to describe the issue in a manner that has a tendency to mislead." Fleming exercised the third option.

Q You knew at the time that you issued this report in February of 1997 and then disclosed it shortly thereafter, after the charges were laid on the 26 of February that one of the issues discussed in the case law that by '97 had evolved even further was this whole audit versus investigation issue, right?

A Correct. And that is the reason that paragraph is included in the prosecution report.

Q And it's your evidence then, that this makes full disclosure to the defence of this problem

- that you've identified in June of '95?
- A No, I don't think that represents full disclosure to the defence of the problem, no.
- Q No. It doesn't at all, does it? In fact, depending on the sophistication of the reader - it turned out I read this and Mr. Sturrock read it. But it might have been just a real estate lawyer or a criminal lawyer not familiar with the tax field, right?
- A I'm sure it could have been, yes.
- Q Yes, and depending on the sophistication of the reader, they may or may not really pick up on what you're saying, right?
- A I guess again, it depends on the sophistication of the reader, yes.
- Q Yes. And really if it did anything it would be worded in such a way that it might in fact even deflect anybody from that issue, because according to that there was no criminal investigation until October of '94, right?
- A Yes. That's what I'm saying.

Transcript, Sept 24/98, Fleming, page 82 lines 14-42

67 I conclude that Fleming's description of the origin of this case and its conduct by Bourque is both inadequate, inaccurate and crafted to deflect attention from the audit vs. investigation issue.

REVENUE CANADA POLICY - INVESTIGATIONS

68 Exhibit 130(3) is a copy of the portion of Revenue Canada's operations manual for special Investigations in effect in October 1992. It states:

1111 Objective and Goals

- (1) The objective of Special Investigations is to plan and administer criminal investigative programs that will provide maximum deterrence to non-compliance by investigating, penalizing and recommending prosecution of significant cases in all categories of taxpayers for deliberate or wilful invasion practices.

69 In "1112 Leads, Case Selection and Determination" it is stated that the success of Special Investigations is dependent on a continuing flow of leads from other sections of Revenue Canada of indications of tax evasion. Tax evasion is defined as it relates to section 239(1) & (2) and it is then stated that "It may be accomplished by one or a series of acts, transactions, schemes, arrangements, or devices, whereby the tax is reduced or completely evaded."

70 There can be no doubt that Special Investigation is a unique branch of Revenue Canada and its investigators might aptly be regarded by the public as tax police. Its members have been properly categorized in law as persons in authority.

71 A relevant portion of Exhibit 130(3) is at pages 11(10)1.1(1) to 11(10)1.1(6) and it is appended. [Editor's note: Revenue Canada Taxation documents are non-displayable.] This portion of the policy deals with interviews with taxpayers during the conduct of an investigation and these must be construed in the context of subsequent memorandums from Revenue Canada, Ottawa dated June 14, 1993, and January 11, 1994, being Exhibit 130(4) and (5) both of which are appended [Editor's note: Revenue Canada Taxation documents are non-displayable]. Also appended [Editor's note: Revenue Canada Taxation documents are non-displayable] is a "communiqu" dated January 29, 1992, Exhibit 130(1), and it clarifies the policy of Revenue Canada in regard to a taxpayer's right to counsel and to remain silent, reaffirms the person in authority status of investigators and it contains the admonition that:

"when the investigator is involved in the review of any taxpayer the caution must be given even if an auditor is carrying out the review on behalf of the investigator. This applies to all interviews."

72 Bourque acknowledged that as criminal tax investigator he was a person in authority. Nevertheless, his view was that in asking for information to carry out his primary function of pursuing criminal prosecutions a caution was not required unless there were reasonable and probable grounds to believe an offence had been committed. He said that this was not just his view, but reflected the information he received from people who had been in Special Investigations virtually their entire careers. As an investigative technique it allowed him to avoid issuing a caution before "hard evidence" was conscripted by claiming there are no grounds until that point in time. A caution given in this manner is perfunctory and superficial. It is also an affront to an investigator's duty to ensure that direct dealings with a taxpayer are abated until the Charter is complied with.

73 Bourque's testimony that judgment must be exercised in determining whether to issue warnings and that Revenue Canada policy in respect of these issues is just a guideline was simply a self serving rationalization that enabled him to ignore policy where compliance might impede expediency.

74 Bourque gave evidence about his conversation on June 29, 1995 with Roberts, which was after the search warrants had been issued, and admitted he did so knowing that criminal investigation had commenced. He confirmed that he telephoned Roberts and tried to set up a meeting and was unsuccessful. He confirmed that he did not caution Roberts at that time, and in fact no caution was ever read to anybody at any time in the course of the entire investigation. This demonstrates open disregard for the policy of ensuring that persons in authority respect the Charter rights of potential targets in an investigation.

75 It is clear that Cowan extended his supervisory role to active participation in the preliminary investigation of the Sim group. This adds significant dimension to what I view as a pernicious

disregard of the necessary separation of the compulsory aspect of the civil audit function of Revenue Canada from the gathering of evidence to support a potential application for judicially authorized intrusion of a taxpayer's records. Cowan participated in and approved of Bourque's expedient of going right at the taxpayers, and when they were rebuffed he countenanced the use of compulsion, the service of demands under section 231. This was a reckless disregard of the duty of an investigator to disclose who he was, what he was investigating (in this case the Board's suspicion of a scam) and the taxpayer's right to counsel, carrying with it the right to refuse to make any response which would include a refusal to comply with section 231 compulsion. The circumstances of this case are inflamed by the duplicity of Bourque, abetted by Cowan, in misinforming George Jones, the lawyer for the Sim group about their purpose which was to interrogate the taxpayers as to their knowledge and state of mind, as Bourque put it to determine if they had mens rea, that being to him the essential ingredient of reasonable and probable grounds.

76 Both Bourque and Cowan turned a blind eye to the fact that as investigators, even at the stage of a preliminary investigation into a reasonable suspicion of fraud, they had no right to disregard the policy of Revenue Canada, and more importantly the constitutional rights of the taxpayer. Exhibit 130(1) was issued on January 29, 1992, and this communiqué had a singular purpose of making clear to all investigators, that they must not deny a taxpayer his/her right to counsel under the Charter of Rights. The second section of the communiqué is headed "AUDIT vs. INVESTIGATION: USE OF CAUTION" and it states in the first two paragraphs, the duty of an investigator.

"The Courts have established that an investigator is a person in authority and that a person under investigation is entitled to the full protection of the Charter. While the department has been successful in defending most challenges under the Charter, investigators must continue to ensure that a taxpayer's rights are not infringed or denied by any action they take or fail to take.

When an investigator is involved in the review of any taxpayer the Caution must be given even if an auditor is carrying out the review on behalf of the investigator. This applies to all interviews."

77 Exhibit 130(2) is a copy of the Caution and the first two paragraphs read:

"You are not obliged to say anything. You have nothing to hope from any promise of favour and nothing to fear from any threat, whether or not you say anything. Anything you do say may be used in evidence.

You have the right to retain and instruct counsel without delay."

EXTENT OF VIOLATION OF POLICY AND THE CHARTER

78 The professed notion of Bourque and Cowan that within the policy of Revenue Canada and outside the embrace of the Charter, they were empowered to carry out a preliminary investigation under the guise of it being an administrative audit and thereby to require a taxpayer to submit to interrogation and later to demands under section 231 is wrong and must be emphatically rejected.

79 At the heart of this false notion was a rampant belief in the Vancouver Section of Special Investigations in 1993 as expressed by Cowan. "... my recollection of the time back in '93, the rules of conducting your review, your audit, or investigation, all hinge on this point in time when you've got reasonable grounds to believe an offence has been committed." (Transcript, Sept 28, page 65, lines 24-28.) What Cowan expressed as to a given point in time relates to a full blown criminal investigation involving the most serious of procedures and that is the application for and execution of search warrants. He and Bourque and the other members of Special Investigations knew full well that they were not auditors performing a benign civil audit function when they were in hand of an A-file. They practiced deception in their interpretation of Revenue Canada policy in pursuing an investigation as a pseudo audit and they set out in giving evidence to practice the same deception in this trial.

80 The following portions of Cowan's testimony reveal the corrupt aspect of the notion that, short of reasonable and probable grounds, they were unconstrained by Policy and unburdened by the Charter.

Q But what I'm trying to establish is that your view of reasonable and probable grounds means something more than suspicion of fraud, there's indicators of fraud, that's not enough reasonable and probable grounds. You've got to have something like you had there, a document that looks like a forgery? That's what I'm calling hard evidence.

A Yeah, that's true, Yeah.

Q So, if we come back to this case, we've looked at some documents. We've seen chief of S.I. has opened a file. We've seen a statistics sheet talking about preliminary investigation from September 27th, 1993. We see in this memo the use of the word "investigation." It's pretty obvious that October 1st, 1993, we've got some suspicions of fraud and it's a preliminary investigation to follow-up on those indicators of fraud?

A Well, we had some suspicions, but we didn't have the test I'd spoke of before.

Q So, you're not at the full-scale investigation, but you are in the preliminary investigation?

A We're in a preliminary stage, yeah.

Q Why do you say preliminary stage and not preliminary investigation?

A Well, maybe we could define what a preliminary investigation is.

Q A Well-My understanding is it's the preliminary stage where you're in between and you're saying am I going to continue the sort of audit functions, so to speak, or is there something that would cause me to think there's grounds to believe an offence has been committed? And that happens within the preliminary stage of the investigation.

Q Okay. So, you're saying that when you're in the preliminary stage of the investigation, I just want to make sure I understand, when you're in the preliminary stage of the investigation you're carrying out an audit to see if there are indicators of fraud, provide you with reasonable and probable grounds to believe an offence has been committed?

A Yeah.

Q That's-

A That sums it up, I think.

Q - your understanding of how it works?

A Yes.

Q This is a November 2nd, 1993 memo to file from Mr. Bourque:

Spoke to Feike Bylsma. Told him that I was with Revenue Canada Taxation Audit Division, and that I wanted to review his 1991 claim for charitable donations, gift to Canada or a province. I stated that I wanted to meet with him to discuss his claim and to review whatever documentation he had underlying that transaction. He stated that he did not have any documentation...

and it goes on.

Now, this indicates that as of November 2nd, '93, after receiving information from the board, Mr. Bourque's next step was to arrange, attempt to arrange a meeting with the donors, correct?

A That's what he says here, yes.

Q And you, as his supervisor, would be aware that that's what he's intending?

A Oh, yes. Yeah, we wanted to contact the taxpayers.

Q So, that's the next step after receiving the information, not to review that information, look for third parties to talk to, but go to the taxpayer?

A Well, I don't remember making that precise decision.

Q A It makes sense, does it? It makes sense, but if other people had been available, or perhaps if other avenues of work had come up, he would have gone down those roads, so to speak, right. But I think it's easiest just to talk to the taxpayers and ask them what's going on.

Q While S.I. is perhaps technically a branch of audit Division, it's misleading to tell someone you're in Audit Division when you're in Special Investigations. Would you agree with Mr. Bourque's comment?

A Well, they wouldn't have known he was with Special Investigations from that.

Q If you were a citizen and you were told by someone that they were with the Audit Division and they were with Special Investigations would you have felt you were misled?

A Yes.

Q Yes.

A Okay.

Q Right now we're at November 2nd, 1993 and at that time, I think you'll agree, the policy was you should identify who you are? That's kind of a basic thing; "I'm S.I."?

A Well, I think the policy was - it's written in there. I'll have to look at the manual, but I think it was if you were asked where you were from you were supposed to explain you were from Special Investigations.

Q But if you're not asked you can mislead?

A I guess if you don't say it then certainly it can be misleading.

Yeah. As to whether Dan was trying to deliberately mislead the Bylsmas, I don't think so, but-

Q But that's the effect, isn't it?

A That can be the effect, yes.

Q Now, Mr. Bourque indicated that this wasn't - this wasn't his idea, to say he was from the Audit Division. In fact, his prior supervisor, Mr. Haynes, taught him to do that. Mr.

Haynes had done it, and lots of other people in S.I. do it. Would you agree it was a common practice at the time, or was there an exception made in this case?

A No, you could say it was common that that was done prior to this.

Q And is that, at the time, the standard way of proceeding, trying to ask the taxpayer questions directly and not have the lawyer be his mouthpiece, as it were?

A Well, what we - in this case we wanted to talk to them, certainly. We didn't mind if Mr. Jones was there. But the sooner we could get on with things.

Q And then in the second paragraph it says that when an investigator, this person in authority, is involved in the review of any taxpayer, the caution must be given, even if an auditor is carrying out the review on behalf of the investigator. This applies to all interviews. So the policy here is that when you've got this person in authority, an investigator, they should, because of the fact they're a person in authority they should give a caution when they meet with taxpayers, correct?

A They should, yes.

Q Well, if you read them their rights, then they know that what they say or do may be used against them in a criminal prosecution. If you don't read them their rights, they think it's - they don't realize that. So wouldn't it be easier, more likely that they would comply and provide information if you didn't read their rights?

A It's possible.

Q So that would be a more expedient way of getting facts is to not read them their rights until you've got facts, and then if there's a problem, once you've got the facts, you can say, well, "There seems to be indicators of fraud here, now we'll read you your rights."

A Yes. I'd agree with that

Q And so in doing - using - adopting your word of an audit, in doing the audit then you're looking for the evidence of the fraud; either simply the made up number, i.e. expense or value, or some more substantial evidence of fraud, for example, a false document, a false invoice, a false receipt.

A Well, you're looking for whatever's behind the claim that's been made.

Q Right.

A Is there a document or is there none.

Q And if you can find, say for example, a phony receipt, then you've got hard evidence of -

A Yeah, it - you know that it's phony, yes.

Q A Right. Well, I'm assuming that. If you - Yes.

Q - find a phony document, and you know it's phony, now you've got hard evidence as opposed to simply, gee whiz, the taxpayer, or the businessman, taxpayer has simply said, but I spent that money entertaining people, for example.

A Yes.

Q But if you find that the business person never did do any entertaining, for example, at the Vancouver Hotel, you've got more evidence -

A Yes.

Q - of the fraud. So in that sense then the SI, and again to use your word "audit" is sort of subsumed, or it's a part of the ongoing continuing "investigation" that it goes through to - what you refer to as what might be the case, reasonable and probable ground.

A Yes.

Q i.e. proof, the hard evidence, right?

A Yes.

(Sept 28/98) page 52 lines 22 - 17, page 53 lines 1-19, page 55 lines 5-27, page 56 lines 4-14 & 20-26, page 57 lines 3-9 & 30-47, page 58 lines 1-8, page 59 lines 6-12. (Sept 29/98) page 4 lines 18-27, page 5 lines 2-14, page 18 lines 1-33.

81 Notwithstanding any perceived ambiguity in the policy of Revenue Canada or interpretation cast upon it by individual investigators reacting to the exigencies of an A-file, the citizen's constitutional rights must be respected and afforded on the very first contact with or communication from Special Investigations.

82 Cowley is a senior employee and Revenue Canada, Ottawa. He described his service as follows:

"Employed at Revenue Canada in the Special Investigations Section out of Ottawa. I've been with the department 22 years. Of those 22 years, 18 have been with the Investigations Section. Currently working in the Operations Division looking after four of our offices across Canada giving technical advice and guidance to our investigators, reviewing search information. And the other responsibility I have is primarily with training, training both investigators in the field and training our audit staff."

83 It is significant that Cowley worked in Special Investigations before the Charter and had

experience with the seizure of records using ministerial authority and the striking down of the process in the aftermath of the Charter, the effect of Hunter's case and the other decisions down to the present acute distinction between the audit and the investigative functions. This, with his role as an instructor, gave substance to his testimony.

84 Cowley testified that it was Revenue Canada policy to take a conservative approach and administer the formal caution prior to any confrontational discussions or verbal response from taxpayers who are suspects and that this applies at the preliminary investigation stage. At different times in his evidence Cowley was asked by both Mr. Martin and Mr. Butcher when a taxpayer should be cautioned as to his right to remain silent and have the assistance of counsel. His answers reflected disparate situations, one being the case of an investigator who has evidence from third party sources and documents establishing reasonable grounds which creates the obvious duty to inform the taxpayer of his rights. The other situation would be, as this case, where an investigator has only some documents and the suspicion of fraudulent values, chooses to go directly to the taxpayer using audit procedure; in which case, Cowley said that there is an onus on the investigator to ensure that the taxpayer understands his function and that a conservative approach requires the administering of a caution.

85 Cowley's evidence was that it is particularly important to advise a lawyer of the purpose of any contact with a taxpayer because if it is purely an administrative matter, the taxpayer may be compelled to answer under threat of prosecution and if it is a preliminary investigation then a lawyer must tell his client he is not compellable.

Q And in the context of a tax investigation, what the lawyer is told is particularly important about the purpose of the inquiry, right?

A Mm-hmm.

Q Because unlike in a traditional criminal case, where the police are doing things, if the purpose of the inquiry is audited and administrative, then the taxpayer under penalty of law, has to answer -

A Has to answer, yes.

Q A So, the lawyer plays a critical role, doesn't he? yes.

Q He has to tell the taxpayer, based on what he's receiving from the department either you must answer the question, because -

A That's admitted, yes.

Q - you're legally obliged to.

A Right.

Q And the lawyer has to be sure he's not counselling his client to commit an offence for refusing to file or comply with a lawful demand -

A Right.

Q - under 231 of the Income Tax Act, right?

A Yes.

Q On the other hand, if he's provided with information just those basic three pieces of information, I'm from S.I., he knows he's dealing with, who he's dealing with, a policeman-

A Yes.

Q I have suspicions and I'm asking questions to - in the phase of a preliminary investigation that could lead to criminal sanctions, then the lawyer can make an informed decision, correct?

A Right.

Q One where he doesn't have to worry about counselling an offence, putting his own client in jail-

A Yes.

Q He can say to the client, look, the Charter of Rights and Freedoms enshrines your right to silence at the investigative stage. You have a right, notwithstanding this law, to refuse to answer the question.

A Mm-hmm.

Q Right?

A Yes.

Transcript, Sept. 18/98, Cowley, page 55 lines 22-47 Page 56
lines 1-17

86 The most telling aspect of Cowley's evidence is that he disassociated himself from the manner in which Bourque conducted the investigation of the Sim group and he did so because policies were ignored and there was misleading of the taxpayers and their lawyers. The following series of answers speak volumes.

87 Cowley had the following comments about SI officers misleading a taxpayer and his answers speak volumes.

Q ...is it the policy of your branch to permit Special Investigators to mislead taxpayers at any stage in an investigation?

A No.

Q More particularly is it policy of your branch to permit an investigator to intentionally identify himself as being from the Audit Division rather than special Investigations in order to mislead a taxpayer into agreeing to a face to face meeting with an investigator?

A No.

Q ...you cannot, under any circumstances, attempt to deceive or mislead the taxpayer of this basic fact at any stage?

A Right.

Q Now, if you discovered that an investigator had in fact done this -

A Misled?

Q - intentionally and deliberately misstated his department and said audit instead of SI in order to induce a taxpayer to have a face to face meeting with him, what would you do about that?

A If you're telling me it was deliberately done with the intent to mislead the taxpayer, then to me, a letter should go out from headquarters advising that a review of this file has indicated such and such has happened and that this will not be tolerated.

Q Okay. Read the riot act?

A That's right, yeah.

Q Now, maybe it's unnecessary to ask you this, but is it the policy of your branch to permit Special Investigators to mislead the legal representatives of the taxpayer at any stage?

A He's an extension of the taxpayer, as far as we would be concerned, so no, we wouldn't condone misleading the legal agent, I mean he represents the taxpayer.

Q What if...today you learned that SI officers were even testifying at court that they believed that they could mis-identify themselves as from the Audit Division rather than Special Investigations when calling up a taxpayer... and that sort of goes on in the Vancouver district Office even through until '97, would that shock you?

A Yes, if they're doing an investigation, it would shock me that they would mislead the taxpayer into believing that they're from the Audit Section. Yes, that would - it goes clearly

against the policy of the department.

Q A And why would it shock you ... Because the courts have told us that this is not acceptable and we have formulated a policy over a number of years, each time the court decisions have come down, to bring our operations policies in conformity with court decisions. And...if we have people who are just going to ignore them, then obviously there's a problem.

Transcript, Sept 18/98, Cowley, Page 51, lines 25-35, page 52 lines 32-35; page 53, lines 9-46; Page 54 lines 14-29, 39-47; page 55 lines 1-4; page 61, lines 35-47; page 62, lines 1-10

Q A And if the investigator kept doing it? Then obviously the investigator should be dealt with through disciplinary action...

Q Fired, even, if she just keeps at it?

A Fired, yeah.

Q A You've got to take some step at some point? That's right, yes, we would take a stand because we go to great lengths to make sure that the taxpayer's rights are protected and we don't want rebels out there deciding policy for the department.

Q ...what if you discovered that an investigator's group leader...had condoned or actively participated in such conduct...

A ...the same conditions apply...something would have to be done, that it's not going to be tolerated.

Q And I know that this might stretch your belief but consider this hypothetical. If ...more than one group leader in a district office was engaging in such conduct, that is, misidentifying themselves, calling themselves rather than - from the Audit Division rather than the Special Investigations -

A Right.

Q And that was being done deliberately in order to obtain face to face meetings, what would you do about that?

A ...we've got a whole office out of control, so we would look at it and say is there something

seriously wrong with what's being communicated down to the field?...

SUMMARY OF FACTS

88 1. Bourque's predominant purpose as of October 1, 1993, was criminal investigative and he was then engaged in a criminal investigation.

89 2. In order that he might obtain statements and documents, Bourque intentionally misled the Sim group and their lawyers, Jones and Viccars, as to his investigative purpose by:

- a) in the first instance, failing to identify himself as being from S.I. in order to attempt to obtain face to face interviews;
- b) authoring misleading correspondence to the taxpayers and their counsel;
- c) orally misrepresenting to the taxpayers and their counsel the purpose of his inquiries;
- d) persisting in his course of misrepresentation when confronted as to his investigative purpose;
- e) directing a covert "audit" through the Victoria audit and S.I. offices and through the Board;
- f) intentionally and deliberately interviewing suspects without either disclosing his investigative purpose or administering Charter warnings; and
- g) intentionally utilizing s. 231.1 administrative requirement demands for criminal investigative purposes.

90 3. Bourque commenced and perpetuated his abusive investigative conduct as follows:

- a) he failed to conduct third party interviews and document examination before proceeding to interview suspects;
- b) he utilized information improperly obtained from the suspects and their counsel in applying for search warrants;
- c) he authored a fundamentally misleading information to obtain search warrants;
- d) even after obtaining search warrants, he utilized demands and attempted to interview suspects without Charter warnings.

91 4. Bourque was aware that all of the above conduct was contrary to Revenue Canada policy.

92 5. Vancouver office Group Head, Cowan, aided and abetted Bourque and he was aware that it was contrary to Revenue Canada policy.

93 6. Fleming, with knowledge of all the foregoing conduct, elected to author a deceptive prosecution report.

94 7. Bourque, Cowan and Fleming each knew that the policy of Revenue Canada was to bring about effective application of the guaranteed Charter rights of all persons subjected to investigative procedures, and each of them knew this to be a duty concomitant with their authority under the Income Tax Act.

ABUSE OF PROCESS

95 On the facts of this case I am asked to find that the investigation and prosecution of this matter is an abuse of process of a magnitude that warrants a stay of proceedings. There are two categories in which an abuse of process and violation of section 7 of the Charter could occur. The first category is where the fairness of the trial is adversely affected by the abusive conduct. The second is a "residual category":

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

R. v. O'Connor (1995) 103 C.C.C. (3d) 1 S.C.C.

96 I am asked to invoke the residual category by concluding that the investigation of the Sim group and Viccars was carried out through a wide range of egregious conduct which has permeated the ongoing process and that such conduct was in open disregard for Revenue Canada policy and the Charter; and that it erodes the integrity of the judicial process.

97 In considering the significance of offences under the Income Tax Act as they relate to public interest in the administration of justice and the integrity of the judicial process I was impressed by an extemporaneous comment of Mr. Martin during his oral submission. In distinguishing tax prosecutions from drug prosecutions he said:

"A startling thing about tax administration is that we as taxpayers and citizens of this country are all members of the club called the State and we all pay our membership dues through the payment of taxes. We are all potential suspects, each and every one of us. No matter how law abiding and diligent we are, we are all potential suspects of tax evasion. We are all, you know, people say that they never really appreciate their rights until they come into conflict with the law. Their son is, or they are charged with impaired driving or something, your local vice-president of sales of some local industrial company, and it's when people confront the criminal justice system that they become this sort of reasonable observer that the case law always talks about, and are informed about the

principles that operate.

What's important about the sensitive administration of the tax law, and the reason it's important that it be sensitively administered is that every Canadian citizen may at one stage or another in their lives be touched by that administration, unlike impaired driving or drug trafficking, or fraud, or assault, or murder or all the other criminal processes that we administer in these courts. So this fundamental and most important rationale of the Shirose decision isn't operative in this field."

Transcript, Sept 21/98, page 37 lines 19-42

98 The Income Tax Act bears upon almost every citizen by the requirement that for each year a report of income must be filed and where a tax is due, it must be paid. Thereafter a tax return is assessed, and can be made the subject of a civil audit, and possibly an investigation for tax avoidance or evasion. No other law brings the citizen and state into such regular and intimate contact.

99 The abuses in this case are varied and blatant and span the investigation reaching into the prosecutorial and trial processes. If I decide that a stay is not justified in the extreme circumstances of this case then the conduct of an investigation under the guise of an audit will become widespread, and in tax matters the rule of law will be threatened by arbitrary and capricious behavior.

100 What Bourque did, aided and abetted by his supervisor, Cowan, and continued by Fleming to the point of prosecution, was a willful attempt to use the administrative audit process as an investigative tool. This was not a case of them saying, "We made an honest mistake" when testifying before me - not at all, for each of them, with a synergy that bristled with a common purpose and lack of candour, claimed that the taxpayers were only being audited and not investigated and that an investigator has an inherent right to act as an auditor until reasonable grounds are achieved.

101 Counsel for the defendants were able to produce a series of cases, all post-Charter decisions, which reveal that Revenue Canada has been unable to bring an end to the practice of criminal investigators using the compulsion of the civil audit process as an investigative technique in order to establish the probability of an offence, which then becomes a basis for the issuance of search warrants. It is apparent that this practice is based on expediency. In this case, the investigators all claimed that it is only after an investigator has evidence on reasonable and probable grounds that an offence has been committed that a special investigation audit ends and a criminal investigation begins. I find this to be a spurious argument.

102 When Special Investigation Section accepts a referral of potential tax evasion, Revenue

Canada must be deemed to have commenced a criminal investigation. At its outset, the predominant purpose of that criminal investigation is to take suspicion of fraud and by all lawful evidence-gathering techniques short of section 231 compulsion, establish reasonable grounds for a judicially authorized intrusion on a taxpayer's privacy. Failing this, Revenue Canada is obliged to abate the case and leave the taxpayer alone. There must be no room for individual investigators to assert that the policies of Revenue Canada are only guidelines allowing them to determine the nature and conduct of a referral to Special Investigations.

103 That Bourque was out of control in the investigation of the Sim group may best be exemplified by his direct contact with the defendant Roberts on June 29, 1995, well after the execution of search warrants.

Q So even in June 29, 1995 after the execution of the search warrants you're still trying to talk to Mr. Roberts?

A Well, he - he said that he wanted to cooperate, so I took that to mean - as being an offer to cooperation and I asked him what he meant by that and he - as it says here it wasn't clear so I asked him does he mean does he want to meet and have an interview and he said he would but George Jones wouldn't let him.

Q Well, there's nothing there in his memo to indicate that you have mentioned anything to him about a caution.

A I didn't caution him.

Transcript, Sept 23/98, page 41 line 47 Page 42 lines 1-11

104 Having concluded that this is a case of abuse of process it is necessary to decide if a stay of proceedings is the appropriate remedy. What is at stake is the integrity of the administration of justice.

STAY OF PROCEEDINGS

105 Clearly the administration of justice will be prejudiced if the trial continues because what was done by the investigators constitutes a serious and intentional misuse of audit powers under the Income Tax Act and a flagrant disregard for The Charter. This is coupled with the crafting of misleading statements in the Information to obtain search warrants and the prosecution report. The actions of the investigators evidence a pattern of policy violations that appear to be standard practice in the Vancouver office of Special Investigations.

106 Knowing full well that it could not withstand a Charter claim by the defendants, the Crown stated its intention to make no attempt to use the evidence unlawfully obtained. For what appears to have been purely practical reasons, the Crown disclosed to the defendants its intention of proving the case against them relying only on evidence "... that could and would have been inevitably

discovered as a result of Information provided by the Canadian Cultural Property Export Review Board." There is a great deal more practicality than principle in this tactic in that it affords a notional answer to the defendants' assertion of abuse of process. Before the Charter, the Crown's tactic might have succeeded, but today it cannot justify an abuse of process which has permeated the entirety of the Crown's case. I accept and adopt the argument of the defendants as definitive on this issue:

To allow these proceedings to go forward upon the basis that it is suggested, after the fact, that the evidence could have been obtained by the Crown in another way - a matter which is far from clear and should arguably be the subject of an entirely separate evidentiary hearing - would be to ignore, and indeed to condone, abusive investigative and prosecutorial conduct that included the following:

- 1) misleading conduct at every stage of the investigation;
- 2) use of the compulsion power to obtain a conscriptive statement from the Applicant Roberts which furnished the roadmap for the rest of the investigation;
- 3) routine violations of explicit departmental policy, and
- 4) unexplained late disclosure of key evidence.

The primary evidence that the Crown would seek to tender on the trial with respect to the Applicant Viccars, for example, was, in fact, derived from the statement and documents obtained from Roberts at the January 25, 1994 meeting. The statement and documents formed the basis for the request he made on February 7, 1994 to the Internal Revenue Service for information about Frederick Brown (T., 22 September 1998, p. 74, 1. 18 - p.75 1.46 (evidence of Bourque); Ex. 127.24)

The second request to the IRS, made July 4, 1994, was based entirely on documents obtained from the applicant Viccars in May 1994 by use of the section 231 compulsion power. The Crown has indicated, however, that it will not be tendering, inter alia, any documents provided pursuant to requirement by the applicant Viccars. (Exs. 126 and 127.41; T., 24 September 1998, p.24, 1. 36-38)

"... in a "documents case", the type of case that Revenue Canada in particular will be involved with, copies of various documents will almost always be

discoverable in premises other than those of the taxpayer/suspect. If the inevitable discovery doctrine were applicable then the Crown would always "happily concede" the inadmissibility of evidence derived from the taxpayers, notwithstanding an abusive investigation of them, as has been done by Mr. Butcher here, and thereby render all of the abusive conduct legally irrelevant and of academic interest only. In *Kokesch* (1990) 61 CCC (3d) 207 (S.C.C.) the Supreme Court of Canada specifically rejected this transparent device as follows, at p.227:

"... the Crown would happily concede s. 8 violations if they could routinely achieve admission under s. 24(2) with the claim that the police did not obtain a warrant because they did not have reasonable and probable grounds. The irony of this result is self-evident."

107 Finally, is this the clearest of cases? I have no doubt that the prejudice caused by the abuse in question will be manifested and perpetuated throughout the conduct of the trial, and that if there is no rejection of the abusive conduct, it will become the dominant investigative technique used by Special Investigations. This is the clearest of cases and it must be stayed.

ABUSIVE COMPULSION TO OBTAIN ADVANTAGE - CHARTER 5.7/11(d)

108 The defendants put forward a third ground for a stay of proceeding based on colourable compulsion.

109 A detailed analysis of the 1995 Supreme Court of Canada decision in *R. v. S.(R.J.)* was put before me in written and oral submissions. I quote the essence of that argument:

"...Bourque's interrogation of Roberts (that resulted in the disclosure of Robert's position) and the demands made upon Viccars (that resulted in statements made by him and in disclosure of all of his files), in fact and law, were carried out by the "police" armed with subpoenas.

Even when confronted Bourque maintained his deception. Cowan corroborated him. Jones had no basis to establish colourable compulsion prior to January 25, 1994."

Alternatively, and independently, the Applicants also submit that a stay of proceedings is an obligatory appropriate remedy where Revenue Canada officials have used the compulsion powers of the Income Tax Act to build or advance their criminal investigation of the Applicants.

The Applicants' position, concisely put, is that in the Supreme Court of Canada's landmark decision in respect to self incrimination issues in Canada, *R. v. S.(R.J.)* (1995) 96 CCC (3d) 1, two majority ratios emerge dealing with different effects of the prior compulsion of a subsequently charged citizen.

The first ratio for which *S.(R.J.)* is traditionally cited is that arising from the five judge majority of the Supreme Court of Canada which upheld C.E.A.s 5(1) by supplementing C.E.A.s 5(2) with residual derivative use immunity.

The second five judge majority ratio³, with the concurrence of the first majority⁴, that is of particular importance to the proceedings herein, also clearly holds that where the state has compelled a witness/suspect/accused to self incriminate through compulsion procedures the predominant purpose of which is to build or advance the prosecution case, and at the extreme to probe the accused's defences, then Charter s. 7 and 11(d) are violated, with the result that the subsequent criminal trial proceedings must be stayed pursuant to Charter s. 24(1).

Faced with a Court divided into two four-justice camps in *S.(R.J.)* Chief Justice Lamer concurred with both Mr. Justice Iacobucci (thus upholding s. 5 C.E.A. and creating residual derivative use immunity) and Justices Sopinka, and by necessary implication, Madam Justice L'Heureux Dubé, (thus providing for the availability of compulsion exemption and a stay of subsequent criminal proceedings, in circumstances such as those at bar). 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" [Emphasis Added]

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.

Accordingly, it is submitted that for the concurring reasons given separately by Mr. Justice Sopinka and Madam Justice L'Heureux Dubé the conduct herein constitutes an abuse of process remedied, generally, by way of stay of proceedings. The Applicants submit where such conduct is shown a stay is essentially required, unencumbered by the clearest of cases caveat imposed by the Charter s. 7 / abuse of process law described in paragraphs 183 to 218, supra.

110 In this case the defendants have established that the predominant purpose of Revenue Canada was to establish a case against them; that by deception and the abusive use of compulsion under section 231 of the Income Tax Act their right to silence was denied; that Revenue Canada with unjustifiable compulsion sought and obtained evidence under the guise of its civil administrative audit powers. They were subjected to colourable compulsion when, with inexcusable deception, the investigators used demands under section 231.

111 What was done by the investigators in by-passing the procedural safeguards in the Charter was a fundamentally unfair conduct violating the principles of fundamental justice. It was a colourable and persistent attempt to obtain information from the defendants when the relationship between Revenue Canada and the defendants was adversarial. Revenue Canada obtained advantages which it seeks to use in this trial and the only appropriate remedy is to direct that the proceedings be stayed.

112 The defendants have more than satisfied the evidentiary burden that on a balance of probabilities there has been a denial or infringement of Section 7 and 11(d) of the Charter and that the only just remedy is under Section 24(1) by the Order of the Court staying the prosecution of the charges in Information 17195-01.

113 Appended to this judgment is a copy of the defendant's Supplementary Notice of Application dated August 28, 1998.

CRAIG J.

* * * * *

114

Information No. 17195-01

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

Between:

Regina

Respondent

And:

David Roberts and Thomas Viccars

Applicants

SUPPLEMENTARY NOTICE OF APPLICATION

WHEREAS on March 27th, 1998 the Applicants served upon the Respondent a Notice of Application seeking Orders pursuant to the Canadian Charter of Rights and Freedoms as follows:

- (1) an order excluding from evidence pursuant to sections 24(1) and 24(2) of the Canadian Charter of Rights and Freedoms all documents produced in response to demands made pursuant to section 231.2(1) of the Income Tax Act;
- (2) alternatively, and in any event, an order pursuant to s. 24(1) of the Charter staying the prosecution in respect to the Information herein upon the basis that the demands made pursuant to s. 231.2(1) of the Income Tax Act were made for the predominant purpose of building or advancing the prosecution case herein in violation of the Applicants' rights guaranteed by ss. 7 and 11(d) of the Charter; and
- (3) alternatively, and in any event, an order setting aside those search warrants granted 29 March 1995 and excluding from evidence pursuant to s. 24(2) of the Charter the product of the various searches conducted in this matter on 5 April 1995.

as reflected in Exhibit A to this Supplementary Notice;

WHEREAS on July 16th, 1998 the Respondent forwarded to the Applicants a previously undisclosed file memorandum dated September 21st, 1993 said to have been "found" in a senior Revenue Canada official's file entitled "re: suspected scam";

WHEREAS on August 6th, 1998, by letter, the Respondent formally conceded the relief sought in Paragraph (1) and (3) above as follows:

"The Crown will not be tendering any documents in which, in the Crown's view, the accused could make a s. 8 claim of privacy interest. Thus, no documents seized or obtained pursuant to requirement from the Roberts' residence, Viccar's

offices, Robert's accountants or Mr. Jones will be tendered."

THEREFORE TAKE FURTHER NOTICE that an application will be made on Monday, September 14th, 1998 at 10:00 a.m., or so soon thereafter as this matter may be heard, before The Honourable Judge Craig, at 222 Main Street, in the City of Vancouver, Province of British Columbia, by counsel on behalf of the Applicants for:

- 1) an order pursuant to s. 24(1) of the Charter staying the prosecution in respect of the Information herein upon the basis that the conduct of the investigation and prosecution of the Applicants by Revenue Canada officials contravenes basic principles of decency and fundamental justice to such a degree that the prosecution must be halted either as a common law abuse of process, or for violation of Charter s. 7, in order to maintain the integrity of the administration of justice.
- 2) alternatively, and in any event, an order in the terms originally sought by paragraph (2) of the March 24, 1998 Notice of Motion, to wit:

"alternatively, and in any event, an order pursuant to s. 24(1) of the Charter staying the prosecution in respect to the Information herein upon the basis that the demands made pursuant to s. 231.2(1) of the Income Tax Act were made for the predominant purpose of building or advancing the prosecution case herein in violation of the Applicants' rights guaranteed by ss. 7 and 11(d) of the Charter;"

- 3) finally, and in the alternative to the full stay of proceedings order sought in 1) and 2) above, an order imposing upon the Respondent the onus of demonstrating to the Court on the balance of probabilities that Revenue Canada officials would have inevitably discovered each piece of evidence sought to be tendered by the Respondent in the proceedings herein;

IN SUPPORT OF THIS APPLICATION, THE APPLICANTS RELY UPON THE FOLLOWING:

- (1) the Affidavit of Paula Archer, to be sworn and filed herein;
- (2) the record of disclosure made by Crown counsel pursuant to R. v. Stinchcombe (1991), 68 C.C.C. (3d) 1 (S.C.C.);
- (3) the evidence of witnesses to be called upon the motion/voir dire including but not necessarily limited to Revenue Canada Officials, Dan Bourque, Grant Cowan, Chris Fleming, Rod Jamieson, Pat Cowley as well as other witnesses including David Walden and George Jones;
- (4) such further and other material as counsel may advise and this Honourable Court may permit.

Dated at Vancouver, B.C. this 28th day of August, 1998

David J. Martin
Barrister & Solicitor
2000-1040 West Georgia Street
Vancouver, B.C. V6E 4H1
Telephone: 682-4200; fax: 682-3352
Solicitor for the Applicant Viccars

Craig Sturrock
Thorsteinssons 27th floor, 595 Burrard Street Vancouver,
B.C. V7X 1J2 Telephone: 689-1261; fax: 688-4711 Solicitor
for the Applicant Roberts

TO: ATTORNEY GENERAL OF BRITISH COLUMBIA
c/o Ministry of Attorney General
Legal Services Branch
P.O. Box 9280 Stn. Prov. Govt.
Victoria, B.C. V8W 9J7

TO: ATTORNEY GENERAL OF CANADA
C/o DAVID G. BUTCHER
Singleton Urquhart Scott
Barristers and Solicitors
1200-1125 Howe Street
Vancouver, B.C. V6Z 2K8

* * * * *

115

EXHIBIT A

Information No. 17195-01

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

Between:

Regina

respondent

And:

David Roberts and Thomas Viccars

applicants

NOTICE OF APPLICATION

TO: DAVID G. BUTCHER
Singleton Urquhart Scott
Barristers and Solicitors
1200 - 1125 Howe Street
Vancouver, B.C. V6Z 2K8

TAKE NOTICE that an application will be made on Monday, May 25, 1998 at 10:00 a.m., or so soon thereafter as this matter may be heard, before The Honourable Judge Craig, at 222 Main Street, in the City of Vancouver, Province of British Columbia, by counsel on behalf of the Applicants for:

- (1) an order excluding from evidence pursuant to sections 24(1) and 24(2) of the Canadian Charter of Rights and Freedoms all documents produced in response to demands made pursuant to section 231.2(1) of the Income Tax Act;
- (2) alternatively, and in any event, an order pursuant to s. 24(1) of the Charter staying the prosecution in respect to the information herein upon the basis that the demands made pursuant to s. 231.2(1) of the Income Tax Act were made for the predominant purpose of building or advancing the prosecution case herein in violation of the Applicants' rights guaranteed by ss. 7 and 11(d) of the Charter; and
- (3) alternatively, and in any event, an order setting aside those search warrants granted 29 March 1995 and excluding from evidence pursuant to s. 24(2) of the Charter the product of the various searches conducted in this matter

on 5 April 1995.

THE GROUNDS FOR THIS APPLICATION ARE:

- (1) That Revenue Canada utilized section 231.2(1) of the Income Tax Act to demand documents from various individuals at a time when it was conducting a criminal investigation, contrary to ss. 7 and 8 of the Charter;
- (2) That Revenue Canada's utilization of s. 231.2(1) of the Income Tax Act for the purpose of advancing a criminal prosecution violates the Applicants' rights to silence and a fair trial guaranteed by ss. 7 and 11(d) of the Charter;
- (3) That the admission into evidence at trial of information obtained through demands under section 231.2(1) of the Income Tax Act violates the Applicants' rights under sections 7 and 8 of the Charter;
- (4) That the Information to Obtain the various search warrants in this matter are based upon information that was obtained in violation of the Applicants' rights under sections 7 and 8 of the Charter;
- (5) That if the information that was obtained in violation of the Applicants' rights under sections 7 and 8 of the Charter were to be excised from the Information to Obtain, the Information to Obtain would no longer contain reasonable and probable grounds upon which to issue the search warrants;
- (6) Such further and other grounds as counsel may advise and this Honourable Court may permit.

IN SUPPORT OF THIS APPLICATION, THE APPLICANTS RELY UPON THE FOLLOWING:

- (1) the Affidavit of Paula Archer, to be sworn and filed herein;
- (2) the record of disclosure made by Crown counsel pursuant to R. v. Stinchcombe (1991), 68 C.C.C. (3d) 1 (S.C.C.);
- (3) such further and other material as counsel may advise and this Honourable Court may permit.

Dated at Vancouver, B.C. this 27th day of March, 1998

David J. Martin
Barrister and Solicitor
2000-1040 West Georgia Street
Vancouver, B.C. V6E 4H1
Telephone: 682-4200; fax: 682-3352
Solicitor for the Applicant Viccars

Craig Sturrock
Thorsteinssons
27th floor, 595 Burrard Street
Vancouver, B.C. V7X 1J2
Telephone: 689-1261; fax: 688-4711
Solicitor for the Applicant Roberts

* * * * *

INFORMATION/DÉNONCIATION

Form/Formulaire 2

PCR 004B

17195-01

Rev/Rev 10/89

Court File Number

Numero De Dossier De La Cour

Canada: Province of British Columbia
Province De La Colombie-Britannique

This is the information of/Les présentes constituent la
dénonciation de Mr. Chris Fleming,
an Officer of the Department of National Revenue, Investigator of/de Vancouver, British Columbia

The informant says that he has reasonable and probable grounds to believe and does believe that/Le
dénonciateur qu'il a des motifs raisonnables et probables de croire et croit effectivement que

David Roberts

Count 1: On or about the 30th day of April, A.D. 1992, at or near the Municipality of Oak Bay, in the Province of British Columbia, did make, participate in, assent to or acquiesce in the making of false or deceptive statements in his filed T1 Income Tax Return for the 1991 taxation year, filed as required under the Income Tax Act R.S.C. 1985, c.1 (5th supp.), as amended, by stating that he made a charitable donation valued at \$18,000, and thereby received donation tax credits totalling \$5,190, which statements were false or deceptive, by reason that he did not make any such donation, and did thereby commit an offence contrary to section 239 (1) (a) of the Income Tax Act.

Count 2: On or about the 30th day of April, A.D. 1993, at or near the Municipality of Oak Bay, in the Province of British Columbia, did make, participate in, assent to or acquiesce in the making of false or deceptive statements in his filed T1 Income Tax Return for the 1992 taxation year, filed as required under the Income Tax Act R.S.C. 1985, c.1 (5th supp.), as amended, by stating that he made a charitable donation valued at \$123,000, and thereby received donation tax credits totalling

\$35,670, which statements were false or deceptive, by reason that he did not make any such donation, and did thereby commit an offence contrary to section 239(1) (a) of the Income Tax Act.

Count 3: Between the 31st day of December, A.D. 1990 and the 1st day of May, A.D. 1993, at or near the Municipality of Oak Bay, in the Province of British Columbia, did wilfully evade or attempt to evade the payment of taxes imposed by the Income Tax Act, R.S.C. 1985, c.1 (5th supp.), as amended, in his filed T1 Income Tax Returns for the 1991 and 1992 taxation years, by falsely reporting charitable donations and thereby receiving non-refundable tax credits in the amount of \$40,860, and did thereby commit an offence contrary to section 239 (1) (d) of the Income Tax Act.

Count 4: Between the 31st day of December, A.D. 1990 and the 1st day of May, A.D. 1992, at or near the City of Victoria and the city of Vancouver, in the Province of British Columbia, did wilfully evade or attempt to evade compliance with the Income Tax Act, R.S.C. 1985, c.1 (5th supp.), as amended, by using a document, to wit: a deed of gift which intended to be relied upon to obtain a donation tax credit, for Gordon Sim, and did thereby commit an offence contrary to section 239 (1) (d) of the Income Tax Act.

Count 5: Between the 31st day of December, A.D. 1990 and the 1st day of May, A.D. 1992, at or near the City of Victoria and the City of Vancouver, in the Province of British Columbia, did wilfully evade or attempt to evade compliance with the Income Tax Act, R.S.C. 1985, c.1 (5th supp.), as amended, by using a document, to wit: a deed of gift which contained statements that were false, and which were intended to be relied upon to obtain a donation tax credit, for Fred Romanuk, and did thereby commit an offence contrary to section 239 (1) (d) of the Income Tax Act.

Count 6: Between the 31st day of December, A.D. 1990 and the 1st day of May, A.D. 1992, at or near the City of Victoria and the City of Vancouver, in the Province of British Columbia, did wilfully evade or attempt to evade compliance with the Income Tax Act, R.S.C. 1985, c.1 (5th supp.), as amended, by using a document, to wit: a deed of gift which contained statements that were false, and which were intended to be relied upon to obtain a donation tax credit, for Feike Bylsma, and did thereby commit an offence contrary to section 239 (1) (d) of the Income Tax Act.

Count 7: Between the 31st day of December, A.D. 1990 and the 1st day of May, A.D. 1992, at or near the City of Victoria and the City of Vancouver, in the Province of British Columbia, did wilfully evade or attempt to evade compliance with the Income Tax Act, R.S.C. 1985, c.1 (5th supp.), as amended, by using a document, to wit: a deed of gift which contained statements that were false, and which were intended to be relied upon to obtain a donation tax credit, for Margaret Bylsma-Howell, and did thereby commit an offence contrary to section 239 (1) (d) of the Income Tax Act.

Thomas Viccars

Count 8: On or about [11th day of] (count 8-12 amended per W.G. Craig) August 1993, at or near the City of Vancouver, in the Province of British Columbia, did wilfully attempt to evade

compliance with the Income tax Act, R.S.C. 1985, c.1 (5th supp.), as amended, by trying to obtain the issuance of the Canadian Cultural Property Income Tax Certificate on behalf of David Roberts, from the Canadian Cultural Property Export Review Board, by using a document containing statements that were false or deceptive, and did thereby commit an offence contrary to section 239 (1) (d) of the Income Tax Act.

Count 9: On or about [11th day of] August 1993, at or near the City of Vancouver, in the Province of British Columbia, did wilfully attempt to evade compliance with the Income Tax Act, R.S.C. 1985, c.1 (5th supp.), as amended, by trying to obtain the issuance of a Cultural Property Income Tax Certificate on behalf of Gordon Sim, from the Canadian Cultural Property Export Review Board, by using a document containing statements that were false or deceptive, and did thereby commit an offence contrary to section 239 (1) (d) of the Income Tax Act.

Count 10: On or about [11th day of] August 1993, at or near the city of Vancouver, in the Province of British Columbia, did wilfully attempt to evade compliance with the Income Tax Act, R.S.C. 1985, c.1 (5th supp.), as amended, by trying to obtain the issuance of a Cultural Property Income Tax Certificate on behalf of Fred Romanuk, from the Canadian Cultural Property Export Review Board, by using a document containing statements that were false or deceptive, and did thereby commit an offence contrary to section 239 (1) (d) of the Income tax Act.

Count 11: On or about [11th day of] August 1993, at or near the City of Vancouver, in the Province of British Columbia, did wilfully attempt to evade compliance with the Income Tax Act, R.S.C. 1985, c.1 (5th supp.), as amended, by trying to obtaining the issuance of a Cultural Property Income Tax Certificate on behalf of Feike Bylsma, from the Canadian Cultural Property Export Review Board, by using a document containing statements that were false or deceptive, and did thereby commit an offence contrary to section 239 (1) (d) of the Income Tax Act.

Count 12: On or about the [11th day of] August 1993, at or near the City of Vancouver, in the Province of British Columbia, did wilfully attempt to evade compliance with the Income Tax Act, R.S.C. 1985, c.1 (5th supp.), as amended, by trying to obtain the issuance of a Cultural Property Income Tax Certificate on behalf of Margaret Bylsma-Howell, from the Canadian Cultural Property Export Review Board, by using a document containing statements that were false or deceptive, and did thereby commit an offence contrary to section 239 (1) (d) of the Income Tax Act.

W.G. Craig (514)
Judge of the Provincial
Court of British Columbia
(Each Accused)

Sworn Before Me/Assermenté Devant Moi

On/Le the 24th of February 1997

At/À Vancouver Process/Acte De Procedure Summons for both 1 April 97 @g (100)

* * * * *

ATTACHMENT TO INFORMATION NUMBER

Re: David Roberts
Thomas Viccars

Sep 14 1998

David Anderson Walden

Sep 15 1998

David Anderson Walden, recalled
Daniel William Bourque

Sep 16 1998

Daniel William Bourque, recalled

Sep 17 1998

Daniel William Bourque, recalled

Sep 18 1998

Patrick Joseph Cowley

Sep 21 1998

Patrick Joseph Cowley, recalled

Sep 22 1998

Daniel William Bourque, recalled

Sep 23 1998

Daniel William Bourque, recalled

Sep 24 1998

Daniel William Bourque, recalled
Christopher Fleming

Sep 25 1998

Christopher Fleming, recalled
Thomas Sprysa

Sep 28 1998

Christopher Fleming, recalled
Donald Grant Cowan

Sep 29 1998

Donald Grant Cowan, recalled

Sep 30 1998

George Foundham Jones, Q.C.

* * * * *

Canadian Charter of Rights and Freedoms

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.
10. Everyone has the right on arrest or detention
 - (a) to be informed promptly of the reasons therefor;
 - (b) to retain and instruct counsel without delay and to be informed of that right;
11. Any person charged with an offence has the right

- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

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.

- (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

* * * * *

COMMUNIQUÉ

Audit Directorate

Number
SI-92-01

Date

January 29, 1992

Issued By

Investigations Section

Section Affected

Special Investigations

Subject

Right to Counsel - Canadian Charter of Rights and Freedoms

- (1) Right to Counsel Pursuant to Section 10(B) of the Charter

A judge recently ruled that the rights of a taxpayer under investigation were violated under Section 10(b) and 7 of the Charter. The judge stated, in part, that the accused was completely lacking in his understanding of the criminal warning or Caution that had been read to him.

Section 10(b) of the Charter states that everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right. Unless the Courts at a future date state otherwise, it is the Department' position that a taxpayer under Section 239 Income Tax Act investigation is being "detained" within the meaning of Section 10(b) of the Charter and therefore must be properly cautioned.

(2) Audit vs. Investigation: Use of Caution

The Courts have established that na investigator is a person in authority and that a person under investigation is entitled to the full protection of the Charter. While the department has ben successful in defending most challenges under the Charter, investigators must continue to ensure that a taxpayer's rights are not infringed or denied by any action they take or fail to take.

When an investigator is involved in the review of any taxpayer the Caution must be given even if an auditor is carrying out the review on behalf of the investigator. This applies to all interviews.

It is imperative that the taxpayer know that they are now the subject of a criminal investigation and that they be advised of any possible charges under Section 239 of the Income Tax Act. An investigator must be aware that if the Caution is not given incorrectly, there is a risk not only of any statement subsequently being ruled inadmissible, but also that any derivative evidence may be found inadmissible (e.g. search documents). Again, it is important that the notes of the meeting reflect that the taxpayer was advised that they are now the subject of a criminal investigation and the possible consequences.

(3) Administration of the Caution

The giving of the warning to a person under investigation requires not only the

reading of the Caution but also determining, to the best of your ability, whether the individual understands the Caution, and whether the legal right to counsel is understood. This is of particular importance where the individual has limited formal education or there appears to be a language barrier.

The time, manner and fact that the taxpayer has been given the Caution and any reaction and comments must be noted in the minutes of any meeting. The Caution should be read out loud, discussed, and it should be clearly indicated that the taxpayer may use the telephone immediately, to call Duty Counsel or Legal Aid, if they so wish. Investigators must have the telephone numbers both of the local Legal Aid office and of Duty Counsel available, should the taxpayer request it. The taxpayer must be asked if they have clearly understood what has been said.

(4) Revised Caution Card

A new Caution card is being prepared. Until the revised card has been issued, investigators must carry a typed copy of the new caution, (as per the example attached) and must use the revised version.

For further information please contact Patricia McLachlan at (613) 957-9413 or Louise Proulx at (613) 957-9407.

J.P. Lavigne
Director
Audit Programs Division

* * * * *

11(10)0 Interviews

11(10)1 Purposes

- (1) Investigators will carry out interviews with taxpayers during the conduct of investigations for the purpose of:
 - (A) Drawing from suspects and potential witnesses the full extent of their knowledge of the matters under investigation.

- (B) Obtaining information, facts, and documentary evidence admissible in Court to prove charges of tax evasion.
- (C) Reducing investigation time by the use of effective questioning techniques.

11(10)1.1 Meetings and Interviews with Taxpayers under Investigation

- (1) During the course of an investigation the investigator may be required to meet with the taxpayer under investigation, either at his/her place of business or elsewhere, and to make enquiries of him/her in relation to his/her personal or business tax affairs. The following general rules should be considered when communicating with a taxpayer under investigation:
 - (A) The audit and investigation processes are treated differently by the courts and different rules will apply to each situation.
 - (B) The audit process including making demands for returns and information is deemed to be a regulatory procedure necessary for the effective monitoring of the Income Tax Act. In Mckinley Transport Limited the Supreme Court held that a requirement does not constitute a seizure in the sense that it infringes upon the recipient's expectation of privacy, but the seizure was a reasonable one.
 - (C) It has also been recognized that an auditor obtaining information from a taxpayer during a routine audit is not a person in authority, and thus information and statements made to him during this process are generally acceptable as evidence in court proceedings, subject to the determination of voluntariness.
 - (D) An investigator is recognized by the courts as a person in authority whose primary function is to pursue criminal prosecution of individuals involved in Income Tax offences. The investigator's contact with a potential accused is similar to that of a police officer and as a result the person under investigation must be given the full protection of the Charter. An auditor, acting as an agent of the investigator, will inherit the same responsibilities as a person in authority. The investigation process can invoke the following Charter rights which are closely inter-related:
 - (a) Section 7 - Fundamental Justice includes the right to be free from self incrimination.
 - (B) Section 10(b) - "Detention" can occur as a result of the questioning of a potential accused and this triggers his right to counsel, without delay.
 - (E) Any infringement of a person's Charter rights can result in the exclusion of the evidence obtained, including any derivative evidence obtained as a result of the

Charter violation.

- (F) Section 7 of the Charter enshrines the right of a suspect or accused to remain silent during both the investigative stage and the judicial process. Investigators in the course of their duties are permitted to ask questions and are not required to refrain from doing so during the investigative stage, merely because the accused has no obligation to answer. As discussed in the following paragraphs, it will be necessary for the investigator to administer the formal Caution, where appropriate, to ensure that there is not a violation of the Charter rights of a potential accused.
- (G) A clear distinction is made during the preliminary investigation of a possible violation, in that the investigator is required to seek information including asking questions when necessary, to determine whether an offence has been committed. This includes quantifying the alleged discrepancies, identifying the alleged offender, and establishing on the balance of probabilities that the actus reus and the mens rea necessary to support an offence are present.
- (H) The right to remain silent will extend to situations where the taxpayer under investigation is asked to provide potentially incriminating information or statements pursuant to a 231.2 requirement relating to his own tax affairs, and where the information sought is for an investigative rather than an administrative purpose. If the information is obtained from a taxpayer during the audit stage, either by requirement or otherwise, this information will generally be admissible as evidence in a subsequent criminal tax proceeding. Similarly, the right to remain silent would not apply to the production of books, records or other documents ordinarily required to be maintained pursuant to the Income Tax Act. The auditor, can go back to the taxpayer' business and examine or re-examine.....

* * * * *

Revenue Canada Taxation
MEMORANDUM

To Director Taxation
Assistant Director Audit
Chief Special Investigations

All District offices

From Audit programs
Division
Investigations and
Avoidance Section
J. Lafontaine
(613) 941-9707

Subject: Special Investigations File
Identification of Auditors,

Investigators and Charter
Rights

June 30, 1993

The administration of the Income Tax Act can involve the civil or criminal legal process. There have been a number of recent instances in Special Investigations which have emphasized the need to reaffirm our policies regarding the distinction between the civil and criminal processes and the requirement to properly identify ourselves when dealing with a client under investigation and the client' representative, agent or employee.

The criminal aspect of the administration of the Income Tax Act must conform to the Charter of Rights and Freedoms and the continually evolving jurisprudence. In this regard it is imperative that the investigators or auditors conducting an enquiry as part of the investigative process clearly identify that they are carrying out an investigation.

Our major concern relates to the gathering and derivative use of evidence. An evidentiary problem could arise if an auditor or an investigator obtains evidence directly or indirectly from a potential accused and does not clearly disclose that an investigative body is seeking the information. In these circumstances the potential accused could allege that he/she believed that the information was provided as an obligation under the Income Tax Act for administrative and not criminal purposes.

It would be appreciated if you would review the cases you currently have under investigation with your Chief of Special Investigations to ensure that there are no situations where evidence is based on information that was obtained without proper disclosure by an auditor or an investigator. Any such cases should be reported immediately to Ron Moore, Chief Investigative Services, Head Office, Audit Technical Support Division.

Attached for your information is a summary of relevant parts of TOM 11 dealing with our policy concerning contact with a potential accused and an outline and commentary regarding recent criminal cases involving Section 7 and Section 10(b) Charter issues.

Paul E. Séguin
Director general
Audit Directorate

Attachment

* * * * *

TOM 11 SUMMARY

Summarized below are excerpts from TOM 11 which discusses contact with a potential accused, including the use of the formal "Caution" with additional comments relating to situations where information is being sought from a potential accused through a third party such as an accountant.

As discussed in TOM 1142.2(3), in the referral of a file to Special Investigations, there are often indications of fraud present but the information on hand is incomplete or the evidence is not strong enough to warrant the commencement of a preliminary investigation. If the information is insufficient to warrant the opening of a preliminary investigation the T-134 should be declined with adequate explanations of its deficiencies. This is necessary to maintain a clear distinction between the civil and criminal process.

Special Investigations staff should not put themselves in a position of directing the audit process for the purpose of gathering information for a search warrant in response to T134 referrals. Where additional work is contemplated for the purpose of gathering information for a search warrant, the T-134 should be accepted by Special Investigations and the client rights under the Charter must be considered as outlined in Tom 11(10)1.1

TOM 11(10)1.1(1)(D) identifies the investigator as a "person in authority" whose primary function is to pursue criminal prosecution of individuals involved in Income Tax offences. Further, an auditor acting as agent of an investigator will inherit the same responsibilities of a person in authority. The investigation process can initiate the following Charter rights which are closely related:

- (a) Section 7 - "Principles of Fundamental Justice" includes the right to remain silent at the investigative stage of the criminal process and at the trial stage;
- (b) Section 10(b) - On detention everyone has the right to retain and instruct counsel without delay, and to be informed of that right. A "detention" can occur as a result of the questioning of a potential accused.

The use of the formal "Caution" is also discussed at length in TOM 11(10)1.1. Additionally, the instructions specify that when approaching a client whose file has been referred to Special Investigations with the intent of conducting a preliminary investigation, the investigator should properly identify himself/herself by presenting an identification card and stating that he/she is from Special Investigations. Under no circumstances should an attempt be made to deceive or mislead the client of this basic fact. These instructions would also apply to auditors who are on loan or acting under the direction of Special Investigations staff.

Reference should be made to TOM 11(10)1.2 for instructions and procedures relating to conducting interviews with third parties.

In addition to the above reference, it should be noted that the accountant of a client under investigation can be a "third party" or can act as "an agent" of the client under investigation whereby information is directly obtained from the client and communicated to Revenue Canada - Taxation.

The use of "real evidence" such as an accountant' working papers and information obtained from the

accounting records of the client should not invoke Section 7 or 10(b) Charter rights. However, Section 8 Charter challenges may be anticipated based on alleged Section 7 or 10(b) Charter violations.

Information obtained verbally by the accountant from the client under investigation in response to specific Revenue Canada Taxation queries merely places the accountant as an agent and communicator of information between the client and the Department. The use of this information may invoke Charter challenges by the accused at trial or in motions to quash search warrants. It is because of this fact that the potential accused should be aware beforehand that the information is being sought by an investigative body in order that he or she can exercise his/her constitutional right to remain silent during the investigative process. The same basic principle could apply in respect to information sought from the client under investigation through an employee of the client.

* * * * *

To	Director Taxation From	Investigations
	Assistant Director Audit	Audit Technical
	Chief, Special Investigations	Support Division

All District Offices

File 1994-1-1

Subject: Interrelationship Between Audit and Special Investigations: When to give the Criminal Warning

In Mr. Séguin's memorandum dated June 14, 1993, attached, it was emphasized that investigators or auditors seeking evidence as part of the investigative process must clearly identify that they are carrying out an investigation. This memorandum is to provide further advice with respect to when the criminal warning should be given.

In recent case law (McKinlay Transport, Tyler, Roberts, Coghlan) seizures in the criminal and administrative context have been discussed. The importance of the distinction between the criminal and administrative context lies in the degree to which various legal rights will apply depending into which context a function being carried out falls.

If we consider the range of sanctions which the Department may take against a taxpayer as a spectrum, one end is a pure audit situation and the other is a full scale S.I. case. The case law to date is clear that actions taken by an auditor in the audit stage, where there is no suggestion of any kind of fraud, constitute administrative actions. A lesser standard of Charter rights apply to these actions

so that the warning does not have to be given by an auditor when discussions are being held with a taxpayer.

It is equally clear, however, that a full scale S.I. investigation is a criminal function which attracts the full impact of Charter rights so that the warning must be given when an investigator interviews a taxpayer under investigation.

At some point in the spectrum an audit administrative function will change to a criminal investigative one when allegations of fraud arise from the audit. The Department of Justice has advised that this point is when a Departmental officer concludes that he/she has grounds to believe that an offence may have taken place. At this point the warning must be given when the taxpayer under investigation is interviewed.

The difficult point in the spectrum is, of course, the middle ground, from when an auditor begins to find indications of fraud through to S.I. accepting a fraud referral. It will be a question of fact in each case whether an investigation has commenced. If the purpose of any work undertaken is in furtherance of gathering evidence to place in a search information or in respect of gathering mens rea for an offence then it will be considered an investigative function. If a T134 is accepted by S.I. it will put the case into an investigative function if it is not already so considered.

Upon receiving a referral, S.I. may be of the opinion that not all audit steps have been completed and the referral should be rejected. For example, in a situation where an auditor suspects personal expenses of a shareholder have been paid by a company but he/she has not yet checked the year end adjusting entries to verify whether the expenses have been posted to a shareholder's loan account, the checking of such entries by Audit would still be an administrative step, in our view.

However, in a situation where S.I. agrees that a T134 contains elements of fraud, but, considers that additional quantum or more than one year of suspected fraud is needed for an acceptable referral, the in our view, there is an acknowledgement that the investigation stage has been reached.

It must be understood that if the auditor is found to be acting as the "agent" of the investigator and is seeking information as part of the investigation, the admissibility of that information and the derivative evidence can be placed in jeopardy if the warning is not properly administered.

The Department of Justice has advised that an S.E.P. audit is an administrative function until the criminal investigation stage is reached as discussed above. Therefore, the warning does not have to be given at the commencement of such an audit, rather, only when it is believed an offense may have been committed.

It should be noted that the officer conducting the audit can make the determination that an offense may have been committed. It need not be an S.I. officer. It is therefore important that the Audit staff be made aware of and understand the principles involved. They should strive to provide a complete picture to S.I. upon making a fraud referral thus reducing the need for additional work to be done

involving the taxpayer directly.

We would be pleased to discuss any of these matters with you or arrange to make a presentation to any of your staff on these issues. For further information please contact Jack Hansen at (613) 957-9427 or our legal advisor Eugene Kucher at (613) 957-9426

E.H. Gauthier
Director
Audit Technical Support Division

Attachment

* * * * *

11(10)0 INTERVIEWS

11(10)1 PURPOSES

- (1) Investigators will carry out interviews with taxpayers during the conduct of investigations for the purpose of:
 - (A) Drawing from suspects and potential witnesses the full extent of their knowledge of the matters under investigation.
 - (B) Obtaining information, facts, and documentary evidence admissible in Court to prove charges of tax evasion.
 - (C) Reducing investigation time by the use of effective questioning techniques.

11(10)1.1 Meetings and Interviews with Taxpayers under Investigation

- (1) During the course of an investigation the investigator may be required to meet with the taxpayer under investigation, either at his/her place of business or elsewhere, and to make enquiries of him/her in relation to his/her personal or business tax affairs. The following general rules should be considered by the investigating officer when communicating with a taxpayer under investigation:
 - (A) The audit and investigation processes are treated differently by the courts and different rules will apply to each situation.
 - (B) The audit process including making demands for returns and information is deemed to be a regulatory procedure necessary for the effective monitoring of the Income Tax Act. In Mckinley Transport Limited the Supreme Court held that a requirement does constitute a seizure in the sense that it infringes upon the recipient's expectation of privacy, but the seizure was a reasonable one.

- (C) It has also been recognized that an auditor obtaining information from a taxpayer during a routine audit is not a person in authority, and thus information and statements made to him during this process are generally acceptable as evidence in court proceedings, subject to the determination of voluntariness.
- (D) An investigator is recognized by the courts as a person in authority whose primary function is to pursue criminal prosecution of individuals involved in Income Tax offences. The investigator's contact with a potential accused is similar to that of a police officer and as a result the person under investigation must be given the full protection of the Charter. An auditor, acting as an agent of the investigator, will inherit the same responsibilities as a person in authority. The investigation process can invoke the following Charter rights which are closely inter-related:
 - (a) Section 7 - Fundamental Justice includes the right to be free from self incrimination.
 - (b) Section 10(b) - "Detention" can occur as a result of the questioning of a potential accused and this triggers his right to counsel, without delay.
- (E) Any infringement of a person's Charter rights can result in the exclusion of the evidence obtained, including any derivative evidence obtained as a result of the Charter violation.
- (F) Section 7 of the Charter enshrines the right of a suspect or accused to remain silent during both the investigative stage and the judicial process. Investigators in the course of their duties are permitted to ask questions, and are not required to refrain from doing so during the investigative stage, merely because the accused has no obligation to answer. As discussed in the following paragraphs, it will be necessary for the investigator to administer the formal Caution, where appropriate, to ensure that there is not a violation of the Charter rights of a potential accused.
- (G) A clear distinction is made during the preliminary investigation of a possible violation, in that the investigator is required to seek information, including asking questions when necessary, to determine whether an offence has been committed. This includes quantifying the alleged discrepancies, identifying the alleged offender, and establishing on the balance of probabilities that the actus reus and the mens rea necessary to support an offence are present.
- (H) The right to remain silent will extend to situations where the taxpayer under investigation is asked to provide potentially incriminating information or statements pursuant to a 231.2 requirement relating to his own tax affairs, and where the information sought is for an investigative rather than an administrative purpose. If the information is obtained from a taxpayer during the audit stage,

either by requirement or otherwise, this information will generally be admissible as evidence in a subsequent criminal tax proceeding. Similarly, the right to remain silent would not apply to the production of books, records or other documents ordinarily required to be maintained pursuant to the Income Tax Act. The auditor, can go back to the taxpayer's business and examine or re-examine existing business records to obtain additional information necessary to complete his audit functions.

- (I) Once the investigator has satisfied himself on the balance of probabilities that an offence has taken place and has identified a specific suspect, any discussions with the potential accused for the purpose of eliciting information or evidence, can result in a "detention" as described in Section 10(b) of the Charter. This in turn triggers the taxpayer's right to retain and instruct counsel without delay. The investigating officer has a duty to administer the Caution to the potential accused to protect his/her Charter rights.
- (J) Detention as described in Section 10(b) of the Charter is directed to the restraint of liberty, other than arrest in which the person may reasonably require the assistance of counsel but may be prevented or impeded from retaining or instructing without delay. There is a detention within the meaning of S. 10 when an agent of the state assumes control over the movement of the person by a demand or direction which may have significant legal consequences and which prevents or impedes his access to counsel. There need not be physical compulsion. Detention can occur if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes the choice to do otherwise does not exist (Therens). During tax investigations these circumstances will include situations where the taxpayer is being questioned about items relating to possible alleged offences and where there are reasonable grounds by the investigator at the time to determine that an offence has been committed and the answers are being sought to cause the taxpayer to incriminate himself.
- (K) Section 10(b) of the Charter imposes at least two duties on the investigator in addition to the duty to inform the detainee of his rights. First, the investigator must give the accused or detained person a reasonable opportunity to exercise the right to retain and instruct counsel, and second, the investigator must refrain from questioning or attempting to elicit evidence from the detainee until the detainee has had that reasonable opportunity.
- (L) The administering of the caution includes the responsibility that the recipient fully understands his/her Charter rights and further that a lawyer of his/her choice, duty counsel or legal aid can be readily consulted.
- (M) The rights set out in Section 10(b) of the Charter are not absolute. the Supreme Court has held the right to retain and instruct counsel must be exercised diligently by the detainee. If the detainee is not diligent, then the correlative duties of the investigative officers are suspended.

- (N) No statement made out of court by an accused to a person in authority can be admitted into evidence against him unless the prosecution shows to the satisfaction of the trial judge that the statement was made freely and voluntarily. "Accused" means at the time he/she is the accused in a criminal trial when the statement is sought to be introduced against him/her, rather than at the time the statements were made.
 - (O) A statement determined to have been made voluntarily by a taxpayer to an auditor or investigator does not violate a Charter right and may be entered as evidence in a subsequent proceeding.
- (2) The following practices are to be adhered to when communicating with the taxpayer under investigation:
- (A) When approaching a taxpayer whose file has been referred, with the intent of making a preliminary examination of the alleged discrepancies and/or case potential, investigators should properly identify themselves as being employees of Revenue Canada - Taxation, present their T3000 card, and state that he or she is a member of the Special Investigation Section. Under no circumstances should an attempt be made to deceive or mislead the taxpayer of this basic fact.
 - (B) Investigators and auditors are given authority under 231.1(a) of the Income Tax Act to inspect, audit or examine the books of a taxpayer at all reasonable times for any purpose related to the administration or enforcement of the Income Tax Act.
 - (C) The revised Criminal Warning or Caution is provided in Exhibit 11(10)0-A attached. When the Caution is administered, it is also the responsibility of the person administering it to ensure that the person receiving it understands what is being said and that he/she is aware of their Charter rights.
 - (D) Whenever the extent of the examination of the taxpayer extends from the general investigation process to a point where the investigator has reasonable and probable grounds to believe that the taxpayer has committed an offence, and the taxpayer is being examined on specific transactions where fraud is suspected, is placed in a position of incriminating himself/herself, and/or where we plan to use the information or statement in a subsequent proceeding, the taxpayer must be given the Caution and the protection of the Charter.
 - (E) The danger of not providing the taxpayer of the protection of the Charter is that not only will the statements made be inadmissible but derivative evidence, such as documents obtained by search warrant, may also become inadmissible.
 - (F) If a case goes to trial, the Investigator can expect to be questioned extensively on, how he/she interpreted the facts at any specific point in time and to explain why he/she did, or why he/she did not, afford the taxpayer with his Charter rights.

Certainly, the investigator should be able to objectively indicate to the court at what time the fact supported, mere suspicion, inconclusive grounds that an offence had been committed, and at what time he had reasonable grounds to apply for a search warrant.

- (G) During the preliminary investigation stage the investigator should firstly consider concentrating his efforts on examining the available documentary evidence and the evidence of key witnesses before attempting to interview the taxpayer. If an interview with the taxpayer under investigation is considered necessary, it is Departmental policy to exercise a conservative approach and administer the formal Caution prior to any confrontational discussions or where verbal responses from the taxpayer are likely to be self incriminating in nature.
 - (H) The investigator should approach the file with an open mind and objectively evaluate the facts and evidence as they arise. In this way the decision as to whether he has reasonable and probable grounds to determine if an offence has been committed will naturally evolve.
 - (I) In any subsequent meeting with the taxpayer under investigation, after the file has been accepted for full scale investigation, staff must:
 - (a) Identify themselves as representatives of Special Investigations prior to any in depth discussions;
 - (b) Inform the taxpayer that he/she is under criminal investigation and give the Criminal Warning (Caution) and his/her right to counsel before there is any written recording of a statement from the subject.
- (3) When administering the Criminal Warning or Caution to a taxpayer, the following points must be considered:
- (A) The Caution must be read out loud by the investigator which includes the statements "Do you understand what has been said to you?" and "Do you want to call your lawyer now?" A clear response must be received to both these questions. In addition to the verbal responses from the taxpayer to these questions, the investigator must determine to the best of his ability whether the individual understand the Caution, and whether the legal right to counsel is understood. This is particularly important where the individual has limited formal education or where there appears to be a language barrier.
 - (B) It should be indicated clearly to the taxpayer that he/she may use the telephone immediately, to call counsel of his/her choice, Duty Counsel or Legal Aid, if he/she so wishes. Investigators should have telephone numbers of both the Legal Aid office and of Duty Counsel available, should the taxpayer request it. (There

may be slight differences in legal aid systems administered by each province. Investigators should establish the local procedures to be followed in their jurisdiction to obtain access to legal aid service including service by telephone).

(C) The time, manner and the fact that the taxpayer had been given and understood the Caution and any reaction and comments must be noted in the minutes of the meeting

- (4) Planning of searches should include preparation for questioning the taxpayer, his employees and associates. It is appropriate to ask questions and to give the taxpayer the opportunity to respond, if he wishes to do so. The Caution must be given to the taxpayer under investigation before any explanations are sought or questions asked relating to the alleged offences. By the very nature of a search action, it is an opportune time when the taxpayer and/or some of his employees should be questioned for the purpose of obtaining explanations, isolating office procedures, and defining authorities and responsibilities. If properly used, information can be obtained from the taxpayer and his staff that will materially shorten the investigation. Senior members of the search party should be assigned to conduct the interviews while the balance of the search party carries out the search.

qp/s/jjl

3 Lamer, CJC at para. 1-7; Sopinka J. at para. 301, 316, 319, 322; and for different reasons, but more emphatically, L'Heureux Dubé, J. at para. 233, 237, 241, 257, 261, 266-267 (the conduct of the state herein also constitutes an abuse of process), 270, 273 (prevention of the conduct revealed in the case at bar is the "constitutional bottom line"), 277, 278 (no general power interrogation), 280, 283, 285, 286, 287 (no colourable discovery), 288 (hindsight is 20/20; stay where state obtains "important and diverse strategic advantages").

4 It is fair to say that the "bottom line" response of L'Heureux Dubé, J. to the worst case scenario of compulsion procedures (that the case herein represents) is shared by the Iacobucci, J. and first majority, e.g., para. 141-145; albeit that the first majority preferred to develop a broader rule that addresses all forms of compulsion, both proper and colourable. Mr. Justice Iacobucci's focus on the inquisitorial character of the prior inquiry proceedings simply emphasizes that what occurred herein is subject to the "essential objection", para. 146, of the balance of the Court. It is more than implicit in any event, that Justice Iacobucci would propose to limit the abuses which Justice L'Heureux Dubé" focuses upon pursuant to the abuse of process doctrine: para. 158.

