Dockets: 2016-2716(IT)G
2016-2717(GST)G

BETWEEN:

COLIN MCCARTIE,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on September 20, 21, 22, 23, 2021 and on October 13, 14, 15, 2021 at Vancouver, British Columbia

Before: The Honourable Justice Patrick Boyle

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Eric Brown
	Jamie Hansen

ORDER

In accordance with the attached written reasons, it is ordered that in this appeal:

1. The respondent cannot introduce or rely on any evidence that was first collected from the search and seizure at the McCarties' home to establish the amount of tax owing. Further, the respondent's assumptions set out in its reply do not enjoy any presumption of being correct nor impose any initial burden on Mr. McCartie to demolish them.
2. The respondent cannot introduce or rely on any evidence that was first collected from the search and seizure at the McCarties' home to justify reassessing after the normal assessment period had expired; and

3. The respondent cannot introduce or rely on any evidence collected from the second audit of the McCarties, or first collected from the search and seizure at the McCarties' home, to support the penalties assessed.
4. The Appellant is entitled to costs on this hearing

Signed at Ottawa, Canada, this 6th day of February 2024.

"Patrick Boyle"

Boyle J.

Citation: 2024 TCC 16
Date: 20240206
Dockets: 2016-2716(IT)G
2016-2717(GST)G

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REASONS FOR ORDER

Boyle J.

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I. Précis

[1] These are my reasons on a *voir dire* to determine whether a remedy is available, and if so what remedy is appropriate, in this proceeding in respect of multiple violations of Mr. McCartie's Charter rights in his related criminal proceedings arising out of CRA's audit of him and his wife[1].

[2] In the underlying reassessments in issue, Mr. McCartie is presumed by the Crown to have claimed natural person, sovereign citizen type deductions or non-inclusions to not include, or to significantly reduce, the amount of revenue he reported as taxable and subject to GST/HST. He was reassessed by Canada Revenue Agency ("CRA") to deny those deductions and to impose gross negligence penalties.

[3] Mr. McCartie was also charged criminally with false reporting and evasion under the *Income Tax Act* ("ITA") and with evasion under the *Excise Tax Act* ("ETA") in respect of these claimed deductions or failures to include in income. His wife was also charged under the ITA with evading taxes. Their criminal cases proceeded together in the British Columbia courts. In a lengthy series of rulings, the BC Provincial Court clearly found that the McCarties' Charter rights had been violated in multiple respects and on multiple occasions. This included their rights under both section 7 and section 8 of the Charter. The BC Court imposed section 24 Charter remedies in respect of these breaches at several stages of the criminal

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[1] In McCartie v. HMQ, 2018 TCC 185, Justice Bocock decided at the first phase of a Rule 58 motion that these issues were best left to the trial judge.

proceedings. Both CRA Criminal Investigations Division and RCMP police were involved in the events giving rise to the breaches of the McCarties' Charter rights. In the end, the BC Court stayed the criminal charges because it concluded that, in the circumstances, if there were to be a trial, it would not be possible for the McCarties to receive a fair trial as guaranteed by section 11(d) of the Charter.

[4] The Charter violations found by the BC Court included breaches of sections 7 and 8 in respect of the search of their home and CRA's unacceptably negligent loss of its notes and records. The BC Court described the breaches as significant and cumulatively very serious.

[5] The Charter violations found by the BC Court are not being relitigated in this proceeding, and this Court has not been asked to decide if there were events giving rise to other Charter violations. The only Charter issues in this *voir dire* are whether a section 24 remedy can be imposed by this Court in respect of Mr. McCartie's tax appeal for the Charter breaches found by the BC Court in respect of which remedies were already granted in that court and, if so what remedy is appropriate in this Court. This includes possible remedies for breaches of section 8 Charter rights that only exist with respect to criminal proceedings.

[6] For the reasons that follow, I have decided that section 24 of the Charter permits this Court to impose remedies if appropriate in respect of Charter breaches determined by another court in which a remedy is already being, or has been, imposed in respect of that court's proceedings. I have concluded this could extend, if appropriate, to breaches of Mr. McCartie's section 7 and section 11 Charter rights which can only be breached in the context of criminal proceedings.

[7] I have concluded that, in Mr. McCartie's particular circumstances, certain evidence will not be able to be used by the respondent in this proceeding for certain purposes, whether by way of tendering it in evidence, using it to impeach credibility, referring to it in any manner that is even implicitly suggestive that an adverse inference might be drawn, or otherwise. The excluded evidence is set out below, and includes evidence subsequently obtained by the respondent as a result of having obtained evidence in breach of Mr. McCartie's Charter rights. Nor can the respondent use the transcript in this *voir dire* or these reasons except, as permitted below, with respect to the evidence of the respondent's witnesses on the substantive issues alone.

[8] I do not and cannot address at this *voir dire* stage whether Mr. McCartie's alleged under-reporting of his income and revenue in the years in question, was done

"knowingly or under circumstances amounting to gross negligence" permitting the assessment of penalties, or whether it was a misrepresentation permitting reassessments beyond the normal reassessment period. Those issues have to be left until the hearing resumes on the substantive merits.

II. The Relevant Charter Provisions

Legal Rights	**Garanties juridiques**
Life, liberty and security of person	Vie, liberté et sécurité
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.	7 Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
Search or seizure	Fouilles, perquisitions ou saisies
8 Everyone has the right to be secure against unreasonable search or seizure.	8 Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.
Proceedings in criminal and penal matters	**Affaires criminelles et pénales**
11 Any person charged with an offence has the right	11 Tout inculpé a le droit :
…	…
(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;	c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;
(d) to be presumed innocent until proven guilty according	

to law in a fair and public hearing by an independent and impartial tribunal;

d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

Enforcement

Enforcement of guaranteed rights and freedoms

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.

Exclusion of evidence bringing administration of justice into disrepute

(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.

Recours

Recours en cas d'atteinte aux droits et libertés

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

Irrecevabilité d'éléments de preuve qui risqueraient de déconsidérer l'administration de la justice

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

III. Preliminary Matters

(i) The subpoena of CRA's Ms. Sundberg.

[9] Prior to the hearing, the appellant sought to issue a subpoena for the lead CRA investigator of the McCarties in the years in question, Kathy Sundberg, who testified against them in the BC Court proceedings. Ms. Sundberg had since retired from CRA and the respondent did not want to disclose her address to the appellant. Following a trial management hearing, the respondent agreed it would subpoena Ms. Sundberg and call her as a witness. Attempts to serve Ms. Sundberg were not successful. Based on the multiple process servers' reports, I concluded prior to the trial date that Ms. Sundberg was very clearly evading service of the Crown's subpoena. Accordingly, the Court had arrangements in place for the first day of hearing to promptly and effectively address Ms. Sundberg's failure to accept service of the subpoena and to attend Court.

[10] Prior to the first day of the hearing, the parties reached an agreement that Mr. McCartie would not require Ms. Sundberg to testify if certain agreements and concessions were made with respect to her testimony and evidence before the BC Court and that Alan Jones would testify. Mr. Jones was the Team Leader of the CRA Criminal Investigations unit in Vancouver at the relevant times.[2]

[11] In these circumstances, and for purposes of this proceeding, I will regard Ms. Sundberg's evidence in the BC Court, and what that court wrote about it, as the most favourable version of events from the respondent's point of view and Ms. Sundberg's, as it has not been the subject of further testimony from her or subject to cross-examination in this Court. I will similarly regard what her team leader Mr. Jones testified to in this proceeding regarding Ms. Sundberg as matters Ms. Sundberg would not disagree with as she has herself chose not to testify. Finally, any of Ms. Sundberg's evidence from the BC Court proceedings can be challenged by Mr. McCartie in this proceeding as is specified in the parties' agreement, subject of course to issue estoppel, abuse of process and/or similar constraints.

(ii) Scope of *voir dire* evidence.

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[2] It would have been preferable had the parties communicated their agreement to the Court in advance so that the measures in place regarding Ms. Sundberg's evasion and non-appearance for that morning could have been stepped down.

[12] This *voir dire* is to address the issue of what remedy, if any, should be imposed under section 24 of the Charter in respect of the events and concerns giving rise to several breaches by the respondent of Mr. McCartie's Charter rights.

[13] Mr. McCartie is a self-represented litigant. In this appeal the onus/burden of proof is on the respondent with respect to both the statute-barred years and gross negligence penalty issues.

[14] In the interest of efficiency of the appeal process as a whole, the parties were agreeable to the Crown witnesses on this *voir dire* also giving their evidence on the merits and substantive issues in these appeals. In this decision on the *voir dire* addressing the issue of remedies, and having decided the remedy will include restrictions on evidence the Crown may submit on the substantive merits regarding these issues, I also need to identify what portion, if any, of their testimony in the *voir dire* can be used in the hearing on the merits. On this basis, all of the Crown witnesses in this proceeding have given evidence in chief, been cross-examined, and have answered my questions regarding their evidence. Any further Crown evidence in this proceeding will require leave.

[15] In the circumstances of this case, I would not allow Mr. McCartie to testify in this *voir dire* to the merits and substantive issues in his appeals. His evidence was limited to the Charter issues and evidence. It did not appear wise to allow an unrepresented appellant testify on a *voir dire* and submit to cross-examination on the substantive aspects of his appeal. The efficiency of the trial process should not be allowed to override the interests of justice and fairness. When his hearing resumes on the merits, Mr. McCartie and his other witnesses will testify, be cross-examined and answer the Court's questions at that time, once Mr. McCartie knows what Crown evidence is excluded.

[16] I did allow Mr. McCartie to testify on a limited basis to facts pertaining to the substantive merits sufficient to provide me with the context he thought I needed to have before hearing the Crown witnesses.

[17] This hearing lasted [7] days over a 3 month period. Written submissions from the parties were scheduled and received thereafter. The respondent later made written submissions in respect of the subsequent January 2023 decision of juge Lafleur of this Court in *Bellevue Félix*, 2023 CCI 5, to which the appellant was also given the opportunity to respond after being provided by the Court with the official English translation of juge Lafleur's decision.

(iii) Crown concession re 2009 ITA gross-negligence penalty.

[18] At the outset of the hearing, the respondent conceded the issue of the assessment of a gross negligence penalty under the ITA for the year 2009. The appeal in respect of that 2009 ITA penalty is allowed.

IV. The Charter Breaches

[19] There are a number of decisions of the BC Court in the years 2013 to 2015 involving the related tax evasion charges against the McCarties. That court found several breaches of the McCarties' Charter rights under sections 7 and 8. In the end, the BC Court judge stayed the charges against both McCarties in 2015 on the basis that, if he allowed the trial to continue without access to evidence relating to the date that CRA's predominant purpose became an investigation of a potential crime, both because of CRA having lost most of the notes taken by the auditor who made notes of almost everything, and the failure of other auditors and/or investigators to make and/or keep notes, and because of the McCarties' lack of access to the tax lead that may have given rise to the involvement of CRA Criminal Investigations because its contents and/or date might disclose the identity of the informer, would be to deny them to a fair trial and fundamental justice contrary to sections 8 and 11 of the Charter.[3]

[20] The following BC Court decisions and reasons are relevant to this *voir dire* in Mr. McCartie's tax appeal. All of these are decisions of Judge Gouge, and the McCarties were self represented at each of these hearings. There were at least four earlier decisions of the BC Court in the McCarties' proceedings dealing with, among other things, the McCarties' disclosure request for CRA's notes and records, the McCarties' asserting of their rights to fairness in their trial, and the issue of informer privilege.

(i) McCartie 2013 BCPC 221 ("McCartie 2013-1") (3-day *voir dire* hearing)

[21] In the immediately preceding McCarties decision by another judge, the BC Court determined that informer privilege applied to "Any information which might give rise to a risk of disclosure of the identity of an informer in this case" and "the

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[3] Judge Gouge had read the tax lead documents and would have been fully aware of their date and contexts, and perhaps their identity. Informer privilege precluded the McCarties having this information.

Crown aknowledges that the informer, while confidential, was not anonymous, and the Crown is aware of his or her identity".

[22] Before the BC Court, at this hearing after the trial had commenced, was the issue of whether certain evidence gathered by CRA using its audit power should be admissible since it was asserted by the McCarties that it was obtained by compelled disclosure at a time that the predominant purpose of CRA's inquiries was to gather evidence for a criminal prosecution which is contrary to *R.* v. *Jarvis* [2002] 3 SCR 757. Central to this issue was the foundational need for the McCarties to establish the date on which the predominant purpose of CRA's inquiries changed from audit to potential criminal prosecution which that court referred to, and as defined as, the Key Date.

[23] The evidence regarding the Key Date depended primarily on oral evidence of CRA employees. The Crown asserted that "much of the evidence that would shed light on the Key Date would, if disclosed to Mr. and Ms. McCartie, give rise to a risk of disclosure of the identity of the informer". The Crown asked Judge Gouge that hear that evidence *in camera*.

[24] Judge Gouge's summary of the evidence in the trial prior to the commencement of the *voir dire* he was then deciding included the following.

[25] Jason Brown audited both McCarties' 2002 and 2003 years in 2004. Mr. Brown submitted his audit report to his supervisor in March 2005. Reassessments of both years were issued to both taxpayers. Both McCarties appealed the reassessments and were "substantially successful" resulting in "significant reduction" to their reassessed taxes and the cancellation of penalties assessed. Prior to March 2005 Mr. Brown had no communication with CRA Criminal Investigations relating to the McCarties.

[26] In March 2005 Mr. Brown prepared the Penalty Recommendation Report. The penalty report stated that Mr. McCartie knowingly claimed specific business expenses that he knew were false having: i) deducted a single expense twice; ii) deducted expenses incurred in Canada while he was not in the country; and iii) deducted amounts that were not even incurred.

[27] Judge Gouge noted that, read grammatically, each of these three assertions is an allegation of criminal fraud by Mr. McCartie. Mr. Brown, however, denied that he intended to make such allegations. That penalty report was sent, as a matter of routine, to Criminal Investigations. Per Judge Gouge "That is because, in most cases,

the circumstances which will justify the imposition of the penalty under section 163(2) of the ITA raised at least the possibility of criminal misconduct"

[28] In the next two months (prior to June 2005) the Assistant-Director of Criminal Investigations and one of her Investigators summoned Mr. Brown to a meeting with them to discuss whether there should be a criminal investigation of the McCarties. It was decided that they did not warrant a criminal investigation due to the amounts involved and the available evidence. Mr. Brown flagged the McCarties' audit files for follow-up in future years.

[29] Mr. Brown transferred to Criminal Investigations for a period of six to seven months in 2007 and worked as an Investigator throughout that time. He could not recall if he took the McCarties' audit files with him to Criminal Investigations, whether he could access them electronically, or whether Criminal Investigations could access audit files electronically.

[30] At the end of his seven months in Criminal Investigations, Mr. Brown returned to his duties in Audit. His reminder system brought the McCarties' audit files forward for review. He noted Mr. McCartie had made an assignment in bankruptcy and that his annual personal expenses reported to the trustee in bankruptcy could not have been funded from his income reported to CRA.

[31] Mr. Brown's supervisor and Team Leader in Audit also testified. His team conducted a series of audits of the McCarties during the periods 2002 to 2007. His audit team prepared and printed on February 11, 2008 documents, a portion of which had been rubberstamped after printing with the words "ADDITIONAL INFORMATION - SEE INVESTIGATIONS - DO NOT PLACE SCREEN 1 IN TAXPAYER'S FILE". That rubberstamp is kept in the office of Criminal Investigations and used by Criminal Investigations. Judge Gouge wrote that "it appears at least likely that the stamp was applied after the Key Date". When the judge asked his own question of the witness about when such a stamp would be applied to documents generally by Criminal Investigations, the Crown objected on the basis an answer might reveal the date of the informer tip and assist the McCarties to identify the informer. When Judge Gouge did not allow the objection, the Crown asked for an *in camera* hearing to determine which questions the McCarties or the judge could put to CRA witnesses in relation to the Key Date.

[32] In his analysis, Judge Gouge described as "well settled" that the right to make full answer and defense is an aspect of the right to fundamental justice guaranteed by section 7 of the Charter. He continued that one cannot make a full answer to

evidence which one has not heard. He noted that this may be limited by other pressing juridical objectives and that the Supreme Court of Canada has held that the need to protect informer confidentiality outweighs the right to fundamental justice. Judge Gouge concluded that an *in camera* hearing should be held to determine the Key Date, but that another judge of the BC court should preside at the *in camera* hearing. Judge Gouge also noted that, while the onus to prove a Charter breach on a balance of probabilities normally falls on the party alleging the breach, in this case the Crown may carry that onus as the facts pertaining to the Key Date are within the exclusive knowledge of the Crown.

(ii) McCartie 2013 BCPC 289 ("McCartie 2013-2") (3-day *voir dire* hearing)

[33] A judge of the Supreme Court of British Columbia had held that Judge Gouge had erred in deciding that another BC Provincial Court judge should preside at an *in camera* hearing and determine the Key Date. The matter was sent back to Judge Gouge.

[34] Judge Gouge wrote in his background paragraphs that the McCarties explained that they were unable to afford counsel and had been refused legal aid. He continued "they are intelligent, articulate, well educated people, but have no legal training. As a result, the complex procedural issues now under discussion are difficult for them to understand".

[35] In deciding what procedure would best accommodate to the greatest extent the McCarties' right to a fair trial and give them a fair opportunity to present their case for exclusion of alleged evidence compelled after the Key Date, given the state's interest in protecting the identity of a confidential informer, Judge Gouge concluded:

a. An adversarial hearing in which all of the evidence is presented by the Crown, and in which no one is entitled to cross-examine the Crown witnesses, is not a fair hearing;
b. An adversarial hearing in which one party, who may bear the onus of proof, is excluded while the other party presents all of the material evidence would be an "extremely unfair hearing".
c. That, if Judge Gouge were to ask questions of the Crown witnesses on behalf of the McCarties, but without any ability to get instructions from them or to

review all of the Crown disclosure to them, that process would be "grossly unfair".[4]

d. There should be no *in camera* hearing to determine the Key Date in the course of the trial, unless and until the Crown identifies that information relevant to the confidential informer identity is about to be, or may be revealed. At that time, the hearing of the trial would proceed *in camera* until the judge decides the risk has passed.

e. While the trial is heard *in camera*, the judge would ask questions of counsel and witnesses as he thinks appropriate which may include a "searching cross-examination" of a witness, and

f. While excluded from any witness' testimony, the McCarties could offer suggestions to the judge, in the presence of the Crown but not the witness, as to areas of evidence he ought to explore with each witness and suggestions for cross-examination by the judge when the *in camera* testimony of the Court continued.

[36] Judge Gouge noted that he was not confident his procedure would result in a fair trial and that he could only assess that later in the trial. If he were to conclude the trial was not fair, it would then be necessary for him to decide whether it should be allowed to proceed, despite the unfairness, or whether a stay of proceedings should be ordered by him.

[37] He further noted that, as the standard of proof in proving the Key Date was a balance of probabilities, and given that determinations to such a standard rarely depend on who bears the onus, it might never be necessary to decide where the onus lies in this case.

(iii) McCartie 2014 BCPC 128 ("McCartie 2014") (19-day *voir dire* hearing)

[38] Judge Gouge begins by noting that, at this stage, he is at 19 days of a *voir dire* hearing since resuming the trial after McCartie 2013-2 had started and that the *voir dire* is incomplete. He suspended this *voir dire* after he asked the parties if it should be suspended to allow him to hear and decide an application by the McCarties for a stay of judicial proceeding filed months earlier after McCartie 2013-2. The grounds advanced for the stay were that the McCarties had been denied a fair opportunity to

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[4] The possibility of *amicus curiae* was also considered, but was found to be precluded by valid precedent.

prove their case on the *voir dire* as a result of CRA's loss of the notes prepared by Annette Coles, a CRA auditor, during the CRA audit of the McCarties for 2005 to 2007. The parties all agreed that the stay application should be heard at that time. However, after Mr. McCartie made their submissions, and just before the Crown was to make its submissions, the McCarties said that they had reconsidered, that they wanted to finish calling their witnesses in the *Jarvis voir dire* and defer further consideration of the stay application until that had been completed. Judge Gouge decided that it was not appropriate to continue hearing a stay application until either:

1) All of the evidence on the *Jarvis voir dire* had been heard; or
2) All of the parties agreed that enough evidence had been heard on the *Jarvis voir dire* to return to hear and decide the stay application.

[39] Further evidence/facts in this decision: Judge Gouge's summary of the evidence heard to that date was as follows.

[40] CRA has separate departments for civil audits and for Criminal Investigations that have separate offices, separate staff and separate files. When an auditor suspects that a criminal offence has been committed, they are required to report their suspicions to their team leader. If the team leader considers it appropriate, the team leader reports the facts to Criminal Investigations, which then decides whether to launch a criminal investigation. If it decides to launch a criminal investigation, Audit hands over its file to Criminal Investigations and ceases to have any role with the case.

[41] The evidence of CRA's note-taking policies was from two auditors involved with the McCarties' audits—Ms. Coles mentioned above, and David McLachlin, who took over the audits from Ms. Coles (and who also testified in the *voir dire* I am now deciding). The evidence of these two auditors diverged on this topic. Judge Gouge summarized Ms. Coles' evidence; it included:

> [12] Two CRA auditors, Ms. Coles and Mr. McLachlan, gave divergent evidence about CRA's note-taking and note retention policies. Ms. Coles said that:
>
> a. She took handwritten notes during all meetings of significance, whether with the taxpayer, with other CRA employees or with external sources of information.
>
> b. Upon her return to her office, she would transpose those notes onto CRA Form T-2020.

c. In many cases, her notes on Form T-2020 were more extensive than her handwritten notes because she would supplement her handwritten notes with her memory of the meeting.

d. Form #T-2020 is used to record notes of: (i) substantive information received; (ii) significant oral communications; and (iii) decisions relevant to the audit, which are not otherwise recorded in writing. So, for example, all oral communications with the individuals who are the subject of the audit are recorded on Form #T-2020, but correspondence with those individuals is not because hard copies of the correspondence are maintained in the correspondence file.

e. As she understood CRA's policies, she was required to make notes on Form T-2020 whenever she discussed an audit with her team leader or with any employee of the Investigations Department. Those notes would include summaries of the matters discussed, of any decisions taken and of the reasons for the decisions.

f. Form T-2020 notes were stored on CRA's computer system.

[13] Mr. McLachlan said that he would make a note on Form T-2020 whenever he met with his team leader, but that the note would not necessarily record what was said at the meeting - it might simply record that a meeting occurred. Similarly, if he met with staff of the Investigations Department, and the Investigations Department decided not to launch a criminal investigation, he would note the existence, but not necessarily the substance, of the discussion, on Form T-2020. He said that, if the Investigations Department decided to launch a criminal investigation, he would hand over his files (paper and electronic) to the Investigations Department, and would not thereafter have access to the file, with the result that he could not make any further notes on Form T-2020.

[14] The evidence includes some examples of Mr. McLachlan's T-2020 notes on the McCartie file. They are consistent with his oral evidence of his note-taking practice; i.e. they provide few or no details of the matters discussed on the occasions which are the subject of the notes.

[42] Judge Gouge's summary of Mr. Brown's evidence included:

[18] Shortly after issuing his notice of reassessment [for the earlier years 2002-2003 in 2005], Mr. Brown was approached by Ms. Karen Etches and Mr. Greg Chan. Ms. Etches was then the Assistant Director of the Investigations Department and Mr. Chan was an investigator who worked under her supervision. Mr. Brown, Ms. Etches and Mr. Chan met. Mr. Brown described the meeting in the following terms:

… they were asking me questions about possibly conducting an investigation, and I told them that this is mostly just personal expenses, and I don't think that this

would warrant a … full-on investigation. I just felt that it was just a --- that they [Ms. & Mr. McCartie] were just negligent.

Mr. Brown said that, at the conclusion of the meeting, Ms. Etches and Mr. Chan expressed a lack of interest in pursuing a criminal investigation of Mr. & Ms. McCartie.

[19] Mr. Preshaw [respondent counsel] informed me that Ms. Etches and Mr. Chan have no notes of the meeting, and profess to have no recollection of it.

[20] Mr. Brown denied that he suspected Mr. or Ms. McCartie of fraud or tax evasion. However, three passages in his report to his team leader, Mr. Gordon Lidster, cast some doubt on the assertion.

a. In his report, Mr. Brown said:

The taxpayers' records were inadequate for income tax purposes. Furthermore, some of the expense receipts were not even incurred by the taxpayer.

In his oral evidence, Mr. Brown characterized that statement as an assumption, rather than an assertion. The document does not support that characterization.

b. In his report, Mr. Brown said:

Along with the egregious amounts of personal expenses being deducted, there were many other problems with the records. Some of the cash expenses were already recorded.

In answer to Mr. McCartie's question during cross-examination, Mr. Brown confirmed that this passage was intended to convey Mr. Brown's suspicion that Mr. & Ms. McCartie had double-reported, or claimed twice, certain expenses.

c. In his report, Mr. Brown said:

Also, the taxpayer deducted two receipts from the same restaurant bill.

In his oral evidence on the Jarvis voir dire, Mr. Brown denied that he intended any of those assertions to be an allegation of criminal fraud.

[21] Mr. Brown was transferred from the Audit Department to the Investigations Department for a period of about 6 months in mid-2007.

[22] In November, 2007, Mr. Brown completed and submitted a document, on CRA Form T-133, entitled "Tax Lead or Project Information", the purpose of which was to recommend a further audit of Ms. & Mr. McCartie, in relation to their tax returns for the years 2005 - 2006. In that document, Mr. Brown said:

Geodiscovery Interactive Inc is owned by Annie McCartie although day-to-day operations are performed by Annie's spouse, Colin.

Annie and Colin reported a total income of $28,035 from April 1005 to December 31, 2006. However, according to income and expense statements provided to trustee, they have personal expenditures of between $4000 and $5000 per month, or between $84,000 and $105,000 from April, 2005 to December 31, 2006.

The only known source of revenue is Annie's company, Geodiscovery Interactive Inc in 2006. Geodiscovery reported $145,000 in subcontracts on gross sales of $165,000, and no T4A's issued. Was this $145,000 paid to Colin? Between Colin and Annie, they only reported gross income of $1635 in 2006.

Colin and Annie were previously audited and reassessed for a large amount of expenses that were deducted.[5] In 2004, Colin declared bankruptcy and was absolved of his tax debt.

In June, 2007 (outside audit period) the McCarties sold their house for $365,000 and purchased a new house for $540,000. Where's all this money coming from?

Possible net worth.

[23] At the conclusion of Mr. Brown's evidence, I was left in some doubt about the reliability of his evidence. I found it difficult to reconcile his assertion that he did not suspect Mr. & Ms. McCartie of tax evasion with the documents quoted in paragraphs 20 and 22. That, in turn, led me to doubt his assertion that Ms. Etches and Mr. Chan disclaimed any interest in a criminal investigation.

[24] Mr. Brown was asked no questions about notes, note-taking or Form T-2020. Mr. & Ms. McCartie say that they asked no questions on that subject because Mr. Brown's T-2020 notes were not disclosed to them until after Mr. Brown had given his evidence and been excused. I asked him no questions about note-taking because I first learned about Form T-2020 from Ms. Coles, who gave evidence after Mr. Brown. If Ms. Coles' evidence of CRA's note-taking policies is correct, Mr. Brown ought to have made detailed notes, in Form T-2020, of his meeting with Ms. Etches and Mr. Chan. Some of his T-2020 notes have since been disclosed by the Crown and tendered in evidence. However, the notes disclosed do not include notes from the period after he issued his notice of re-assessment, and so do not span the period in which he met with Ms. Etches and Mr. Chan, and later with Ms. Coles. No notes of those meetings have been disclosed.

(Emphasis added)

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[5] Note Mr. Brown omits that those reassessments had been largely vacated on objection to CRA Appeals.

[43] Mr. Brown's T-133 Tax Lead was first assigned to auditor Ian Chabot. After making a request to the McCarties for documents related to 2005 to 2007, Mr. Chabot fell ill which is when Ms. Coles became the auditor for the McCarties. Judge Gouge's summary of Ms. Coles evidence included:

> [26] Mr. Chabot fell ill later that summer, and Ms. Annette Coles, another CRA auditor, was assigned to replace him on August 14, 2008. Ms. Coles does not recall whether she met with Mr. Chabot when she assumed conduct of the file. She agrees that, in the normal course, she would meet with the preceding auditor on assuming conduct of an audit, so as to be briefed about what had been done and what remained to be done to complete the audit assignment. However, she believes that she may not have done so in this case because Mr. Chabot was unwell. She is simply uncertain about whether the meeting occurred or not.
>
> [27] Ms. Coles said that, if she had met with Mr. Chabot, she would have entered her notes of the meeting on Form T-2020.
>
> [28] Ms. Coles met with Mr. Brown at an early stage of her audit of the McCartie file. She said that she would have made detailed notes of that meeting on Form T-2020.
>
> [29] At some point in the chronology, CRA received an informer tip in relation to Mr. & Ms. McCartie.[6] Such tips are routed to the Investigations Department. Sometimes, such tips are referred by the Investigations Department to the Audit Department. That was done in relation to Ms. & Mr. McCartie. When first assigned to the file, Ms. Coles attended at the office of the Investigations Department and reviewed the informer tip. She said that she did not discuss the tip with anyone in the Investigations Department, and that she had no other communication with the Investigations Department (in relation to Ms. or Mr. McCartie) until after the McCartie file had been formally referred to the Investigations Department by Mr. McLachlan (see paragraph 43, below).
>
> [30] On August 25, 2008, Mr. McCartie sent a letter, entitled "Notice of Facts", to Ms. Coles. Although the document is confusing, it would be reasonable for the reader to infer from it that Mr. McCartie espoused the theory that "natural persons" (however defined) are not liable to pay income tax. That theory is promoted by a number of people to whom CRA employees commonly refer as "tax protesters". Ms. Coles said that: (i) after she read the letter, she probably reviewed it with her team leader, Mr. Lidster, at a meeting; and (ii) they both probably concluded that Mr. & Ms. McCartie were tax protesters. If the meeting occurred, she would have recorded the fact of the meeting, the substance of the discussion, and the conclusion reached in a T-2020 note. However, she does not recall the meeting.

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6 This is separate and distinct from Mr. Brown's T-133 Tax Lead.

[31] I pause for a necessary digression. The "natural person" theory is complete nonsense. It has no basis in law. It is not even remotely arguable. It is important to make that clear because some people have been persuaded by it that they are not liable to pay tax, and have suffered as a result.

[32] Ms. Coles, accompanied by another CRA auditor, Mr. Lecznar, met with Mr. & Ms. McCartie in November, 2008. At the meeting, Mr. & Ms. McCartie provided copies of some of the documents which Ms. Coles wanted to see. Among those were some cancelled cheques with the names of the payees blanked out. Mr. & Ms. McCartie declined to provide the names of the payees or unredacted copies of the cheques. Mr. Lecznar and Ms. Coles each took handwritten notes at the meeting. After the meeting, Mr. Lecznar gave his notes to Ms. Coles and Ms. Coles used them, along with her own, to prepare her T-2020 notes of the meeting. She put the handwritten notes in the file.

[33] In December, 2008, Ms. Coles met with Mr. Lidster. They decided to exercise CRA's statutory power to issue notices to certain financial institutions to require those institutions to provide copies of financial records pertaining to Mr. & Ms. McCartie. Among the documents sought were unredacted copies of the cheques produced by Mr. & Ms. McCartie at their meeting with Ms. Coles and Mr. Lecznar. Ms. Coles said that she would have made T-2020 notes of her meeting with Mr. Lidster, recording the decision to issue notices to the financial institutions and the reasons for that decision.

[34] Ms. Coles was transferred to other duties early in 2009. As a result, it was necessary for another auditor to be assigned to the McCartie file. Mr. McLachlan was chosen for that assignment. Because Ms. Coles and Mr. McLachlan belonged to different teams, a meeting or discussion between the two team leaders was necessary to effect the transfer. If Ms. Coles' evidence about CRA' record-keeping policies is correct, there ought to have been a T-2020 note of that communication. No such note has been produced.

[35] Ms. Coles believes that she met with Mr. McLachlan in or about April, 2009 to acquaint him with the file. She has little recollection of the meeting. She believes that she told him of her suspicion that Mr. & Ms. McCartie were tax protesters. She gave Mr. McLachlan her file, including all handwritten and typed notes and all of her T-2020 notes (in electronic form). She did not make a T-2020 note of her meeting with Mr. McLachlan - she expected that he would do that.

[36] Ms. Coles said that, when she transferred the file to Mr. McLachlan:

a. She had received responses from some, but not all, of the financial institutions.

b. The audit was incomplete.

c. She thought that Mr. & Ms. McCartie might have underreported gross business revenues, but, in her view, that did not necessarily mean that they had underreported net income or evaded tax, because she did not know what business expenses had been incurred to generate those business revenues.

d. She saw no need to refer the file to the Investigations Department.

[37] After the initiation of this prosecution, Ms. Coles was asked to produce her notes, including her T-2020 notes. She has looked for them, but cannot find them. The last time she saw them was when she handed the file to Mr. McLachlan. As noted below, the evidence provides very little information about how the notes came to be lost. Mr. Preshaw says that the answer to that question may never be known.

[44] Judge Gouge's summary of Mr. McLachlan's evidence included:

[38] Mr. McLachlan's team leader, then Mr. Rick Gill, asked him to take on the McCartie audit. Mr. McLachlan does not recall whether he met with Mr. Lidster. He recalls meeting with Ms. Coles, but does not recall what occurred or was discussed at the meeting. He does not recall whether he made notes of the meeting. It was not his view that he was expected or required to make T-2020 notes of the meeting. He recalls that he subsequently met with his team leaders (initially Mr. Gill and latterly Ms. Sally Biggar), but does not recall how many times he met with them about the McCartie audit, nor what was discussed on each occasion. He did not make T-2020 notes of those meetings.

[39] Mr. McLachlan was busy with other matters, and so unable to give attention to the McCartie audit for some months after receiving the file from Ms. Coles. He thinks that he began work on the file in June, 2009. The only information which he received was: (i) that contained in Ms. Coles' file; (ii) responses received from financial institutions during the period April - September, 2009 in response to the requests sent out by Ms. Coles in December, 2008. From that material, he concluded that there were "vast discrepancies" between the income reported by Mr. & Ms. McCartie for the years in question and the information provided by the financial institutions.

[40] Mr. McLachlan had no communication with Mr. or Ms. McCartie on any matter of substance, asked them for no information and received none from them.

[41] On March 2, 2010, Mr. McLachlan prepared a "Penalty Recommendation Report", recommending the imposition of a penalty on Mr. McCartie under section 163(2) of the Income Tax Act. In the Penalty Recommendation Report, Mr. McLachlan said (bold print in the original document):

[Mr. McCartie] is claiming that he is a "Natural Person" and has failed to report any income from his personal business operations. He has failed to report net business income of $404,458.39 for the period 2005-01-01 to 2007-12-31.

…

[Mr. McCartie] failed to provide any documents for his personal business operations. He did provide some information for his wife's corporation (operating as CGM Multimedia). [Mr. McCartie] provided information from the corporation blackened all references to Mr. McCartie and to his bank account information. Mr. McCartie's name was blackened from the cheques and his endorsement was blackened from the back of the cheques. All references to his name on the invoices he issued to the corporation were also blackened out.

Bank requirements were issued to determine the business operations of [Mr. McCartie] and confirmed the recipients of the funds.

It is instructive to compare Mr. McLachlan's conclusions, as expressed in the Penalty Recommendation Report, with those of Ms. Coles, as noted in paragraph 36, above. Essentially, the two auditors were working from the same information. Mr. McLachlan had a complete set of responses from the financial institutions, but there was no suggestion in the evidence that those records were different in kind from the partial responses received by Ms. Coles before April, 2009, or that the additional responses received after April provided the missing information about Mr. McCartie's business expenses. As noted below, Mr. McLaclan was prepared to recommend a criminal investigation on the basis of the information he had. Ms. Coles said that she was not.

[42] Mr. McLachlan reviewed the Penalty Recommendation Report with his team leader, Ms. Sally Biggar, on March 4, 2010. Ms. Biggar approved the report on that day.

[43] Once a Penalty Recommendation Report is approved, a copy is sent to the Investigations Department as a matter of routine. That was done in this case. On March 4, 2010, Ms. Biggar signed a document entitled "Referral to Enforcement Division", in which the following allegation was made (bold print in the original document):

The taxpayers have failed to report over $525,000.00 in Income Tax revenue and almost $30,000 in GST. Colin McCartie has been claiming that he is a Natural Person and has failed to report any of the income he received from 2005 to 2007.

[44] Sometime after March 4, 2010, staff of the Investigations Department came to Mr. McLachlan's office with a search warrant and seized his file. That seemed to him to be an unusual procedure. In the ordinary case, if a file was to be

> referred to the Investigations Department, the file would simply be handed over without a warrant.

[45] The McCarties asked Judge Gouge to compel a number of CRA witnesses to testify in the *Jarvis voir dire* along with one Justice lawyer. The CRA witnesses requested were those involved in CRA's Project Fable, a Canada-wide program of targeted prosecutions of Canadians CRA believed to be tax protesters. They could provide evidence whether, and if so when, the McCarties became targets of Project Fable. The Justice lawyer was requested to provide evidence regarding a letter he sent to the McCarties in 2013 about the lost audit notes (including the ones Ms. Coles knew she had written). The Justice lawyer wrote "We understand that T2020 notes are ordinarily kept during the course of an audit. We have made inquiries in this regard. Unfortunately, we understand that due to design issues of the relevant CRA databases, the T2020 entries were not retained in this matter. We understand that you have all available T-2020 Notes/Memo for File notes that have been retained".

(iv) McCartie 2015 BCPC 066 ("McCartie 2015-1") (2-day *voir dire* hearing)[7]

[46] In his opening summary of the "long and complex procedure history" of the prosecution of the McCarties, J. Gouge included that Crown counsel had informed the Court that the evidence obtained by the exercise of CRA's statutory audit powers from the McCarties' banks "is crucial to the Crown case". Judge Gouge's full summary is attached to these reasons as Appendix A. This hearing addressed Ms. Coles missing audit notes (the "Coles Notes") in the context of the request to have the previous Justice lawyer testify regarding his letter to the McCarties that the Coles Notes were not retained following, and as a result of, a digitisation conversion of records by CRA.

[47] Judge Gouge wrote:

> [4] Ms. Coles said that she had been instructed by her superiors to make notes, in every audit, of the substance of all meetings with her team leaders and with representatives of the Investigations Department, and to record in those notes the substance of the discussion and of any decisions or conclusions reached at the meeting. She understood that the preparation and retention of those notes was one of the duties of her employment. Notes of that kind are admissible in evidence

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[7] The term *voir dire* hearing is used by me to identify the BC Court's *voir dires* and related procedural applications, separate from the trial days upon which some of the evidence is drawn by Judge Gouge.

pursuant to section 26 of the Canada Evidence Act RSC 1985, c C-5, which provides:

…

[5] Ms. Coles acknowledged that her recollection of her meetings with other CRA employees was vague. Her notes may have contained a record of comments made by other CRA employees respecting suspicion of tax evasion on the part of Mr. or Ms. McCartie or the intentions of those other CRA employees respecting prosecution for such an offence. Of course, one could not say that with confidence without first seeing the notes. I observe that, at common law, an out-of-court statement by a person of that person's motivation or intention is admissible as evidence of that person's motivation or intention, if such motivation or intention is a fact in issue and the statement is tendered by a party adverse in interest. Such out-of-court statements by other CRA employees could be proven by Ms. Coles' notes.

[6] Mr. McFadgen's point, as I understand it, is that the intentions or motivations of CRA's staff are not facts in issue in the prosecution, but only on the application by Mr. & Ms. McCartie to exclude the bank records from evidence. The nub of his submission is that the Crown's duty to preserve and disclose evidence is limited to evidence bearing on the issue of guilt or innocence, and does not extend to evidence bearing on an alleged infringement of a Charter right. Mr. McFadgen referred me to no authority in which such a limitation is expressly stated, and I am not aware of any.

[7] I do not think that the Crown's duty to preserve and disclose evidence should be limited as proposed by Mr. McFadgen. It seems to me unreasonable to suggest that evidence which may assist the accused to prove an infringement of a Charter right, and so to support an application for a judicial stay of the prosecution, is less important or less worthy of preservation than evidence which may assist the accused to establish a substantive defence to the charge or to impugn the credibility of Crown witnesses. I observe that the duty to preserve evidence was described in *Regina* vs *La* as a logical extension of the duty to disclose established by *Regina* vs *Stinchcombe*. It is well-settled that the disclosure obligation is not confined to documents which would be admissible in evidence, but extends to documents, like witness statements, which might be useful to the defence in other ways. To take another example, a police recording of an interrogation of the accused must be disclosed because it may assist the accused to challenge the voluntariness of any statements made by the accused or to establish an infringement of his Charter rights during the interrogation.

[8] However, I think it important to acknowledge that the Crown's obligation to preserve evidence relevant to infringements of Charter rights is subject to the same limitations as the Crown's obligation to preserve evidence relevant to the

substantive elements of the offence. For example, in *Regina* vs *La* at paragraph 21, Sopinka, J said:

> The police cannot be expected to preserve everything that comes into their hands on the off-chance that it will be relevant in the future. In addition, even the loss of relevant evidence will not result in a breach of the duty to disclose if the conduct of the police is reasonable. But as the relevance of the evidence increases, so does the degree of care for its preservation that is expected of the police.

I have not yet heard submissions on the question whether it would be reasonable to expect CRA to preserve Ms. Coles' notes in this case.

…

[10] Mr. McFadgen says that Ms. Coles' notes are not "… fruits of the investigation …" because they are not records of information obtained from others, but rather records of CRA's internal proceedings. Ms. Coles describes her notes as including both types of information. However, the purpose for which they are presently sought is to assist in determining the state of mind of CRA staff at the relevant times.

[11] It is difficult to answer the question without seeing the notes. In light of Ms. Coles' evidence, it is reasonable to infer that the notes might contain one or more of the following:

a. references to information obtained by CRA from outside sources which might reasonably lead the reader to conclude that Mr. or Ms. McCartie had committed an offence of tax evasion;

b. notes of oral statements by CRA employees to the effect that they had, or had not, reached such a conclusion, firmly or tentatively;

c. expressions of intention by CRA employees in relation to possible prosecution of Mr. or Ms. McCartie.

References of the first kind might support an inference that, as at the date of the meeting recorded in the note, CRA intended to prosecute, because any reasonable person in possession of such information would form that intention. Notes of the second or third kind might be direct evidence of such an intention. References of the first kind might be properly described as "… fruits of the investigation …". Notes of the second or third kind would not.

THE THIRD QUESTION

[12] In *Regina* vs *La* at paragraph 20, Sopinka, J said:

> The right of disclosure would be a hollow one if the Crown were not required to preserve evidence that is known to be relevant. Yet despite the best efforts of the Crown to preserve evidence, owing to the frailties of human nature, evidence will occasionally be lost. The principle in *Stinchcombe (No. 2)*, supra, recognizes this unfortunate fact. Where the Crown's explanation satisfies the trial judge that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached. Where the Crown is unable to satisfy the judge in this regard, it has failed to meet its disclosure obligations, and there has accordingly been a breach of s. 7 of the Charter. Such a failure may also suggest that an abuse of process has occurred, but that is a separate question. It is not necessary that an accused establish abuse of process for the Crown to have failed to meet its s. 7 obligation to disclose.
>
> That passage seems to me to place on the Crown the onus of proving how the missing documents came to be lost. In the absence of any admissible evidence on the point, the court is bound to infer that they were lost deliberately or by unacceptable negligence.
>
> [Emphasis added]

(v) McCartie 2015 BCPC 69 (McCartie 2015-2)

[48] This was an application by the McCarties for a judicial stay of their prosecution on the basis that, in their particular prevailing circumstances, it was impossible for them to have a fair trial as they are entitled to under section 11(d) of the Charter.

[49] Judge Gouge's summary of the issues, prevailing circumstances and questions, are attached, along with his summary of evidence, as Appendix B.

[50] Judge Gouge decided the application on the basis that the McCarties had the onus to prove the facts they alleged and most importantly that CRA's predominant purpose in December 2008 was to gather evidence for use in a criminal prosecution when they made the December 2008 Request For Information ("RFI") from the McCarties' banks, following a November 2008 meeting with the McCarties.

[51] He went on to summarize the McCarties' hypotheses that:

> [15] Ms. Coles said that, when she issued the demands to the banks, she had no interest in a criminal investigation. She said that her job was to conduct civil audits of tax returns, and that was what she did in relation to Mr. & Ms. McCartie. Mr. & Ms. McCartie tell me that they do not challenge Ms. Coles' veracity. However, they do advance the following hypothesis:

a. In 2005, Mr. Brown, Ms. Etches and Mr. Chan formed the opinion that Mr. & Ms. McCartie were guilty of tax evasion, but that CRA lacked the evidence to support a prosecution.

b. Mr. Brown recommended a further audit in 2007 for the purpose of gathering the necessary evidence.

c. Ms. Coles was the unwitting tool of the Investigations Department, and was used by the Investigations Department to procure the evidence from the banks.

[52] Judge Gouge went on to a detailed summary of Ms. Coles' evidence regarding her notes involving the McCarties' audit and her interactions with Criminal Investigations and with Mr. McLachlan. Ms. Coles followed her normal note-taking practice throughout the McCarties' audits, she entered her T2020 notes of the McCarties audit on CRA's computer system, and she gave her handwritten notes to Mr. McLachlan when she transferred the file to him in 2009. She believes that she may not have met with her predecessor Mr. Chabot when she assumed conduct of the audits from him, as would have been her practice. If they did meet, she would have entered her notes of the meeting on a T2020 also. Ms. Coles met with Mr. Brown at an early stage of her McCartie audit and made detailed notes of that meeting on a T2020. Ms. Coles attended at Criminal Investigations when she was first assigned to the file to review the informer tip, that she said she did not discuss it with anyone in Criminal Investigations and did not have any other communications with Criminal Investigations regarding the McCarties until after Mr. McLachlan formally referred their file to Criminal Investigations. Upon receipt of Mr. McCartie's letter of August 2008 espousing a natural person tax exemptions theory, she probably reviewed it with her Team Leader at a meeting, and, if so, she would have recorded the substance of their discussion and the conclusion reached in the T2020. Following a November 2008 meeting of the McCarties with Ms. Coles and her colleague Mr. Lecznar, Mr. Lecznar gave Ms. Coles his handwritten notes of the meeting which she used along with her own to write notes to prepare her T2020. These handwritten notes are among the Coles' Notes that CRA has lost. Ms. Coles also prepared the T2020 of her meeting with her Audit colleague, Mr. Lidster, at which they decided to issue requirements to the McCarties' bankers. Ms. Coles did not prepare a T2020 following her April 2009 meeting with Mr. McLachlan to acquaint him with the McCarties' files as responsibility had been reassigned to him when she was transferred to other duties in late 2009 and she expected Mr. McLachlan would do that.

[53] When Ms. Coles was asked to produce her notes, including her T2020 notes, she looked for them but could not find them. She last saw them when she handed

her file to Mr. McLachlan. Some of her handwritten notes relating to the McCarties' audit have been produced but none of her T2020 notes. Judge Gouge was informed by counsel appearing on the application that they had been "lost".

[54] Judge Gouge summarized the evidence regarding the loss of the Coles Notes and other CRA notes as follows:

> [32] In a letter to Mr. & Ms. McCartie dated August 15, 2103, Mr. Gibson, then Crown counsel, said:
>
> We understand that T2020 notes are ordinarily kept during the course of an audit. We have made enquiries in this regard. Unfortunately, we understand that, due to design issues of the relevant CRA databases, the T2020 entries were not retained in this matter. We understand that you have all available T2020 notes/Memo For File notes that have been retained.
>
> In a letter to Mr. Preshaw (who succeeded Mr. Gibson as Crown counsel) dated July 18, 2014, Mr. Gibson said:
>
> I now understand that the McCarties interpreted my correspondence as confirmation that further notes did exist, were not disclosed, and were lost through the database design. I do not know if this was the case. I cannot verify what notes were originally created by CRA. My primary concern, upon drafting the letter, was to indicate that there were no further materials to provide and to advise the McCarties of the possibility that notes may have been deleted. Questions as to whether notes were actually lost should be directed to the relevant CRA employees.
>
> Ms. Coles was quite clear in her evidence that she did make T-2020 notes of the McCartie audit. Mr. McFadgen was equally clear in his assertion at the hearing before me that they have been lost. The source of Mr. Gibson's assertion that the notes were lost "… due to design issues of the relevant CRA databases …" has not been identified. No other information has been provided to assist in determining how or when the notes came to be lost.

[55] Judge Gouge went on to address documents that CRA might be expected to have created but may never have existed, and their relevance to the stay application he was deciding. Neither the Assistant Director of Criminal Investigations Ms. Etches, nor Investigator Chan had yet testified. The Crown advised that neither of them had any recollection of their meeting with Auditor Brown in 2005 and that "no notes of that meeting exist". All parties asked that the stay application not await further testimony of Ms. Etches and Mr. Chan, and the Court proceeded on that basis in fairness to the accused McCarties. The McCarties' assertion on the stay application was that the failure to make notes of that meeting by Etches, Chan and Brown impairs the McCarties' ability to effectively cross-examine any of Brown,

Etches or Chan as to their intentions and motives, and this has the effect of denying them their right to a fair trial.

[56] In his reasons, Judge Gouge emphasised that appropriate pre-trial disclosure is essential to a fair trial, and that a failure to make such disclosure may render the trial unfair. He framed the questions he was deciding on this application as "whether, in light of what CRA did, or did not do, in relation to making and retaining notes, the trial upon which I am now engaged is as fair as it could reasonably be expected to be. If the answer to that question is "no", then Mr. and Ms. McCartie are denied their right to a fair trial. Such a conclusion does not necessary imply a finding of misconduct on the part of CRA".

[57] Judge Gouge wrote of Ms. Coles and her notes as follows:

> [43] I accept, as do Mr. & Ms. McCartie, that Ms. Coles was a truthful witness, who did her best to recount accurately the events in which she participated. It necessarily follows that her intention or motivation was solely to conduct a civil audit of Mr. & Ms. McCartie's returns. That fact does not preclude the possibility that she was used by others to gather evidence for a prosecution. The present question is whether there is a reasonable possibility that her lost notes would assist in proving that fact. I think that there is.
>
> [44] In paragraph 6, above, I quote certain passages from Mr. Brown's contemporaneous notes which cast doubt on his assertion that, in 2005, he suspected Mr. & Ms. McCartie of gross negligence in the preparation of their returns, but not of fraud. In paragraph 10, I quote his recommendation to initiate the second audit, in the course of which CRA obtained the bank records. In my view, that document is consistent only with a suspicion on the part of Mr. Brown that Mr. & Ms. McCartie were guilty of tax fraud. Mr. Brown and Ms. Coles met at the inception of her audit. She has now no independent recollection of that meeting. It is reasonably probable that, at the meeting, Mr. Brown told her what he had discovered in the course of his earlier audit and what conclusions he had reached. If he had done so, Ms. Coles, in accordance with her usual practice, would have recorded those remarks in her T-2020 notes. It would be instructive to compare: (i) what Mr. Brown said in his 2005 notes (quoted in paragraph 6 above); (ii) what Mr. Brown said in his 2007 recommendation (quoted in paragraph 10, above); (iii) what Mr. Brown said to Ms. Coles (which would have been recorded in Ms. Coles lost notes); and (iv) Mr. Brown's evidence at this trial.
>
> [45] Ms. Coles attended at the offices of the Investigations Department at the inception of her audit to review the informer tip. She says that she did not speak with anyone in the Investigations Department about the file. Of course, that cannot be literally true - someone in the Investigations Department must have pulled the tip from the file and given it to her to review. Some words must have been

exchanged. Ms. Coles' memory of the event is, understandably, vague. It would be unreasonable to exclude the possibility that a discussion took place which was recorded in the lost notes. Accepting, as I do, Ms. Coles' honesty, there may well have been something in that discussion which would be of assistance to the defence, although Ms. Coles attributed no significance to it at the time.

[46] Ms. Coles met with her team leader, Mr. Lidster, after she and Mr. Leczner met with Mr. & Ms. McCartie and before Ms. Coles issued her statutory demands to the banks. The purpose of the meeting was to seek Mr. Lidster's authorization to issue the demands. Ms. Coles' lost notes contained a record of that meeting. It is possible that Mr. Lidster made comments similar to those quoted in paragraph 10. If so, they would be capable of supporting an inference that Mr. Lidster suspected Mr. & Ms. McCarty of fraud. That, in turn, might support an inference that Mr. Lidster was interested in a prosecution when he authorized the demands to be issued to the banks.

[47] I conclude that there is a real possibility that Ms. Coles' notes would have been of assistance to the defence and that the Crown has not discharged its onus of proving that they were not lost by unacceptable negligence. It follows from those two conclusions that there has been an infringement of Mr. & Ms. McCartie's Charter rights. In *R* vs *Carosella* @ paragraph 37, Justice Sopinka said:

The right to disclosure of material which meets the Stinchcombe threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the *Charter*. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice. To paraphrase Lamer C.J. in *Tran*, the breach of this principle of fundamental justice is in itself prejudicial. The requirement to show additional prejudice or actual prejudice relates to the remedy to be fashioned pursuant to s. 24(1) of the Charter.

[48] In this case, the Crown has offered no explanation for the loss of Ms. Coles' notes. There is no basis upon which I could conclude that they were not lost by unacceptable negligence. Accordingly, I must conclude that there has been a breach of Mr. & Ms. McCartie's rights under section 7 of the Charter.

(Emphasis added)

[58] Judge Gouge wrote of the absence of note taking by all other than Ms. Coles, and their impact on the fairness of the trial to the McCarties, as follows:

[49] Mr. & Ms. McCartie say that the omission by Mr. Brown, Mr. Lidster, Ms. Etches and Mr. Chan to make notes of their communications is a breach of Mr. & Ms. McCartie's rights under sections 7 and 11 of the Charter. During argument, the parties characterized this issue as raising the question whether those individuals had a duty to make notes in the circumstances pertaining. Mr. & Mrs. McCartie

also complained of the failure of Mr. McLachlan to make notes. However, I consider that to be of no significance because the question is CRA's motive or intention in December, 2008, when notices were delivered to compel disclosure of the bank documents, and Mr. McLachlan had no role in the case until the spring of 2009.

[50] Mr. & Ms. McCartie say that the duty to make notes arises from two sources:

a. They say that there is a legal duty, of general application, on police officers to make notes, and the same duty should apply to CRA investigators.

b. They refer to many entries in CRA policy manuals and training materials, which instruct CRA investigators to make and retain detailed notes.

[51] In support of the first proposition, they rely on *Wood* vs *Schaeffer* 2013 SCC 71 (CanLII), [2013] 3 SCR 1053. However, I note that *Wood* vs *Schaeffer* was concerned with the application of a particular Ontario regulation, having the force of statute, which expressly imposed specific obligations on Ontario police officers to make notes in specific circumstances. I was referred to no statute which imposes a similar obligation on CRA staff. In the absence of such a statute, I think that the legal position was correctly stated in *Regina* vs *Davidoff* 2013 ABQB 244; i.e. note-taking is a prudent and responsible police practice, but not a legal obligation.

[52] I do consider CRA's policies and training manuals to be of significance. I discuss that issue in paragraphs 60 - 61, below. However, they do not create legal duties: *Hewko* vs *British Columbia* 2006 BCSC 1638; [2006] BCJ #2877 @ paragraphs 313 – 318.

[53] I conclude that the CRA staff were under no legal obligation to make notes.

TRIAL FAIRNESS

[54] Having addressed the application on the basis advanced by the parties, I return to my own view of the matter. To my mind, there are two questions:

a. Does the absence of contemporaneous notes materially impair the fairness of this trial?

b. If so, is it reasonable to expect that CRA would have prepared and preserved such notes?

I think that the first question is mandated by section 11(d) of the Charter and the second question by *Thomson Newspapers* @ paragraphs 170 – 178. If the answer

to each question is "yes", there has been an infringement of Mr. & Ms. McCartie's Charter right to a fair trial.

[55] These are different questions from the question whether CRA staff had a legal duty to take notes. As I have said, I do not think that they did. I find nothing in section 11(d) to support the inference that an unfair trial constitutes a denial of the Charter right only where the unfairness results from a breach of a legal duty by a government agent. Section 11(d) simply says that an accused person is entitled to a fair trial. If the trial is unfair, having regard to the principle that it need only be as fair reasonably possible, the right to a fair trial is infringed. There may be cases in which a fair trial is precluded by some unfortunate accident which is the fault of no one. In such a case, it may be that an unfair trial cannot be allowed to proceed, subject always to the balancing of public and private interests described in *Thomson Newspapers*. In this case, if it would have been reasonable to expect Mr. Brown, Ms. Etches and Mr. Chan to make notes, and they did not, and the result is an unfair trial, the consequence may be that the trial cannot proceed.

…

[57] In order to assess the effect of the lost and missing notes on trial fairness, it is necessary to consider the formidable task which Mr. & Ms. McCartie face on the *Jarvis* issue. They carry the onus of proving, in 2015, the states of mind of three hostile witnesses (Mr. Brown, Ms. Etches and Mr. Chan) in 2005 – 2007. If the question were whether a witness performed some physical act 10 years ago, one might hope to find an independent witness to the event or some physical evidence that the act occurred. In some cases, the state of mind of a witness can be proven by reference to actions taken or omitted by the witness. For example, a person who is angry with another rarely seeks the company of the other. In this case, it is difficult to imagine how the state of mind of Ms. Etches, Mr. Brown or Mr. Chan could be proven except by leading evidence of words which they uttered. The Crown asserts, and the defence accepts for the purpose of this application, that they have no present recollection of what they said in 2005. Even assuming that they would be completely candid when cross-examined, it would not be possible to prove their state of mind because they don't remember what they said. The only avenue of cross-examination open to Mr. & Ms. McCartie would be to put to the witnesses the proposition that, in 2005, they suspected Mr. & Ms. McCartie of tax evasion and launched the second audit in search of evidence to prove it. It seems safe to assume that the witnesses would deny any such intention. There would be no further question which the cross-examiner could usefully ask.

[58] By contrast, if notes had been made, the notes might well offer ammunition to the cross-examiner. By way of example, I refer to the documents authored by Mr. Brown (paragraphs 6, 10, above).

[59] Of course, one cannot say whether the notes would have been helpful to the defence unless one has seen the notes. In that circumstance, the question is

whether there is a real possibility that they would have been: *Regina* vs *Carosella* @ paragraphs 30 – 36. I conclude that such a real possibility exists in this case, and so conclude that the first of my two questions should be answered in the affirmative.

[60] The next question is whether it would be reasonable to expect Mr. Brown, Ms. Etches and Mr. Chan to make and retain notes of their communications. Two items of evidence cause me to answer that question in the affirmative.

a. Ms. Coles did, as a matter of routine. There was nothing in her evidence to indicate that she found the practice to be burdensome or impractical. If she had attended the 2005 meeting, rather than Mr. Brown, she would have made a detailed T-2020 note of the meeting, including the substance of the discussion, the decision taken and the reasons for the decision. Nothing in the evidence supports the conclusion that it would have been more difficult for Mr. Brown, Ms. Etches or Mr. Chan to do so.

b. CRA's policy and training manuals contain many instructions to CRA staff to make and retain detailed notes. To take only the most apposite of many examples, CRA's training manual for investigators recommends that the investigator interview the auditor after reviewing the auditor's file and before deciding to proceed with an investigation. In relation to that interview, the manual states:

Take notes of the interview. It is imperative that notes be taken during the interview or as soon after as possible. Those notes should be as accurate as possible. They can be handwritten or typed. However, your handwritten notes must be retained for future reference. They could possible (sic) be called into question during the trial.

It seems to me that it cannot be unreasonable to expect CRA investigators to comply with the instructions of their management on the point in question.

[61] I hasten to say that, in my view, the reasonableness of an expectation that an investigator take and retain notes is highly fact-specific. For example, very different factors would require consideration in the case of a police officer conducting a traffic stop or executing a search warrant at a crack house.

[62] Having answered both of my questions in the affirmative, I conclude that Mr. & Ms. McCartie have been denied their right to a fair trial.

(Emphasis added)

[59] See also the close of paragraph 68 dealing with costs and whether these were extraordinary circumstances wherein Judge Gouge repeats that this was not a case of misconduct on the part of CRA. "It has failed to discharge its onus of proof in

relation to the loss of Ms. Coles' notes, but there is no evidence from which I could infer deliberate destruction of those notes, or culpable negligence causing their loss. The omission of Mr. Brown, Ms. Etches and Mr. Chan to make notes was not culpable—they were under no obligation to make them. The omission to make and keep them has prevented Mr. and Mrs. McCartie from exercising their rights to a fair trial, but that does not render their omission culpable. I do not consider this an exceptional case in which the omission to make notes rises to the level of an abuse of process".

(Emphasis added)

[60] Judge Gouge went on to conclude that the appropriate remedy in the McCarties' particular circumstances was not to stay the proceedings at that time, but to restrict what evidence the Crown could rely on:

> [66] The only alternative remedy suggested by Mr. McFadgen is the possibility that, when assessing the credibility of Mr. Brown, Ms. Etches and Mr. Chan, I should take into account the loss of Ms. Coles' notes and the omission of the others to make notes. In my view, that remedy would be inadequate to address the prejudice to Mr. & Ms. McCartie. They carry the onus of proving CRA's motive and intentions. That onus can be discharged only by affirmative evidence. An adverse inference may assist in corroborating or reinforcing affirmative evidence, but is not a substitute for affirmative evidence. For that reason, it has been held that "…an adverse inference will not be drawn where the effect of drawing such an inference is to reverse the onus of proof …": *McIlvenna* vs *Viebeg* 2012 BCSC 218; [2012] BCJ #292 @ paragraph 70. At present, the only affirmative evidence of CRA's motive and intentions consists of: (i) Mr. Brown's notes, quoted in paragraphs 6, 10, above; and (ii) the notable circumstance that Mr. Brown proposed the second audit of Mr. & Ms. McCartie's returns, in the course of which the bank documents were procured, within a month or so of his return to the Audit Department from the Investigations Department. Coupled with an adverse inference, that evidence might support a conclusion that the hypothesis advanced by Mr. & Ms. McCartie is correct, but it is not a strong case for the defence. By comparison, if Ms. Etches and Mr. Chan had kept notes, and if they had expressed themselves in a manner similar to Mr. Brown, the notes might have presented a compelling case for the McCartie hypothesis.
>
> [67] However, I do not think that a judicial stay of the prosecution is necessary. The prejudice to Mr. & Ms. McCartie can be remedied by excluding from evidence all documents procured by CRA by the exercise of its statutory powers during the second audit. If the Crown can prove its case without those documents, it should do so.
>
> …

> [69] All documents procured by CRA by the exercise of its statutory powers during the second audit (conducted by Ms. Coles and Mr. McLachlan) will be excluded from evidence.
>
> (Emphasis added)

(vi) McCartie 2015 BCPC 233 ("McCartie 2015-3")

[61] In this application Judge Gouge was deciding whether Ms. McCartie's section 8 Charter rights were infringed during a search of the McCarties' home by CRA Criminal Investigations agents and the RCMP in August of 2010. Ms. McCartie was at home with their daughter; Mr. McCartie was not present at the time of the search. If so, the application was also asking to exclude from evidence the documents seized by CRA during that search. Judge Gouge stated at the outset that he would refrain from commenting on whether the conduct of the CRA investigator is deserving of criticism because those issues had not been fully argued.

[62] The pertinent evidence was from Investigator Sundberg who was in charge of the search, and Mr. Stenchman, an Investigator who was assisting her, as well as RCMP Constable Reynolds. To the extent their testimony differed, Judge Gouge accepted Mr. Stenchman's testimony.

[63] Investigator Sundberg applied for and was granted a warrant to search the McCarties' Nanaimo home on August 30, 2010. The following morning at 9:00 a.m. Ms. Sundberg attended the McCarties' home accompanied by Mr. Stenchman, Constable Reynolds, eight other CRA Investigators, and one other RCMP Officer. (In his testimony in this *voir dire* before me, Mr. Jones, head of Criminal Investigations in Vancouver, said he was among those present throughout.)

[64] Ms. Sundberg went to the front door accompanied by Mr. Stenchman and Constable Reynolds in uniform. Ms. Sundberg had a copy of the search warrant in her hand, and the original search warrant under her arm.

[65] Upon answering the door with the security latch on, Ms. Sundberg informed Ms. McCartie she had a warrant and demanded Ms. McCartie open the door. Ms. McCartie asked for the warrant. Ms. Sundberg did not give it to her but replied by asserting that Ms. McCartie was obliged to open the door and that, if she did, Ms. Sundberg will enter the house and go over the warrant with her. Ms. McCartie said she was going to call a lawyer and closed the door. About a minute later, Ms. McCartie opened the door again with the security latch in place. Constable Reynolds told her that Ms. Sundberg had a warrant and that Ms. McCartie was obliged to open

the door. Constable Reynolds told her that he had authority to break down the door, and that he would do so unless she opened it immediately. Ms. McCartie closed the door again.

[66] A few minutes later Ms. McCartie unlatched and opened her front door. Accompanied by her daughter, she stepped outside of the house and again asked for the warrant. Ms. Sundberg's reply was that if Ms. McCartie would go in to the house with her, she would go over the warrant with her. Ms. McCartie declined that invitation. Ms. McCartie then walked with her daughter to their vehicle and drove off. The door was left at least somewhat opened; Judge Gouge does not suggest whether this was intentional or an oversight. There is no suggestion in his reasons that it could have been considered an invitation to enter without showing her the search warrant.

[67] Both RCMP officers then entered the house to satisfy themselves there were no threats to the investigators' safety. The CRA Criminal Investigations' investigators then entered and search the house and seized a number of documents.

[68] Judge Gouge then considered the requirements of section 29(1) of the Criminal Code which provides:

> "It is the duty of everyone who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so"
>
> « Quiconque exécute un acte judiciaire ou un mandat est tenu de l'avoir sur soi, si la chose est possible, et de le produire lorsque demande lui en est faite »

[69] When asked by Judge Gouge why she did not give Ms. McCartie the copy of the warrant in her hand when asked, Ms. Sundberg's reasons included that she wanted to offer Ms. McCartie the chance to go over the warrant after she was inside the house to induce Ms. McCartie to let her inside the house. That is "she wanted to use the document as a lever to induce Ms. McCartie first, to open the door and allow Sundberg to enter, second, to identify herself, and, third, to engage in a discussion of the warrant with Ms. Sundberg". In the circumstances Judge Gouge also wrote "unless and until shown a copy of the warrant Ms. McCartie was under no obligation to open the door" nor to identify herself. He also wrote "Ms. McCartie was under no obligation to speak with Ms. Sundberg. Indeed, as a person under investigation, she was wise to decline that invitation." Ms. Sundberg also said that in her opinion she was not obliged to produce the warrant or give Ms. McCartie a copy until she had

executed the warrant, which would not be until she crossed the threshold, which she had not yet done when asked by Ms. McCartie.[8]

[70] Judge Gouge found that none of Ms. Sundberg's explanations rendered it impracticable for her to have given Ms. McCartie a copy when she first asked for it. He also gave very short shrift to the Crown's more technical arguments that to produce it did not mean to provide a copy, that the RCMP had not yet ensured that entering the house was safe, and the possibility that evidence was being destroyed as they spoke outside the home.

[71] Judge Gouge wrote about the failures of Ms. Sundberg and Constable Reynolds:

> [18] There was a simple, easy and harmless mode of production available to Ms. Sundberg which would not require Ms. McCartie to open her house to strangers. I conclude that such was the mode of production required by the statute in the circumstances.
>
> [19] Mr. McFadgen cited no authority in support of his third point, and I have found none which discusses when a warrant may be said to have been "executed". None of the dictionaries which I have consulted offer enlightenment.
>
> [20] In *Bohn* at paragraph 31, Justice Ryan quoted the following passage with approval:
>
> > The reason for the requirement that an officer executing the warrant have it available for production, is to allow the occupant of the searched premises to know: (1) why the search is being carried out, so as to enable the occupant to properly assess his or her legal position; and (2) that there is, at least, a colour of authority for the search and that forcible resistance is improper. This last rationale also plays a role in the second procedural requirement for a valid search, that the peace officers announce themselves before entering the premises to be searched.
>
> Those objectives would be rendered entirely moot if the occupant is not entitled to see the warrant before the searchers cross the threshold. Once the searchers enter the home, the violation of privacy has already occurred and the opportunity to resist an unauthorized intrusion has passed. The purpose of section 29(1) is to entitle the occupant of a house to satisfy herself as to the searcher's legal authority to enter the house before the occupant is obliged to allow the searcher to enter. The section

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[8] Note Ms. Sundberg knew that crossing the threshold would constitute executing the warrant.

is perfectly clear. The occupant is not required to accept the searcher's assertion that she has a warrant and a right to enter. The occupant is entitled to demand production of the warrant, as Ms. McCartie did.

[21] Section 29(1) imposes a production obligation on a class of persons; i.e. those who execute warrants. That, in itself, does not tell us when such persons must produce the warrant. The time is determined by the final phrase of section 29(1); i.e. "… when requested to do so". Ms. Sundberg was plainly a person who executed a warrant. While she was in the course of doing so, Ms. McCartie asked her to produce the warrant. Applying the plain words of the section, Ms. Sundberg was obliged to do so when the request was made. I do not say that a person executing a warrant must always respond instantly to a request for production. Circumstances may render it impracticable to do so. However, the person must comply with the request as soon as it is practicable to do so. In this case, as noted above, it would have been perfectly practicable for Ms. Sundberg to do so immediately upon Ms. McCartie's first request.

[22] I conclude that, in this case, Ms. Sundberg failed to comply with section 29(1) of the Criminal Code.

(Emphasis added)

[72] Judge Gouge went on to conclude that this was a breach of Ms. McCartie's Charter rights:

[23] Section 8 of the *Charter* provides:

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

As noted above, in *Bohn*, Justice Ryan said at paragraph 34:

> Failure to produce the warrant on request, without good reason, is in my view, a significant breach of s. 8.

I am bound to follow that direction unless it has subsequently been overruled by the Supreme Court of Canada. In R vs Patrick 2007 ABCA 308; [2007] AJ No. 1130; [2008] 1 WWR 600; 227 CCC (3d) 525, Justice Ritter said at paragraph 49:

> I do not agree with the analysis in *Bohn* that failure to comply with s. 29 of the *Criminal Code* necessarily creates a s. 8 *Charter* breach. What is protected are unreasonable searches, which depends the reasonableness of the police's grounds after authorization by a judicial officer, rather than procedural niceties.

> Justice Ritter's judgment was affirmed by the Supreme Court of Canada: 2009 SCC 17 (CanLII), [2009] 1 SCR 579. However, the point under discussion here is not mentioned in the Supreme Court of Canada judgment. The basis of the majority judgment was stated by Justice Binnie in the following terms at paragraph 73:
>
> > … I agree with the trial judge and the Court of Appeal majority in this case that the appellant had abandoned his privacy interest in the contents of the garbage bags gathered up by the police when he placed them in the garbage alcove open to the laneway ready for collection. The taking by the police did not constitute a search and seizure within the scope of s. 8, and the evidence (as well as the fruits of the search warrant obtained in reliance on such evidence) was properly admissible.
>
> That being so, I cannot conclude that, in *Patrick*, the Supreme Court of Canada overruled *Bohn*, and I am bound to apply *Bohn* in this case. I note also that *Bohn* was followed, on this point, in *R* vs *Fan* 2013 BCSC 1406; [2013] BCJ No. 1710 at paragraphs 70 - 74, and that *Fan* is also an authority binding upon me.
>
> [24] Accordingly, I am bound to conclude that Ms. Sundberg's failure to comply with section 29(1) of the *Criminal Code* infringed Ms. McCartie's rights under section 8 of the Charter, unless the evidence discloses a "good reason" for that failure. In paragraph 12, above, I identified the reasons given by Ms. Sundberg. In paragraphs 13 - 21, I explained why those were not good reasons. I do not think that they justify her failure to comply with section 29(1).
>
> [25] As no good reason has been established for Ms. Sundberg's failure to comply with section 29(1) of the *Criminal Code*, it follows that her conduct infringed Ms. McCartie's rights under section 8 of the Charter.

[73] While the Tax Court is not so strictly bound by the BC Court of Appeal, I will not, and have not been asked to, revisit Judge Gouge's finding of a breach of Ms. McCartie's section 8 Charter rights for any reason. The principals of judicial comity, deference and common sense apply here. As the home was also Mr. McCartie's home, and housed his property, I accept that his section 8 Charter rights against unreasonable search or seizure were also breached by this squad of CRA Criminal Investigations and RCMP that morning. I was not asked to do otherwise.

[74] As noted below in McCartie 2015-4, Judge Gouge found that the execution of the search warrant was also a breach of Mr. McCartie's section 8 Charter rights. Also, as noted below in McCartie 2015-4, Judge Gouge quashed the search warrant itself, further rendering the search and seizure to be unlawful and a section 8 Charter breach.

(vii) McCartie 2015 BCPC 254 ("McCartie 2015-4")

[75] In this decision, Judge Gouge was dealing with the McCarties' request for an order excluding certain documents seized from their home under the authority of the search warrant described above. This is the search and seizure found by Judge Gouge in McCartie 2015-3 to have been unreasonable. The exclusion of the seized documents is the remedy that the McCarties both sought as appropriate and just under section 24 of the Charter for the breach of their Charter rights under section 8. Judge Gouge begins by pointing out, very correctly, that he is deciding this in the context of the McCarties' criminal trial and that the legal principals governing the exclusion of evidence in criminal proceedings differ in some respects from those applicable in civil proceedings for the collection of taxes and civil penalties from the McCarties. He is clear that he expresses no opinion in relation to the admissibility of evidence in any civil proceeding in this Court.

[76] In his Background, Judge Gouge wrote:

> [4] On a previous application, Mr. & Ms. McCartie sought a judicial stay of this prosecution, on the ground that CRA had infringed their rights under the *Canadian Charter of Rights & Freedoms* by exercising CRA's statutory audit powers to compel Mr. & Ms. McCartie to disclose information to CRA at a time when CRA's predominant purpose was to gather evidence for a criminal prosecution: *R* vs *Jarvis* 2002 SCC 73 (CanLII), [2002] 3 SCR 757. In order to decide that application, it would be necessary to determine the date on which CRA's predominant objective changed from a civil audit to a criminal prosecution. I was unable to determine that date because: (i) some of CRA's internal documents have been lost; (ii) some CRA employees omitted to create other documents, which they would normally have prepared and which would have provided insight into CRA's motives and objectives from time to time. As a result, the Charter breach alleged by Mr. & Ms. McCartie was not proven. However, I concluded that, unless an appropriate remedy were granted, the loss of some CRA documents, and the omission to create others, would result in a breach of Mr. & Ms. McCartie's right (under section 11(d) of the Charter) to a fair trial. In order to prevent that Charter breach, I ordered that the documents procured by CRA during its audit be excluded from evidence: *R* vs *McCartie* 2015 BCPC 69; [2015] BCJ No.636.
>
> [5] It should be noted that I did not conclude that the loss of some CRA documents, or the omission to create other CRA documents, was a breach of the *Charter*. Rather, I concluded that: (i) those events would result in an unfair trial unless the evidence procured during the audit were excluded from the trial; and (ii) an accused person has a right to a fair trial whether or not the impediment to a fair trial arises from Crown misconduct. The order which I made was a prophylactic

against an imminent *Charter* breach, rather than a remedy for a *Charter* breach which had previously occurred.[9]

[6] Mr. & Ms. McCartie then applied to quash the search warrant, on the ground that much of the evidence described in the information to obtain ("the ITO") had been procured by CRA during the civil audit. On the hearing of that application, Mr. McFadgen, for the Crown, very properly conceded that all of the evidence procured during the civil audit should be redacted from the ITO, and that the question on the application was whether a search warrant could properly have been issued on the basis of the redacted ITO. Mr. McFadgen and Mr. & Ms. McCarty were able to agree on the appropriate redactions, and presented me with a redacted ITO for consideration. It was immediately apparent that no search warrant could properly have been issued on the basis of the redacted ITO, and I quashed the warrant for that reason.[10]

[7] Ms. McCartie then applied for a declaration that CRA had infringed her Charter rights because, when CRA investigators attended at the McCartie home to execute the warrant, they refused her request for production of the warrant before they entered her home. I concluded that Ms. McCartie's complaint was well-founded, and granted the declaration which she sought: *R* vs *McCartie* 2015 BCPC 233. Mr. Jones, for the Crown, concedes that Mr. McCartie is entitled to the same declaration because, although he was not at home at the time of the search, his Charter-protected privacy rights in his home were infringed by the refusal of Ms. McCartie's request.

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9 It is important to note that Judge Gouge appears to be misremembering or somewhat inexact in his paragraph 5 regarding his earlier decision in McCartie 2015-2. This is perhaps understandable given the complex, lengthy and circuitous nature of the proceedings. It is clear that, prior to addressing the Trial Fairness aspects in McCartie 2015 -2, Judge Gouge concludes (paragraphs 12, 47-48) that "there has been a breach of Mr. and Ms. McCartie's right under section 7 of the Charter" by virtue of the Coles Notes having been "lost deliberately or by unacceptable negligence" on the part of CRA. Section 7 is the right to fundamental justice. This finding of a Charter breach was a precursor to his Trial Fairness and Remedy analyses. Judge Gouge also refers to and considers the Coles Notes and any other lost notes in his paragraphs 63, 65 and 66 under his Remedy section that results in the exclusion from evidence of the documents procured by CRA in the 2005-2007 second audit.

10 There appears to be no reported decision. I was not told by either party if Judge Gouge gave reasons, much less what his reasons were. Judge Gouge's wording describes it here as resulting from the Crown's concession, and not just from Judge Gouge's order excluding from evidence the documents procured by CRA in the second audit. It can be noted that Judge Gouge and the Crown had information not disclosed to the McCarties or to me from their *in camera* hearing regarding the Key Date.

> [8] Two breaches of section 8 of the *Canadian Charter of Rights & Freedoms* have been established:
>
> a. The consequence of my decision to quash the search warrant is that the search of the McCartie home was not authorized by law. A search which is not authorized by law is an unreasonable search: *R* vs *Klimchuk* 1991 CanLII 3958 (BC CA), [1991] BCJ No. 2872; 67 CCC (3d) 385.
>
> b. The refusal of Ms. McCartie's request for production of the search warrant before the investigators entered the house was, itself, a breach of section 8: *R* vs *Bohn* [2000] BCJ No. 867; 2000 BCCA 239; 145 CCC (3d) 320.
>
> The question on the present application is whether the appropriate remedy for those breaches is to exclude from evidence the documents seized by CRA during the search.
>
> (Emphasis added)

[77] Note there is not a published decision, nor was I provided with the transcript of Judge Gouge's decision to quash the search warrant. Therefore I am left uninformed of the reasons the Crown "very properly conceded that all of the evidence provided procured during the civil audit should be redacted" from the Information To Obtain ("ITO") for the search warrant was because of the unresolved Key Date issue, which prevented the Crown from establishing that the evidence was properly collected. Given Judge Gouge's very serious remedy of quashing the search warrant, I infer that there were significant concerns, including potentially from his *in camera* hearing on the informer tip and the Key Date, with accepting that the evidence to date established that CRA Criminal Investigations had not yet started looking for evidence for prosecution.

[78] Section 24(2) of the Charter requires exclusion of evidence obtained in breach of one's Charter rights if it established that, having regard to all the circumstances, its admission in court proceedings, would bring the administration of justice into disrepute.

[79] Judge Gouge described the principles governing such a determination as follows:

> [10] The governing principles were summarized in *R* vs *Grant* 2009 SCC 32 (CanLII), [2009] 2 SCR 353 @ paragraphs 67 – 71 (underlining added):
>
> The words of s. 24(2) capture its purpose: to maintain the good repute of the administration of justice. The term "administration of justice" is often used to

indicate the processes by which those who break the law are investigated, charged and tried. More broadly, however, the term embraces maintaining the rule of law and upholding *Charter* rights in the justice system as a whole.

The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute.

Section 24(2)'s focus is not only long-term, but prospective. The fact of the Charter breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system.

Finally, s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system.

(Emphasis added)

A review of the authorities suggests that whether the admission of evidence obtained in breach of the Charter would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. (Underlined by Judge Gouge)

[80] Judge Gouge went on to consider these three lines of inquiry:

The Three Lines of Enquiry

The Seriousness of CRA's Conduct

[11] In *Grant* at paragraphs 72 - 75, Chief Justice McLachlin and Justice Charron said:

The first line of inquiry relevant to the s. 24(2) analysis requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct. The more severe or deliberate the state conduct that led to the Charter violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law.

…

State conduct resulting in Charter violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the Charter may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of Charter rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.

…

"Good faith" on the part of the police will also reduce the need for the court to disassociate itself from the police conduct. However, ignorance of Charter standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith ….

[12] Mr. Jones and Mr. McFadgen urge me to conclude that the CRA investigators proceeded in good faith; i.e. in the belief that they had a valid warrant and that they were not obliged to produce the warrant until they had executed it by crossing the threshold of the McCartie home. "Good faith" and "bad faith" are polar ends of a spectrum. In placing particular police conduct in that spectrum, it is necessary to consider whether a police officer's belief that she was acting lawfully was reasonable: *R* vs *Caron* 2011 BCCA 56; [2011] BCJ No. 200; 269 CCC (3d) 15 @ paragraphs 38 - 42.

[13] I accept that this was not a case in which the CRA investigators who executed the search warrant deliberately disregarded Mr. & Ms. McCartie's Charter

rights. The investigators honestly believed that they were entitled to proceed as they did.

[14] I think that the individual CRA investigators' belief that the warrant was valid was a reasonable belief. The individual investigators had no reason to doubt the validity of the warrant.

[15] However, that factor is somewhat attenuated by the *Jarvis* issue.

[16] In this case, there is evidence capable of supporting the inference that CRA used its audit powers to gather evidence for a criminal prosecution. I discussed the evidence which supports that inference in two previous decisions in this case: *R* vs *McCartie* 2014 BCPC 128; [2014] BCJ No. 1227; *R* vs *McCartie* 2015 BCPC 69; [2015] BCJ No. 636.

[17] The question whether, in this case, CRA deliberately used its audit powers to gather evidence for a criminal prosecution cannot be answered because relevant documents have been lost and others which would have been created in the ordinary course of CRA's business were not created in this case. CRA has not explained the loss of the documents or the omission to create others. For a more detailed exposition of that point, see *R* vs *McCartie* 2015 BCPC 69; [2015] BCJ No. 636 @ paragraphs 4 - 32. When I asked Mr. McFadgen for an explanation during the course of that hearing, he replied that "… the explanation is that the notes were lost". I have been provided with no information about the efforts, if any, which CRA has made to investigate how records came to be lost or why others, which would normally have been prepared, were not prepared in this case. CRA's reticence on the issue of the missing documents renders it difficult to assess its corporate good (or bad) faith. I find that regrettable, because a candid explanation from CRA might have done much to encourage public confidence in the fairness and integrity of the system.

[18] I do not think that the individual investigators' refusal of Ms. McCartie's demand for production of the warrant was reasonable. The investigators' position was "let us in and we will show you the warrant". That position was plainly unreasonable. The obvious purpose of section 29(1) of the Criminal Code is to empower the homeowner to demand to see the legal authority for the search before allowing anyone to enter her home.

[19] I would not describe either of the two Charter breaches in issue as "inadvertent or minor". Overall, I would assess the state of mind of the individual investigators who executed the search warrant in this case as being toward the "good faith" end of the spectrum, but not far from the centre.

The Impact of the Breach on the *Charter*-Protected Interests of the Accused

> [20] CRA conducted a search of Mr. & Ms. McCartie's home which was not authorized by law. During the search of the home, CRA seized, and subsequently searched, Mr. & Ms. McCartie's computers. In *R* vs *Morelli* 2010 SCC 8 (CanLII), [2010] 1 SCR 253 @ paragraph 105, Justice Fish said that "… it is difficult to imagine a more intrusive invasion of privacy than the search of one's home and personal computer …". I think it necessary to acknowledge that there are a number of types of bodily searches, commonly conducted by police officers, which are more intrusive than a search of a home or personal computer. With that acknowledged, a search of a person's home or personal computer is a very serious matter.

[81] Judge Gouge included passages from *R.* v. *McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, including:

> [21] Mr. McFadgen urged me to take into account the following observation of Justice Reilly in *R* vs *Dial Drug Stores Limited* 2003 CanLII 23014 (ON SC), [2003] OJ No. 754; 63 OR (2d) 529:
>
> With respect to the consequences related to s. 8 of the *Charter, McKinlay Transport, supra,* makes it clear that taxpayers have very little privacy interest in the materials and records that they are obliged to keep under the [Income Tax Act] and that they are obliged to produce during an audit.
>
> However, it is important to note that the judgment in *R. McKinlay Transport* 1990 CanLII 137 (SCC), [1990] 1 SCR 627, to which Justice Reilly referred, was not concerned with a criminal investigation, but rather with CRA's powers to compel production of documents in the exercise of its civil audit powers. At paragraphs 32 - 34 of *McKinlay Transport,* Justice Wilson said (underlining added):
>
> > At the beginning of my analysis I noted that the *Income Tax Act* was based on the principle of self-reporting and self-assessment. The Act could have provided that each taxpayer submit all his or her records to the Minister and his officials so that they might make the calculations necessary for determining each person's taxable income. The legislation does not so provide, no doubt because it would be extremely expensive and cumbersome to operate such a system. However, a self-reporting system has its drawbacks. Chief among these is that it depends for its success upon the taxpayers' honesty and integrity in preparing their returns. While most taxpayers undoubtedly respect and comply with the system, the facts of life are that certain persons will attempt to take advantage of the system and avoid their full tax liability.
> >
> > Accordingly, the Minister of National Revenue must be given broad powers in supervising this regulatory scheme to audit taxpayers' returns and inspect all records which may be relevant to the

> preparation of these returns. The Minister must be capable of exercising these powers whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act. Often it will be impossible to determine from the face of the return whether any impropriety has occurred in its preparation. A spot check or a system of random monitoring may be the only way in which the integrity of the tax system can be maintained. If this is the case, and I believe that it is, then it is evident that the *Hunter* criteria are ill-suited to determine whether a seizure under s. 231(3) of the *Income Tax Act* is reasonable. The regulatory nature of the legislation and the scheme enacted require otherwise. The need for random monitoring is incompatible with the requirement in *Hunter* that the person seeking authorization for a search or seizure have reasonable and probable grounds, established under oath, to believe that an offence has been committed. If this *Hunter* criterion is inapplicable, then so too must the remaining *Hunter* criteria since they all depend for their vitality upon the need to establish reasonable and probable grounds. For example, there is no need for an impartial arbiter capable of acting judicially since his central role under *Hunter* is to ensure that the person seeking the authorization has reasonable and probable grounds to believe that a particular offence has been committed, that there are reasonable and probable grounds to believe that the authorization will turn up something relating to that particular offence, and that the authorization only goes so far as to allow the seizure of documents relevant to that particular offence.
>
> This is not to say that any and all forms of search and seizure under the *Income Tax Act* are valid. The state interest in monitoring compliance with the legislation must be weighed against an individual's privacy interest. The greater the intrusion into the privacy interests of an individual, the more likely it will be that safeguards akin to those in *Hunter* will be required. Thus, <u>when the tax officials seek entry onto the private property of an individual to conduct a search or seizure, the intrusion is much greater than a mere demand for production of documents.</u> (Emphasis added). <u>The reason for this is that, while a taxpayer may have little expectation of privacy in relation to his business records relevant to the determination of his tax liability, he has a significant privacy interest in the inviolability of his home</u>. (underlined by Judge Gouge)

Two conclusions flow from this passage:

a. <u>Different legal principles apply, and different public-policy issues arise, when CRA is pursuing a criminal investigation than when it is conducting a civil audit</u>.

> b. Even when CRA is conducting a civil audit, different legal principles apply, and different public-policy issues arise, when CRA seeks to enter a private dwelling without the consent of the occupier.
>
> (Emphasis added)
>
> I conclude that Justice Reilly's comments in *Dial Drug Stores* are of limited, if any, application where CRA is conducting a criminal investigation, or where it seeks to enter a private dwelling without the consent of the occupier.

[82] *McKinlay* was only concerned with seizure in civil tax collection proceedings. In the McCarties' case, the issue arises, as is often the case, in both their tax evasion investigation and civil tax and penalties audit. These were so intertwined by CRA that Criminal Investigations took over the audits and issued the reassessments. It can be noted that the Crown has the burden of proof in both tax evasion and civil penalties proceedings, albeit to different standards, as compared with the burden of proof with respect to the correctness of the amount of tax in dispute in this Court. (The Crown also has the burden in this proceeding on the statute-barred years.)

[83] It can also be noted that the BC Court found two section 8 Charter breaches; section 8 Charter breaches, unlike sections 7 and 11, are not limited to criminal and penal proceedings.

[84] Judge Gouge went on to consider the fact that Mr. McCartie's business records were also stored at their home and wrote:

> [22] Mr. McFadgen points out that the CRA investigators had received information to the effect that Mr. McCartie carried on business from his home. He relies on *R* vs *Roy* 2010 BCCA 448; [2010] BCJ No. 1999; 261 CCC (3d) 62 in support of the proposition that a person who carries on business from his home has a lesser expectation of privacy in his home than a person who uses his home solely as a residence. I accept that proposition in relation to home businesses which invite the public to attend at the home for the purpose of transacting business: *R* vs *Contant* 2008 QCCA 2514; 253 CCC (3d) 259. However, there is no indication in the evidence that Mr. or Ms. McCartie did so. There are many home businesses which do not invite their customers, or other members of the public, to attend at the residence. Mr. McCartie's business may have been one of those. In such circumstances, I do not think that the home/business owner is entitled to any lesser expectation of privacy than anyone else.
>
> [23] The refusal of Ms. McCartie's request for production of the warrant had a less serious impact on the privacy rights of Mr. & Ms. McCartie [than the warrantless search and seizure at their home]. However, a Charter breach of that kind was described as "significant" in *Bohn* @ paragraph 34. I observe that it has

> had a material impact on Mr. & Ms. McCartie's sense of personal security. Simply put, they feel less safe in their home than they did before the search. That is an interest which the Charter seeks to protect.
>
> (Emphasis added)

[85] Judge Gouge's overall assessment was:

> [24] Overall, I would assess the impact of the two Charter breaches in question as, cumulatively, very serious.
>
> (Emphasis added)

[86] I believe Canadian taxpayers and benefit recipients can, understandably, be expected to have heightened concerns about their privacy in their own home when CRA and RCMP breached their obligation to produce a copy of the warrant and literally threaten to break down their front door. The fact the search warrant was obtained on the basis of information that should not have been in CRA's ITO for the warrant can only be expected to add to Canadians' concerns.

[87] With respect to the third consideration, Judge Gouge noted:

> **Society's Interest in the Adjudication of the Case on Its Merits**
>
> [25] This issue is particularly difficult where the offence alleged is tax evasion. Most Canadians accurately report their income and expenses, and voluntarily pay the tax which they owe. They do that because they believe that the overwhelming majority of their fellow citizens do the same. Canadians have observed the very grave consequences which have ensued in some other countries, in which the citizens have lost confidence in the fairness of the tax system and its administration. Once that confidence is lost, tax evasion becomes commonplace (because individual citizens' willingness to pay their fair share depends largely on their belief that others do the same), government revenues fall dramatically and a fiscal crisis ensues. Canada has avoided such consequences, at least in part, because most Canadians are confident that both the tax system and its enforcement are fair and reasonable. The maintenance of that public confidence depends on two factors:
>
> a. CRA must diligently and vigorously pursue tax evaders. Public confidence in the fairness of the system depends, in part, on public confidence that those who do not pay their fair share will be identified, relentlessly pursued and appropriately sanctioned.
>
> b. CRA must proceed fairly and lawfully in its dealings with taxpayers, including those suspected of tax evasion. One cannot maintain public confidence

in the fairness of a system if those charged with enforcement of the system conduct themselves unlawfully or unfairly. (Emphasis added)

The question is whether, in this case, a greater risk to public confidence in the fairness of the tax system and its administration would arise from: (i) excluding the evidence, with the attendant risk that the public will perceive that an evader escaped appropriate sanctions; or (ii) admitting the evidence, with the attendant risk that the public will perceive that the court is unwilling to require CRA to comply with applicable laws, designed to protect individual rights from government intrusion.

[26] At paragraph 83 of *Grant*, Chief Justice McLachlin and Justice Charron said that the "… importance of the evidence to the prosecution's case is another factor that may be considered in this line of enquiry" (underlining added). Mr. McFadgen and Mr. Jones inform me that the evidence seized from the McCartie home is of critical importance to the Crown's case, and that an order for the exclusion of that evidence will probably put an end to this prosecution. Mr. & Ms. McCartie agree that the evidence is very important. It seems to me that this is a knife which cuts two ways. I have in mind that the objective of the enquiry is to reach a result which fosters public confidence in the process. On the one hand, the fact that the evidence is strongly incriminating would cause public concern that its exclusion might allow tax evaders to escape punishment. On the other hand, the significance of Mr. & Ms. McCartie's privacy interest is directly proportional to the importance of the documents seized from them.

(Emphasis added)

[88] Judge Gouge's conclusion is:

Conclusion on the Three Lines of Enquiry

[27] After careful reflection, I think that receipt of the evidence seized under the search warrant would pose a greater risk of injury to public confidence in the administration of justice and the fairness of the tax system than its exclusion. Applying *Grant*, I must therefore exclude the evidence.

[28] Ms. Sundberg, CRA's lead investigator in this case, acknowledged that, without the documents procured during the audit process, she would have had no reasonable grounds upon which to apply for a search warrant, and would not have done so. If it were proven that CRA procured the audit documents in breach of the constraint imposed by *Jarvis*, it would be necessary to consider whether the principle of derivative use immunity would support exclusion of the documents seized under the search warrant: *R* vs *RJS* 1995 CanLII 121 (SCC), [1995] 1 SCR 451 @ paragraphs 160 - 204. Unless Mr. & Ms. McCartie can prove that CRA misused its audit powers, the question of derivative use immunity does not arise. The loss of CRA's internal documents, and the omission to create others, is a

> material impediment to the presentation of Mr. & Ms. McCartie's case on the issue of derivative use immunity.
>
> [29] By its unexplained and unjustified conduct in relation to its internal documents, CRA has materially impaired Mr. & Ms. McCartie's ability to defend the charges made against them. The right to a fair trial is both guaranteed by section 11(d) the Charter and fundamental to the preservation of public confidence in the fairness of the justice system: *R* vs *Collins* 1987 CanLII 84 (SCC), [1987] 1 SCR 265 @ paragraph 36. A fair trial of tax evasion cases is also fundamental to the preservation of public confidence in the fairness of the tax system and its administration.
>
> [30] Neither a judicial stay of the prosecution nor an order to exclude evidence should be granted if a lesser remedy would suffice to ensure a fair trial: *R vs O'Connor* [1995] 4 SCR 651 @ pages 465-466; *R* vs *Bjelland* 2009 SCC 38 (CanLII), [2009] 2 SCR 651 @ paragraph 19. In this case, a judicial stay of the prosecution is not necessary for that purpose, but an order for exclusion of the evidence seized under the authority of the search warrant is.
>
> **Disposition**
>
> [31] The documents seized under the authority of the search warrant will be excluded from evidence at this trial.

V. Summary of the BC Court's Charter breach findings and remedies

[89] In summary Judge Gouge found one section 7 breach and two section 8 breaches, as well as a section 11 breach if he allowed the trial to continue and not stay the proceeding. His remedies for the sections 7 and 8 breaches were to exclude evidence from the home and the computers and to exclude evidence from CRA's second audit.

[90] In McCartie 2015-2 the BC Court found that CRA's failures to make notes, and to retain the notes that were made, denied the McCarties the right to a fair trial. A fair hearing is enshrined in section 11 of the Charter. The BC Court also found that the McCarties' rights under section 7 of the Charter had been breached by CRA's unacceptably negligent loss of the Coles Notes.[11] The remedy imposed by the BC Court was to exclude from evidence all documents procured by CRA exercising its statutory power as part of the second audit — i.e. the audit giving rise to the reassessments in dispute in this Court.

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[11] See paragraphs 47-48

[91] In McCartie 2015-3 and 2015-4 the BC Court found that the failure by the CRA Investigators to comply with section 29(1) of the Criminal Code regarding the production of a copy of a search warrant when asked was a significant breach of section 8 of the Charter regarding unreasonable search or seizure.

[92] In McCartie 2015-4 the BC Court threw out the search warrant for the search of the McCarties' home as the ITO could not support the search warrant being issued without the evidence obtained by CRA during the second audit. The resulting warrantless search was another breach of the McCarties' section 8 Charter rights. The BC Court completed its detailed *Grant* analysis for both of these section 8 breaches which it described as cumulatively very serious breaches. The section 24 remedy imposed in the BC Court's proceeding for these two section 8 breaches was to exclude from evidence in that proceeding evidence seized from their home.

VI. This *Voir Dire* Proceeding

Witness testimony

[93] Mr. McCartie was the only witness for the appellant in this hearing. As stated above, he only testified to, and was cross-examined on, facts relevant to this stage of the proceeding, and not on the substantive issues applicable to the several penalties assessed under the ITA and GST/HST provisions, the statute-barred years, or the substantive tax issues.

[94] The respondent called three witnesses from CRA. The Auditor Ms. Coles, the Auditor Mr. McLachlan to whom the audit file was transferred in 2009, and Mr. Alan Jones, the Team Leader heading Criminal Investigations in Vancouver at the time. Their testimony covered both the evidentiary and procedural aspects of the *voir dire*, and, as described above, the respondent's witnesses' evidence on the substantive merits of the penalties assessed and in dispute in this appeal, along with the substantive tax issues including the statute-barred years. The respondent also called Dr. Angelina Loo, an orthodontist who was one of the persons to whom Mr. McCartie provided services for which he billed and was paid. Virtually all of Dr. Loo's evidence pertained to the substantive merits of this appeal.

[95] As noted by Judge Gouge, Mr. McLachlan's testimony was not relevant to the issues before the BC Court, as he took over the audit in 2009. Similarly, it is of little direct relevance in this *voir dire*.

[96] It should also be noted that Mr. Brown, the auditor who completed the earlier audit of the McCarties, transferred to Criminal Investigations, and then returned to Audit from Criminal Investigations to recommend the audits in question leading to the referral to Criminal Investigations, did not testify. As I wrote above with respect to Ms. Sundberg, I will regard Mr. Brown's evidence in the BC Court and what that court wrote about it, as the most favorable version of events from the respondent's point of view and from Mr. Brown's. I also accept Judge Gouge's assessment of his testimony and I share his doubts about it.

(i) Mr. McCartie's evidence

[97] Mr. McCartie described the first audit of 2002 and 2003 by Mr. Brown. He noted that Mr. Brown's penalty report was approved by his Team Leader Mr. Lidster. The McCarties filed objections to the 2002-2003 reassessments, which were largely allowed. Penalties were withdrawn and most of the denied expenses, hundred of thousands of dollars, were allowed by CRA Appeals.

[98] Mr. McCartie explained that Mr. Brown's audit led to liens being placed upon their home, even before the reassessments were issued, which in turn led to his bankruptcy.

[99] Mr. Brown recommended the second audit on November 21, 2007, which is almost immediately upon returning to Audit from Criminal Investigations. Mr. Brown's T134[12] was accepted by Criminal Investigations for "full scale" Investigation by Ms. Sundberg.

[100] During the second audit, at a November 27, 2008 meeting with Ms. Coles and Mr. Lecznar, the McCarties were asked by Mr. Lecznar about their beliefs regarding natural persons and their beliefs about paying income tax. These questions made Mr. McCartie uncomfortable and suspicious of Mr. Lecznar's motives and purposes for asking such questions as they did not seem consistent with an audit verification of income, expenses, deductions etc., but were about his personal thinking, opinion and belief. He found Mr. Lecznar's questions were more focussed on an intention to not pay taxes.

[101] Mr. McCartie said that he and his wife felt compelled to provide some cancelled cheques and invoices (that his wife had partially redacted) at the audit meeting. While asked for, they were also told that they would be compelled by

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[12] Referral to Criminal Investigations-Tab 16 Appellant's Book of Documents

written requirements to if they didn't provide them. The questionnaire they were asked to fill out also went beyond questions about the records required to be kept under the ITA and GST legislation.

[102] In December 2008 Ms. Coles and her Team Leader Mr. Lidster met to issue the bank requirements.

[103] There was a letter to Ms. Coles called a Statement of Facts that purported to be from Mr. McCartie. Mr. McCartie denies sending it, does not know who did, and was unaware of it prior to its production on discovery in the BC Court proceedings. I have no reason at this stage not to believe that, having heard from all of the respondent's witnesses. If it turns out Mr. McCartie did send it or authorize it to be sent, it would be a voluntary document and there will be no reason for its exclusion on Charter grounds. Its provenance and its relevance can be ultimately determined at the trial stage. For purposes of this *voir dire*, I accept his explanation.

[104] Mr. McCartie acknowledged in cross-examination that a Mr. Ho of Paradigm Education attended one of the McCarties' meetings with Ms. Coles and Mr. Lecznar. Ms. McCartie invited Mr. Ho to observe the meeting and he did not participate. This is not relevant to the Charter issues. Suffice it to say CRA believed both McCarties were de-taxers making natural person claims, and that was based in part on Mr. McCartie having attended some Paradigm seminars, and a Paradigm official attending the one audit meeting as described. In addition, Mr. McCartie signed a $4,800 contract for services to be provided by Mr. Ho or by Paradigm (though Mr. McCartie says it should have only said Mr. Ho) as educator to tutor Mr. McCartie on the Charter and the Bill of Rights. This is one of the documents that were seized by CRA when the McCarties' home was searched.

[105] Mr. McCartie testified that Ms. McCartie let Criminal Investigations and RCMP in the house before she left on the day they searched the McCarties' home. However, Mr. McCartie was not present at that time. He said he wasn't sure and did not know for certain. Judge Gouge's decisions do not mention this and it would have been relevant to what he was deciding. I conclude Mr. McCartie is wrong on this point and I accept that Ms. McCartie left the home before the RCMP and CRA chose to enter after she and her daughter left.

[106] I do have some credibility concerns with Mr. McCartie saying that his tutoring by Mr. Ho was separate from Mr. Ho's role at Paradigm. I note this even though the courses are not relevant at this stage. I do not have credibility concerns on matters that are relevant at this stage.

[107] I also have some reliability concerns that on several occasions Mr. McCartie was very categorical and certain about some things that, when presented with evidence to the contrary, he had to acknowledge he should have been less certain about than he had been.

[108] The issue of Mr. Ho not Paradigm being the tutor under contract as educator is not one that Mr. McCartie would back down from, even when faced with questions from me and in cross-examination asking why his contract with Mr. Ho referred to Paradigm a number of times, and each page of the contract was printed on Paradigm letterhead with Paradigm footers and described their standard payment plans as a percentage of the tax savings.

(ii) Annette Coles' evidence

[109] Ms. Coles has a CPA designation and is a team leader in Audit at CRA. She had been an auditor in the years in question, having started at CRA as an auditor in 2005. Ms. Coles has never worked in Criminal Investigations.

[110] Ms. Coles testified that she issued the Requests for Information "RFIs" to the financial institutions since that is the normal step to follow when unable to obtain all of the information from taxpayers directly.

[111] She had no involvement in the decision to refer the audit file to Criminal Investigations, and no involvement with what was referred to Criminal Investigations or what documents Audit made available to Criminal Investigations.

[112] Ms. Coles transferred the file to Mr. McLachlan when she was transferred within Audit from General Income Tax Audit to GST Refunds Return Audits. At the time she transferred the file to Mr. McLachlan she had not come to any conclusion regarding the audit as it was still very much in the information gathering stages. She had not used or relied on any banking information and records to come to any decision or conclusion about Mr. McCartie's income.

[113] Ms. Coles confirmed that the lost Coles' Notes would have included her detailed chronology of the steps she took and the events that occurred in the course of the audits she was attending to.

(iii) Mr. McLachlan's evidence

[114] Mr. McLachlan has been with CRA for over 30 years as an Excise Tax auditor throughout, which included some responsibilities as a generalist in Tax and in GST Audit. He did not complete the CGA program he started in the 1970s.

[115] Mr. McLachlan confirmed that the audit files were transferred to him in 2009. He said that he can not recall why the McCarties were selected for audit. As part of the McCarties' audits that he took over from Ms. Coles, he reviewed Mr. Brown's earlier audit of 2002-2003. He started work on it around June of 2009 a few months after it was transferred to him. He worked about 200 hours on the file before the March 2010 referral by him and his team leader to Criminal Investigations. After completing his review of Ms. Coles' file at that time, he came to "an inconclusive conclusion" as there were many items in the bankruptcy that CRA could not explain. He never contacted or dealt with Mr. McCartie during the audit. He processed the file as transferred to him by Ms. Coles along with any records received from the banks to the RFIs that were received thereafter. He said that he does not particularly recall why the audit was transferred to Criminal Investigations even though he was the person who recommended to his team leader that it be transferred to Criminal Investigations.

[116] Mr. McLachlan said he does not know what documents were taken from the searching and seizure of his desk. He was working from home at that stage. He said he does not know why his desk was searched. He said this was the only time in his CRA career that he had a search of his desk or anything seized from his files.

[117] Mr. McLachlan does not recall if the Laurentian and ResMor bank records were received in response to an RFI sent by Ms. Coles. He testified that they could have been seized from Ms. McCartie's computer at the search of the McCarties' home. Mr. McLachlan said he did not rely on them as part of his audits. He did not think they were relevant so they did not go in the audit file, but would have remained at his desk awaiting shredding at the completion of the audits but for the seizure. He testified documents received from taxpayers or others that an auditor does not think are relevant (even if a taxpayer does) do not get placed in the audit file but are kept separately "on hold" and shredded at the conclusion of the audit. CRA audit procedures required that anything relevant to the assessment in the audit be inserted in the Audit package, and nothing more. The relevance of documents for these purposes is determined by the auditor who may find to be irrelevant documents that are provided by or on behalf of a taxpayer who believes they are relevant. It should have been described in the T-2020. Mr. McLachlan's working papers and summaries of unreported income, allow for expenses and GST payable on those expenses. They were based entirely on the RFIs and documents received in response to them. His

summaries were forwarded to Criminal Investigations along with anything Ms. Coles may have prepared when she worked the file.

[118] The only expenses Mr. McLachlan allowed in his audit work were those documented by cheques drawn on the CIBC account, and not any that might have been payed otherwise or by cheque on another of the McCarties' banks to which CRA had issued RFIs. Mr. McLachlan agreed that Mr. McCartie was correct that this was "an incomplete audit" and CRA had not accounted for expenses to the full extend audit procedures provided for.

(iv) Angelina Loo's evidence

[119] Dr. Loo is an orthodontist. She met Mr. McCartie when they both attended the same "course" on natural persons. Sometime after that, Dr. Loo hired Mr. McCartie to design her practice's website for a fixed fee.

[120] Dr. Loo was later contacted by Ms. Sundberg of Criminal Investigations to obtain copies of the invoice she received for that work along with her cheque by which she paid it. Dr. Loo provided these. Other evidence confirms that these were used by Criminal Investigations in its investigation prior to the assessments in question being issued by Criminal Investigations.

[121] I see no reason on these facts to consider excluding the documents obtained by CRA from Dr. Loo from being relied on by the respondent in this proceeding.

(v) Alan Jones' evidence

[122] Mr. Jones is a CPA and has worked at CRA for over 20 years. In the period in question, he was the team leader of Criminal Investigations in Vancouver. He had been in Criminal Investigations since 2002 and was its team leader since 2005. Mr. Jones explained that in about 75% of cases, an investigation starts with a referral from Audit.

[123] He was the team leader for the McCarties' audits and Ms. Sundberg was the lead investigator. He would have reviewed all of Ms. Sundberg's working papers and any reports she would have prepared. He gave Ms. Sundberg guidance on the investigation. He had regular meetings with her regarding the investigation's direction and progress.

[124] All six of the senior Investigators reported to him and he oversaw their work and all of their investigations. He was involved in reviewing all of their work including primary reports, ITOs, search warrants, audit reports and prosecution reports. He reviewed everything that came in to Ms. Sundberg's possession, the whole audit file and all documents from production orders.

[125] Mr. Jones testified that Audit had only reviewed Mr. McCartie's 2005 to 2007 years and that, after it was referred to Criminal Investigations, Criminal Investigations expanded their investigation audit to add 2008 and 2009.

[126] Mr. Jones confirmed that Criminal Investigations had Mr. Brown's initial audit file of 2002-2003 and reviewed it. It is not entirely clear how, when or why it first came into Criminal Investigations' possession. He also confirmed that during the period Mr. Brown was in Criminal Investigations, being after he completed the initial audit of the McCarties and before he returned to Audit from Criminal Investigations and recommended the audits in question, Mr. Brown reported to Mr. Jones as his team leader as one of his Investigators.

[127] Mr. Jones was present at the McCarties' home for the execution of the search warrant and throughout the search. He said that he does not recall if he was present for the search of Mr. McLachlan's desk.

[128] With respect to the search and seizure at the McCarties' home, Mr. Jones testified that he and his whole Criminal Investigations' team of six or seven Investigators attended the execution of the search. They were supplemented by some Auditors and perhaps some Collections staff. Mr. Jones did not suggest that Ms. McCartie let the RCMP or the CRA into their home. He is clear that she opened the door and left the premises altogether, and only at that time did their search begin. He confirmed that he knew Ms. McCartie was not given the search warrant when she asked, or at all, but that a copy was left on the McCarties' dining room table at the end of the day.

[129] This Court had the benefit of Mr. Jones' testimony on behalf of the Crown. Mr. Jones did not say he was at anytime unaware of the Criminal Code's requirement to provide a taxpayer a copy of the search warrant when asked. He did not say that his Criminal Investigations unit Investigators were not appropriately trained on executing search warrants, including that requirement. Mr. Jones did not defend or try to explain away what his two Investigators, Ms. Sundberg and Mr. Stenchman, did and didn't do when first executing the search warrant prior to the search of the home being conducted. He did not say his Investigators were following RCMP

Constable Reynold's lead. Mr. Jones said that he was unaware of, and did not see or hear, what happened at the door even though he was at the property. I infer from this that, in fact, Mr. Jones and all of his Investigators present at the McCarties's home were aware of the requirements.

[130] This testimony, that Judge Gouge did not have, leads me to conclude that the section 8 Charter breach of conducting the search without complying with the Criminal Code requirement that Ms. McCartie be given a copy of the search warrant when she asked for it was more severe and more deliberate, and on the opposite side of the centre line between good faith and bad faith, than Judge Gouge "accepted" in McCartie 2015-4.

[131] Mr. Jones was clear in his testimony that none of the documents seized from the home assisted Ms. Sundberg with the assessments of tax as the only information used for the tax assessments came from the bank records received from the banks in compliance with the RFIs and production orders issued by CRA to the banks. Documents seized from the home were relied on to assess the penalties and to open the statute-barred years, along with the information from Ms. Sundberg's interviews with Dr. Loo and other third parties.

VII. Law and analysis

[132] This Court can, if appropriate, impose a section 24 Charter remedy in respect of the identified Charter breaches, including breaches under sections 8 and 11 regarding the BC criminal proceedings.

[133] This is supported by the wording of section 24 itself. This is also supported by *O'Neill Motors Limited*, 1998 CanLII 9070 (FCA), *Donovan* [2000] 4 FC 373, *Warawa* 2003 TCC 756 (affirmed 2005 FCA 34) and *Canada* v. *Jurchison*, 2001 FCA 126.

[134] Cases such as *Romanuk* 2013 FCA 133, *Piersanti* 2014 FCA 243, *Bauer* 2018 FCA 62, *Brooks* 2019 TCC 47 (affirmed 2019 FCA 293) and *SPE Valeur* 2019 TCC 174, holding that a taxpayer cannot complain in the Tax Court of a section 8 or section 11 breach, are cases where no criminal proceeding had occurred in which the breach was raised and the breach determined to have occurred.

[135] For example, in *Warawa* J.A. Sharlow was dealing with an appeal from J. Beaubier's decision in this Court that involved somewhat similar facts to this case. Mr. Warawa had been found in his related criminal proceeding to have had his

Charter rights breached leading to the criminal trial not proceeding. Neither Justice Sharlow nor Justice Beaubier's reasons suggest a section 24 remedy could not be granted in this Court for the section 7 breach.

[136] It is clear that this Court must reweigh the factors and the appropriate relief, if any, for Charter breaches under section 8 or 11 in a related criminal proceeding.

[137] The parties do not disagree with this, although the respondent maintains that Mr. McCartie obtained a full remedy in the BC Court and no further remedy is warranted in this civil Tax Court proceeding. At times it did appear that the respondent did want to disagree in oral argument, but resiled when questioned.

[138] Section 24 of the Charter requires that a *Grant*-type analysis be conducted. As described by Judge Gouge in McCartie 2015-4 above, a court must conduct a *Grant* analysis to determine what remedy, if any, is appropriate under section 24 of the Charter in respect of identified Charter breaches. This is required whether or not the breaches occurred in the proceeding considering the remedy. The Supreme Court of Canada in *R.* v. *Reilly* 2021 SCC 38 has more recently described the *Grant* analysis considerations and weighing.

[139] The parties do not disagree with how Judge Gouge approached and applied the *Grant* analysis in the BC Court proceedings. While the respondent Crown may not have agreed with the result of Judge Gouge's application, no appeal was taken.

[140] The weighing of competing interests in a criminal proceeding for tax evasion may be different than in a civil tax proceeding involving the same circumstances, as regards the quantum of tax, the reopening of statute-barred years, and even the gross negligence penalties for tax offences under the ITA.

VIII. The *Grant* Analysis and Conclusions

[141] This is not a case in which the *Grant* analysis is easy or straightforward. Canadians rightly expect fellow taxpayers to pay their taxes and for there to be consequences for those who choose not to. Canadians also rightly expect law enforcement officers executing search warrants or collecting evidence to support an investigation of potential criminal wrongdoing, to be knowledgeable of, and to respect, at least the basic straightforward rules applicable when doing so.

[142] I agree with Judge Gouge's considerations, his weighing of the competing considerations, and with the remedy he chose to impose in his court. The question

that I must decide is what if any remedy should be imposed in this Tax Court proceeding.

[143] In conducting the *Grant* analysis in this Court, I am mindful of the fact that the amounts in dispute in the Court are composed of three separate issues. These are the substantive issues to be ultimately decided in this proceeding:

1) the amount of tax that should be paid and interest thereon;

2) whether the statute-barred years are subject to being reopened after the normal reassessment period under the ITA, which requires the respondent show that a taxpayer has made a misrepresentation attributable to carelessness, neglect or wilful default, or has committed fraud; and
3) the gross negligence penalties and whether the threshold for them applying has been met under the ITA, which requires the respondent show that the taxpayer has made a false statement in a return knowingly (including being wilfully blind) or in circumstances amounting to gross negligence.

[144] With respect to the first issue, the quantum of the taxes owing, I think Canadians' expectations that their fellow Canadians pay their taxes owing as required by the ITA and HST legislation, weigh much more heavily in this Court and may be less easily displaced by other considerations in proceedings in this Court. I believe that is the case as I weigh the *Grant* factors in this tax appeal.

[145] In the circumstances I conclude that the only evidence that the respondent should be precluded from relying on in this Court to establish the amount of tax (income tax, GST or HST) owing by Mr. McCartie is the evidence, if any, first collected from the search and seizure of the McCarties' home. This is not to suggest such is always or generally expected to be the case in respect of an unlawful search of a home as part of a parallel, related tax evasion proceeding. I find that the particular circumstances of the search of the McCarties' home in this case, combined with the existence of several other Charter breaches in this case, when weighed appropriately, lead to this being the appropriate section 24 remedy in Mr. McCartie's case. I also find it appropriate that the respondent's assumptions of fact when reassessing set out in its reply not have the benefit of being presumed to be correct and to subject the taxpayer to an initial burden to demolish them on a *prima facie* basis, to the extent that *Hickman Motors* principle remains.

[146] A consideration of the *Grant* factors leads me to a similar conclusion with respect to the issue of the respondent's ability to maintain its assessments of otherwise statute-barred years, that it has reassessed after the normal assessment period had expired. The ITA allows such reassessments in circumstances where a taxpayer has made a misrepresentation in their tax return due to carelessness or neglect. The tax consequences of such an assessment being permitted to be made is that the taxpayer is assessed for the taxes, and interest thereon, on the amount that they should have reported correctly in their return. Those are the amounts Canadians are expected to pay, and that Canadians expect their fellow Canadians to pay. This weighing of the *Grant* factors again leads me to the conclusion that only the evidence first collected by the respondent from the search of the McCarties' home should be excluded in this Tax Court proceeding given the particular circumstances of the search of the McCarties' home and the existence of the other Charter breaches. The respondent has the burden of proof with respect to reassessing statute-barred years under the ITA or any comparable GST or HST requirement.

[147] Given the state of the evidence on the *voir dire*, and in particular the absence of Ms. Sundberg's testimony, I am not deciding the issue at this time of what evidence, if any, was first obtained during the search of the McCarties' home. This issue can be dealt with if a dispute arises as this tax appeal moves forward.

[148] Although the audit of Mr. McCartie's 2008 and 2009 years was initiated by Criminal Investigations, I do not think that, on the facts in question in this case and weighing the *Grant* considerations, it would be an appropriate remedy to allow Mr. McCartie's appeal of those two years.

[149] Miss Sundberg, her Team Leader Mr. Jones, and all of their colleagues who prepared for and attended the search of the McCarties' home, failed to properly execute the search. The same is true of Corporal Reynolds and perhaps his RCMP colleague in attendance. While I defer to Judge Gouge who heard testimony from Ms. Sundberg and Corporal Reynolds as regards these two not intentionally failing to comply with the requirements to properly execute a search warrant, or threatening to break down a door instead of providing a copy of the search warrant when asked as required, I have great difficulty believing the entire Criminal Investigation's unit in Vancouver, including its Team Leader Mr. Jones, could have been unaware of such a requirement and prepared the Criminal Investigation's unit accordingly for this attendance and for execution of search warrants generally. While I did not hear from Ms. Sundberg or Sergent Corporal Reynolds, I did hear from Mr. Jones.

[150] Penalties under the ITA and GST/HST legislation are penalties, intended to punish Canadians for their choice to not comply with the statutory requirements of our tax legislation intentionally or in circumstances amounting to gross negligence. They clearly do not engage sections 8 and 11 of the Charter, and therefore civil penalty proceedings under our tax legislation can not, on their own, result in breaches of those two Charter sections, resulting in a remedy therefor under section 24. However, this is not such a case. In Mr. McCartie's case the BC Court has properly found these two sections of the Charter were breached. Judge Gouge imposed a section 24 remedy in the BC Court proceeding. The question in this Court is whether any further section 24 remedies are appropriate in this Court for all of the Charter breaches against Mr. McCartie found by the BC Court to have occurred — including sections 8 and 11. That requires a separate weighing of the *Grant* factors by this Court in respect of the civil penalties than in respect of the quantum of tax and reassessing after normal reassessment period.

[151] While I agree with Judge Gouge's *Grant* analysis, he found that Ms. Sundberg and the RCMP actions were unintentional and *bona fides*. I accept that. However, I believe that Canadian taxpayers might strongly doubt that as they reasonably expect CRA's law enforcement officers and RCMP officers executing search warrants, especially on an individual's home, to be familiar with the basic aspects of execution and to be properly trained in such matters. I base this on decades of experience in dealing with Canadian taxpayers of all sorts from across this country—French, English and those Canadians who need the use of translators in other languages, from those Canadians who only access social benefits from CRA, employees who receive paycheques, small and medium businesses and their owners, through to Canada's major financial institutions, big pharma and Canadians who own them and who are prosperous. I would expect the majority of Canadian taxpayers, if asked, would make it very clear that they would have trouble accepting that CRA Criminal Investigators executing search warrants were unaware of taxpayers' rights to a copy of the search warrant as required by the Criminal Code provision authorizing search warrants. It would bring the Canadian judicial system including this Court, and including CRA's administration and enforcement of the ITA, into disrepute to think that, even if not done in bad faith, CRA's officials and RCMP enforcing search warrants are not appropriately trained on such a basic and necessary right of all Canadians to fundamentally coexist and together fund the operation of this country and distribute its social programs and its fiscal and economic programs.

[152] All Canadians challenging a CRA decision must engage with CRA. An objection to CRA is required before taxpayers can appeal to this Court. Many Canadians do go on to initiate proceedings in this Court. The Tax Court deals with

alleged detaxers' tax and penalty obligations very often, relatively consistently and effectively, and in published decisions. The Federal Court of Appeal does so as well. Canadians know this. Similarly, CRA appears readily able to identify and pursue alleged detaxers in accordance with the ITA and the Criminal Code without breaching taxpayers' Charter rights. I do not believe this will be eroded in any material way if this Court finds that Mr. McCartie is entitled to a remedy in this Court as a result of the breaches of his and his family's Charter rights by CRA and the RCMP assisting it.

[153] On the other hand, it is not often that a taxpayer brings to the attention of this Court, and has very convincing evidence to show, that CRA investigators blatantly breached their Charter rights on multiple occasions in this pursuit, even when searching their homes with the RCMP at CRA's side, and despite a clear and straightforward provision of the Criminal Code's warrant provisions. In such circumstances, confronted with this, I believe it is necessary that I recognize the importance that this Court clearly impose consequences in the form of section 24 remedies to avoid Canadians losing faith in their Canadian justice system's commitment and obligation to ensure that our shared tax burden is both lawfully shared by taxpayers, and lawfully administered and collected by our revenue authorities in accordance with the provisions of the tax legislation and all other applicable law. This can be expected to help keep cases such as this rare and exceptional.

[154] Transfers of CRA staff between Audit and Investigations are understandable. However, Canadians might expect there to be an ethical wall to prevent Investigators being involved in investigations into taxpayers they had previously been involved with in Audit or any other department, and certainly to prevent Auditors who had been in Investigations from initiating an audit or taking audit measures in respect of taxpayers they had previously investigated or had previously audited before being in Investigations. This case demonstrates how this can erode the Canadian public's confidence in CRA and law enforcement, and the public's credibility of the testimony in our courts of law enforcement officers. This would be particularly problematic in our taxation system which is built and dependent upon a self-assessment regime.

[155] I find that the appropriate section 24 remedy in this Court with respect to income tax, GST and HST penalties is that the respondent not be allowed to rely on any evidence collected from the second audit or collected from the search of the McCarties' home. These are the same such remedies as Judge Gouge determined to be appropriate with respect to the penal proceedings.

[156] I am satisfied that these remedies under section 24 of the Charter constitute the satisfactory and appropriate remedies in respect of the events complained of that were related to, and gave rise to, the Charter breaches, without the need to consider the Canadian Bill of Rights due process right to the enjoyment of property and its right to the principles of fundamental justice, or to the principles of procedural fairness in Canadian courts.

[157] The Appellant is entitled to costs on this hearing.

[158] The parties shall have 30 days from the date hereof to reach an agreement on costs, failing which the parties shall have a further 30 days to file written submissions on costs. Each party will have a further 15 days thereafter to file any responding submissions. Any such submissions shall not exceed 15 pages in length initially, and 10 pages for responding submissions. If the parties do not advise the Court that they have reached an agreement and no submissions are received from the appellant, costs shall be awarded in the amount set out in the Tariff to the *Rules of the Tax Court of Canada (General Procedure)*.

Signed at Ottawa, Canada, this 6th day of February 2024.

"Patrick Boyle"

Boyle J.

CITATION:	2024 TCC 16
COURT FILE NO.:	2016-2716(IT)G , 2016-2717(GST)G
STYLE OF CAUSE:	COLIN MCCARTIE AND HIS MAJESTY THE KING
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	September 20 to 23, 2021 and October 13 to 15, 2021
REASONS FOR JUDGMENT BY:	The Honourable Justice Patrick Boyle
DATE OF JUDGMENT:	February 6, 2024

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Eric Brown Jamie Hansen

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:	François Daigle Deputy Attorney General of Canada Ottawa, Canada

APPENDIX A - McCartie 2015-1

BACKGROUND

[1] This prosecution has a long and complex procedural history. For detailed summary, the reader may refer to a decision which I rendered on May 29, 2014: R vs McCartie 2014 BCPC 128; [2014] BCJ #1227. In brief:

a. Mr. & Ms. McCartie are charged with tax evasion.

b. Some of the evidence which the Crown proposes to tender against them was obtained by Canada Revenue Agency ("CRA") from Mr.& Ms. McCartie's bankers by the exercise of CRA's statutory audit powers under the Income Tax Act. Crown counsel inform me that that evidence is crucial to the Crown's case.

c. Relying on R vs Jarvis 2002 SCC 73 (CanLII), [2002] 3 SCR 757, Mr. and Ms. McCartie seek to exclude that evidence on the ground that the evidence was obtained from them by compelled disclosure under CRA's statutory audit powers at a time when the predominant purpose of CRA's enquiries was to obtain evidence for use in a criminal prosecution. In order to rule on that issue, it would be necessary for me to determine the date upon which the predominant purpose of CRA's enquiries changed from a civil audit to a criminal investigation ("the Key Date").

d. The first CRA audit of Mr. & Ms. McCartie was conducted by Mr. Brown, in 2004 – 2005. After he issued his audit report, Ms. Karen Etches of CRA's Investigations Department asked to meet with Mr. Brown to discuss the audit. The sole function of the Investigations Department is to conduct criminal investigations and prosecutions. Mr. Brown met with Ms. Etches and Mr. Chan, another member of the Investigations Department. No decision to prosecute was taken at that time. However, Mr. Brown recommended a second audit of Mr. & Ms. McCartie. Ms. Annette Coles was assigned to conduct that audit. In the course of that duty, Ms. Coles exercised CRA's statutory power to compel Mr. & Ms. McCartie's bankers to disclose the documents in question.

e. Ms. Coles' practice was to make detailed notes of her meetings with other CRA staff. She believes that she followed that practice in this case. It is reasonable to think that her notes might shed light on the intentions and purposes of other CRA

staff with whom she met during the course of her audit, and so might assist in determining the Key Date. However, her notes have been lost.

f. Mr. Gibson, who was Crown counsel at an early stage of this prosecution, informed Mr. & Ms. McCartie by letter that Ms. Coles' notes appear to have been lost as a result of a computer malfunction, and that no further information on that subject is available.

g. Mr. & Ms. McCartie submit that the loss of Ms. Coles' notes impairs their ability to establish the Key Date (the onus of proof of which lies upon them)[13], and so impairs their ability to make full answer and defence. They seek a judicial stay of proceedings, relying on Regina vs La 1997 CanLII 309 (SCC), [1997] 2 SCR 680. In considering that issue, I must decide whether it should be inferred that Ms. Coles' notes were lost as a result of "… an unacceptable degree of negligent conduct …." on the part of CRA: R vs La @ paragraph 22. The very brief statement in Mr. Gibson's letter is insufficient to allow me to decide that question.

h. Mr. Preshaw, who succeeded Mr. Gibson as Crown counsel, undertook to call any Crown witnesses whom the court considers to be necessary on this issue. I am obliged to decide whether the Crown must call Mr. Gibson to identify his sources of information and to elaborate upon the statement in his letter.

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[13] Note that elsewhere, and in later decisions, Judge Gouge is clear he has not decided the issue of who bears the onus regarding when CRA's predominant purpose changed from a civil audit to a criminal investigation. See especially McCartie 2013-1, 2013-2.

APPENDIX B - McCartie 2015-2

THE ISSUE

[1] Mr. & Ms. McCartie are charged with tax evasion. On this application, they seek a judicial stay of the prosecution, on the ground that, in the circumstances prevailing, it is not possible to provide them with a fair trial, to which they are entitled by section 11(d) of the Canadian Charter of Rights & Freedoms.

[2] The following are the pertinent circumstances:

a. The Crown's case depends upon certain documents procured by Canada Revenue Agency ("CRA") from Mr. & Ms. McCartie and their bankers by the exercise of CRA's statutory audit powers.

b. Mr. & Ms. McCartie assert that, at the time that the statutory audit powers were exercised, CRA's primary objective was to gather evidence for a criminal prosecution. If that assertion is proven, the documents in question ought to be excluded from evidence: R vs Jarvis 2002 SCC 73 (CanLII), [2002] 3 SCR 757.

c. Mr. & Ms. McCartie carry the onus of proving the motives and intentions of certain members of CRA's staff.[14] They can discharge that onus only by successful cross-examinations of those individuals.

c. Ms. Coles, the CRA auditor who exercised CRA's statutory powers to procure the documents, made notes of her meetings with other CRA staff and with Mr. & Ms. McCartie. Those notes might shed light on the motives and intentions of other CRA staff at relevant times. The notes have been lost.

d. Other CRA staff did not make notes of certain key meetings. If they had, the notes might shed light on the motives and intentions of those who attended the meetings.

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[14] see footnote 13, (immediately preceding footnote) *Supra*

[3] The questions are whether the loss of Ms. Coles' notes and the omission by other CRA staff to make notes materially affect the fairness of the trial and, if so, what remedy ought to be granted.

THE EVIDENCE THUS FAR

[4] Two separate CRA departments were involved in the matter: (i) the Audit Department, which conducts audits to determine the civil liability of taxpayers; and (ii) the Investigations Department, which conducts criminal investigations of tax evasion and directs prosecutions for such offences. The Investigations Department was formerly known as the Enforcement Department.

[5] In July, 2004, Mr. Jason Brown was working as an auditor in the Audit Department. He was assigned to audit the tax returns of Mr. & Ms. McCartie for the years 2002 and 2003. He disallowed certain business expenses which they had deducted from gross income and issued a notice of re-assessment. He also imposed penalties under section 163(2) of the Income Tax Act, which provides:

…

When Mr. Brown imposed the penalty, he prepared a penalty report for inclusion in the Audit Department file.

[6] In his oral evidence, Mr. Brown denied that he suspected Mr. or Ms. McCartie of fraud or tax evasion. However, three passages in his penalty report cast some doubt on his evidence.

a. In his report, Mr. Brown said:

The taxpayers' records were inadequate for income tax purposes. Furthermore, some of the expense receipts were not even incurred by the taxpayer.

In his oral evidence, Mr. Brown characterized that statement as an assumption, rather than an assertion. <u>The document does not support that characterization</u>.

(Emphasis added)

b. In his report, Mr. Brown said:

Along with the egregious amounts of personal expenses being deducted, there were many other problems with the records. Some of the cash expenses were already recorded.

In answer to Mr. McCartie's question during cross-examination, Mr. Brown confirmed that this passage was intended to convey Mr. Brown's suspicion that Mr. & Ms. McCartie had double-reported, or claimed twice, certain expenses.

c. In his report, Mr. Brown said:

Also, the taxpayer deducted two receipts from the same restaurant bill.

[7] Mr. Brown completed his audit in March 2005. About two months later, he was approached by Ms. Etches, who was then the Assistant Director of the Investigations Department. Ms. Etches asked Mr. Brown to meet with her to discuss Mr. & Ms. McCartie's file. Mr. Brown believes that it is the practice of the Investigations Department to review all penalty reports, and that it was his penalty report which brought Mr. & Ms. McCartie to Ms. Etches' attention. Mr. Brown met with Ms. Etches and Mr. Chan, another staff member in the Investigations Department. In his oral evidence, Mr. Brown described the meeting in the following terms:

… [Ms. Etches and Mr. Chan] were asking me questions about possibly conducting an investigation and I told them that this is mostly just personal expenses and unsupported expenses, and I don't think that this would warrant a -- a full-on investigation. I just felt that it was just a -- that [Mr. & Ms. McCartie] were just negligent.

* * *

And then [Ms. Etches and Mr. Chan] said okay, and I guess they decided not to go forth with it.

* * *

… [Ms. Etches and Mr. Chan] said right there in the -- in the interview, they said "Okay, well, we really thought it was just a bigger issue than it really is".

[8] No documentary record of the meeting has been disclosed, and it may be that none ever existed.

[9] Mr. Brown was transferred to the Enforcement Department for the period from February to September, 2007. He returned to work in the Audit Department in September or October, 2007.

[10] In November, 2007, Mr. Brown completed and submitted a document, on CRA Form T-133, entitled "Tax Lead or Project Information", the purpose of which was to recommend a further audit of Ms. & Mr. McCartie, in relation to their tax returns for the years 2005 - 2006. In that document, Mr. Brown said:

Geodiscovery Interactive Inc is owned by Annie McCartie although day-to-day operations are performed by Annie's spouse, Colin.

Annie and Colin reported a total income of $28,035 from April 2005 to December 31, 2006. However, according to income and expense statements provided to trustee, they have personal expenditures of between $4000 and $5000 per month, or between $84,000 and $105,000 from April, 2005 to December 31, 2006.

The only known source of revenue is Annie's company, Geodiscovery Interactive Inc in 2006. Geodiscovery reported $145,000 in subcontracts on gross sales of $165,000, and no T4A's issued. Was this $145,000 paid to Colin? Between Colin and Annie, they only reported gross income of $1635 in 2006.

Colin and Annie were previously audited and reassessed for a large amount of expenses that were deducted. In 2004, Colin declared bankruptcy and was absolved of his tax debt.

In June, 2007 (outside audit period) the McCarties sold their house for $365,000 and purchased a new house for $540,000. Where's all this money coming from?

Possible net worth.

[11] As a result of that document, Mr. Ian Chabot, an auditor in the Audit Department, was assigned to conduct an audit of Mr. & Ms. McCartie's tax returns for the years 2005 – 2007. Mr. Chabot fell ill before making any significant progress in the audit, and Ms. Annette Coles was assigned to replace him.

[12] Ms. Coles, accompanied by another CRA auditor, Mr. Lecznar, met with Mr. & Ms. McCartie in November, 2008. As a result of information provided by Mr. & Ms. McCartie at that meeting, Ms. Coles exercised CRA's statutory powers to require Mr. & Ms. McCartie's bankers to produce to her copies of Mr. & Ms.

McCartie's bank records. The bankers provided her with the copies demanded, as they were obliged to do. Mr. Gibson, who was Crown counsel at the inception of this prosecution, informed me that those documents are essential to the Crown's case. Statutory demands were issued to the banks in December, 2008 and the documents were provided to CRA in January – February, 2009.

[13] Ms. Coles was re-assigned in or about March, 2009, and was replaced as the auditor of Mr. & Ms. McCartie's returns by Mr. McLachlan. Mr. McLachlan reviewed the bank documents, and formed the conclusion that they would support a prosecution for tax evasion. He made that recommendation, which was accepted. On the basis of that recommendation, the Investigations Department launched a criminal investigation, obtained a search warrant and seized Mr. McLachlan's file (which contained the bank records). This prosecution ensued.