

# TAX COUNSEL

## CHARTER CONSEQUENCES:

### R. v. NORWAY INSULATION - AGAIN

Like it or not, the *Charter of Rights and Freedoms*<sup>1</sup> has absolutely changed the legal landscape in this country.

This is especially evident in criminal law where the use and abuse of police powers has been limited through judicial stays and exclusion of evidence. It has always been a tenet of our court system that a person is innocent until proven guilty and that it is better to let a guilty person go free for lack of proof than convict an innocent. With the advent of the *Charter*, however, Canadians also escape prosecution when the police abuse powers of arrest and search and seizure. Our *Charter* rights are paramount.

Section 8 of the *Charter* guarantees us the right to be secure against unreasonable search and seizure.

Sections 7 and 11 provide, among other things, that we cannot be compelled to give evidence against ourselves.

Where our tax laws intersect with the criminal system, the same *Charter* rules apply – but in a limited way.

The powers of investigation and information access granted CCRA through ss. 231.1 and 231.2 of the *Income Tax Act* (Audit and Requirement powers) have been categorized by the Courts as search and seizure powers but have been deemed reasonable<sup>2</sup>. It is said that we have a low expectation of privacy in respect of documents prepared for the purpose of determining the amount of tax owed by us and that, given the nature of our self reporting-system, CCRA must have these investigative powers to administer the system and fulfil its obligations to the citizens of Canada.

Here's the rub: If you are conducting criminal activities, your rights against unrestricted search and seizure of incriminating documents are protected by the *Charter*; but if you are an honest

taxpayer, your life is an open book. So, what if you are a dishonest taxpayer?

In *R. v. Norway Insulation*<sup>3</sup> an auditor, working on the advice of a member of CCRA's Special Investigations group, obtained information that ultimately provided the basis for a search warrant. Had the auditor's purpose been collection of information for his routine audit, his questions would have been perfectly fine. However, it was not and they were not. His mission in fact was to assist Special Investigations in assembling enough information for a charge of tax evasion.

At trial, the criminal court excluded all evidence caught by the warrant stating:

*"...there appears to be a public interest to be served in ensuring that public officials who possess the ability to lay charges in quasi –criminal matters not be allowed unfettered powers of collecting evidence beyond the point where they have turned their minds from mere administration or regulation to prosecutions."*

This case has now been followed on numerous occasions. In *R. v. Jarvis*<sup>4</sup> banking documents were excluded. A suspected accountant in *R. v. Warawa*<sup>5</sup> was afforded *Charter* protection over oral and documentary evidence respecting both himself and his client. Similarly, verbal and documentary evidence obtained following a *Charter* breach in *R. v. Melnychuk*<sup>6</sup> was excluded in a s. 239 prosecution. Identical conclusions were reached in the Ontario cases of *R. v. Saplys*<sup>7</sup> and *R. v. Soviak*<sup>8</sup>. The latter was a prosecution for evasion of provincial tax.

So much for the criminal prosecutions of these taxpayers, but what about the missing tax?

In the new *Norway Insulation*<sup>9</sup>, CCRA reassessed the corporation and its principal shareholder for shareholder appropriation and unreported income. It relied, in part, upon the information obtained in breach of the *Charter* to support its position. The

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# CHARTER CONSEQUENCES (CONT'D)

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taxpayers applied to the Tax Court of Canada to have the notices of reassessment vacated. Their position was that CCRA could not rely upon such tainted evidence in Tax Court any more than it could in Provincial Court.

Section 24 of the *Charter* states: “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.” The section also gives a court the right to fashion an appropriate and just remedy in the circumstances of each case.

In an earlier similar case of *O'Neill Motors v. The Queen*<sup>10</sup> the Tax Court simply vacated the assessment. In that case, CCRA had agreed its assessment was based solely on the impugned evidence and thus if the evidence failed, so did its case. In *Norway Insulation*, there was no such admission and it was CCRA's position that it could proceed even if the original evidence was excluded – it would simply use the examination for discovery process to assemble any missing pieces of the puzzle.

The taxpayers' application was successful but not in the way anticipated. The remedy fashioned by Judge Bowie was interesting indeed. He did not vacate the assessment but rather:

- ordered that the evidence obtained subsequent to the normal audit be excluded;
- ordered that there be no examination for discovery of the taxpayers;
- removed the presumption of correctness of the assessments and reversed the onus of proof.

In so doing, the Tax Court Judge recognized that in order to give true effect to the remedy arising from the *Charter* breach (the exclusion of illegally obtained evidence) CCRA should be prohibited from using the knowledge gained from the impugned evidence as well.

CCRA has appealed this decision.

In the meantime, the lesson of these cases is that the propriety of a request/demand/requirement from CCRA is not necessarily determined by the question itself or its form, but rather by the purpose behind it. A question asked in furtherance of the routine investigation of the tax liability of a specific individual or individuals or to verify compliance with the Act MUST be answered. The same question asked pursuant to a quasi-criminal or criminal investigation MUST NOT be answered. This is the effect of the *Charter*.

Accounting and tax professionals must be vigilant to determine the purpose of inquiries from CCRA before deciding the appropriate level of cooperation.

1. Part I, *Constitution Act, 1982*, enacted as Sch. B to the *Canada Act, 1982*, (U.K.) 1982, c.11
2. *McKinlay Transport* 90 DTC 6243 (S.C.C.)
3. *R. v. Norway Insulation* 95 DTC 5328 (Ont. Gen. Div.)
4. *R. v. Jarvis* 98 DTC 6308 (Alta Q.B.)
5. *R. v. Warawa* 98 DTC 6471 (Alta Q.B.)
6. *R. v. Melnychuk* [1998] S.J. No. 710
7. *R. V. Saplys* [1999] O.J. No. 394
8. *R. v. Soviak* [1997] O.J. 1215
9. *R. v. Jurchisen* 2000 DTC 1660 (T.C.C.)
10. *O'Neill Motors v. The Queen* 96 DTC 1486 (F.C.T.D.)



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Donald P. Mallon, BSc LLB, a partner in Prowse & Chowne, is a seasoned litigator with over 20 years of experience. Focusing on administrative and tax litigation, he draws upon his courtroom and negotiation skills to effectively represent individual and business taxpayers in disputes with Revenue Canada.



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