

CONFIDENTIALITY OF TAXPAYER INFORMATION

TAXNET PRO

NOVEMBER 2014



LEGISLATIVE AND REGULATORY PRIVACY CONSIDERATIONS IN THE CONTEXT OF THE APPLICATION OF, AND AMENDMENTS TO, SECTION 241 OF THE INCOME TAX ACT

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SECTION 241 OF THE INCOME TAX ACT: INTRODUCTION AND SUMMARY ANALYSIS

It can be stated without fear of contradiction that the *Income Tax Act* (“the ITA”), and its associated and attendant regulations, guidelines, and policies are amongst the most substantively densely formulated, readily misinterpreted, and – in instances in which misapplication by tax authorities affects the interests of the individual citizen – potentially prejudicial of all Canadian legislation.

The successful operation of the ITA is predicated on the presumption of voluntary compliance by the taxpayer, and, notwithstanding the seeming simplicity of such a reductive characterization, Canadian courts, provincial legislative assemblies, and parliament have lent exhaustive scrutiny to the reliance of the Act on the amenability of Canadians to fulsome and unfettered disclosure of confidential personal information to ensure effective functioning of the ITA’s collection and enforcement mechanisms.

A logical corollary to this requirement for the promotion of voluntary disclosure by taxpayers is the assurance that information acquired through the operation of the ITA’s manifold collection mechanisms be subject to the most rigorous confidentiality obligations, and it is incumbent upon those government functionaries – or “officials,” as defined by the Act – responsible for the administration of the statute that they preserve and protect the integrity and privacy of taxpayer information.

A cogent affirmation of the essential principle that the preservation of the sanctity and confidentiality of taxpayer data is instrumental to – if not ultimately determinative of – the effective operation of the Act is enunciated by the Supreme Court of Canada in its decision in *Slattery (Trustee of) v. Slattery*, [1993], wherein Iacobucci J. opined,

... Parliament recognized that to maintain the confidentiality of income tax returns and other obtained information is to encourage the voluntary tax reporting upon which our tax system is based. Taxpayers are responsible for reporting their incomes and expenses and for calculating the tax owed to Revenue Canada. By instilling confidence in taxpayers that the

personal information they disclose will not be communicated in other contexts, Parliament encourages voluntary disclosure of this information. The opposite is also true: if taxpayers lack this confidence, they may be reluctant to disclose voluntarily all of the required information (Edwin C. Harris, *Canadian Income Taxation* (4th ed. 1986), at pp. 26-27).¹

Further affirmation of the principle that the preservation of the confidentiality of taxpayer information is imperative to the effective operation of the ITA is provided by the Privacy Commissioner of Canada's 2012-2013 Report to Parliament, "Securing The Right To Privacy," wherein the Commissioner concludes (with respect to the extraordinarily high level of compliance of Canadians with their obligations pursuant to the Act) that "(t)o maintain citizens' invaluable and exceptional level of confidence and goodwill, it is essential that the Agency continuously strives to improve its privacy and security safeguards and to reduce its risk of privacy breaches."²

The rather onerous burden of regulation and implementation of the general confidentiality requirement imposed by the ITA is assumed by section 241 of the Act, which instantiates Parliament's intent to guarantee that specified taxpayer information is disclosed only in stringently delineated circumstances, and with recourse to quasi-criminal prosecution and civil liability in those instances in which unauthorized disclosure occurs.

In summary, section 241(1) of the Act prohibits an official or representative of a government entity from

- knowingly providing, or knowingly allowing to be provided, to any person any taxpayer information;
- knowingly allowing any person to have access to taxpayer information; or
- knowingly using any taxpayer information otherwise than in the course of the administration or enforcement of this Act . . .³

Enforcement of the confidentiality obligations imposed by s. 241 is provided by Section. 239(2.2) of the Act, which imposes a penalty on "an official or other authorized person who violates the secrecy of the information obtained from taxpayers,"⁴ and the Act sets out in considerable detail the definition of "official" for the purposes of interpretation of the confidentiality obligations imposed by s. 241. Exhaustive judicial consideration has been directed towards articulating the scope of the confidentiality requirement, to provide clarification as to precisely what is properly subsumed under the classification of "taxpayer information," and to dictate how these provisions operate to restrict officials from engaging in unauthorized disclosure of such information.

Parliament's recognition of the necessity for achieving proportionality with respect to confidentiality obligations and the taxpayer's right to privacy is given statutory expression through the operation of the numerous counterbalancing provisions contained in the Act. These provisions exhaustively enumerate the

¹ [1993] 3 S.C.R. 430, at 444. [*Slattery*]

² Office of the Privacy Commissioner of Canada, *Securing The Right To Privacy*, (Annual Report to Parliament 2012-2013) (Ottawa, Office of the Privacy Commissioner of Canada, 2013). [*Securing The Right*]

³ *Income Tax Act*, (R.S.C., 1985, c. 1 (5th Supp.)), s. 241(1).

⁴ Chapter 1, The Administrative Framework

exemptions and exceptions to the confidentiality requirement otherwise imposed by the ITA, and are formulated for the purpose of ensuring that the Canada Revenue Agency (“the CRA”) is capable of satisfying its ultimate collection and enforcement mandate.

In his seminal analysis of the ITA’s confidentiality obligations and disclosure prohibitions, “The Requirement of Confidentiality Under the Income Tax Act and Its Effect on the Conduct of Appeals Before the Tax Court of Canada,” Patrick Bendin identifies and summarizes the mechanisms through which the multitude of provisions governing the confidentiality obligations incumbent on officials operate, and the means by which they ultimately seek to achieve proportionality between the need to preserve the privacy rights of taxpayers and the requirement for the Minister of National Revenue to access information for purposes of the administration and enforcement of the Act. In the abstract preceding the actual analysis, it is succinctly stated that

This balance is achieved through section 241 of the Income Tax Act, which contains a general prohibition against the disclosure of taxpayer information, a restriction on the compellability of officials to testify at legal proceedings in respect of such information, and two categories of exemptions. The first category allows taxpayer information to be disclosed for specified purposes to various federal and provincial government departments. The second category completely exempts criminal proceedings and administrative and enforcement proceedings under the Income Tax Act, and certain other federal enactments, from both the prohibition against disclosure and the limit placed on the compellability of officials to testify at such proceedings.⁵

Although the scope of the exceptions contained in section 241 may be characterized as narrow, several provisions are particularly significant in that their inadvertent or intentional misapplication – whether or not of sufficient severity to constitute a tortious breach of a statutory duty, or misfeasance – jeopardizes the integrity of what are intended to be inalienable privacy protections embodied elsewhere in s. 241, undermine the duty imposed upon government representatives and officials to ensure preservation of taxpayer confidentiality wherever mandated, and vitiate the legitimacy of the purposes for which such disclosure was obtained.

Notwithstanding that exceptions to the provisions contained in s. 241 ITA have historically granted authorization to the CRA to disclose information pertaining to tax specific criminal offences, or information originating as a consequence of legitimate auditing procedures, legislators continue to evince the desire for incremental expansion of what Parliament had initially conceived of as the narrow scope of such authorization by engaging in periodical legislative review, and through amendments to the confidentiality provisions inherent in the Act.

⁵ Patrick Bendin, “The Requirement of Confidentiality Under the Income Tax and Its Effect on the Conduct of Appeals Before the Tax Court of Canada” (1996) Canadian Tax Journal Vol. 44 No. 3. at 1. [Bendin]

With respect to contemporary government policy, it can be reasonably argued that ongoing amendments to the ITA's confidentiality provisions are both manifestations of a political calculus that demonstrably seeks to dilute the efficacy of existing legislative and regulatory privacy protections, and the natural expression of an ideological propensity towards investing delegated government officials with increasingly augmented discretionary powers of decision-making. Specifically where it relates to s. 241 of the Act, the current government has exhibited its intention to relax the prohibitions against unauthorized disclosure of taxpayer information so as to facilitate prosecution of criminal offences, repeatedly demonstrating its determination to pursue this objective without consideration for the exposure of Canadian taxpayers to the risk of erosion or attenuation of privacy rights otherwise guaranteed by the ITA.

Examples of recent amendments to s. 241 which have sought the expansion of the discretionary authority of officials to disclose taxpayer information include those pertaining to registered charities, and provisions intended to facilitate disclosure to assist FINTRAC, the RCMP and CSIS with the identification and prosecution of individuals involved in financing international terrorist organizations. In all instances of the contemplation of such amendments, legislators have exhibited a keen appreciation of the necessity of exhaustive consultation and comprehensive public review, with the reasonable expectation that any improvident, ill-conceived or gratuitous modification of the ITA's confidentiality requirements will be subject to rigorous judicial scrutiny, and accordingly, determinations that they are disproportionate in nature, or – at the extreme end of the continuum of judicial sanction – constitutionally violative.

The delicacy of the balance that exists between the operation of the confidentiality obligations imposed by section 241, and those provisions which are structured to permit the CRA (and other designated officials and representatives, as defined by the Act) to access and secure information required for the effective performance of investigative and prosecutorial duties is fundamental to harmonizing the Act with constitutionally enshrined privacy rights and the guarantee of protection from unreasonable search and seizure as articulated by section 8 of the *Charter of Rights and Freedoms* ("the Charter").⁶ In rendering its decision in *Slattery*, the court characterized section 241 as a legislative embodiment of

(t)he importance of ensuring respect for a taxpayer's privacy interest, particularly as that interest relates to a taxpayer's finances. Therefore, access to financial and related information about taxpayers is to be taken seriously, and such information can only be disclosed in prescribed situations. Only in exceptional situations does the privacy interest give way to the interest of the state.⁷

In her dissenting opinion in *Slattery*, McLachlin J. (as she was then) gives further expression and effect to the significance of ensuring respect for the privacy interests governed by section 241, ascribing greater priority to the necessity for preserving such interests than does Iacobucci J, and ultimately asserting that the phrase "in respect of," as it appears in the exception clauses contained in s. 241(3), should be construed narrowly, not broadly.

⁶ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. [*Charter*]

⁷ *Slattery*, supra footnote 1, at 444.

There can be little doubt that both the majority and dissenting opinions in *Slattery* stand firmly for the proposition that respect for and compliance with the privacy interests contemplated by section 241 are of paramount societal significance, and that any interpretation and administration of the Act by government officials must be undertaken with an unequivocal and unstinting appreciation of this fact.

Moreover, the sanctity of the confidentiality obligations imposed by section 241 are buttressed not only by the constitutional inviolability of privacy rights and proscription against unreasonable search and seizure constituted by section 8 of the *Charter*, but also receive further support and protection from the quasi-constitutional nature of the *Privacy Act*, which, together with the participation of the Privacy Commissioner in the legislative process, militates against policy and legislation which seeks to compromise the taxpayer's right to privacy.

CONSTITUTIONAL IMPLICATIONS OF AMENDMENTS TO THE ACT, FROM BILL C-31 TO SECTION 241 (9.5)

On June 19, 2014, Bill C-31 – “an act to implement certain provisions of the budget tabled in Parliament on February 11, 2014” – received Royal Assent, and accordingly the ITA was amended through the insertion of subsection 241(9.5) into the Act. Subsection 241(9.5) – “Serious Offences” – provides designated officials (in the context of the administration of the ITA, CRA employees) with the authority to disclose taxpayer information to a law enforcement officer of an appropriate police organization where there are reasonable grounds to believe that a serious criminal offence has been committed.

Subsection 241(9.5) contains an exhaustive inventory of offences with regards to which a CRA employee, acting in the capacity of an “official” pursuant to the Act and on the basis of the reasonable belief that the commission of such an offence has occurred, would be capable of invoking the exception to the general confidentiality requirements of section 241. These serious offences include those proscribed under the *Corruption of Public Foreign Officials Act*, criminal code offences such as sexual assault, the possession, distribution or accessing of child pornography, money laundering, abduction, as well as certain terrorism and criminal organization offences, and all offences subject to a minimum term of imprisonment, or that upon conviction impose a maximum term of imprisonment of 14 years to life, or a maximum term of imprisonment of 10 years and that resulted in bodily harm, involved the import, export, or trafficking of drugs, or the use of a weapon.

The latitude of the permissible exceptions to the confidentiality obligations that are prescribed by subsection 241(9.5) is vast, and its potential for diminishing – if not at least *partially* dismantling – the validity of the confidentiality protections that have been so scrupulously statutorily embodied elsewhere in section 241 is cause for profound concern. At the time of the Supreme Court's rendering of its decision in *Slattery* in 1993, the general principles governing the confidentiality requirements incumbent on officials administering the Canadian tax system had already been subject to greater than 30 years of legislative wrangling and exhaustive judicial review. It can be reasonably argued that the intensive scrutiny by the courts and repeated legislative refinement of the provisions of section 241 has succeeded in achieving just the degree of proportionality between preservation of taxpayer privacy and accessibility of information, confidentiality and disclosure, necessary to promote efficient administration and enforcement of the tax assessment and collection

mechanism, while ensuring that the Act is not rendered vulnerable to repeated and potentially incapacitating constitutional challenges.

Of particular relevance to the constitutional implications of the interaction of the ITA's information disclosure powers and its privacy protections – especially with regards to the exceedingly broad exceptions to the Act's confidentiality requirement set out in s. 241(9.5) – is the decision of the Supreme Court of Canada in *R. v. Jarvis*.

In *Jarvis*, the court examined the specific situations in which the privacy rights of the individual, as ensconced in s. 241, may be superseded by the audit powers granted to CRA investigators to obtain information from taxpayers pursuant to ss. 231.1(1) and 231.2(1) of the Act. Speaking for the majority, Iacobucci and Major JJ. observed that

In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss.231.1(1) and 231.2(1). In essence, officials “cross the Rubicon” when the inquiry in question engages the adversarial relationship between the taxpayer and the state.⁸

The court's decision in *Jarvis* establishes the theoretical bases on which to establish a distinction between where the ITA's auditorial fact-finding powers begin and end, and where they provide justification for disclosure of taxpayer information to specified third-party government representatives and agencies. Although the majority held in *Jarvis* that the ITA does provide the Minister of National Revenue with broad powers for the administration and enforcement of Act, and that these powers include the capacity to compel production of taxpayer documents and information pursuant to s. 231.1(1) and 231.2(1), it was also held that where penal liability and the liberty of taxpayer is at stake, certain constraints and limitations are imposed not only by the provisions of the ITA itself, but through the application of *Charter* protections that are relevant in the criminal context, including ss. 7 & 8.

Moreover, the court opined that where audit powers pursuant to the Act are exercised in the context of a criminal investigation, and more specifically where the criminal investigation is initiated subsequent to and as a consequence of information disclosed or information obtained during the course of an audit, the *Charter* protections against unreasonable search and seizure should be invoked. In other words, where taxpayer information may be required in the course of legitimate administrative or enforcement procedure, the privacy interest in records is low, but once the purpose of a particular inquiry exposes the taxpayer to the risk of penal liability, the “Rubicon has been crossed,” and the constitutional protection against self-incrimination operates to prohibit the CRA from “recourse to the inspection and requirement powers under ss. 231.1(1) and 231.2(1).” In such circumstances, the CRA must provide the taxpayer with notification that an investigation has been commenced, and seek judicial intervention in the form of authorization of a search warrant before initiating any intrusive searches.

⁸ *R. v. Jarvis*, 2002 SCC 73, at para. 88. [*Jarvis*]

Another leading decision that informs the court's interpretation and application of the confidentiality requirements and disclosure authority under the Act is *R. v. Plant*, in which the Supreme Court ruled on the admissibility of evidence obtained through the execution of warrantless searches. In rendering its judgment in *Plant*, the court opined that,

In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.⁹

Sopinka J., speaking for the majority, provides further elucidation of this principle by stating,

In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.¹⁰

Sopinka J. continues by engaging in an analysis of the reasonable scope of the expectation of privacy in the context of a criminal investigation, and accordingly enumerates the factors that must be considered in determining the "parameters of the protection afforded by s. 8 with respect to informational privacy," specifically as they pertain to information obtained without formal judicial authorization.

Consideration of such factors as the nature of the information itself, the nature of the relationship between the party releasing the information and the party claiming its confidentiality, the place where the information was obtained, the manner in which it was obtained and the seriousness of the crime being investigated allows* for a balancing of the societal interests in protecting individual dignity, integrity and autonomy with effective law enforcement.¹¹

Reference to and application of the determinative principles enumerated by the Supreme Court in *Plant* is provided by the Federal Court of Canada in its decision in *Del Zotta v. Canada*,¹² in which the court made opined that "In *R. v. Plant*, [1993] 3 S.C.R. 281 (S.C.C.), 292-3, Sopinka J. (for 6 of 7 members of the Court) also fastened on the significance of informational privacy under s. 8 . . ."¹³

⁹ *R v. Plant*, [1993] 3 S.C.R. 281, at 292. [*Plant*].

¹⁰ *Ibid*, at 293.

¹¹ *Ibid*.

¹² [1997] 3 C.T.C. 199, 147 D.L.R. (4th) 457. [*Del Zotto*]

¹³ *Ibid*, at para. 24.

Further affirmation of the relevance of the principles set out in *Plant* as they relate to the operation of the confidentiality obligations under s. 241 of the ITA can be found in the decision in *R. v. Hanif's International Foods Ltd.*¹⁴, in which the court stated:

(t)he appropriate analysis that must be undertaken in determining whether the search and seizure of tax records by the Crown and its agents is outlined in the decisions of *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] S.C.J. No. 36 (S.C.C.), *R. v. Jarvis*, [2002] S.C.J. No. 76 (S.C.C.), *R. v. Plant*, [1993] 3 S.C.R. 281 (S.C.C.).¹⁵

Moreover, the decision of the court in *R. v. Bhalla*¹⁶ is also instructive with respect to the principles enunciated by the court in *R. v. Plant*, in that it constitutes a reiteration and reaffirmation of the governing factors that must be appreciated and examined by the court in any adjudication of privacy interests and the reasonable expectation that such interests will receive protection from intrusion by state authorities. Specifically with respect to the reasonable expectation of privacy vested in commercial records, Williams J. in his discussion opined:

I see no apparent error in the analysis and the approach taken by the learned trial judge. She properly considered the issue in light of the principles which have been judicially articulated for the analysis, most notably *R. v. Plant*, [1993] S.C.A.R. 281 (S.C.C.). She correctly appreciated the need to examine the nature of the information, the relationship of the parties, and the other variable that the situation may present. She has also appreciated that courts have generally recognized that privacy interests in commercial records are likely to be more tenuous than in personal documents, and that a meaningful inquiry must be made.¹⁷

Obviously, in the criminal context, the correct application and interpretation of the factors set out in *Plant* is essential to ensuring that any information obtained by means other than through authorization by search warrant is not ultimately subject to determinations of inadmissibility on the basis of having violated the protections contained in s. 8 of the *Charter*.

Moreover, although in its majority decision the court rejected the appellant's contention that the violation of his privacy interests was sufficiently egregious to constitute a *Charter* breach which outweighed any societal benefit that may have been derived from the admission of evidence necessary for the successful prosecution of his offence, in her concurring opinion McLachlin J. (as she then was), observed that

I confess to reservations about a case-by-case balancing approach to whether a warrant is required or not to obtain information. In each case, the police would have to ask themselves: is the offence serious enough to outweigh the suspect's privacy interest? If the answer is yes, they would take the evidence without a warrant. The courts would then have to review their

¹⁴ 2008 ABPC 238.

¹⁵ *Ibid*, para. 24.

¹⁶ 2010 BCSC 486.

¹⁷ *Ibid*, at para. 55.

exercise of judgment. In my view, such a regime would provide little comfort to the person whose privacy interest is at stake, and would breed uncertainty and litigation . . . The test must remain the individual's reasonable expectation of privacy. If that test is met, a search without a warrant will constitute a violation, even where the suspected offence is a serious one.¹⁸

SPECIFIC IMPLICATIONS OF *JARVIS* AND *PLANT* FOR POTENTIAL *CHARTER* CHALLENGES OF SUBSECTION 241(9.5)

The court's decision in *Jarvis*, in particular with respect to the execution of warrantless searches, and the conditions precedent to the determination that auditorial powers conferred under the ITA have been exceeded in the performance of an investigation, will be binding on future courts in their scrutiny of the constitutionality of the amendments made to the confidentiality requirements of the Act. The judgment in *Jarvis* stands for the proposition that criminal investigations cannot be founded on the basis of evidence derived from the warrantless examination of taxpayer information; although the expectations of preservation and protection of individual privacy interests is subject to reasonable limitations under the ITA, the fruits of the collection and scrutiny of personal taxpayer data must not be disclosed in a manner that risks offending the *Charter's* fundamental guarantees. Subsequent to the court's landmark decision in *Jarvis*, taxpayers have been insulated from potential abuses that would otherwise have arisen from indiscriminate disclosure of – to once again cite the language of McLachlin J. in *Plant* – a “biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state.”

The tests enumerated by the court in *Jarvis* ensure that officials responsible for the administration and enforcement of the ITA are compelled to respect the taxpayer's fundamental constitutional right to silence, protection from self-incrimination, and the prohibition against unreasonable search and seizure. Prior to the introduction of Bill C-31, its ratification and the insertion of s. 241(9.5) of the Act, robust statutorily embedded assurances existed that taxpayers would not be exposed to potential penal liability through *arbitrary* disclosure of personal information. Sections 7 and 8 of the *Charter of Rights and Freedoms* are the formal constitutional expression of what are amongst the most precious and inviolable of civil rights enjoyed by Canadians, and they are ultimately complemented by those rights contained in section 11, including the “golden thread” – as it was described by Lord Sankey – of the presumption of innocence, which is inextricably woven into the fabric of all criminal jurisprudence.

Subsection 241(9.5) of the ITA authorizes officials to disclose taxpayer information to law enforcement organizations with respect to a vast array of offences – none of which are directly related to the enforcement or administration of Canada's system of taxation – if the official has *reasonable grounds* to believe that such information will afford evidence of an act or omission having been committed.

It seems improbable that an official as designated under the Act, even in the course of exercising the most intrusive auditorial powers conferred under ss. 231.1(1) and 231.2(1), would *with regularity* have access to the

¹⁸ Ibid, at 304.

category of intimate and personal taxpayer information that would result in the formation on *reasonable grounds* that an offence had been committed. Furthermore, as set out in *Jarvis*, the court's prohibitions against the abuse of auditorial powers, and the stringency of the distinction between the limited right to an expectation of preservation of the confidentiality of taxpayer information in a regulatory context, and the constitutionally entrenched protections against arbitrary disclosure of such information where the risk of exposure to penal liability exists, will certainly expose subsection 241(9.5) to challenges argued on grounds of inherent inconsistency with the *Charter*.

The probable outcome of Bill C-31's amendments to the confidentiality requirements of the ITA is that CRA officials who are exercising their auditorial powers legitimately and within both statutorily and judicially established parameters will accordingly be precluded from "accidentally" encountering the specific category of taxpayer information contemplated by subsection 241(9.5), whereas only those who have engaged in either intentionally overbroad or entirely arbitrary scrutiny of confidential data will be in a position to form the belief on reasonable grounds that the information disclosed will afford evidence of an offence having been committed. It is this characteristic of s. 241(9.5) – the possibility that its application might result in CRA officials disclosing information to designated law enforcement organizations as a result of information obtained through embarking on "fishing expeditions" – that is most intrinsically constitutionally violative, most flagrantly threatens breaches of the protections against unreasonable search and seizure granted by s. 8 of the *Charter*, and constitutes the highest probability of bringing the administration of justice into disrepute.

Furthermore, it is likely that violations of ss. 7 & 8 that arise from disclosure of taxpayer information pursuant to s. 241(9.5) will not be saved through the operation of section 1 of the *Charter*, as the decision of the court in *R. v. Plant* has already narrowly defined the circumstances under which warrantless seizure of intimate personal information may be "demonstrably justifiable" so as to achieve a salutary societal outcome (in the criminal context, for the purpose of prosecuting serious offences defined by the section). The court in its decision in *Plant*, and elsewhere, has recognized and acknowledged that the underlying values of the *Charter* foster a reasonable expectation of privacy with respect to a "biographical core of personal information."¹⁹ As McLachlin J. observed, as cited above, "(t)he test must remain the individual's reasonable expectation of privacy. If that test is met, a search without a warrant will constitute a violation, even where the suspected offence is a serious one."²⁰

SECTION 24 CHARTER CONSIDERATIONS

In speaking for the majority in *Plant*, Sopinka J. canvassed the court's previous decision in *R. v. Collins*, where it was concluded that three factors should be considered when determining whether evidence obtained in contravention of the *Charter* should be excluded from evidence:

- (1) The effect of admission of the evidence on the fairness of the trial.
- (2) The seriousness of the violation of the *Charter*, and
- (3) The effect of exclusion on the repute of the administration of justice.²¹

¹⁹ *Plant*, supra footnote 9.

²⁰ *Ibid*, at 300.

²¹ *Ibid*.

Although ultimately the court's decision in *Plant* remains relevant with respect to determinations of the admissibility of evidence procured through presumptively violative searches and seizures of taxpayer information by state authorities, it is also necessary to examine the evolution of the principles governing the current judicial approach to applying the s. 24(2) factors as initially posited in *Collins*.

A comprehensive and authoritative identification and analysis of the factors which are required to be engaged by the court in any determination of the validity and admissibility of evidence obtained through the execution of warrantless searches and seizures in contravention of section 8 of the *Charter* is provided by Richard Wolson and Evan Roitenberg in their dissertation entitled "Muddying the Waters – Section 24,"²² as reproduced in the seminal reference text of Canadian constitutional law, "The Charter at Thirty."²³

With respect to the jurisprudential antecedents upon which contemporary section 24 evidentiary admissibility analyses are predicated, Wolson and Roitenberg observe that

In 1987, the Supreme Court of Canada, in the seminal decision of *R v. Collins*, laid out the principles that would inform all cases dealing with s. 24(2) issues for years to come. The court set out issues that courts would want to concern themselves with in assessing admissibility of evidence where such evidence had been obtained in a manner that infringed a Charter right.²⁴

Continuing with their analysis, Wolson and Roitenberg enumerate and cogently summarize the essential principles and multifactorial bases upon which the court founded its decision in *Collins*, and give further consideration to the interpretation and application of those fundamental precepts in the context of the evolution of section 24's remedial provisions.

Most significantly, perhaps, Wolson and Roitenberg examine and document the unstintingly sedulous efforts of the court, subsequent to rendering its decision in *Collins*, to institute a substantively unassailable and conceptually irreproachable categorization of the dispositive factors that are operative in any s. 24 analysis. In doing so, Wolson and Roitenberg direct attention to the ultimately insuperable difficulties the court experienced in applying the restrictive categories so as to balance the societal interest in deciding the outcome of trials of serious offences on their merits, and precluding the possibility of the admission of conscriptive evidence causing the administration of justice to be brought into disrepute. As Wolson and Roitenberg so astutely observed – specifically in reference to the struggle to reconcile the inconsistencies arising from the interpretation and application of the factors set out in *Collins*, – "(t)he Supreme Court had created a mechanism and it was in need of an overhaul that only the court itself could provide. In July of 2009. The court did just that."²⁵

²² Richard Wolson and Evan Roitenberg, "Muddying the Waters – Section 24" in Ryder Gilliland, editor-in-chief, *The Charter at Thirty* (Toronto: Carswell, 2012) 235. [*Muddying the Waters*].

²³ Ryder Gilliland, editor-in-chief, *The Charter at Thirty* (Toronto: Carswell, 2012). [*Charter at Thirty*]

²⁴ *Muddying the Waters*, supra footnote 22, at 246.

²⁵ *Ibid*, at 256.

It is through the decisions in *R. v. Grant*²⁶ and *R. v. Harrison*²⁷ that the court definitively clarified the s. 24 assessment criteria, and accordingly ruled that it was appropriate to adopt a contextual approach to interpretation of the factors that had originally been articulated in *Collins*, and which in *R. v. Stillman*²⁸ and *R. v. Buhay*²⁹ had been subjected to further attempts by the court to establish definitional distinctions and guidelines for determinations of proportionality.

As Wolson and Roitenberg note in relation to the court's *dicta* in *Grant*,

The court was striving to create a test that was more flexible . . . and one that would be interpreted to carry less absolutes. The court was cognizant that, eventually, patterns may emerge with respect to how courts would deal with certain types of evidence, but those patterns should be guideposts for future courts, not hard and fast rules that courts would feel constrained by.³⁰

As the court itself opined in rendering the decision in *Grant*, any judicial consideration of an application for exclusion of evidence pursuant to the remedial provisions contained in section 24 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.³¹

The ultimate impact of the positions assumed and propositions advanced by the court in *Grant* has been to necessitate that the focus of an s. 24 analysis be shifted "to the conduct that gave rise to the obtaining of the evidence, not the nature of the evidence itself."³² Moreover, the decision in *Harris*, following *Grant*, affirmed and expanded on the requirement for the court's adoption of a contextual approach when determining whether the remedial provisions set out in s. 24 should be invoked to exclude evidence which has been obtained through presumptively unconstitutional searches and seizures. In delivering her decision for the majority in *Harris*, Chief Justice McLachlin determined:

Applying the framework in *Grant* to these facts, I am satisfied that the balance mandated by s. 24(2) favours exclusion of the evidence. It is true that the public interest in having the case adjudicated on its merits favours the submission of the evidence, particularly in light of its

²⁶ (2009), 309 D.L.R. (4th) 1 (S.C.C.). (*Grant*)

²⁷ (2009), 309 D.L.R. (4th) 87 (S.C.C.). (*Harrison*)

²⁸ (1997), 144 D.L.R. (4th) 193 (S.C.C.)

²⁹ (2003), 225 D.L.R. (4th) 624 (S.C.C.)

³⁰ *Muddying the Waters*, supra footnote 22, at 257.

³¹ *Grant*, supra footnote 26, at para. 75.

³² *Muddying the Waters*, supra footnote 22, at 259.

reliability. On the other hand, the impact on the accused's rights, while not egregious, was significant.³³

As Wolson and Roitenberg then go on to properly conclude in their own analysis in *Muddying the Waters*,

The focus placed squarely on the conduct giving rise to the Charter violation, not on the type of evidence located, should lead a court through its s. 24(2) analysis. . . . It is only where the evidence is located that the court can flex its muscle as defender of individual rights and comment on the conduct of the state agent. The ends cannot be seen to justify the means. It is precisely a scenario where the individual is pitted against the vast resources of the state that the individual's rights matter. It is the *raison d'être* of the Charter. If the courts can't protect the vulnerable, the courts can't protect anyone. Grant and Harrison, read together, have set a new course for the future in how courts will deal with admission of unconstitutionally obtained evidence.³⁴

Although many legal practitioners and commentators have expressed their consternation that the decisions in *Grant* and *Harrison* will operate to undermine the integrity of the *Charter's* fundamental protections against unreasonable search and seizure, and the admissibility of conscriptive evidence and state compulsion of self-incriminating testimony as initially affirmed by the court's decision in *Collins*, Wolson and Roitenberg quite properly discount the validity of such claims. By making reference to the recent decision in *R. v. Koczab*³⁵, Wolson and Roitenberg undertake to demonstrate that, far from dispensing with the fundamental principles enumerated in *Collins*, the evolution of the court's pursuit of the three lines of inquiry set out in *Grant* in fact has served to solidify the court's position that jurists must stringently apply the remedial provisions set out in s. 24(2) so as to reject evidence obtained in a constitutionally abusive manner, and to "show the public that courts will not tolerate this conduct."³⁶ Furthermore, Wolson and Roitenberg conclude that where the genuine legislative intent underpinning s. 24(2) is involved,

The nature of the evidence being the paramount concern should never have been the case. The nature of the right violated, the impact of the infringement on the individual involved, the seriousness of the breach and the actual conduct of the state agent should have always been the issues that governed.³⁷

Further contemplation of the Supreme Court's decision in *R. v. Côté*³⁸ is also instructive, as it constitutes the court's reiteration and reaffirmation of the general principles governing the application of s. 24(2) as enumerated in *Grant* and *Harrison*, and as articulated by Cromwell J. who in delivering the opinion of the majority states:

³³ *Harrison*, supra footnote 27, at para. 3.

³⁴ *Muddying the Waters*, supra footnote 22, at 259–260.

³⁵ (2011), 233 C.R.R. (2d) 193 (Man. Q.B.).

³⁶ *Muddying the Waters*, supra footnote 22, at 260.

³⁷ *Ibid*, at 261.

³⁸ [2011] 3 S.C.R. 215.

After considering these factors, a court must then balance the assessments under each of these avenues of inquiry in making its s. 24(2) determination. There is no “overarching rule” that governs how a court must strike this balance (*Grant*, at para. 86). Rather, “[t]he evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice in disrepute” (*Harrison*, at para. 36). No one consideration should be permitted to consistently trump other considerations. For instance, as this Court explained in *Harrison*, the seriousness of the offence and the reliability of the evidence should not be permitted to “overwhelm” the s. 24(2) analysis because this “would deprive those charged with serious crimes of the protection of the individual freedoms afforded to all Canadians under the *Charter*, and in effect, declare that in the administration of the criminal law ‘the ends justify the means’” (para. 40, citing 2008 ONCA 85, 89 O.R. (3d) 161, at para. 150, per Cronk J.A., dissenting). In all cases, courts must assess the long term repute of the administration of justice.³⁹

The court’s decision in *Côté* is particularly relevant with respect to any examination of the potential constitutional inconsistency of the exceptions to the blanket disclosure prohibitions and confidentiality requirements of s. 24 of the ITA, as enacted under s. 241(9.5) of the Act, in that it offers an incontrovertible judicial endorsement of the principle that the seriousness of the offence regarding which the constitutionally impugned evidence has been obtained is a factor to consider in any s. 24(2) analysis, *but not the determinative factor*.⁴⁰ A particularly salient illustration of this principle given judicial effect is offered by the decision in *Côté*, in which, as Wolson and Roitenberg remark,

(T)he result of the exclusion of evidence was an acquittal on a charge of murder. Although the accused would be acquitted of the most serious charge in the *Criminal Code*, an assessment under the *Grant/Harrison* analysis militated in favour of the exclusion of the evidence. One must remember, the more serious the offence, the greater the need to be vigilant in the protection of the individual rights.⁴¹

Specifically with respect to the factors that – as set out in *Collins*, *Grant*, *Harrison*, *Côté* – govern the interpretation and application of the remedial provisions contained in s. 24(2), and their relevance in determining the admissibility of taxpayer information tendered as evidence of serious criminal offences having been committed, as contemplated by the subsection 241(9.5) of the Act, it can be reasonably argued that *Charter* contraventions arising from warrantless and therefore presumptively unconstitutional searches and seizures pursuant to s. 241(9.5) will not necessarily be vindicated by virtue of the societal interest they *may* serve in ensuring that trials of serious criminal offences are decided on their merits. With each passing decision, the court provides further clarification and greater amplification of the fundamental principles first enunciated in *Collins*, and in doing so, demonstrates its resounding and unequivocal affirmation of the presumptive constitutional inconsistency of warrantless searches and seizures, and the ongoing necessity of employing s. 24(2) to fashion suitably proportional remedial responses to contraventions of the *Charter*’s protections against abuses of state authority.

³⁹ *Ibid*, at para. 48.

⁴⁰ *Muddying the Waters*, *supra* footnote 22, at 261.

⁴¹ *Ibid*, at 262.

Ultimately, in the event that the constitutionality of s. 241(9.5) is successfully impugned, and the deprivation of the privacy interests which otherwise receive protection from the confidentiality obligations imposed by s. 241 is determined to contravene the *Charter*, then any evidence of the commission of a serious offence to which the police authorities have become privy through disclosure by the CRA, or other officials under the Act, will be subject to exclusion.

It is precisely this potential – or perhaps even probable – unintended consequence of Bill C-31’s amendments to s. 241 that threatens to produce a disconcertingly paradoxical legislative outcome, namely that by rendering s. 241(9.5) gravely vulnerable to judicial sanction and constitutional attack, Parliament has fashioned a remedy for a perceived societal ill that inadvertently serves to promote the disease. By disclosing taxpayer information that is the “tainted fruit” of an ill-conceived and inherently constitutionally defective statutory information gathering mechanism, not only are officials under the Act at risk of violating privacy rights enshrined in the *Charter*, but also of depriving law enforcement and police organizations of potentially valuable, but ultimately inadmissible, evidence.

THE REQUIREMENT FOR PRIOR JUDICIAL AUTHORIZATION

It can be persuasively argued that the most effective and immediate means of preventing *Charter* breaches – and, consequently, the exclusion of valuable evidence – would be to institute either common-law or statutory measures mandating judicial authorization prior to disclosure of any information to law enforcement agencies or police organizations pursuant to s. 241(9.5).

Judicial control over the unauthorized exercise of power where disclosure of taxpayer information might result in exposure of the taxpayer to penal liability was the solution proposed by the court in *R. v. Jarvis*, and given the immense array of offences referred to in s. 241(9.5) (none of which directly relate to tax-specific misconduct), it is logical to infer that the court would draw analogous conclusions if judicial consideration of the constitutionality of that section is required. Just as with *R. v. Jarvis*, the requirement for judicial authorization of disclosure of information pursuant to s. 241(9.5) would assume the form of a search warrant issued either under the *Criminal Code*, or the applicable provisions of the ITA itself. The necessity of prior judicial authorization – specifically in the context of searches executed pursuant to the *Combines Investigation*

Act, R.S.C 1970, c. C-23 – was examined by the Supreme Court in its decision in *Hunter et al. v. Southam Inc.*⁴² In delivering the decision for the majority, Dickson J. held that for the prior authorization procedure to be meaningful, the individual performing the authorization must, at minimum, possess the capacity to properly “assess the conflicting interests of the state and the individual in an entirely neutral and impartial manner”,⁴³ with the further provision that the arbiter must not be an individual also exercising investigative or prosecutorial functions under the relevant statutory scheme.⁴⁴ In other words, although “the person

⁴² [1984] 2 S.C.R. 145. [*Hunter*]

⁴³ *Ibid*, at 146.

⁴⁴ *Ibid*.

considering the prior authorization need not be a judge, he must nevertheless, at a minimum, be capable of acting judicially.”⁴⁵

The decision in *Hunter* is relevant with respect to any assessment of the inherent constitutionality of the amendments to s. 241 of the ITA introduced by C-31, as it contemplates the same fundamental issues that govern determinations of the extent and limitations of the confidentiality obligations that should be imposed on officials exercising investigative powers under the Act. Although the issue under scrutiny in *Hunter* was the performance of a power of prior authorization to execute a search warrant by an official charged to do so under the relevant statutory scheme, the information disclosure exemption contained in s. 241(9.5) grants a similarly sweeping and potentially constitutionally offensive power to CRA officials, and one which exposes individual Canadians to a risk of severe penal liability and deprivation of liberty. Furthermore, the prospective evidence of an offence that may become available to law enforcements organizations through the operation of s. 241(9.5) includes intimate personal information that the taxpayer is compelled to disclose to the CRA, and accordingly the expectation that the privacy interest in such information must be preserved is extremely high. As Dickson J. opined in *Hunter*,

I recognize that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals’ expectations of privacy. Nevertheless, where it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure.⁴⁶

Elucidation of the principles enunciated in *Hunter* is provided by the decision of the court in *R. v. Spencer*,⁴⁷ in which further consideration was directed to the definition of the factors which constitute the bases for a reasonable expectation of privacy attached to the core biographical information of an accused targeted in a criminal investigation. The court’s decision in *Spencer* turned on the subject matter of a search related to the alleged commission of a child pornography offence, and whether “the accused’s subjective expectation of privacy was reasonable.”⁴⁸

The court in *Spencer* determined that the accused’s expectations of privacy with respect to his core biographical information were reasonable, and that the disclosure of such information in the circumstances of the investigation constituted a search and seizure under the common law. It was then for the court to determine whether there was a subsisting lawful authorization of such a search, or alternatively whether a section 8 Charter violation had occurred. After canvassing the authorities, and scrutinizing the applicable statutory provisions, including subsection 487.014(1) of the *Criminal Code* and subsection Section 7(3)!(c.1)(ii) of the *Personal Information Protection and Electronic Documents Act (PIPEDA)*, Cromwell J. held for the court that

The wide variety and number of factors that may be considered in assessing the reasonable expectation of privacy can be grouped under four main headings for analytical convenience:

⁴⁵ Ibid.

⁴⁶ Ibid, at 161.

⁴⁷ 2014 SCC 43. [*Spencer*]

⁴⁸ Ibid, at 3.

(1) the subject matter of the alleged search; (2) the claimant's interest in the subject matter; (3) the claimant's subjective expectation of privacy in the subject matter; and (4) whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances: *Tessling*, at para. 32; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 27; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 40.⁴⁹

Moreover, specifically with relation to distinguishing between what constitutes a reasonable expectation of privacy as it pertains to the potential for protection of such interests to shelter legal or illegal activity, Cromwell J. opined that

The nature of the privacy interest does not depend on whether, in the particular case, privacy shelters legal or illegal activity. The analysis turns on the privacy of the area or the thing being searched and the impact of the search on the target, not the legal or illegal nature of the items sought.⁵⁰

The decision in *Spencer* is instructive in that it represents a reaffirmation of the position assumed by the court in *Jarvis*, to wit that the fundamental consideration in any determination of the reasonableness of an expectation that the privacy interests residing in taxpayer information will be protected and preserved should be the context in which the information is being sought – either regulatory, quasi-criminal or criminal – and further that it is the context in which a search or seizure is conducted that establishes the legal basis for justifying the intrusive intervention by state authorities. In light of the amendments to the ITA introduced by Bill C-31, *Spencer* can now clearly be interpreted as standing for the proposition that the reasonableness of an expectation of the privacy of taxpayer information is independent of the seriousness of the offence for which evidence is sought through the permissible contravention of the ITA's blanket confidentiality protections by the exceptions contained in subsection 241(9.5) of the Act. As the court stated in *R. v. McKinlay Transport Ltd.*,⁵¹

The standard of review of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful. It is consistent with this approach to draw a distinction between seizures in the criminal or quasi-criminal context to which the full rigours of the *Hunter* criteria will apply, and seizures in the administrative or regulatory context to which a lesser standard may apply depending upon the legislative scheme under review. In light of the regulatory nature of the legislation and the scheme enacted, it was evident in this case that the *Hunter* criteria were ill-suited to determine whether a seizure under s. 231(3) of the Act was reasonable.⁵²

Notwithstanding that an investigation is initiated for regulatory purposes, and as a consequence discloses information that it is reasonable for an official designated under the ITA to believe constitutes evidence that the taxpayer has committed a serious offence, the privacy interests vested in taxpayer information remains intact. It is only through the application of a contextual analysis of the totality of circumstances surrounding such information, and through the examination of the factors set out by the court in *Hunter*, that the appropriate balancing of privacy interests and the societal interest in effectively prosecuting serious offences

⁴⁹ *Ibid*, at para. 18

⁵⁰ *Ibid*, at para. 36.

⁵¹ [1990] 1 S.C.R. 627. [*McKinley*]

⁵² *Ibid*, at 628.

can be achieved, and violations of *Charter* guarantees be avoided; it is patently absurd to suppose that an official as defined under the Act – regardless of how experienced, capable and assiduous they may be in the administration of the ITA’s regulatory authority – should be capable of making such a nuanced, discretionary assessment within the statutory confines of subsection 241(9.5).

Considering the potential for *Charter* abuses that would transpire if CRA officials performing an investigative or prosecutorial function assume the role of arbiter, and consequently invoke the discretionary powers conferred under 241(9.5) as a form of prior authorization to execute what are – in effect – unreasonable searches and seizures, it seems only logical to conclude that the functions of investigator/prosecutor and arbiter should remain discrete and starkly differentiated, and that responsibility for providing prior authorization for disclosure of taxpayer information pursuant to s. 241(9.5) should reside exclusively with the judiciary.

Furthermore, any argument that seeks to justify granting CRA officials what is tantamount to a discretionary power of decision-making (pursuant to s. 241(9.5)), and is predicated on the belief that such officials possess the expertise necessary to effectively exercise such powers, fails not only on the substantive and constitutional bases established by the court in its decisions in *Hunter, Plant, and Jarvis*, but also fails with respect to the practicality of applying the provisions of s. 241(9.5) in a regulatory environment. Determining whether it is reasonable to believe that taxpayer information might constitute evidence of a “serious offence,” as prescribed by s. 241(9.5), would require CRA officials to accurately identify, construe and contextualize the highly technical provisions and guarded language of the *Criminal Code*, and also in some instances to make reference to applicable jurisprudence for purposes of confirming putatively “reasonable beliefs”. It verges on quixotic to assume that even a properly accredited, trained and highly experienced civil service employee should be capable of successfully navigating the intricacies of the *Code*’s multitudinous provisions, and to do so without inadvertently exercising a statutorily mandated power in a manner which inadvertently but inevitably triggers a *Charter* violation, and as a consequence, a costly and time-consuming constitutional challenge.

A woeful example of an egregious abuse of authority by a CRA official, resulting in violations of the confidentiality requirements imposed by section 241, can be found in the recent Federal Court of Canada decision in *Collins v. Her Majesty The Queen*,⁵³ in which it was alleged by the plaintiff, a CRA employee, that her privacy rights had been contravened, contrary to s. 241 of the Act.

As a background to the case, in 2006 the plaintiff, Ms. Collins, formed a suspicion that her privacy interests had been breached and her personal information accessed without authorization by her fellow employees at the CRA. Accordingly, Ms. Collins submitted a request under the *Privacy Act*,⁵⁴ directing the CRA to disclose to her a list of all CRA employees who had accessed her personal taxpayer information. CRA complied with the request, and the report and subsequent inquiries revealed that a CRA employee – one Perry Zanetti – had in fact accessed Ms. Collin’s personal information without authorization (Mr. Zanetti was not one of those initially suspected by the plaintiff).

⁵³ 2014 FC 307. [*Collins*]

⁵⁴ R.S.C., 1985, c. P-21.

Although an internal investigation resulted in the offending employee's termination, and no formal charges of breach of trust were brought or finding of misfeasance established, it is nonetheless disturbing to reflect on the implications of Mr. Zanetti's testimony that "for a period of time while he was an employee of the CRA, he would look up the tax records of colleagues and other taxpayers as an 'exercise in curiosity.'"⁵⁵ Furthermore, given the flagrancy and flippancy of the privacy breach, it is of little consolation that Mr. Zanetti insisted under oath that he had never disclosed or retained any of the taxpayer information he had accessed without authorization.

The fact situation and outcome in *Collins* should raise alarm bells for taxpayers, regulators, legislators and members of the judiciary, as it exemplifies the systemic vulnerability of the Canadian tax regime to breaches of taxpayers' privacy interests by duly appointed – and putatively competent, properly trained and qualified – officials operating under the jurisdiction, exercising the powers and subject to the confidentiality obligations with which the CRA is charged under the ITA. Moreover, in the post-Bill C-31 regulatory environment, it is profoundly disconcerting to contemplate the potential consequences of a CRA official capriciously and improvidently breaching the ITA's confidentiality obligations, such as was the case in *Collins*, particularly if such an "exercise in curiosity" culminated not in the dismissal of the offending CRA employee, but in a warrantless search and seizure of intimate personal taxpayer information as authorized by s. 241(9.5), and consequently exposure of the taxpayer to prosecution, severe penal liability, and deprivation of fundamental *Charter* rights.

JUDICIAL OVERSIGHT REQUIREMENT: PARLIAMENTARY CONSULTATION CONFIRMS STRONG SUPPORT

From the time of its introduction, to the granting of Royal Assent in June of 2014, the amendments to the confidentiality requirements inherent in section 241 of the ITA – which are now codified in the provisions contained in s. 241(9.5) – garnered vociferous opposition from members of the public, concerned Parliamentarians and the judiciary, and inspired protracted and frequently acrimonious debate. Perhaps the most incisive criticism regarding the potential constitutional illegitimacy of subsection 241(9.5) came in the form of testimony by witnesses appearing at the Parliamentary committee stage, prior to ratification of the amendments proposed by Bill C-31.

Referring specifically to the threat to the integrity of the existing confidentiality requirements and obligations for preservation of taxpayer privacy interests codified in section 241 of the ITA, one expert witness testifying before the committee stated,

I think this requirement – the addition of a judge's permission between the agency and the police authorities – would, on the one hand, help make those information exchanges adequate when they are necessary, and avoid their becoming automatic, and, on the other hand, help protect both the police investigation and the tax authorities have a dual responsibility. They

⁵⁵ *Collins*, supra footnote 53, at para. 53.

ensure that taxes are paid in a civil manner and that they can also result in criminal prosecutions in case of tax evasion.⁵⁶

These sentiments expressed above were concurred with by the Member of Parliament for Victoria and Official Opposition Critic for National Revenue, Murray Rankin, who observed that – particularly with respect to the very long list of offences involving minimum mandatory sentences – it would be contrary to the “Canadian way” to permit warrantless disclosure of taxpayer information to police organizations under a “sweeping set of circumstances.”⁵⁷ Further in his testimony, Mr. Rankin addressed the official opposition’s proposed amendment to Bill C-31, referring to its purpose as “to provide oversight of those transfers (of taxpayer information) to ensure that these powers (as they are now enacted under s. 241(9.5) are not abused.”⁵⁸

Further support for the requirement for judicial control and intervention in the implementation of the powers that (were at that time) proposed to be conferred by s. 241(9.5) was offered by Elizabeth May, M.P. for Saanich-Gulf Islands, who stated in her testimony that the amendments to section 241 of the ITA constitute a very real risk to not only privacy interests of Canadians, but the effective administration and regulatory functioning of the tax system in general. Specifically, Ms. May testified that the CRA’s role “as an authority is both to ‘ensure that taxes are paid in a civil manner and that they can also result in criminal prosecutions in the case of tax evasion,’”⁵⁹ and that given the possibility of taxpayers incurring criminal liability due to investigations and prosecutions initiated by CRA officials, “(i)t’s critical . . . that we involve the judiciary.”⁶⁰

The combined effect of these endorsements of judicial oversight of the powers granted by s. 241(9.5) is to emphasize the magnitude of the concerns with its constitutional inconsistency that existed *prior* to the enactment of Bill C-31 and its ITA-specific amendments, and the even greater concern that now exists that the misapplication or, in extreme cases, intentional abuse by CRA officials of s. 241(9.5) will spawn a proliferation of expensive and disruptive *Charter* challenges, and ultimately bring the administration of justice into disrepute.

Perhaps more disconcerting is the very real possibility of severe erosion of taxpayer goodwill as a consequence of the perceived and actual legislative efforts to undermine privacy interests, as represented by the provisions contained in subsection 241(9.5). A tragic and perverse outcome of the amendments to the confidentiality requirements otherwise imposed by s. 241 may be that taxpayers are dissuaded from voluntarily complying with statutorily mandated information disclosure, or, more problematically, that taxpayers are compelled to adopt measures to circumvent disclosure mechanisms, and to avoid fulfilling their obligations pursuant to the Act.

⁵⁶ Testimony of Stéphane Eljarrat, (Partner, Davies Ward Phillips and Vineberg LLP), House of Commons, Standing Committee on Finance, Evidence Meeting 33 (May 2014). [Eljarrat]

⁵⁷ Testimony of Murray Rankin, M.P., House of Commons, Standing Committee on Finance, Evidence Meeting 37 (May 2014).

⁵⁸ Ibid.

⁵⁹ Testimony of Elizabeth May, M.P., House of Commons, Standing Committee on Finance, Evidence Meeting 37 (May 2014).

⁶⁰ Ibid.

THE REQUIREMENT FOR PRIOR JUDICIAL AUTHORIZATION: THE QUEBEC PERSPECTIVE

Additional support for the proposition that prior judicial authorization is a prerequisite for the preservation of the inherent constitutionality of any legislative enactments conferring powers of search and seizure on officials responsible for the administration of the Income Tax Act can be drawn from provisions governing the application of similar powers by officials in the province of Quebec. Section 69.0.0.12 of the Quebec Tax Administration Act states:

Subject to other exceptions provided for in this division, an employee of the Agency authorized by regulation may, without the consent of the person concerned, communicate information contained in a tax record to a member of a police force, to a department or to a public body responsible for the enforcement of an Act, *with the authorization of a judge of the Court of Québec where the judge is satisfied on the basis of an affidavit* that there is reasonable cause to believe that the information may serve to prevent or repress a serious offence within the meaning of subsection 1 of section 467.1 of the Criminal Code (R.S.C. 1985, c. C-46) or an offence referred to in the second paragraph other than a criminal or penal offence provided for in section 69.0.0.16, committed or about to be committed by a person.

The offences to which the first paragraph refers are the following:

- (a) an offence under Division IX of the Health Insurance Act (chapter A-29);
- (b) an offence under Chapter IX of the Building Act (chapter B-1.1);
- (c) an offence under Schedule I to the Act respecting contracting by public bodies (chapter C-65.1);
- (d) an offence under Chapter VII of the Act respecting labour standards (chapter N-1.1);
- (e) an offence under Division VII of Title VI of the Act respecting the Québec Pension Plan (chapter R-9);
- (f) an offence under Chapter XIV of the Act respecting occupational health and safety (chapter S-2.1); and
- (g) any other prescribed offence.⁶¹

As clearly articulated by the provisions set out in s. 69.0.0.12, communication of information to the designated state authorities without the consent of a taxpayer may only occur where a judge of the Court of Quebec is satisfied that the basis of the affidavit provides justification for authorization of such disclosure.

In his testimony before the Parliamentary Standing Committee on Finance, Stéphane Eljarrat, a tax specialist and respected legal practitioner in the Province of Quebec, summarized the benefits that are derived through the *Tax Administration Act's* requirement for judicial intervention in, and authorization of, any non-consensual

⁶¹ *Tax Administration Act*, RSQ c A-6.002, s. 69.0.0.12.

disclosure of taxpayer information, and asserts that a correlative benefit would be realized by imposing an analogous obligation on those officials who exercise similar powers pursuant to s. 241(9.5) of the ITA.

In response to a question posed by Mr. Emmanuel Dubourg, Member of Parliament for Bourassa, Quebec, Mr. Eljarrat remarked that

As you mentioned, the Quebec legislation has a provision that is similar, but contains a major difference. I am talking about section 69.0.0.12 of the Tax Administration Act. The provision stipulates that this type of information can be shared, but only with a judge's permission.

I think this requirement – the addition of a judge's permission between the agency and the police authorities – would, on the one hand, help make those information exchanges adequate when they are necessary and avoid their becoming automatic and, on the other hand, help protect both the police investigation and the tax authorities. Those authorities have a dual responsibility. They ensure that taxes are paid in a civil manner and that they can also result in criminal prosecutions in case of tax evasion.⁶²

Mr. Eljarrat further addresses the implications of warrantless disclosure of taxpayer information as contemplated by s. 241(9.5) of the ITA, and the possibility that acquittals may arise from the court's determination that evidence that might otherwise be dispositive of the outcome of a criminal trial must be excluded pursuant to s. 24(2) of the *Charter*, on grounds that the means by which it was procured contravened section 8's protections against unreasonable search and seizure.

When the authorities conduct civil audits, they have the power to compel – in other words, they can force people to provide information. If the information is compelled, later on, could someone be acquitted of a charge based on the information provided? That would jeopardize this provision's objective, which is ultimately to obtain a conviction. The ultimate goal is not to charge criminals, but to convict them. So it is pointless to adopt measures that can lead to abuses.

That is why I am recommending that this committee consider the measures adopted in other jurisdictions, especially Quebec, to add a judge to the process. *That would help strike a balance between the new reality of fighting some extremely serious crimes and the change to the Canada Revenue Agency's role.*⁶³

Giving due consideration to Mr. Eljarrat's testimony, and with an appreciation of the National Assembly of Quebec's scrupulous regard for achieving a properly proportionate legislative solution that balances relevant societal interests with respect for the sanctity of fundamental *Charter* protections – as instantiated by the judicial oversight requirements contained in s. 69.0.0.12 of the *Tax Administration Act* – it can be said with little fear of contradiction that the gratuitous and improvident powers granted to CRA officials and others by s.

⁶² Eljarrat, Meeting 33, Thursday, May 8, 2014.

⁶³ Ibid.

241(9.5) of the ITA are tantamount to a legislative “ticking time-bomb,” the “detonation” of which is likely to produce a multitude of *Charter* challenges, and, arguably, the paradoxical outcome of constitutionally-based acquittals.

IMPLICATIONS OF SUBSECTION 241(9.5) – APPLICATION OF THE PRIVACY ACT

The purpose of the *Privacy Act*⁶⁴ (“the PA”) as stated in the statute,
(Is) to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.⁶⁵

Section 3 of the PA – “Interpretation” – defines personal information as “information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing . . .”, and although a specific reference to taxpayer information is not subsumed in the classifications that follow in subsections (a)-(i) of the act, there can be little doubt that the CRA collects biographical information that is contemplated by section 3, including the taxpayer’s national or ethnic origin, colour, religion, age or marital status. Accordingly, any disclosure of taxpayer information is governed by the provisions set out in section 8 of the PA, which – subject to the exceptions provided elsewhere in the act – prohibits disclosure of such information without the consent of the individual to whom it relates.

Further elaboration and amplification of the Act’s purposes, and the ongoing efforts to effectively implement and enforce its mandate, is provided by the Office of the Privacy Commissioner of Canada, in its above reference Annual Report to Parliament, 2012-2013. In her introductory message, the Commissioner states,

I want to underscore the critical importance of government’s responsibility to collect only the information necessary to govern, as justified in a free and democratic society and to handle the personal information of Canadians with utmost respect.

This is not just a custodial role. It is about a relationship between citizen and state where fundamental freedoms may only be curtailed in a manner that is demonstrably justified and where the citizen’s trust is honoured.⁶⁶

The Privacy Commissioner’s commentary is significant in that it not only explicitly affirms the *Privacy Act*’s legislative commitment to preservation and protection of privacy interests, but also anticipates that the act’s provisions will be subject to interaction with those of other statutes, the underlying legislative intent of which may be antithetical to that of the PA. Furthermore, in her testimony before the House of Commons Standing Committee on Finance, the *Privacy Commissioner* makes reference to the quasi-constitutional scope and application of the *Privacy Act*, and expressing her belief that in the event of conflict existing between the stated purposes of the PA and its provisions, and those of the ITA proposed by the amendments introduced by Bill C-31, the authority of the *Privacy Act* would prevail.

⁶⁴ R.S.C., 1985, c. P-21. [*Privacy Act*]

⁶⁵ *Ibid.*, s. 1.

⁶⁶ *Securing The Right*, supra footnote 2, at 1.

Specifically with respect to the amendments to s. 241 of the ITA, in an appearance as a witness before the House of Commons Standing Committee on Finance, the Privacy Commissioner (“the Commissioner”) testified that the *Privacy Act* had been declared quasi-constitutional by the courts, and provided clarification of the Commissioner’s position regarding the constitutionality of s. 241(9.5) of the ITA.

Initially referring to what was, at that time, the proposed “Serious Offences” amendment as constituting an exception to sections 7 & 8 of the *Charter*, the Commissioner properly alluded to the requirement that any exception pursuant to section 1 of the *Charter* must be prescribed by law and demonstrably justifiable in a free and democratic society.

Without entering into an exhaustive analysis of section 1 of the *Charter*, or a comprehensive review of the factors enumerated in the test posited by Dickson J. in the landmark decision in *R. v. Oakes*⁶⁷, it is reasonable to conclude that the concerns expressed by the Commissioner are predicated on a solid foundation of case law. The possible, if not probable, breaches of ss. 7 & 8 are sufficiently severe so as to be properly characterized by the Commissioner as precluding recourse to being saved by s. 1, and it is consistent with the Privacy Commission’s public policy responsibilities to identify the intersection of such constitutional concerns with the *Privacy Act*’s statutory scope. To this end, the Commissioner makes an impassioned plea in her testimony before the committee, urging members

(t)o ask for a demonstration of the necessity of the provision whereby an official out of the Canada Revenue Agency could provide to law enforcement authorities without a warrant information about a taxpayer on the basis of reasons to believe that perhaps there was criminal activity. That is exceptional and therefore should be buttressed by an empirical demonstration of necessity, and I would encourage you to seek it.⁶⁸

It is instructive to examine the implications of the amendments made to s. 241 of the ITA, not exclusively in the context of the probability of *Charter* challenges arising as a consequence of their innately constitutionally violative characteristics, but also with regard to their inconsistency with the purposes and legislative intent of the *Privacy Act*, as well as with the court’s determinations in recent decisions such as *R. v. Cole*,⁶⁹ which strongly affirm the sanctity of privacy rights. For example, in delivering the court’s recent judgment in *Cole*, Fish J. expressly acknowledged that every Canadian is constitutionally entitled to expect privacy in personal information that is meaningful, intimate, and touches on the individual’s core,⁷⁰ and further declared that constitutional protection for such reasonable expectations of privacy must be extended to subsume personal information and digital data stored electronically.

⁶⁷ *R. v. Oakes*, [1986] 1 S.C.R. 103. [*Oakes*]

⁶⁸ Testimony of Chantal Bernier, Privacy Commissioner of Canada, House of Commons, Standing Committee on Finance, Evidence Meeting 35 (May 2014).

⁶⁹ [2012] 3 SCR 34, 2012 SCC 53. [*Cole*]

⁷⁰ *Ibid*, at para. 2.

APPLICATION OF SUBSECTION 241(9.5): RULES OF FUNDAMENTAL JUSTICE AND PROSPECTIVE SECTION 7 CHARTER VIOLATIONS

Section 7 of the *Charter* grants immunity from encroachment by legislative enactments on 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.”⁷¹

The court has adopted a purposive approach to construing legislation that either avowedly seeks to infringe on the guaranteed rights enshrined in section 7 (presumably in a manner that is intended to be demonstrably justifiable), or through the enactment of whose provisions contraventions of the *Charter’s* s. 7 guarantees are determined to have occurred. In its landmark decision in *R. v. Malmo-Levine*⁷², the Supreme Court of Canada held that

(f)or a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.⁷³

Established principles of fundamental justice that have been identified by the court as requiring consideration in any analysis of the purported constitutional inconsistency of a legislative enactment include: arbitrariness, vagueness, overbreadth, and gross disproportionality.

Even a cursory scrutiny of the amendments to the ITA enacted under Bill C-31 elicits a reasonable apprehension that the exercise of the disclosure powers granted to officials by subsection 241(9.5) – contrary to the confidentiality requirements enshrined elsewhere in the Act – will trigger strong constitutional challenges on the grounds that the section’s provisions are overbroad and arbitrary in their application.

With respect to the issue of a Charter challenge founded on the arbitrariness of section 241, it is instructive to consider the court’s words – albeit those of the dissenting opinion of L’Heureux-Dubé and McLachlin JJ. (although the opinion comported with that of the majority) – in *Rodriquez v. British Columbia*⁷⁴ wherein it was stated that:

A particular limit will be arbitrary if it bears no relation to, or is inconsistent with, the objective that lies behind the legislation. When one is considering whether a law breaches the principles of fundamental justice under s. 7 by reason of arbitrariness, the focus is on whether a legislative

⁷¹ *Charter*, supra footnote 6, s. 7.

⁷² [2003] 3 R.C.S. [Malmo]

⁷³ *Ibid*, at 574.

⁷⁴ [1993] 3 S.C.R. 519. [Rodriquez]

scheme infringes a particular person's protected interests in a way that cannot be justified having regard to the objective of this scheme.⁷⁵

Proceeding with the analysis of the prospective constitutional inconsistencies of s. 241 (9.5) with the protections enshrined in s. 7 of the *Charter*, it is beneficial to consider the judgment in *R. v. Heywood*,⁷⁶ in which the court determined,

Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.⁷⁷

Although it is not possible to engage in an exhaustive canvassing of the authorities governing interpretation and application of the principles underlying the arbitrariness and overbreadth doctrines of constitutional analysis, it seems only reasonable to conclude that the vast array of applicable offences, likelihood of warrantless searches, and the absence of judicial oversight that are associated with or stem from subsection 241(9.5) of the ITA will render it vulnerable to successfully argued *Charter* challenges. These challenges will undoubtedly allege that the provisions of subsection 241(9.5) infringe a particular taxpayer's protected interests in a way that cannot be justified having regard to the objectives of the ITA's greater legislative scheme, and that the means it employs to achieve the government's objective of facilitating effective prosecution of serious crimes "are broader than necessary to accomplish the objective."⁷⁸

The confidentiality requirements of the ITA exist in response to and for the purpose of fulfilling the legislative objective of promoting voluntary and unequivocal disclosure by the taxpayer of statutorily mandated information so as to ensure efficient functioning of Canada's complex system of tax computation, assessment, and collection. The Act achieves this objective, in large part, through the ITA's codification of essential protections to the taxpayer's reasonable expectation of privacy in section 241, which imposes on every official the obligation to preserve the confidentiality of core biographical information.

By enacting s. 241(9.5), Parliament has created a blunt instrument which will – by virtue of conferring powers and assigning authority in a fashion which is inherently constitutionally violative through the overbreadth and arbitrariness of its conception and implementation – undermine privacy protections that are the statutory instantiation of a decade's long exercise of judicial and legislative rights balancing.

⁷⁵ *Ibid.*, at 523.

⁷⁶ [1994] 3 SCR 761.

⁷⁷ *Ibid.*, at 792-3.

⁷⁸ *Ibid.*

PRIVACY PROTECTIONS – INTERNATIONAL CONSIDERATIONS

Although s. 241 of the ITA is characteristically Canadian in that it provides legislative expression of the fundamental principle that a taxpayer's reasonable expectations of privacy surrounding core biographical information should receive strong statutory protection, its provisions are not wholly divergent from those that have been enacted by other international jurisdictions for the purpose of securing taxpayer's privacy interests.

MEXICO

In Mexico, the protection and preservation of the confidentiality of tax-related information is considered to be a relative as opposed to an absolute right, as exceptions to such privacy restrictions apply. The discretion of tax authorities to maintain the confidentiality of tax-related information may not be observed in cases where the taxpayer has placed himself outside the rule of law.

The Supreme Court of Justice ("the Supreme Court") has established that article 69 of the Federal Tax Code ("the *Tax Code*") imposes the requirement for maintaining absolute confidentiality regarding the taxpayer's tax information (statements and data provided by third party payers, as well as those obtained during audit procedures). Thus, in principle, such legislative measures constitute a binding obligation on the authorities, which consists of a non-disclosure rule concerning tax information. (*First Chamber of the Mexican Supreme Court, Precedent No.: 1a. CVII/2013*).

In other words, authorities should have full discretion regarding tax data and documentation. However, such residual power does not apply regarding the name, corporate name and federal taxpayer registry code of those who are subsumed in any of the following classes of taxpayer:

- a) Taxpayers who owe corporate tax credits.
- b) Taxpayers responsible for enforceable tax credits, such as those that are not paid or properly guaranteed.
- c) Taxpayers residing outside Mexico.
- d) Taxpayers that face condemnatory sentences regarding the commission of tax offenses.
- e) Taxpayers responsible for cancelled or irrecoverable tax credits.
- f) Taxpayers who have received a tax pardon or have benefitted from a condonation program.

The Internal Revenue Service (*SAT*) will publish on its official website information regarding the name, corporate name and federal taxpayer registry code of those individuals or corporations who fall under any of the provisions enumerated by article 69 of the *Tax Code*. Taxpayers who are dissatisfied with the publication of their data may carry out a clarification process, after the resolution of which *SAT* can proceed to remove such published information.

It is interesting to note that new exceptions to tax secrecy were introduced on October 29, 2013, aimed at delinquent taxpayers and those who have benefited by the cancellation, condonation or remission of tax credits. As a direct consequence of the introduction of these exceptions the *SAT* has now been granted legal authority to publish through its website the names and federal taxpayer registry code of those who are considered delinquent taxpayers, with the rationale being that access to this information will permit individuals and corporations to determine whether or not to engage in transactions or perform operations

with such individuals or corporations. In other countries such as Greece, the UK, Chile and the USA such practices are known as *naming and shaming* and are mainly used to attack tax evasion problems.

It is important to observe that “tax confidentiality” is defined in Article 16 of the Federal Constitution (“the *Constitution*”), which confers the right of citizens to personal data protection. However, such provisions state that the law may establish exceptions regarding public order, national security, health and the protection of third parties rights, in which cases such privilege does not apply.

Also, Article 6 of the Constitution states that all information in the governmental tax authority’s possession is considered public and can only temporarily be reserved for public interest reasons, within the terms set by the law. Therefore, the *Maximum Disclosure Principle* must prevail at all times. Similarly, Article 2, Section VII, of the Federal Taxpayers Rights Law (*Taxpayers Law*) protects confidential data, reports and history information, as does Article 14, Section II of the Federal Law of Transparency and Access to Public Government Information (“the *Transparency Law*”), which considers tax information as *confidential*.

The most known litigated tax-related issue in Mexico, which specifically addresses taxpayer confidentiality interests, is the resolution given on June 18, 2014, by the Federal Institute for the Access of Information (*IFAI*), which ordered the SAT to disclose a list of taxpayers who had benefited by partial or total condonation/cancellation of tax debts, in compliance with a Presidential Act that provided such pardons, published on February 19th, 2013 in the Official Gazette, and that was also authorized by the third interim article of the Federal Budget Tax Law for 2013.

In declaring this resolution, the IFAI considered that the cancellation of a tax credit implies that the tax authority has recognized that some credits conferred on taxpayers are unaffordable, or that there is practical impossibility of recovery. Therefore, the annulment of such credits is considered to represent a monetary profit for individuals, at the expense of the federal treasury. Hence, the cancellation of tax credits represents a policy area of great public importance.

Another exception applicable to the fundamental statutory protections of taxpayer privacy interests is provided by article 69-B of the *Tax Code*, which attacks tax avoidance schemes that involve the illegal acquisition of deductible tax receipts by taxpayers (an unlawful practice that seeks to erode the tax base), without real and effective commercial transactions being performed, therefore realizing a reimbursement of the expenditure initially billed.

In this case, when the SAT finds that a taxpayer has been issuing tax receipts regarding acts or activities without having proper assets, personnel, infrastructure or physical capacity to deliver goods or services – or in the instance that the individuals or corporations that supplied such receipts are not localized – the SAT will provide notification of the detected irregularity to whomever acquired such receipts, through notification by mail (as determined by addresses contained in the SAT’s official website) and by publishing a description of the irregularity in the Official Gazette. Accordingly, upon receiving notification, taxpayers who are presumed to have acquired the illegal receipts may provide the SAT with documentation and information that demonstrates that the operation contained in the questioned tax receipt is valid and real, subsequent to

which the SAT will evaluate the evidence and defenses that were asserted, provide notification of its decision through email, and publish the list of delinquent tax payers on the official website.

The publication of the above referenced SAT list will annul tax effects (deductions) regarding the operations contained in such tax receipts. Also, the commercial operations contained in such receipts will be considered as “simulated acts” for criminal purposes. Individuals or entities who obtained tax benefits founded on receipts included in the published list will be legally obligated to proceed to rectify their tax situation. If it is determined that a taxpayer did not rectify their tax situation, or if the taxpayer fails to prove the legality of the commercial transaction, the SAT will proceed to determine the tax credits that apply.

In the same vein, according to article 69 of the *Tax Code*, fiscal secrecy does not apply regarding the information provided by tax authorities to credit bureau institutions authorized by the Ministry of Finance (SHCP), specifically as it relates to corporate tax credits, in accordance with the Law Regulating Credit Information Companies (credit bureau). Since 2008, the SAT has provided credit information companies (credit bureaus) with taxpayer information regarding tax credits that have not been paid or properly guaranteed in the terms established by the law.

Having recourse to the intervention of the credit bureau eliminates the necessity of the government directly accessing credit information, and it can be used as a means of pressuring taxpayers so as to ensure that they are up to date regarding tax obligations so access to credit is possible. In this regard, the Supreme Court of Mexico recently issued criteria recognizing the constitutionality of Article 69 of the *Tax Code*, and in particular affirmed those provisions that confer on the SAT the legal authority to provide credit bureaus with taxpayer information, contingent on the fact that it does not violate any fundamental rights.

Moreover, recently the Supreme Court clarified that Article 69 of the *Tax Code* is intended to encourage the effective payment of contributions by taxpayers and, at the same time, preserve the financial system’s recognition of the paramountcy of “the public interest”. The Mexican Supreme Court Justices noted that the circumstances that encourage the legislature to empower the SAT to provide certified credit bureaus with tax credit information (regarding debts not properly paid or guaranteed), also operate to encourage the payment of contributions and to apply legal pressure towards that end. Fundamentally, it can be concluded that Article 69 grants a security framework for users and SIC’s customers, while protecting the rights of the greater taxpayers’ community.

Furthermore, the Supreme Court of Mexico concluded that by allowing credit bureaus to collect and disseminate the credit and tax information of individuals and corporations, Article 69 does not violate the fundamental rights provided by the Mexican constitution, and further opined that such measures are in fact performed for the sake of securing the public interest in taxpayer confidentiality, and to preserve the integrity of the Mexican financial system.

According to the Supreme Court of Mexico and the IFAI, the net result of these legislative measures is that the public interest in recognizing how the SAT exercises its powers regarding the remission of tax credits is greater than the interest in protecting the tax data of those who were favoured under the various governmental “tax condonation” programs. Moreover, in Mexico, it is considered to be in the public interest for the SAT to

disclose the names of those taxpayers whose credits were cancelled, the amount subject to being excused under the Tax Code, and the exact date of such tax pardons. Considering that the tax credit forgiveness actions undertaken by the SAT result in a form of statutorily defined “public spending”, disclosure of taxpayer information can be justified by demonstrating that it is necessary in order to allow effective accountability in public resources’ management.

Ultimately, Mexican tax legislation and regulatory instruments are predicated upon the assumption that the names and amounts of tax pardons are useful elements that can be utilized to evaluate the efficacy of the state authority’s tax collection efforts, and also as a means of corroborating that the measures applied under the auspices of the Tax Code are not only constitutionally consistent, but conform to the objectives of national fiscal policy, and facilitate the process of identifying and prosecuting instances of corruption and criminal misrepresentation.

PEOPLE’S REPUBLIC OF CHINA

The *Law of the People’s Republic of China on the Administration of Tax Collection* (the “*Tax Collection Law*”) and the related *Rules for Implementation* (the “*Tax Collection Rule*”) stipulate the framework of the administration of tax-related confidential information of taxpayers in China.

Article 8 Paragraph (1) of the *Tax Collection Law* states that “taxpayers and withholding agents shall have the right to require the tax authorities to retain the confidentiality of taxpayers’ and withholding agents’ information, and the tax authorities shall keep such information confidential in accordance with the provisions of state laws and administrative regulations.” Article 59 provides that “when conducting tax inspections, tax officials shall have the duty to preserve the privacy interests of persons under inspection.” Article 54, Paragraph (6) notes that the tax authorities shall have the power to conduct tax inspections of the deposit accounts that a taxpayer who is engaged in business operations, or a withholding agent, has opened with a bank or any other financial institution, and to inquire about the savings of a suspect. No information obtained by means of an inquiry by the tax authorities may be used for purposes other than tax collection. Article 5 of the *Tax Collection Rule* provides that “information to be kept confidential for taxpayers and tax withholding agents, as stipulated in Article 8 of the Law on the Administration of Tax Collection, refers to the commercial and individual privacy interests of taxpayers and tax withholding agents. Any illegal activities of taxpayers and withholding agents do not fall within the scope of confidentiality.”

Where tax officials violate the confidentiality obligations held towards taxpayers, withholding agents or persons who report wrongdoings, the persons who are directly in charge and the other persons who are directly responsible shall, in accordance with Article 87 of the *Tax Collection Law*, be subject to administrative sanctions by the governmental units to which they belong, or the units concerned.

As to the civil or criminal liabilities of failure to preserve and protect the confidentiality of taxpayer information, these liabilities are contingent on various facts and their extent of damages and shall be dealt with in accordance with relevant laws and regulations. With respect to property damages incurred by taxpayers that arise from the disclosure of confidential information by tax officials, the taxpayer is entitled to bring an administrative lawsuit in accordance with Article 36 Paragraph (8) of the *State Compensation Law*, providing that “if other damage is done to property rights, compensation shall be paid for direct losses.”

Article 45 of the *Administrative Procedure Law* stipulates, “administrative cases in the people’s courts shall be tried in public, except for those that involve state secrets or the private affairs of individuals or are otherwise provided for by law.” Article 97 of the *Interpretations of the Supreme People’s Court on Several Issues Concerning the Enforcement of the Administrative Procedure Law* provides that the trial of administrative cases, except in accordance with the administrative procedures law and this interpretation, may be in accordance with the provisions concerning civil litigation actions. Article 134 of the *Civil Procedure Law (2012)* provides that “civil cases shall be put to public trials, except for those that involve State secrets or personal privacy or are to be tried otherwise as provided by the law. A case involving trade secrets may not be heard in public if a party so requests.” In accordance with the aforementioned laws and regulations, trials involving trade secrets and individual privacy are generally not conducted in a public forum, and such cases are not publicized by tax authorities; accordingly there is a corresponding lack of information in the public domain regarding these matters. Another possible explanation for the absence of public information pertaining to investigations and prosecutions of matters concerning taxpayer privacy interests is that violation of confidentiality by Chinese tax authorities is very rare.

To summarize, applicable Chinese privacy legislation focuses on restricting and regulating the enforcement powers of tax authorities with respect to the administration of the tax-related confidential information of taxpayers.

For the purposes of protecting the legal rights and interests of taxpayers and regulating the procedures which govern the ability of tax authorities to accept the inquiries of external government departments respecting the tax-related confidential information of taxpayers, the State Administrator of Taxation has formulated the *Interim Measures for the Administration of Tax-related Confidential Information of Taxpayers* (CITE: No.93 [2008] of the State Administrator of Taxation, hereinafter the “*Interim Measures*”) on October 9, 2008. The following is a brief introduction to and consideration of the principal provisions of the *Interim Measures*:

Scope of Confidential Information

The term “tax-related confidential information of taxpayers” refers to the information that is developed or collected, and recorded and stored in certain forms by the tax authorities according to applicable laws and regulations during the process of administration of tax collection, and that is related to taxpayers’ commercial or personal privacy interests. Such information mainly includes the taxpayers’ technical information, business information, and the personal privacy that taxpayers, major investors, as well as business operators are unwilling to disclose.

The information with respect to a taxpayer’s unlawful conduct relating to taxation does not fall into the scope of confidential information.

Scope of Tax-related Confidential Information for Which Disclosure is Authorized

The *Interim Measures* dictate that tax authorities and tax officials shall maintain the confidentiality of the taxpayers’ tax-related confidential information, and that they may provide such information to any external department, the general public or any individual except under the following circumstances and for the following purposes:

- a) Information that shall be disclosed according to relevant laws or regulations;
- b) Information that is made available to statutory third parties according to laws;
- c) The taxpayers' own information; and
- d) Information that is disclosed upon consent of the taxpayers.

Article 4 of the *Interim Measures* authorizes Chinese tax authorities to disclose a taxpayer's tax-related confidential information, in accordance with the requirements of the laws and regulations and for the purpose of performing the duties set out therein. This confidential information mainly comprises industrial, regional and other comprehensive tax-related information summarized on the basis of taxpayers' information, data on the analysis of tax computations, taxpayers' credit grades, as well as the rationed tax amounts of periodic and rationed taxpayers.

Application for Disclosure of Tax-related Confidential Information

Article 12 of the *Interim Measures* provides that tax authorities shall, within the scope of their responsibilities, support the requests of the following entities and individuals for disclosure of confidential taxpayer information under the relevant laws and regulations, namely: a) requests of the people's courts, people's procuratorates and public security authorities with respect to information that is relevant for handling cases according to law; b) requests of taxpayers about their own tax-related information; and c) requests of mortgagees and pledgees about taxpayers' overdue taxes. In addition, tax authorities on all levels shall designate specialized departments to respond to inquiries about confidential taxpayer information and the statutorily mandated disclosure of confidential taxpayer information to the public.

Liabilities of Divulgence of Tax-related Confidential Information

Articles 23-25 of the *Interim Measures* provide that tax officials who divulge confidential taxpayer information shall be penalized according to Article 87 of the *Tax Collection Law*. Furthermore, where an inquiring entity or individual divulges confidential taxpayer information without authorization, Articles 23-25 direct that the individual or entity responsible for the unauthorized disclosure will be subject to punishment as prescribed by the applicable governing provisions of the *Interim Measures*. In cases of delayed reporting, intentional concealment, or impairment of the timely remedies, the representative of the state authority responsible for the disclosure, and the relevant supervising official, shall both be subject to their respective liabilities in light of the gravity of the consequences of said disclosure for the taxpayer whose privacy interests have been violated.

Confidentiality Obligations under International Tax Treaties

Both the *Tax Collection Law* and the *Interim Measures* stipulate that the protection and preservation of confidential taxpayer information, as it relates to a tax treaty or information exchange agreement concluded between the government of China and the government of another country or region, shall be conducted in compliance with the obligations imposed by the relevant treaty or agreement.

In the course of executing their legislative and regulatory mandates, Chinese tax authorities are currently engaged in acquiring an increasing amount of confidential taxpayer information, and this has resulted in a correspondingly urgent public appeal for government assurances that the privacy interests of taxpayers will continue to be protected. An obvious legislative manifestation of this public policy requirement is the recent government promulgation of the *Notice Concerning Strengthening the Administration of Confidential*

Information in Personal Income Tax Self-declaration of the Individuals that Have Annual Incomes over 120 Thousand Yuan (CITE: No.1248 [2007] of the State Administrative of Taxation) on December 17, 2007.

Having been confronted with the challenges presented by the requirement to expand the scope of its cooperation with international tax authorities, and the obligations associated with its participation in information exchange programs between governments, the Chinese legislature is now engaged in a process of revising and modifying its relevant tax legislation and applicable regulations. The ultimate intention of these legislative and regulatory reforms is to draw lessons from, and incorporate elements of, policies and practices that have been adopted by other jurisdictions in the international context, and in so doing to improve the protection of confidential taxpayer information and the privacy interests of individual taxpayers in the People's Republic of China.

THE RELEVANCE OF THE PROTECTION OF PRIVACY INTERESTS IN MEXICO AND CHINA IN THE CANADIAN LEGISLATIVE AND REGULATORY CONTEXT

Statutorily mandated protections against unauthorized disclosure of taxpayer information in Mexico and China are representative of an intensification of legislative efforts in those jurisdictions towards enhanced recognition and protection of privacy interests, particularly where they concern core biographical information such as that disclosed by citizens for purposes of administration of critical systems of taxation, including assessment, collection and enforcement mechanisms. In the context of Canadian tax regulation, however, it should be noted that although the confidentiality requirements imposed by section 241 of the ITA continue to operate as an effective bulwark against flagrant contravention of taxpayers' reasonable expectations of privacy, these protections have been palpably eroded by the amendments introduced by Bill C-31, and in particular by the exceptions contained in subsection 241(9.5).

This divergence of Canadian legislative intent from what appears to be a Mexican and Chinese governmental trend towards expansion and augmentation of existing confidentiality obligations regarding taxpayer information, although incremental, is disconcerting not only in that it jeopardizes taxpayer confidentiality, but also in that it ill-accords with more progressive attitudes towards enhancement of privacy interests that previously characterized the legislative landscape in Canada. It would behoove Canadian legislators and regulatory authorities to train a keen eye on the evolution of legislative and regulatory instruments governing privacy of taxpayer information in foreign jurisdictions such as Mexico and China, and to acknowledge the benefits that will inevitably accrue from the harmonizing of Canadian systems of taxation with those of two of Canada's most politically influential and, historically, economically consequential trading partners.

CONCLUSIONS

It has been amply demonstrated that the exercise of the powers enacted pursuant to subsection 241(9.5) of the ITA will result in warrantless searches being conducted in the context of investigations and potential prosecutions that expose taxpayers to severe penal liability upon conviction, and that in accordance with the court's decisions in *Hunter*, *Jarvis*, *Plant*, *Spencer* and others, these searches will be presumptively unconstitutional. It is also reasonable to assume that although state authorities may seek justification for these presumptive violations of the *Charter's* section 8 guarantees against unreasonable search and seizure by invoking the saving provisions contained in section 1, the paramount importance of protecting and preserving

the privacy interests of taxpayers – and the fact that, as the court opined in *Slattery*, only in exceptional situations does the privacy interest give way to the interest of the state⁷⁹ – will create a potentially insuperable obstacle for any argument subjected to the proportionality test articulated by the court in *Oakes*.⁸⁰

Moreover, although it can be said that the amendments to section 241 of the ITA so enacted by Bill C-31 address an objective related to concerns which are pressing and substantial in a free and democratic society,⁸¹ the expansive ambit of the offences intended to be caught by the disclosure authority inherent in the “Serious Offences” provisions of the Act, the certainty of infringements on the reasonable expectations of the privacy of taxpayer information, and the likelihood of outcomes which are discordant with and contrary to the fundamental purposes of the ITA – namely, interference with the free and full disclosure of relevant personal information by taxpayers so as to facilitate effective functioning of the tax system – strongly militate in favour of constitutional challenges of subsection 241(9.5) on the grounds of arbitrariness, lack of rational connection to the legislative objective, and gross disproportionality.

There can be little doubt that the court will be called upon to pass judgment on the validity of subsection 241(9.5), and will be required to do so in the very near future. Furthermore, as demonstrated above, the constitutionality of subsection 241(9.5) is likely to be impugned not only on the basis that it contravenes the *Charter’s* section 8 protections, but also on grounds that it infringes section 7’s guarantees of life, liberty, and security of the person. As has been amply illustrated in the foregoing analysis, the innately aggressively intrusive nature of subsection 241(9.5) threatens to undermine the *Charter* protections against self-incrimination and undue compulsion by the state, and predicates its justification for doing so on the rationale that invasive, presumptively unconstitutional searches and seizures of taxpayer information are necessary to promote the societal interest in combating serious crimes.

Although it remains for the court to assess the proportionality of the determinative factors, it can be convincingly argued that the benefits that accrue from the protection of Canadians from intrusive search and seizures, state compulsion of testimony and nonconsensual disclosure of core biographical information are significantly greater than those derived from state access to taxpayer information yielding evidence that a serious criminal offence has been committed. It is for this reason that subsection 241(9.5) is rendered – potentially fatally – prone to judicial determinations that it is arbitrary and overbroad, that its salutary effects are outweighed by its deleterious impact on taxpayers, and, accordingly, that it is constitutionally violative and of no force and effect.

In the alternative, if the court determines that subsection 241(9.5) is constitutionally inconsistent, but deems it appropriate to “read in and read down,” as opposed to striking down the provision in its entirety, then it is reasonable to assume that the bench will instruct that the application of the provision’s disclosure authorization be severely straitened, and that officials disclose only information that is legitimately encountered in the course of the performance of regulatory duties pursuant to the ITA. Furthermore, in light of the urgent opposition to the amendments to the ITA initially proposed by Bill C-31, and in particular what

⁷⁹ *Slattery*, supra footnote 1, at 444.

⁸⁰ *Oakes*, supra footnote 64.

⁸¹ *Ibid*, at para. 69.

has now been enacted by Parliament as subsection 241(9.5), it is likely that the court will determine that prior judicial authorization is a prerequisite to any exercise by officials of the powers conferred under the “serious offences” provisions of the Act.

Finally, having given exhaustive consideration to the probable constitutional, legislative and judicial implications of Bill C-31’s amendments to the privacy protections and confidentiality requirements otherwise given expression by section 241 of the Act, it is instructive to contemplate the potential societal, political and legal ramifications of the provisions specifically encompassed by subsection 241(9.5).

The provisions contained in s. 241(9.5) are cause for concern not only by virtue of their seemingly overbroad and arbitrary codification of the current government’s stalwart legislative pursuit of its “law and order” political agenda, but also in that their application will almost certainly result in the creation of undue delay by subjecting income tax matters that engage s. 241(9.5) to intense judicial scrutiny and lengthy constitutional challenges, thereby exacerbating an existing access to justice crisis in Canada.

In her presentation to a meeting of the Canadian Bar Association in August of 2007, Madam Chief Justice McLachlin observed that access to justice may be denied to most Canadians in part because “pre-trial motions, which often involve constitutional challenges by accused people to the admissibility of evidence, have become common and often consume a great deal of court time”⁸² As Madam Chief Justice McLachlin has also cogently remarked, access to justice “is a fundamental right, not an accessory,”⁸³ and accordingly there can be no justice without access to justice.

Subsection 241(9.5) constitutes a profound departure from the scrupulously wrought legislative enactments and jurisprudence that are manifested in the ITA’s subsisting confidentiality requirements, given expression by the varying provisions enumerated by section 241. Over the course of its history, section 241 has emerged as an effective legislative mechanism for assisting with securing the fulfillment of the Act’s underlying purpose – to facilitate the efficient operation of the tax system, and to encourage self-reporting and self-compliance by taxpayers, without requiring that the government incur unnecessarily onerous expense, and without promoting undue delay.

Subsection 241(9.5), on the other hand, can perhaps be conceived of as a legislative aberration, a metaphorical “sore thumb” which so grossly ill-accords with the otherwise judiciously drafted correlative and counterbalancing individual components which comprise section 241 that it threatens to frustrate the efficient administration of the tax system, and to generate further stresses on an already overburdened and inaccessible justice system by creating a surfeit of delay through resultant litigation and constitutional scrutiny.

Ultimately, it is not only the extent to which subsection 241(9.5) is inconsistent with the fundamental rights guaranteed by ss. 7 & 8 of the *Charter* that disquiets informed observers, but the fact that its objectives are

⁸² Tracey Tyler, “Access to Justice a “Basic Right,” *The Toronto Star* (12 August 2007), online: <http://www.thestar.com/news/canada/2007/08/12/access_to_justice_a_basic_right.html>.

⁸³ Lucianna Ciccocioppo, *There is no justice without access to justice: Chief Justice Beverley McLachlin*, online: University of Toronto Faculty of Law <<http://www.law.utoronto.ca>>.

discordant with what for many legislators and jurists is the progressively more urgent apprehension of the devastating consequences of denial of access to justice for Canadians at every level of interaction with the state's authorities. Regardless, whether the legitimacy of its provisions are impugned on grounds that they are constitutionally violative, or decried because their application produces delay that gravely precludes access to justice in both regulatory and penal contexts, subsection 241(9.5) undoubtedly compromises and imperils the efficient administration of the complex matrix of provisions that underpin the entire system of tax assessment, collection, and enforcement. Accordingly, its improvidently enacted and sweeping powers can only be reasonably apprehended as jeopardizing the sanctity of decades of legislative debate and scrupulous adjudication by decision-makers at all levels of government, and the overbroad and arbitrary nature of the powers it confers can only be rectified through judicial intervention in the form of ongoing scrutiny, oversight, and measured restraint.

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